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ARTICLES

STUDENTS' COLUMN

BOOK REVIEW

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Message from the Patron

It gives me great pleasure in bringing to you the Maiden issue of the NLUA Law & Policy Review. This Journal is the harbinger of promotion of quality research and analysis under the aegis of National Law University, Assam.

The first volume of the University Faculty peer reviewed Journal is in the hands of the readers, which is the outcome of teamwork, within a short span of time. The quality of published articles in the Journal bears testimony to the commitment of the Journal to explore new horizons of research and learning. The present issue contains the contribution of research papers, book reviews of distinguished scholars and student's column.

Quality legal research and standard publications constitute one of the important mandates of the leading Law Schools. Research findings enhance the proficiency and provide a conducive environment, which is paramount for teaching and learning. Far reaching changes are taking place in the fields of legal education, legal profession and welfare legislation. The legal research and its publications by NLUA Law & Policy Review shall make a definite impact on government policy formulation and legislation. This journal is an attempt to provide an intellectual platform for contemporary and philosophical fraternity across the globe. I hope, readers would find the present issue of NLUA Law & Policy Review interesting and thought-provoking. Our reader's response will always be a source of inspiration for NLUA Law & Policy Review Faculty and students to improve the quality of our research publications. A special mention of the immense efforts and patience invested by pioneer Editorial Team towards accomplishing the publication of First Faculty Law Journal of the University. I wish to appreciate the consistent efforts of Pioneer team of NLUA Law & Policy Review Editorial Board and extend my best wishes in their endeavour of qualitative publication.

(Vijender Kumar)
Vice-Chancellor

Editorial

The maiden issue of NLUA Law & Policy Review bears a carefully put together erudite compilation of research papers covering an array of ideas in the domain of Family Law, Gender Justice, Justice system in India, Women Trafficking, Land Law, Human Rights and Constitutional perspective etc. All these research articles deal with issues with far-reaching socio-legal implications.

Professor Vijender Kumar in his article titled "Causes of Divorce in India: An Analysis" observed that with increasing socio-economic independence of women, smaller families and emphasis on individual choice, as well as the self-sufficient notion of relationship are shifting the trend towards less stable married relationships. Similarly *Ms. Priti Rana* in her article observed that if the Indian government sign the international convention of Hague on 'Laws of Marriage' will mitigate the violence against women.

Dr. C.R. Jilova in his article suggested that legal education cannot disassociate itself from the problems concerning society, so we have to establish the legal education in right perspective and *Ms. Saumya Uma* in her article observed that however reservations alone may not suffice to prevent discrimination and denial of opportunities to a person's entry into workplace and other public domains and where as *Mr. Gurjinder Singh* suggested that society should treat equally and respect all genders by accepting LGBTs for their education, health and work.

Dr. Topi Basar in her article observed that the States and Centre are most likely to toe the same line in the current political scenario of the country and grass root level implications from community, the tribes and indigenous people's considerations are ignored by the laws. Similarly *Dr. Mayengbam Nandakishwor Singh* observed that even today many tribal communities continue to hold their conviction on justice firmly having unique notions of justice since ages in India.

The issue aligns with our aim of engaging scholarly exchange of ideas for furthering the cause of contributing to the existing body of research in academia and all the research papers are based on the studies and analysis of contributors in which they have made definite recommendations.

We extend our gratitude to the contributors for their well-researched articles and acknowledge their contribution in furthering the goal of bringing about legal and judicial reforms through their scholarship.

Editorial Board

Affirmative Action in the Private Sector : Need for a Multi-Pronged and Holistic Approach

*Saumya Uma**

It is a well-known fact that Scheduled Castes (SCs) and Scheduled Tribes (STs) have historically faced deprivation, denial of opportunities and discrimination, resulting in their low socio-economic and legal status in India. Affirmative action policies have been looked at a tool to bring about social transformation and structural change in society. As a sub-sect of affirmative action policies, reservations have been provided for in education and employment in the public sector. However, given the present context of neo-liberalization and a shrinking public sector, arguments have been advanced in favour of reservations in the private sector in India.[1] Such arguments have been most vocal, articulate and visible in the context of rights of SCs, where the intent is to create a strong SC entrepreneurial class and in order to provide better access to opportunities for SCs in private sector employment, education, housing and other domains.[2]

The focus on SCs' access to capital and opportunity for participation in the private sector, is a fairly recent one. Some scholars trace it to a Bhopal declaration of 2002, passed at a conference held in Bhopal on 'Charting a New Course for Dalits in the 21st Century', hosted by the Congress government of Madhya Pradesh. It was at this conference that demands were reportedly made, for the first time, that SCs receive a share in capital and in government contracts, and that a minimum job quota for SCs be introduced in the private sector.[3] The conference reportedly had the participation of about 250 leading academics, writers and social activists supportive of the SC cause.[4]

Models of Affirmative Action: Social Justice / Diversity

The proposal to have affirmative action in the private sector in India drew upon the reservation approach that has been traditionally used in the Indian context in the private sector (based primarily on

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1 See Sukhdeo Thorat, *'On Reservation Policy for Private Sector'*, Round table India (2012), available at http://roundtableindia.co.in index.php?option=com_content&view=article&id=4703:on-reservation-policy-for-private sector & catid =118:thought&Itemid=131, last seen on 15/07/2015.

2 See for example S. Thorat, *Why Reservation is Necessary* , Seminar, 549 (2005).

3 V. Kumar, *Understanding the Politics of Reservation*, Economic and Political Weekly 40(9): 803–6 (2005).

4 G. Omvedt, Congress, Dalits and Elections, The Hindu (12/06/2003), http://www.thehindu.com/thehindu/2003/06/12/stories/2003061 2001 91000 .htm last seen on 14/07/2015.

the principle of socio-economic justice), as well as the United States (US) experience of policies pertaining to diversity.[5] In the US, affirmative action policies favouring minorities are in place in both private sector employment as well as education.[6] Further, at least 5 per cent of federal contracts in the US are directed to minority business enterprises.[7] In addition, France, Germany, China and several other countries have some form of affirmation policies in the private sector for minorities in their respective countries. The United States, the United Kingdom, South Africa, Canada and many other countries, also have strong anti-discrimination legislations to complement such policies.[8]

As an alternative to the diversity approach, scholars have deliberated on whether or not the Constitutional provisions, as they presently stand, allow for reservation in the private sector – whether the same would be permissible under Article 16(4) of the Indian Constitution (which enables the State to provide reservation of appointments or posts in favour of any backward class of citizens in the services under the State) or whether the same would be violative of the equality guaranteed under the Constitution. As the Indian Constitution permits special provisions for SC/ST communities as valid exceptions, based on a substantive equality and social justice principle, political will may have to be exercised to include a clause similar to Article 15(5) which provided for reservations for SCs and STs in private unaided educational institutions.[9]

Arguments and Counter-Arguments

In India, efforts to extend reservations in favour of SCs and STs for employment in the private sector has met with sharp resistance. The major contention has been that reservation would kill merit and

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5 Centre for the Study of Social Exclusion and Inclusive Policy, *'The Bangalore Initiative: A Policy Framework and Draft Legislation on Affirmative Action Including Reservations in the Private Sector'*, (National Law School of India University, Bangalore, 2004).

6 S. Thorat, *Remedies against Market Discrimination: International Experience*, 323-48 in *Reservation and Private Sector*, (S. Thorat, Aryama and P. Negi, New Delhi, 2005).

7 R. Vandru, *Legal Remedies against Discrimination in USA, South Africa and India*, 379–88 in *Reservation and Private Sector*, (S. Thorat, Aryama and P. Negi, New Delhi, 2005).

8 Examples are The Equality Act 2010 of the United Kingdom, Title VII of the Civil Rights Act 1964 of the United States, The Employment Equity Act and The Promotion of Equality and Prevention of Discrimination Act of South Africa, and The Canadian Human Rights Act.

9 93rd Constitutional Amendment Act, passed by the Lok Sabha on 21 December 2005.

hamper competitiveness if the quota system was thrust upon the private sector. Only through advancing competitiveness in the companies can more jobs be created (this was supported by Ratan Tata – chairperson of the Tata Group, who reportedly wrote to Meira Kumar and said that "the imperatives of a competitive economy require that industry place a premium on merit").[10] The counter-argument is that merit is not a natural phenomenon but shaped by social circumstances and training; merit is being adjudged and determined in an unjust social system, which perpetuates a denial of opportunities to SCs and STs.[11] It has been emphasized that the Indian corporate sector should become a partner of central and state governments in constructing a stable and sustainable society. Additionally, bringing about socio economic transformation in the society is not the task of state alone, with others being silent spectators. The responsibility has to be shared by civil society, and the affluent class including captains of industry.[12] Scholars have also questioned the claim that members of SCs under-perform and hence it is not profitable to employ them in the private sector.[13]

Some Initiatives by the Private Sector

An undated report of the Confederation of Indian Industry (CII) states that almost all of its 100 CII member companies have drawn up Affirmative Action agendas for SC/ST youth under four heads: employability, entrepreneurship, education and employment.[14] The agenda included vocational training programmes for SC / ST youth, such as training in English, communications, basic information technology, hospitality, customer relations, coaching to enable them to appear in entrance examinations for apprenticeship schemes and other competitive examinations. According to the CII, private sector companies have also taken an initiative to train SC / ST youth in the fundamentals of entrepreneurship and provide for an increasing

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10 S. Aiyar & N. Mishra, *Merit is Used to Practise Mental Untouchability* (Interview with Meira Kumar), India Today (5/06/2006), http://indiatoday.intoday.in/story/private-sector-is-holding-back-on-reservations-meira-kumar/1/191386.html, last seen on 12/07/2015.

11 *Private Sector Should Reserve Jobs for SCs, STs: Meira Kumar*, Zee News (04/02/2009), http://zeenews.india.com/news/nation/private-sector-should-reserve-jobs-for-sc-st-meira-kumar_504692.html, last seen on 10/07/2015.

12 Ibid.

13 C.B. Prasad, *Who Says Dalits Under-Perform*?, Infochange News & Features (06/2005), available at http://infochangeindia.org/human-rights/analysis/who-says-dalits-under-perform.html, last seen on 10/07/2015.

14 Confederation of Indian Industry, *Affirmative Action: Empowering Society for a Brighter Tomorrow* , available at http://cii.in/WebCMS/Upload/report-affirmative-action.pdf, last seen on 15/07/2015.

number of scholarships in educational institutions. By way of providing employment to youth from the SC and ST communities, 636 CII member companies are reported to have signed a Code of Conduct, committing to no discrimination in their employment policies, while the Tata Group has gone one step further and made a conscious effort to recruit meritorious SC / ST youth.[15] Needless to say, many of these initiatives were taken in response to an imminent threat of compulsory reservation in the private sector.

Amidst the contemporary discourse on affirmative action in the private sector–whether it should be in the form of reservations or other special measures, whether it should be made voluntary or compulsory on the part of the private enterprises, and whether the existing Constitutional framework in India would allow for or prohibit the same, the present article advances an argument beyond the restrictive approach of the quota system, to explore a larger body of affirmative action policies. The relevance of a proposed institutional framework – the Equal Opportunity Commission - and a possible legal framework – an anti-discriminatory legislation are discussed in this spirit.

Relevance of an Equal Opportunity Commission

The establishment of an Equal Opportunity Commission (EOC) was first recommended in the Sachar Committee report, presented in the Parliament in 2006, as a tool to monitor, address and redress discrimination against minorities. In August 2007, the Ministry of Minority Affairs, Government of India, constituted a group of experts, with Dr. Madhava Menon as its chairperson, to examine and determine the scope, structure and functions of the EOC, and to advise on an appropriate legislative framework for the same.[16] The group provided its recommendations to the government in 2008, along with a draft Bill, which was based on the Indian Constitutional provisions, social reality, jurisprudence and similar laws in other countries. [17]

Deprived Groups

The expert group opined that the jurisdiction of the proposed EOC should be wide ranging in terms of social groups. The group, in its report, stated that the proposed EOC "should, in principle, be open

15 Ibid.

16 The group of experts included Prof. Gopal Guru, Prof. Javed Alam, Prof. Kalpana Kannabiran, Prof. Satish Deshpande, Mr. R. Venkataramani and Prof. Yogendra Yadav.

17 Ministry of Minority Affairs, Government of India, *Equal Opportunity Commission: What, Why and How? Report by the Expert Group to Examine and Determine the Structure and Functions of an Equal Opportunity Commission*, available at https://www.nls.ac.in/csseip/Files/Additional/EOC.pdf, last seen on 09/06/2015.

to any person who feels disadvantaged, deprived or discriminated against on grounds of belonging to any social group" and its jurisdiction should "extend to all "deprived groups" who have been denied or who claim to have been denied equal opportunities."[18] This includes, but is not limited to, SCs, STs, other backward classes (OBCs), women, children, religious and linguistic minorities, persons with disabilities, elderly, backward Muslims, denotified tribes and displaced persons. The group categorically stated that freezing the list of potential beneficiaries to some identified social groups would hamper the Commission's ability to respond to the newer forms of social inequality that are emerging in our country, and hence the proposed EOC should be open to examining all forms of inequalities barred by the Constitution to any deprived group.[19] Since the proposed EOC's mandate is broad-based and extends to all marginalized communities, discrimination and deprivation of equality based on the inter-sectionality of caste with gender, religion, class and other markers, can potentially be addressed in a holistic manner.

Domains of Applicability

A salient feature of the Bill was that it was applicable not only to the State and its entities but also private enterprises and institutions, including industries and business houses, if they have denied equal opportunity to deprived groups. It further recommended that the proposed EOC initially work in the key domains of education and employment, and entertain only cases related to group inequality. Both these aspects are of significance in addressing the discrimination faced by the SCs and STs, at the hands of state and non-state actors, and primarily in the domains of education and employment.

The draft Bill envisaged the EOC to be as follows;

- pro-active and autonomous from the government;
- research, gather data and evidence related to discrimination on any minority group, and publish the same;
- undertake evidence-based advocacy role;
- monitor and audit the impact of laws and policies;
- advise and provide consultation to various organs and levels of the government;
- intervene in law and policy formulation;
- redress grievances;
- play the role of a watchdog; and
- shape public opinion;

18 Ibid, at 33.

19 Ibid.

Powers Envisaged

In order to discharge these functions, the EOC was to have the following powers:

- powers of a civil court for its inquiries and investigations, viz. to issue summons to individuals to appear before the Commission, issue summons for production of documents and things and to examine witnesses on oath;
- power to give orders and directions to demand information and to inspect records;
- powers to utilise any officer or agency for its investigation and to provide legal assistance to complainants;
- power to intervene in any judicial proceedings in which cases of discriminations were being heard;
- power to require compliance of equal opportunity practice codes and to take violators to the court.

Composition

The composition of the EOC, as envisaged, consists of one chairperson and at least two full time members, moving up to seven members in subsequent years, with a clear possibility of establishment of regional Commissions in due course.[20] It has been proposed that it should comprise of professionals or activists from fields such as education, personnel management, trade union or similar organizations, law, public administration, journalism and social sciences. In its suggestion on the composition of the Commission, the report intentionally departs from the practice of confining the recruitment of members to three categories that usually dominate most other Commissions: serving or retired civil servants, serving or retired judges, and politicians.[21]

It was also strongly felt that the EOC should be constituted in such a way so as to be autonomous of the government of the day and be capable of responding quickly and effectively to any challenge it is faced with.[22] In order to ensure autonomy of the Commission from the government of the day, the report suggests that it is advisable to follow the model prescribed under the Protection of Human Rights Act, as the same ensures a say for the government as well as the opposition in Parliament. Hence it proposes that the Commissioners should be appointed by a Committee comprising of The Prime Minister as Chairperson, Speaker of the House of the People, Minister in-charge

20 Ibid, at 54.

21 Ibid, p. 55.

22 Ibid.

of the Ministry of Minority Affairs in the Government of India, Leader of the Opposition in the House of the People, Leader of the Opposition in the Council of States, Deputy Chairperson of the Council of States and a nominee of the Chief Justice of the Supreme Court as members.[23] Despite the best intentions, the National Human Rights Commission has been criticised as an institution that does not function in an autonomous manner in reality, a chief reason being that the committee recommending selection consists only of politicians (and hardly any civil society representation) and that the process of selection is not transparent.[24] It is hoped that the Equal Opportunity Commission would steer clear of such political influences.

Good Practices Code

The main function of the EOC - to prepare Good Practices Code (GPC) for establishments after consulting all stake-holders. The GPC would lay down ground rules and practices for educational institutions, employers and other establishments (e.g., housing societies) that would provide for more transparent procedures and eliminate possibilities of discrimination. The GPC would be like the statutory standing orders which are binding and violations of the same punishable. After two years of implementation of GPC, learning from the experiences of implementation of the GPC and after consulting stakeholders, the EOC would formulate Equal Opportunity Practices Code (EOPC). The EOC would not normally entertain individual complaints of discrimination, however, they could if exceptional circumstances warranted, particularly, when it manifested group dimension.

Relevance of EOC in Today's Context

Articles 14, 15 and 16 of the Constitution guarantee equality and equal opportunities only against the state apparatus, state-run or state-funded educational institutions as well as public sector undertakings. However in today's context of neo-liberal policies, privatisation and market-driven growth, public institutions and the public sector in general has shrunk considerably. Deprived groups who experience discrimination, including SCs and STs, have no constitutional guarantee to equal opportunity. The EOC Bill attempts to fill this lacuna.

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23 Ibid.

24 See G.P.Joshi, *National Human Rights Commission – Need for Review*, http://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/national_human_rights_commission.pdf, last seen on 15/07/2015; see also Asia Pacific Human Rights Network, *National Human Rights Commission of India: Time to Stand Up and Speak Out*, February 2004, http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/ngo-statements/ngo_india.pdf, last seen on 15/07/2015.

Though the SCs and the STs have reservations in educational institutions and Government employment, and enjoy some protective and special measures, these do not extend to private educational institutions, industries and business houses or housing. These are the areas where discrimination against SCs and STs, apart from other disadvantaged groups, are practiced widely and in an unchecked manner. The SC/ST (Prevention of Atrocities) Act, even if implemented effectively, prosecutes offenders for atrocities but does not address discrimination that might operate directly or in a subtle but systematic manner. The EOC Bill extends protection in such contexts.

The EOC approved by the UPA government in February 2014 is a much-diluted version of the Bill and has been rightly criticized.[25] It sought to restrict the 'deprived groups' to only Muslims, and sought to water down the powers of the EOC, thereby ensuring that the EOC has a still birth. It was seen, at best, as an eyewash and a political gimmick prior to the general elections of May 2014. However, a robust, autonomous and independent EOC with effective powers and resources has the potential to be an important instrument to address the denial of opportunity in education and employment, both by the public sector and the private sector, of groups including SCs and STs.

Essential Nature of an Anti-Discriminatory Legislation

Recent reports of denial of jobs and housing to members of the Muslim community have once again highlighted the need for an anti-discrimination law in India.[26] There has been no governmental initiative towards enacting such a legislation. However, civil society groups such as Lawyers Collective and Alternative Law Forum, have spearheaded the initiative to deliberate upon and formulate a potential law that would comprehensively address the issue of discrimination in the public and private sectors.[27]

25 See I. Engineer, *Cabinet Decision to Constitute Equal Opportunity Commission: Two Steps Backwards*, Secular Perspective (04/03/2014), available at http://www.milligazette.com/news/9956-cabinet-decision-to-constitute-equal-opportunity-commission-two-steps-backwards, last seen on 06/07/2015.

26 A.Ashraf, *Zeeshan Ali Khan Pays a Price for Being Muslim, Denied Job,* Tehelka (21/05/2015), available at http://www.tehelka.com/zeeshan-ali-khan-pays-a-price-for-being-muslim-denied-job/, last seen on 05/07/2015; *Now Muslim Woman from Gujarat Denied Flat in Mumbai*, India Today (27/05/2015), available at http://indiatoday.intoday.in/story/muslim-woman-misbah-quadri-denied-flat-mumbai-mba-zeeshan-khan/1/440476.html, last seen on 05/07/2015.

27 *Anti-Discrimination/Sex Equality*, Lawyers collective, available at http://www.lawyerscollective.org/womens-rights-initiative/anti-discriminationsex-equality.html, last seen on 22/06/2015; Alternative law forum, available at http://altlawforum.org/campaigns/consultation-on-antidiscrimination-laws, last seen on 22/06/2015.

The Present State of Anti-Discrimination Laws in India

The anti-discrimination law as it presently exists in India is deeply fragmented. The Indian Constitution prohibits five grounds of discrimination under Art. 15(1) – religion, race, caste, sex and place of birth; it prohibits discrimination in public employment, descent and residence under Art. 16(2); it also prohibits discrimination in admission into educational institutions maintained by the State or receiving aid from state funds on the grounds of religion, race, caste and language under Art. 29(2). Specific statutes prohibit and redress certain forms of discrimination in limited contexts. For example, The Maternity Benefits Act 1961 prevents discrimination by the management / employers on the ground of pregnancy. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 prevents, prohibits and provides remedies for sexual harassment at the workplace, which is a form of discrimination against women, and enables a safe and conducive work environment for women; the law is equally applicable to employment in the public and private sectors. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 prevents discrimination of persons with disabilities, and seeks to make public spaces and services more accessible to persons with disabilities. However there is no comprehensive law that addresses the issue of direct and indirect discrimination, particularly by private individuals and entities. This legal vacuum is likely to have an adverse effect on persons from socially excluded communities, including SCs and STs in various domains such as education and employment.

Elements of a Possible Anti-Discrimination Law

The grounds of discrimination include caste, class, religion, sex, nationality, language, age, disability, gender, sexual orientation, ethnicity, pregnancy, marital status etc. A ground of discrimination is determined by a) it being immutable / not changeable; or b) it constituting a fundamental choice. An anti-discrimination law not only seeks to protect individuals belonging to, but also those who are perceived to belong to certain groups or identities.

In most jurisdictions, the duty bearers of anti-discrimination provisions in the national Constitution are state / public authorities, while the duty bearers of anti-discrimination provisions in statutory law apply to public and private authorities. In the Indian context, the Constitutional provisions focus, almost entirely (with a few exceptions), on discrimination in the public sector.[28] In the case of SCs and STs,

28 Exceptions include Art. 17 – Abolition of untouchability – and Art. 15(2) - which reads as *(2) No citizen shall, on grounds only of religion, race, caste, sex,*

the perpetrators of discrimination include both public and private authorities, thereby making an anti-discrimination law relevant and an imperative. The jurisprudence on anti-discrimination law in other countries prohibits direct and indirect discrimination, mandates reasonable accommodation (to avoid the disadvantage / discrimination) as well as affirmative action. Thus, a policy on affirmative action in the private sector is closely inter-linked with an anti-discrimination law, as the two complement, reinforce and strengthen each other.

Relevance

An anti-discrimination legislation could potentially address and reduce any denial of opportunity or disadvantage that is faced because of the personal characteristics of a person including his / her group identity. Such a disadvantage may be economic, political and / or socio-cultural, as in the case of SCs and STs in India. As in the case of the Equal Opportunity Commission, an anti-discrimination legislation has the potential to complement a law on affirmative action, by acting as a gatekeeper to prevent discrimination in recruitments and appointments (both in the public and private sectors). Additionally, it can prevent discrimination during the course of employment, including in postings, transfers, promotions and increments.

Conclusion

Special provisions by way of reservation and other forms of affirmative action in the private section are an important strategy for the social inclusion of SCs and STs. However, reservations alone may not suffice. Given the structural discrimination presently perpetuated on members of these marginalized communities, laws, institutions and processes have to be in place to prevent discrimination and denial of opportunities subsequent to the person's entry into a workplace, educational institution, housing society or other domains. Denial of opportunities and discrimination against SCs and STs could be addressed through a combination of legal strategies that address their specific context, needs and experiences, as well as those that are more generic, extending to all marginalized communities. While solutions are sought to ensuring that marginalized sections of society enjoy equal citizenship rights, it could be ensured that such solutions not only address the manifestations of such discrimination, but the root causes of it – the deep-rooted prejudices that have been

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place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

transformed into entrenched and discriminatory social norms and practices. Further, a rights-based legal approach can only provide a partial solution - development-oriented policy interventions through social, political and economic processes are equally indispensable.

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The Land Acquisition Act 2013 and the Proposed Bill - An Insight

*Dr. Topi Basar**

Introduction

Human being and land share a unique and unbreakable bonding at social, psychological, spiritual, material and all other levels. One who has a piece of land even of marginal size is justified to consider himself rich. This holds true for both rural folk as well as urban counterpart. The value and price of land has skyrocketed beyond imagination is simply an understatement. The expansion of population has put its own burden on this invaluable resource. For every conceivable human or industrial activity to happen land is the basic component. By gone are the era of no-man's land, now every single piece of land is owned by someone. Who owns it is simply a factual or legal matter. The ownership may be vested in private or public in varied ways. Every owner of land would give utmost priority to safety and security both physical and material kinds. It is viewed as something much more than a mere legal right. Many a times such individual interests clash with the States who has to perform larger welfare role for the good of all. This has always been a very contentious and volatile issue for the country since time immemorial. The state is no doubt sovereign and enjoys some absolute powers in many ways both constitutionally and legally which is indisputable. However, it does not mean it can have a free run. It is again constricted by the same Constitution and the Rule of law. Hence, who has more eminence, power and authority in matters of land has always been a thorny issue and will continue to be in all hue and color.

The recent controversy in India pertaining to 'the right to fair compensation and transparency in land acquisition, rehabilitation and resettlement Act, 2013' (hereafter LARR) and the Ordinance of 2015 amending the Act of 2013 is the reason why the author makes an attempt to analyse the implication of both the principal Act and the Ordinance. However, the author's focus would be on the rural aspects encompassing the tribal, indigenous and scheduled areas perspectives. Basically to look at how the Ordinance can impact them both positively and negatively. Are all the cries and brouhaha really

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well founded or not? Are the objectives of the law truly attainable or beneficial to the farmers as made out to be? What are the apprehensions not addressed by the law? Can there be better solutions to offer for the larger public interests are some of the issues identified by the author.

Salient features of LARR 2013

The noble intent of the Act is reflected in the preamble. The stated objective is to provide for a humane, participative, informed and transparent process for land acquisition in India for the purposes of industrialization, infrastructural development and urbanization. To ensure right to just and fair compensation, rehabilitation and resettlement to the land owners and the affected persons. The whole idea seems to be to make the affected persons partners in development. The good intent and spirit of the law is made clear in the preamble.

The right to development is a part of basic human right now. Economic growth and development depends on industrialization which hinges on massive infrastructure and other facilities that requires land in large quantity. Hence, acquisition, compensation, rehabilitation and resettlement are the three main limbs of the LARR. When the government acquires any private land, it has to be for some valid and legitimate purpose which is called 'public purpose'. The so called public purpose justifies the compulsory acquisition of land. How 'public purpose' has been defined will govern the entire acquisition process. Other important facets of the LARR are the Consent requirement and social impact assessment (SIA) without which the Act will lose its main purpose stated in the preamble. The SIA ensures participative, informed, transparent and democratic decision making which instill confidence in the affected families who are faced with impending acquisition.

Some of the basic features of the LARR 2013 are as follows:

Section 2 (1) defines public purpose, namely:-

(a) Strategic projects relating to national security or defence of India etc.;

(b) Agro-processing projects, marketing infrastructure for agriculture etc.;

(c) Industrial corridors or mining activities etc.;

(d) Housing for certain income groups, village development, residential projects for poor etc.[1]

1 The list is not exclusive.

Requirement of consent and SIA

In the case of acquisition for private companies, the prior consent of at least 80% of those affected families[2]should be obtained. In the case of public private partnership projects, the prior consent of at least 70% should be obtained. The consent process shall be carried out along with the SIA.

The Scheduled Areas land acquisition is subjected to a condition that no land shall be transferred by way of acquisition in contravention of any law (including any order or judgement of a court which has become final.[3]

Key points of SIA

- The government shall consult with the Panchayats, Municipal Corporation as the case may be to acquire land for a public purpose and carry out SIA in consultation with them;[4]
- The SIA study shall be completed within a period of six months from the date of commencement;[5]
- SIA shall assess whether the proposed acquisition serves public purpose, number of affected families and its displacement, how they are likely to be affected, what is the absolute bare minimum land needed, feasibility of alternate land and social impacts and overall viability of the project *vis-a vis* the benefits;
- Environmental Impact Assessment shall be carried out simultaneously;[6]
- The impact of the project on livelihood of affected families, public and community properties, utilities, infrastructure, land for traditional tribal institutions etc.;
- To prepare a Social Impact Management Plan;
- To hold public hearing to ascertain the views of the affected families;
- Government has to set up Expert Group to evaluate the SIA report;[7]

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2 S. 3 (i) (v) (c), The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

3 Ibid, at S. 2 (b) (ii).

4 Ibid, at Chapter II, S. 4.

5 Ibid, at S. 4 (2).

6 Ibid, at S. 4 (4) (f).

7 Ibid, at Chapter II B Appraisal of Social Impact Assessment Report by an Expert Group.

Other key areas

- Special provision to safeguard food security has been made in the Act whereby no irrigated multi-cropped land shall be acquired and it may be acquired only under exceptional circumstance as a last resort;[8]
- Any land acquired remains unutilized for five years from the date of possession; the same has to be returned to the original owner or owners;[9]
- In case of any acquisition or alienation of land in the Scheduled Areas under the Fifth Schedule to the Constitution, prior consent of the Gram Sabha or Panchayats or the Autonomous District Councils should be obtained;[10]
- In case of involuntary acquisition of land from Scheduled Castes or Scheduled Tribes families a development plan has to be prepared including restoring titles of the SCs or STs on the alienated land as a special measure;[11]
- The affected families of STs shall be resettled preferably in the same Scheduled Area in a compact block so that they can retain their ethnic, linguistic and cultural identity. They would get land free of cost for community and social gatherings;
- Any alienation of tribal lands in disregard of the laws and regulations shall be null and void.[12] They shall continue to enjoy fishing rights etc.;
- If the affected families of SCs or STs are relocated outside their district, they shall be paid an additional 25% as rehabilitation and resettlement benefits along with a one-time entitlement of fifty thousand rupees;
- The LARR recognizes the community rights of STs provided in the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006;[13]

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8 Ibid, at Chapter III S. 10.

9 Ibid, at S. 101.

10 Ibid, at S.41. Also read S. 2 (b) (ii).

11 Ibid, at S. 41(4).

12 Ibid, at S. 41(9).

13 It is evident that different norms of acquisition has been created for the SCs and STs in the light of the Constitutional mandates and other rules and regulations pertaining to these disadvantaged sections of the society.

Changes made by the Ordinance of 2015

The Ordinance has exempted certain projects from the application of Chapter II (determination of social impact and public purpose) and Chapter III (special provision to safeguard food security). The projects are namely, national security or defense vital projects, rural infrastructure or electrification, affordable housing and housing for poor, industrial corridors, public-private partnership projects. The requirement of prior consent of those affected families for land acquisition for these purposes is exempted.

It also amended Section 101 which required unutilized land for five years to be returned to the original owner and substituted with "a period specified for setting up of any project or for five years, whichever is later".

It may be mentioned here that Section 40 of the LARR 13 bestows special powers upon the government in case of urgency to acquire any land for a public purpose *viz* defence of India or national security, natural calamities and any other emergency[14].

Real concern

The recent land Ordinance brought by the NDA government has met with severe criticism and opposition from the political parties, the most notably the Congress party. Even several farmer organizations of the country are opposing it. Many critics of the ordinance are terming it anti-farmer and pro-industry initiative to appease the corporate big wigs. How far these apprehensions and allegations are valid and justified is the moot question. Industrial growth and development is a necessity goes without saying but equally important is the protection of farmers land rights and agriculture for the sake of food security of India. The later cannot be sacrificed in the overzealous attempt to bring about economic liberalization and industrialization. The biggest fear relates to the elimination of consent of the affected family and SIA that was required to be carried out under the LARR 13. The ordinance main objectives seem to be to make some strategic projects fulfilling certain public purpose to have an easy sailing free from all bottlenecks.

14 The right to fair compensation and transparency in land acquisition, rehabilitation and resettlement (Amendment) Ordinance,2015. It is deemed to have come into force on the 31st December,2014. As on 12 September 15 the Centre has decided to discontinue the ordinance for the third time.

Undoubtedly for the land owners both the aspects of consent and SIA was an empowering feature coupled with compulsory payment of compensation although the later has not been varied by the ordinance. These factors are easily the most essential feature of the LARR 2013. The project list contained in the ordinance is so broad and encompassing that anything and everything could be literally brought within the ambit of public purpose. Suddenly there is a strong fear amongst the farmers, tribal and other land owning tribal community that their lands would be snatched from them by the government without their consent and approval. The total exclusion of chapters II and III from these strategic projects are the main concerns of the farmers. These fears and apprehensions are not misplaced either.

The government may claim that the land owners would be given handsome compensation but the reality tells that many tribal people or community may not jump at this whole idea. No amount of compensation may make them agree to part with their land. On the contrary the tribal and indigenous people are also very forthcoming and generous to donate their land for any public purpose if they are convinced and satisfied about the social and other benefits to be attained. Usually the process of consultation involving prior informed consent and wide scale participation with the key role played by the local panchayats at the grass root level has proved to be more successful and effective. Post ordinance, many village Panchayat of the Eastern India have passed resolution against it and vehemently opposed the taking away of consent and SIA provisions. Hence, it is obvious the State governments will face tough opposition for the local level implementation of the ordinance especially in the tribal areas of north eastern India. Moreover, State and Centre are always on the same side of the fence in case of industrialization and people are not really satisfied with the manner in which compensation process are decided and carried out at the grass root level. The matter is far from satisfactory and lacks transparency and fairness at the bureaucratic level. This has further accentuated the dissatisfaction of the people. Too much governmental control on land acquisition matters makes the landowners insecure and suspicious. Moreover, the law does not allow the landowners to deal directly with the interested parties without the intervention of the State. Whether it involves only private parties or public private partnership, the affected people or owners are not free to negotiate freely as a matter of right. Now, the situation after the ordinance is any land found to be fit for the strategic projects specified can be acquired easily by the State whether it is for State project or the Central project by merely paying the compensation stipulated in the law including any kind of agricultural land as the ordinance excludes the application of chapter III. Now, the question

that comes to the mind is if the industrial development more important than the agriculture? Still in India the biggest reality is that tribes or indigenous people largely depend on farming and agriculture to sustain themselves. They need to be convinced how the industrial corridors, smart cities, housing projects, industries etc. stand to benefit them and the only way to make them understand is through effective SIA of the proposed projects. The right to veto any project gives them confidence and empowering feeling. What we need in rural India is a human face of development based on equity and just considerations and not purely based on economics. The private corporations are only concerned about the profit and loss account and not bothered about the social and cultural paradigms of the development. This is precisely what the ordinance misses!

Earlier SIA and environmental impact assessment was to go hand in hand which is not the case now. The move may have a serious social and ecological ramification especially in the rich biodiversity forest areas. The Ordinance also goes against the basic principle and spirit of Forest Rights Act 2006. The FRA recognizes the rights of the STs and other traditional forest dwellers right over the forest land and bestows ownership right on them. Their customary and community rights over the forest land are legally protected under the Act. All the development activities to be carried out within the purview of the Act have to be recommended by the Gram Sabha and restrict the total areas of land for clearing trees in order to maintain ecological balance.

Judiciary on Environment versus Development

The well-known case of Vedanta, UK mining company's bauxite mining plan in Niyamgiri hills of Odisha which was thwarted by the local tribes Dongria Kondh and Kutia forest dwellers of this hill. The tribes claimed that their deity Niyam Raja lives in the hills and that the proposed mine will violate their social, cultural and religious rights. Due to their strong resistance against the Vedanta's plan the honorable Supreme Court, in its order in 2013, gave the village councils in the Rayagada and Kalahandi districts three months to prepare reports on whether bauxite mining should be allowed and to what extent. Thereafter, twelve villages had unanimously rejected the controversial proposal in August 2013.[15] The Apex court's decision to leave the matter for people's referendum to decide whether bauxite mining should be allowed or not was indeed very wise and prudent. As a result, the then UPA government had to reject the Vedanta's proposal. This case throws a soul searching insight in to the issue of tradition-

15 Shayantan Bera, *Niyamgiri Answers*, available at http://downtoearth.org.in/content/niyamgiri-answers, last seen on 12/7/2015.

cultural ethos conflict with economic development. It once again shows that there is a need to balance out ecological considerations from the affected people's perspective and other economic concerns.

Conclusion

The current Government's move to bring a Bill amending the crucial provisions of the LARR 2013 pertaining to consent clause and social impact assessment has attracted immense controversy. Several farmers' organizations, social activists, academia and other members of civil society and major political party like Congress are opposing the move. These clauses are definitely the heart and soul of the LARR 2013 and repealing it would have far reaching consequences and the real essence of the LARR would be defeated. Recently the Government has indicated that the controversial clause in the Bill would be amended whereby the States will have the discretion to keep or drop consent clause and SIA clause in the State Acts. The States have been asked to enact its own law on the subject. Tamil Nadu is reported to be the first one to enact the law. Whereas the central bill if passed would still contain the controversial clauses intact. The proposed amendment will not change the situation as the States are not likely use its discretion in favor of consent and SIA clause as most of the States consider these provisions in LARR 13 as an impediment to fast economic development processes. Moreover, several States simply adopt the Central Acts without any modification in matters of land and natural resources. The States and Centre are most likely to toe same line in the current political scenario of the country. The move seems to be purely driven by economic considerations and socio-cultural and grass root level implications from community, tribes and indigenous people considerations are ignored.

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Judicial Crisis and Corruption: A Stigma on the Face of Indian Judiciary

*Dr. D.P. Verma**

Introduction

The judiciary performs a number of tasks to preserve the democratic order and guarantee the agreed legal foundations of the State. In the field of corrupt practices in particular, the judiciary is the instance which can ensure that perpetrators are brought to task under criminal law and that claims for damages can be made under civil law. This is only possible if alleged corruption leads to charges being pressed and if the judiciary itself is not part of the corrupt system, thus preventing any sanctions being imposed under criminal or civil law. In governance of a democracy, judiciary plays a very important role which is second to none. In fact, by virtue of its very task of sitting on judgment on the actions of the other two constituents–legislature and Executive–and enjoying the privilege of interpreting the constitutional provisions, the judiciary assumes a significant and special importance. Position of courts and judiciary is fortified by higher pay and perquisites and the very powerful provision of contempt as deterrence, a unique feature applicable only to the judiciary

India practices constitutional governance by rule of law. In the modern constitutional State, the principle of an independent Judiciary has its origin in the theory of separation of powers, whereby the Executive, Legislature and Judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society. This independence means that both the Judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources. Judicial Independence and Judicial Accountability are also taken care of under the Constitution. Inter branch relations between legislature/executive on one side and judiciary on other side, often, especially in the area of amendment of Constitution, threw up spitefulness between judiciary and other two branches. When judiciary which is accountable to people expressed pro-fundamental rights attitude in cases challenging parliamentary amendments to the Constitution, the legislature largely controlled by executive came forward with amendments either to nullify the Court

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Judgments or deny the legitimate due to the Judges. Despite all notions, by and large, the independence of judiciary in India is accepted fact.

Notwithstanding several salient strengths of the Indian civil justice system and its proactively independent judiciary, inefficient court administration systems, judicial passivity in an adversarial legal process, and limited alternatives to a protracted and discontinuous full trial frustrate several goals of the adversarial process itself. Inefficiency in court administration denies timely access to legal dispositions. Excessive party control places those seeking legal redress in an unequal position because respondents can abuse and delay the resolution procedures with impunity. Finally, the unavailability of alternatives to litigation clogs the system. Many cases awaiting judgment are no longer contentious and long-awaited judgments are often difficult to enforce. Corruption and protracted delays erode public trust and confidence in legal institutions, and act as significant barriers to India's chosen path to social justice and economic development. Hence present paper is an attempt to discuss crises in Indian judiciary.

Judiciary in India

India has the oldest judicial system in the world. The Constitution of 1950 created for the first time in Indian history a Supreme Court for the whole of India and High Courts for States. Apart from these courts subordinate judiciary plays very important role in imparting justice at ground level. The judiciary has a vital role in the functioning of the state, more so, in a democracy based on Rule of Law.[1] In a democratic polity, the supreme power of the State is shared among its three principal organs as constitutional functionaries. Each of the functionaries is independent and supreme within its allotted sphere and none is superior to the other. Justice has to be administered through the courts and such administration would relate to social, economic and political aspects of justice as stipulated in the Preamble of the Constitution and the judiciary, therefore, becomes the most prominent and outstanding wing of the constitutional system for fulfilling the mandate of the Constitution. The judiciary has to take up a positive and creative function in securing socio-economic justice to the people[2]. Indian judiciary started as an extension of the

1 Pawan Chaudhary, Manmauji, Indian Judicial System: Its Nature and Structure and Distinction between Law and Justice, in S.P. Verma (ed.), Indian Judicial System: Need and Directions of Reforms, Kanishka Publishers, Distributors, New Delhi, 24 (2004).

2 Ibid.

colonial regime. The judges (generally British in pre-independence India) were the symbol of imperial power and all the systems and procedures of the court were intended to humiliate the natives. Even after Indians were appointed as judges, any contact between judges and the common people was discouraged. The modern Indian justice system still resembles its common law counterparts of British origin. A politically independent judiciary applies both federal and state law under aunified federal system and administers the formal civil justice process. The Supreme Court sits at the apex of the federal system; the High Courts, one in each state, serve as the highest state body in both civil and criminal matters. To render justice at grassroots subordinate judiciary, District Court designated as the principal civil court of original jurisdiction, under which sit a number of lower courts, including panchayats, whose powers differ greatly from state to state[3].

Indian judiciary has become a decaying institution that has no internal mechanisms or will or strength to adapt to the changing times. The judicial system does not operate in a vacuum. The administration of justice has a social function and the judicial process is only a part of the larger social process. Therefore the courts of law cannot function in defiance or ignorance of the social objectives or the felt necessities of times. The role of the Indian judiciary cannot be isolated from the social objectives of the nation. Our Constitution has; set before the Indian people the ambitious goal of achieving individual liberty and social control, abolition of anarchy in production and preservation of democracy. The judiciary has become almost a law unto itself, answerable to none and under no pressures to reform or change with time. In order to secure true independence of the Judiciary from the other two branches of government, it has been given independence in administrative, financial and judicial policy making. This independence does not mean, of course, that the judges can decide cases on the basis of their own whims or preferences: it means, that they have both a right and a duty to decide the cases before them according to the law, free from fear ofpersonal criticism or reprisals of any kind, even in situations where they areobliged to render judgements in difficult and sensitive cases. Unfortunately, judges are not always allowed to carry out their work in this spirit of true independence, but in many situations have to suffer undue pressure ranging from inappropriate personal criticism and transfer or dismissal to violent and even fatal attacks on their person.

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3 Hiram E. Chodosh, The Eighteenth Camel : Mediating Mediation Reform in India, 9 German Law Journal 253(2008).

Judicial Crisis

There is a consensus in popular and expert opinion that the Indian judicial system is facing a crisis. As evidence of the problems with the system, court watchers point to the endemic delays in the system, its inefficient and expensive processes, its hyper-technical nature, its capture by special interests – particularly lawyers, and the exclusion of marginalized and vulnerable groups from access to the judicial system as well as to just outcomes from it. The general causes given for these crises include incompetent judges, a sluggish judicial administration, ineffective and/or unethical lawyers, conniving litigants, and an unconcerned or conspiratorial state that keeps the system under-resourced and over-burdened so that the judiciary cannot fulfill its objective of bringing about social transformation through law.[4] To combat the perceived problems with the system, many judicial reform proposals have been initiated or proposed targeting towards combating delays, including through reducing "pendency" by increasing judicial resources and infrastructure, or diverting cases from the system through increased use of ADR, plea bargaining, creations of tribunals, gram nyayalayas, etc.The judicial system exercises immense public power and is mandated with a vital constitutional responsibilities. However, due to the lack of transparency in the functioning of the system, the absence of a culture of openness and willingness to engage with civil society, academics and other stakeholders, and near absolute lack of quality statistics on the functioning of the system, the judiciary escapes accountability.[5]

Addressing judges, advocates, bureaucrats and others after inaugurating the Alternative Dispute Resolution (ADR) Centre in Madras High Court, former Chief Justice of India Justice P. Sathasivam had expressed concern over the steady decline in the reputation of the judiciary and legal profession.[6] To cite one among many reasons is the instance of controversy regarding disclosure of assets. Indian Judiciary bowed to pressure very late to be under disclosure of assets procedure. Given the circumstances in which judges of India's Supreme Court finally agreed to make declarations of their assets public, it seemed to be a case of too little, too late. A lot more needs to be done to restore the huge amount of credibility they

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4 Aparna Chandra, The State of Judicial Statistics in India, available at http://dakshlegal.in/the-state-of-judicial-statistics-in-india/, last seen on 17/9/2015.

5 Ibid.

6 Judiciary facing credibility crisis: CJI, The Hindu (21/8/2013) available on http://www.thehindu.com/news/national/tamil-nadu/judiciary-facing-credibility-crisis-cji/article5041810.ece, last seen on 17/9/2015.

have lost over this issue of transparency. Not only this previous government (UPA) was even forced to bring Anti Transparency Bill, which the government was forced to defer in 2009 because of stiff resistance in the upper house of parliament, whereby the judges had managed to insert immunity clause, that "no judge shall be subjected to any inquiry in relation to the contents of the declaration".[7] It showed that judges were inured to the hypocrisy of not applying to themselves the standards of behaviour they had imposed on others. Not once did Justices of Supreme Court flinch at the irony of judges claiming exemption from transparency even as politicians had been forced by a Supreme Court judgment to make a public disclosure of their assets every time they filed their nominations in elections.[8] This unresolved battle is about reforming fundamental processes such as appointments, promotions, transfers and disciplinary action. It does not augur well for the rule of law that while the Supreme Court is the most powerful court in India, there are no commensurate safeguards to ensure that judges do not misuse their powers. These are inevitable and even desirable aspects of decision making. And yet, when it comes to the integrity of the judiciary, judges and prosecutors often consider themselves beyond reproach even though – like any human being – they are also vulnerable. They are often reluctant to be held accountable and quite often there seem to be a confusion between the notion of the independence of the judiciary and the personal independence of the judges and prosecutors both in professional and private activities. If the Judiciary doesn't owe integrity and sound moral character, public confidence in the judiciary cannot be ensured. It is this public trust and credibility that is now threatened as a result of certain improprieties, indiscretions and even acts of direct and indirect corruption, by certain judges.

A corrupt judiciary means also that the legal and institutional mechanism designed to curb corruption generally will be handicapped. The judiciary is the public institution that is mandated to provide essential checks on other public institutions. A fair and efficient judiciary is the key to anti-corruption initiatives. An independent and impartial judiciary and speedy and efficient system are the very essence of civilization. However, our judiciary, by its very nature, has become ponderous, excruciatingly slow and inefficient. Imposition of an alien system, with archaic and dilatory procedures, proved to be extremely damaging to our governance and society[9].

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7 Indian judiciary's crisis of credibility, BBC News, (28/8/2013), available on http:// news.bbc.co.uk/2/hi/south_asia/8225937.stm, last seen on 17/9/2015.

8 Ibid.

9 Jayaprakash Narayan, Judicial Reforms-Needs of the Hour, in S.P. Verma, Indian Judicial System: Need and Directions of Reforms, Kanishka Publisher, Distributors, New Delhi, 190 (2004).

The Nature and Scale of Crises

The perception of corruption in the judiciary can be as menacing as actual corruption since both have the same effect of undermining public trust in the justice system. When the foundation of receiving justice is based on misconception and looking at outer world where governmental goods and services is based on contacts rather than on merit, where appointment and promotion is a product of patronage, and professional success is achieved when the right connections are employed, citizens will gravitate to powerful individuals rather than succumb to the law to secure a self-serving outcome. In a judicial system where it is whom you know and not what you know, merit-based rewards are seldom forthcoming. This kind of transition brought about a dramatic change in the role of the judiciary and also greatly expanded its tasks. Judicial reform has so far been only partially successful. One of the reasons is that it has failed to address the mentality and behaviour of those working within the judiciary, as well as those interacting with it from the outside. Justice and the judiciary is the inevitable result of civilization. But the present day society is a victim to the dilatoriness of the process of justice. People unfortunately fall victim to injustice.

An effective judiciary guarantees fairness in legal processes. It's a powerful weapon against corruption. But people's experiences in court are often far from fair. A backlog of cases creates opportunities for demanding bribes to fast-track a case. Court personnel can be paid to slow down or speed up a trial, or dismiss a complaint. Judges can also bribe or be bribed, or they can suffer pressure from above. If politicians abuse their power, they can influence decisions and distort appointment processes.

There may be various reasons and ways which are responsible for undermining perception of judiciary but main points which can be highlighted are as under:-

Corruption in Judiciary

Corruption in its ordinary meaning connotes dishonest or fraudulent conduct, typically involving bribery, attributable to persons who are in positions of authority or in a position to influence those in authority. Systemic corruption within the justice system is commonly defined as the use of public authority for personal gain that results in an improper delivery of judicial services and legal protection for citizens USAID Handbook for Fighting Corruption, Washington, DC, 1999 had rated Supreme Court of India as one of India's most trusted institutions for taking leadership role in exposing political kickbacks. But in past decade the credibility of Indian judiciary has fallen to great extent.

Former Chief Justice of Supreme Court Justice V.N.Khare in an interview to Outlook admitted that, "There is no doubt about it. It is rampant. Corruption in the lower courts is no secret. Sometimes, in the high court as well, cases of corruption have surfaced, but in my experience while I was in the Supreme Court, I have not witnessed anything similar."[10] But higher judiciary is not untouched to this corrupt practice as many cases have been highlighted in the past. Former CJI Justice Sadashivam, in an interview to The Hindu admitted that the judiciary is not untouched by corruption.[11]

According to the Freedom House 'Freedom in the World 2014' report for India, 'The lower levels of the judiciary in particular have been rife with corruption…' This report noted that '…in recent years some judges have initiated contempt-of-court cases against activists and journalists who expose judicial corruption or question verdicts. Contempt-of-court laws were reformed in 2006 to make truth a defense with respect to allegations against judges, provided the information is in the public and national interest.'[12]

The Immigration and Refugee Board of Canada, in a report of April 2013, quoted that bribery is common in the judicial system in India. According to the TI [Transparency International] poll, 45 percent of people who had contact with the judiciary between July 2009 and July 2010 had paid a bribe to the judiciary… According to TI, the most common reason for paying bribes in India in general is to "speed things up"… A former chief justice of India, in an interview with the New Delhi-based news magazine Outlook, stated that, in the lower courts "everything comes for a price," noting that there were "fixed" rates for a quick divorce, bail, and other procedures.[13] As many as 77% of Indians believe the country's judiciary is corrupt according to a global survey by Transparency International (TI).[14]

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10 Corruption Is Rampant In The Lower Courts, Outlook, (9/7/2012) available at, http://www.outlookindia.com/article/corruption-is-rampant-in-the-lower-courts-/281457, last seen on 17/9/2015.

11 Judiciary not untouched by corruption, The Hindu, (30/6/2013), available at, http://www.thehindu.com/opinion/interview/judiciary-not-untouched-by-corruption/article4866406.ece, last seen 17/9/2015.

12 Quoted in Country Information and Guidance India: Background information, including actors of protection, and internal relocation , (11/06/2015), available at https://www.gov.uk/government/publications/india-country-information-and-guidance last seen on 11/6/2015.

13 Ibid.

14 Infochange Governance, (15/11/2015) available at http://infochangeindia.org/governance/news/77-of-indians-believe-judiciary-is-corrupt-ti-survey.html last seen on 15/11/2015.

The failure to prosecute where there is a reasonable suspicion that an offence has been committed or where offences are known to have been committed is a typical feature of corruption. At the same time, this impunity for perpetrators, i.e. the lack of risks of sanctions being imposed for criminal corrupt conduct, further strengthens and consolidates corruption as a prevailing condition.[15] Corruption in the judiciary undermines the rule of law and legal certainty. The dysfunction of the judiciary can result in the disintegration of the state, or at least the loss of the supervisory function of the third estate within the system of the separation of powers. If the population does not accept the judiciary as the custodian of the rule of law, the result will be uncontrollable conduct, and the emergence of the law of the jungle where the stronger party wins, whether this takes the form of crime going unpunished, organised crime, the use of violence to enforce legal positions or the misuse of state services and resources.[16]

Appointment of Judges and Fraternisation

The post of the Judge of a Supreme or High Court has importance under our Constitution and the incumbent is supposed to be not only fair, impartial and independent, but also intelligent and diligent. The general eligibility criterion is that a person should have put in ten years of practice/service in the legal/judicial field. As far as selection of judges is concerned, according to the text of the Constitution, President has the power to appoint judges, he has discretion to choose and he can consult the Chief Justice of India as well as senior most judges of Supreme Court in matter of appointment. But the SC in SP Gupta and others v. Union of India[17] held that consultation by CJI means his consent. Thus judges of the High Court and Supreme Court are now appointed by a collegium of senior judges of the Supreme Court. The judiciary has thus become like a self-perpetrating oligarchy. There is no system followed in the selection of judges and there is no transparency in the system. The judges are selected according to the political loyalties acceptable to the ruling party. The Law Commission in Its 230th report has made very severe comment regarding appointments of Judges in High Courts by laying down, "As a matter of practice, a person, who has worked as a District Judge or has practiced in the High Court in a State, is appointed as a Judge of the High Court in the same State. Often we hear complaints about 'Uncle Judges'. If a person has practiced in a High Court, say, for 20-25 years and is appointed a Judge in the same High Court, overnight change is not

15 Mechthild Ronger, Preventing Corruption in the Judiciary System, Eschborn 3(2005).

16 Ibid.

17 AIR 1982 SC 149.

possible. He has his colleague advocates - both senior and junior - as well as his kith and kin, who had been practicing with him. Even wards of some District Judges, elevated to a High Court, are in practice in the same High Court. There are occasions, when advocate judges either settle their scores with the advocates, who have practiced with them, or have soft corner for them. In any case, this affects their impartiality and justice is the loser. The equity demands that the justice shall not only be done but should also appear to have been done. In any case, the judges, whose kith and kin are practicing in a High Court, should not be posted in the same High Court. This will eliminate 'Uncle Judges'."[18] These restrictions include not fraternizing with members of the legal profession who regularly appear before the judge in court, or not allowing family members to appear before the judge's court as parties or lawyers since both give rise to the perception of favoritism and lack of impartiality, and undermine confidence in the administration of justice. The focus on practical guidance and specificity, compared to other international standards, makes them of direct utility to members of the judiciary. A negative image of the judiciary is self-fulfilling and self-extending: it creates a corrupt environment around the entire court process in which other professional groups, such as lawyers, lower-level administrative staff and those who present themselves as middlemen in communicating with a judge, all have a role in making collusion possible.

The present central government while trying to make appointment of Judges transparent decided to constitute National Judicial Appointment Commission in place of old collegiums procedure but Chief Justice of India H L Dattu triggered a huge constitutional crisis by refusing to participate in the National Judicial Appointment Commission till its constitutional validity was upheld by the Supreme Court.[19]

Delay in Delivery of Justice

Speedy trial is guaranteed under article 21 of the Constitution of India. Any delay in expeditious disposal of criminal trial infringes the right to life and personal liberty guaranteed under article 21 of the Constitution. The on-point decision in this regard came in the 1979 case of HussainaraKhatoon v. Home Ministry.[20] Written by

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18 230th Law Commission of India Report, Reforms in Judiciary-Some Suggestions (2009), p.10.

19 CJI triggers constitutional crisis on judges' appointment, Times of India, (27/4/2015), available on http://timesofindia.indiatimes.com/india/CJI-triggers-constitutional-crisis-on-judgesappoin tment/articleshow/47068613.cms, last seen on 17/9/2015.

20 (1979) 3 S.C.R. 169.

arguably the most aggressiveprotector of individual liberties in the Court's post-Emergency period, Justice P.N. Bhagwati, the Hussainara Khatoon opinion established for the first time that a defendant had a fundamental right to a speedy trial under Article 21 of the Indian Constitution. Fueled by media accounts of the delays and horrendous conditions of various prisons,Justice Bhagwati's ruling ordered a massive revamping in how the prison population was to be treated by the state. In the decision, the Court mandated greater access to bail, more humane living standards, and a significant reduction in time from arrest to trial.[21] The debate on judicial arrears has thrown up number of ideas on how the judiciary can set its own house in order. It is high time to restore the confidence of people in the judiciary by providing speedy justice. But pendency is a normal feature of any system but is assuming great proportions in courts. The Judiciary is under great pressure. Announcing way back in 2002 Supreme Court has directed to increase the number of judges 5 times that it was there about 10-11 judges per million population.[22] In S.C. Advocates on Record Association v. UOI[23] the Court pointed out that it may issue direction to assess the felt need and fix the strength of judges according to the need.

In his speech on Law Day in 2005 Y.K. Sabharwal, then Chief Justice of India mentioned that "The failure of the judiciary to deliver justice with the reasonable time-frame has brought about a sense of frustration amongst the litigants." Commenting on the Report of the Arrears Committee (1989-90), which highlighted unfilled vacancies in the High Courts largely accounted for accumulation of cases, admitted that the ratio of judges per million populations in this country is the lowest in the world.[24]

The vacancies in Judiciary are the main root cause for delay in delivery of justice. Procedural laws are also responsible for delayed justice. The lacuna is due to the adversarial process of justice system. Adopting an adversarial system leads to number of hurdles in access to justice, especially procedural hurdles in access to justice. Too many appeals and revisions against even interim orders help vested interest to prolong litigation. The Code of Civil Procedure was amended more than two decades ago but experience shows that cases are still

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21 Jayanth K. Krishnan, C. Raj Kumar, Delay In Process, Denial Of Justice: The Jurisprudence And Empirics Of Speedy Trials In Comparative Perspective, 42 Georgetown Journal Of International Law, 759(2011).

22 (2002) 4 SCC 247.

23 AIR 1994 SC 268.

24 Available at www.supremecourtof india.nic.in/speeches/speeches.../ lawday2005.doc last seen on 17/9/2015.

adjourned for the asking both for filing written statement or documents and even for settlement of issues Elaborating on reasons for increasing corruption in the judiciary, the report says delays due to a shortage of judges and complex legal procedures are making Indians take recourse to corrupt measures to get justice. "The loss of confidence in the judiciary is mainly due to the long gestation period of litigation, with crores of cases pending disposal...This backlog leads to long adjournments and prompts people to pay to speed up the process."[25]

How, a delayed justice hampers individual's rights can be illustrated best through Mohini Jain v. State of Karnataka[26] case where petitioner applied in a medical college in Karnataka but the college was charging an exorbitant amount as capitation fees. The petitioner filed a case in a court, it took the court five years to settle the case and the verdict of the case was that "the case of Mohini Jain may be considered for admission" it took the court 5 long years to decide the case. During these years, the petitioner would have successfully completed MBBS and even after the lapse of 5 years admission to her is not guaranteed.

It is not uncommon for any criminal case to drag on for years. During this time, the accused travels from the zone of "anguish" to the zone of "sympathy". The witnesses are either won over by muscle or money power or they become sympathetic to the accused. As a result, they turn hostile and prosecution fails. In some cases, the recollection becomes fade or the witnesses die. Thus, long delay in courts causes great hardship not only to the accused but even to the victim and the State. The accused, who is not let out on bail, may sit in jail for a number of months or even years awaiting conclusion of the trial. Thus, effort is required to be made to improve the management of prosecution in order to increase certainty of conviction and punishment for most serious offenders. It is experienced that there is increasing laxity in the court work by the police personnel, empowered to investigate the case.[27] The high regard that people have for the judiciary often turns to dismay when faced with the working of the judiciary delivery system. The problem of delay on account of arrears has been a topic of discussion for decades. The lack of speedy dispute resolution system has a direct impact on the level of lawlessness in our society. There are several cases where judgments were delivered by courts after a long time. The degree of delays and corruption has led to cynicism about the justice system. This erosion of confidence has deleterious consequences that

25 Supra n.1.

26 AIR 1992 SC1858.

27 230th Law Commission of India Report, Reforms in Judiciary-Some Suggestions (2009), p.16.

neutralise the deterrent impact of law.

Pendency in the Courts

The system of dispensing justice in India has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency. Due to increase in inflow of cases courts in India are overburdened. According to PRS Legislative Research Report (30th September, 2010), a total of about three crore cases are pending in subordinate courts and 42 lakhs in High Courts. Approximately 9% of these cases have been outstanding for over 10 years and a further 24% cases have been pending for more than 5 years. Pendency has increased by 148% in the Supreme Court, 53% in High Courts and 36% in subordinate courts in the last 10 years.[28] The position has not changed till date as CJI Justice Dattu admitted briefing press after conference of High Court Chief Justices in Delhi, that pendency is about three crore.[29]

Law Commission over a period of time has suggested timely measures for prevention of increase of cases and also for timely disposal of cases. Some of the recommendations include issuesrelating to Adequate number of Courts, judicial manpower, increase of judge strength fivefold, filling up of vacancies at all levels in the judiciary within a time frame, commensurate infrastructure (which includes electronic connectivity) adequate budgetary support by the Government (no paucity of funds for justice administration system), financial autonomy of the judiciary, Human Rights, Public Interest Limitation, reduction of costs of litigation, proper maintenance of law and order and lack of adherence to procedures and principles in case management. Either lack of effective will to put into practice the reforms suggested by Law Commission or the delay in implementation of these recommendations is one of the main causes for the present pendency and delay in disposals. Therefore, the reasons for non-implementation and delay in implementation of the recommendations

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28 Anamika Ray & Ankuran Dutta, Media Glare or Media Trial Ethical Dilemma between two Estates of India Democracy, 5 Online Journal of Communication and Media Technologies 100(2015).

29 Indian Express, (5/3/2015) available at, http://indianexpress.com/article/india/india-others/nearly-three-crore-cases-pending-cji-says-trial-to-end-within-5-years/, last seen on 17/9/2015.

30 Justice P. Sathasivam, Strengthening The Judiciary Towards Reducing Pendency And Delays, Judicial Training & Research Institute Journal 19 (2012).

of the Law Commission from time to time shall be identified and steps be taken to do the needful with an effective will.[30]

Lack of Judicial Accountability

In everyday terms accountability is simply the ability to hold an individual or institution responsible for its actions.Independence of the judiciary is jeopardized by options for exerting political influence, in particular as regards the appointment of judges; lack of orientation in procedural law in the various legal fields; in some cases, lack of clear legal procedures to be followed, in particular as regards cases against political decision-makers highlight the main causes of corruption. Besides inadequacy of salaries and pensionary benefits may be a minor reason. The accountability of judicial officers is very minimal in non-transparent manner working, having vast discretionary powers.

Misbehavior by any judge, whether it takes place on the Bench or off the Bench, undermines public confidence in the administration of justice and also damage public respect for the law of the land, if nothing is seen to be done about it, the damage goes unrepaired. Judiciary is exploiting the situation and getting involved in policy-making process. Judges give judgments on subjects which have a wider policy implication. Policy making is a serious political and administrative activity. They are supposed to evaluate the alternatives and in the end accept one.It is an irony of political history that the judges with limited outlook are trespassing into an area where they are not professionally qualified.[31] The Constitution provides that High Court and Supreme Court judges cannot be removed except by impeachment. The security of job and tenure also require more accountability from judiciary. Many cases in the past has seen judgements without any explanations or reasons, latest being by Madras High court where compromise was asked to be made in rape case. Later set aside by Supreme Court. The judiciary has lots of discretionary powers, no doubt, but coming on to particular decisions are rarely explained. The IT revolution in judicial sector and its adoption by judiciary should be the most welcome step for litigants and concerned intelligentsia as the judgements are displayed online now. An effective means in reducing corruption is the publication of judicial decisions.

A special obligation to defend judicial independence falls on

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31 R.K. Barik, Politics of Judicial Administration, in S.P. Verma, Indian Judicial System: Need and Directions of Reforms, Kanishka Publisher, Distributors, New Delhi, 281(2004).

judges and lawyers not because of self-interest but because they are aware of the history and purpose of judicial independence and the heap of ways by which it can be attacked by powerful interests, public and private. The chief challenge is to spread the influence of Art 14.1 to those persons who have never really enjoyed a culture of competent, independent and impartial judiciary established by law. The answer is very simple yet SC failed to understand it. It is failing to respect Article 14. The SC must bear in mind that the power is given for the performance of duties and functions. They have been granted immunity only for the purpose of doing justice fearlessly, but SC failed to understand this notion of power. It exercises power arbitrarily. That is a challenge to which the Bar Association and the Jurists should jointly commit themselves. In situations where judges, prosecutors and lawyers are either indisposed or unable fully to assume their farm duties, the rule of law cannot be maintained. It is not only individuals who will suffer in such a situation: it is the entire free and democratic constitutional order of the State concerned that will ultimately be in jeopardy.

Conclusions and Suggestions

The negative perception of judiciary has a direct impact on the very essence of the judicial function, which is to deliver an independent, fair and impartial decision. The consequence is unfairness and unpredictability in the legal process from start to finish, and a systematic undermining of the rule of law. Corruption in the judiciary is all the more damaging because of the important role the judiciary is expected to play in combating this very evil. Popular perceptions have some correspondence with reality. We have separation of power syndrome through constitutional provisions but political interference and hierarchical interference in decision making neutralize this concept. What is lacking in the present working of the Judicial Process is the effective judicial reform programmes need to address institutional, organizational and individual dimensions in a comprehensive, systematic and holistic manner. Development and implementation of judicial reform initiatives for enhancing justice will require justice oriented approach based on the new understanding of the definition of justice.

Judicial independence is founded on public confidence. The perceived integrity of the institution is of particular importance, since it underpins trust in the institution. Judicial and political corruptions are mutually reinforcing. Where the justice system is corrupt, sanctions on people who use bribes and threats to suborn politicians are unlikely to be enforced.

As emphasized throughout this paper, judges, prosecutors and lawyers are three professional groups that play a crucial role in the administration of justice. They are consequently also essential for the preservation of a democratic society and the maintenance of a just rule of law.

Judiciary is an important pillar of a democratic state. It is believed by many that the failures of executive and legislature are glaring. Judiciary is over-active and doing duties which should have been executed by other two organs. Both legislature and executive are experiencing decay and unable to perform up to expectations.[32] Similarly the appointment procedure and lack of sanctions has resulted in corrupt practices. The word judicial activism, judicial overreach, judicial credibility sounds to be quite synonymous to judicial review and judicial creativity, until and unless the judiciary works with its full competency and honesty. We have seen cases in which the government found it hard to implement its regressive measures, and the judiciary came to its rescue with pronouncements that are not open to challenge. There is much in Indian jurisprudence which is out of date today. The complexity of cases in the modern era requires the academic curriculum to be updated with international standard so that new professionals who join judiciary become capable of handling the complex cases. Cyber crimes and dealings and international agreements are the lightening examples of complex cases.

The Constitution (120th Amendment) Bill, 2013 or the Judicial Appointment Commission Bill, 2013 amends provisions related to appointment and transfer of judges to the higher judiciary. It establishes a Judicial Appointments Commission (JAC) to make recommendations to the President on appointment and transfer of judges to the higher judiciary. Now, everybody is looking for the new NDA government to take a speedy decision on the appointment of the judges in various levels. Besides commission the followings suggestions can to some extent restore the credibility of judicial system among masses.

- Periodic increase in remuneration of the judges including administrative staff in Judiciary.
- Increase in the number of judicial officers besides filling vacant post already sanctioned. Routinely updating through orientation programmes and training courses can be very useful.
- Promoting and rewarding the judges of good behaviour, physical

32 Ibid, at 279.

and mental capability.

- A code of conduct for judicial officers. A more standardized and stringent process for judicial impeachment of tainted judges.
- Strengthen the transparency and accountability of all who are involved in the justice system. The online publications of Judgements and Orders have played crucial role in accountability of judges. However the judgements should be reasoned bases leaving no room for any doubt as to discretion.
- Transformation in societal attitudes towards corruption in general and the justice system in particular. This mechanism can be furnished with well-equipped judicial record management and accountable administrative staff.

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Legal Education – A Sentinel of Social Justice

Dr. C.R. Jilova[*]

Introduction

Law is one of the most faithful mirrors reflecting the fundamental social economic and political values, at a particular period.[1] The concept of legal education in India, unlike western countries is not new. It has a rich heritage. Since the ancient vedic age, law has been an important field of knowledge of learning and the administration of justice was based on the concept of dharma. The king either use to dispense justice themselves with the help of assessors, or appoint judges and assessors used to be the persons well versed and experienced in the administration of justice[2]. No one can deny that the very existence of democracy will be jeopardized if people are denied justice merely by reason of their social and economic status. The ideal of modern legal system is fairness to rich and poor alike. But those who are often at a practical disadvantage need special legal assistance. One of the facets of social justice is enshrined in article 14 of our Constitution assuring equality before the law; but the slogan equality before law becomes an empty slogan unless the two unequal the rich and poor, the have and have-nots, who come before the court. Law being an instrument of social justice in its present day administration, the need is to extend the benefit of law to those segments of society for whom they are enacted. The positive action of state is necessary to achieve the twin objectives of ensuring on one hand justice to all section of society and also to guarantee of equal protection of laws meaningful to those who otherwise do not have adequate means of securing the justice. As stated by Hon'ble William J. Brennan, Justice, U.S. Supreme Court-

> *Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expenses puts it beyond*

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1 S.S. Sharma, Legal aid to the poor:The law and the Indian legal system (1st ed.,1993).

2 See, Manu, Institutes of Hindu Law, Ch.VIII on 'Judicature' and on 'Law, Private and Criminal', Vol.40, 380.

> *their reach, the threat to the continued existence of a free democracy is not imaginary but very real, because democracy's life depends upon the making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.*[3]

Historical Background

Historical Development of Legal Education in India the concept of dharma, in the Vedic period, can be seen as the concept of the legal education in India. The guiding force for the King or his appointee was the upholding of the dharma. The need for upgrading legal education has been felt for long. To appreciate the kind of legal education that would be socially relevant and serve the community's requirement, it is necessary to consider the development of legal education briefly in its historical perspective.[4] The present pattern of legal education in India has been transplanted into Indian soil by Britishers. The law teaching and the administration of justice in English speaking countries during medieval period were based on moral philosophy enshrined in the Christian concept of morality. But this could not continue for long and was modified by positivists who encouraged the study of law in the form of an empirical study rules and concepts. The study of law and teaching was based on scientific lines as that of the study of science subjects. It was gradually realized that law could be discovered and found out by actual observations rather than from a few priori principles. The developments of law of torts, equity, property etc. are some of the example of such an assumption. During this period the study of law comprised mostly of a study of the concepts of legal rules to be developed by logic and on the principles of justice, equity and good conscience. During the first half of this century, the positivists were followed by the historical and realist schools. This led to the transformation of societies, perhaps as a result of the rapid industrial and technological developments. The emphasis on value and goals were attached to the rules as the basis of legal decisions. Gradually, the sociological factors received more and more attention in the study and learning of law.[5]

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3 L.M. Singhvi, Law and Poverty Cases and Materials (1st ed.,1973).

4 Charles H. Alexanderowicz, The Dichotomy in control of Legal Education in India, 48 (1st ed.1973).

5 K.D.Gaur, Legal education in changed context, 3 Kurukshetra Law Journal, 209 (1977).

Legal education during British period

With the establishment of British rule in India, the administration of justice was taken over by the Britisher from our local rulers accordingly the Britishers started to impart some sort of legal education, so that the interest of the litigants could be looked after. The first step in this direction was taken in the year 1857 with the establishment of three Universities in the metropolitan cities of Calcutta, Madras and Bombay. At the initial stages, legal education was in its very rudimentary form. No standard and qualifications for admission to the law classes were fixed. Evan a non-matric student was permitted to undergo legal training that would enable him to appear and practice before a court of law.[6] In 1870 first time Intermediate with Arts, Science or Commerce was prescribed as the minimum qualification for law course and there after it has been raised to graduation. The teaching of law was being conducted in most of the law colleges on a part time basis by part time students and part time teachers. The courses prescribed for law teaching were thus mainly concerned with the teaching of statutory rules of law and procedure which could help the British in the administration of justice and maintenance of law and order. For almost a century from 1857 to 1957 a stereotyped system of teaching compulsory subjects under a straight lecture method and the two year course continued.

Legal Education after Independence

The scope of law was limited during the British period, however with Independence of our country and establishment of a democratic form of government being a social welfare state, a change in the attitude towards legal education could be noticed. Now the states are under Constitutional obligation to promote and work for the achievement of justice-economic, social and political for the all the sections of the society. It is in this context that legal education has assumed great relevance and significance. The following observations of Gajendragadkar C.J.:-

> *In a democratic country, which is dedicated to the cause of establishing Socio-economic justice, law ceases to be merely a command of the legislature Law becomes dynamic weapon in the armory of democracy to achieve its objectives of reaching the ideal of a welfare state. As soon as law ceased to be merely a Command of the monarch,*

6 An Institution of Mukhtars was established. Mukhtars were allowed to practice in the Revenue Courts.

> *or the legislature and assumes the role of a flexible Instrument intended to serve the cause of socio-economic justice, it follows that the study and teaching of law must also change their complexion*[7].

For the purpose of improving the legal education in India a number of committees and commissions were constituted by the different bodies and organizations. Initially the University Education commission was set up in 1948-1949. In the year 1949 the Bombay legal education Committee was set up to promote legal education. The All India Bar Committee made certain recommendations in 1951. In1954, XIVth report of Law Commission (Setalwad Commission) of India discussed the status of legal education and recognized the need for reformation in the system of legal education. There after the University Grants Commission, the Indian Law Institute, the Bar Council of India and the various Universities took initiative to impart the legal education such as Banaras, Delhi, Rajasthan Cochin and Bangalore etc. With the constitution of the Bar Council of India a new era in the field of legal education is discernible. The Bar Council of India entrusted with the task of organizing and formulating a uniform policy of legal education for the entire country. As a result of the movement for legal reform in legal education some of the significant changes that have been taken place in this direction are as follow:- Introduction of three year LL.B. degree course in place of two year and Introduction of five year B.A., LL.B. degree course apart from three year degree course.

Legal Education and Social Justice

It is rule of law that draws the essential difference between human society and animal world. It is the legal education that plays an important role in promoting the social justice. Awareness of law characterized the lawyers as social engineers. The lawyers are directly in contact with society in its entirety as they have to deal with all kinds of problems of peoples from all sections of society. So, law act as the cementing material of society and an essential medium of social change. A well administered and socially relevant legal education is sine qua non for a proper dispensation of justice. Thus, legal education is imperative not only to produce good lawyers but also to create cultured law abiding citizens[8]. Social justice can be achieved by making some reforms in the legal education. Therefore, need for

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7 9 Jaipur Law Journal 1 (1964).

8 Dr. Tabrez Ahmed, Legal Education in Indian Perspective, available at www.site.technolexindia.com, last seen on 13/9/2015.

reforming the legal education has assumed great importance and urgency in view of far-reaching changes the Constitution (Forty-Second) Amendment Act, 1976 has brought in our Country. Article 39-A which has been introduced in the chapter on Directive Principles, directs the state to secure the operation of legal system which promotes justice, on a basis of equal opportunity and, in particular, provides free legal aid, by suitable legislation or scheme or any other way, ensure that opportunity of securing justice are not denied to any citizen by reason of economic or their disabilities. Apart from Article 39-A, the Preamble of our Constitution and the Part III established in India a new social order based on justice, equality, liberty and fraternity. Obviously, the term justice in the preamble of our Constitution has been used in wide sense. It includes justice as administered by courts of law in deciding disputes between litigants and enforcing their mutual rights and obligations. The right to Equality before law has great significance and importance in this context. But its importance gets reduced to an empty farce if justice is not within the reach of all aggrieved persons, and, if either on account of the costliness of judicial process or of the complicated nature of legal procedure, the aid of the state in vindicating the justice of cause is actually available only to a small number of people who only are able to pay heavily for it. Since last so many years it has increasingly become clear that the cost of litigation is indeed prohibitive to vast majority of our people and to that extent the ideal of equality before the law undoubtedly suffers a continuous blow[9].

The concept of legal aid to the indigent persons has its roots in the well settled principles of natural justice. In the modern time each year a large number of Acts are framed and it is not possible for the aggrieved party to be aware of laws in his favour. Therefore, it has become necessary to take help of lawyers. In a welfare State it is the obligation of the State to ensure the citizen's justice according to law and to secure justice the state is required to provide the lawyers to the citizens who are not in position to engage a lawyer for defending their case. The Supreme Court in Hussainara Khatoon v. Home Secretary, State of Bihar[10] had called upon the government to frame appropriate scheme for providing legal aid to poor. The purpose of legal education in the changed context should not be just to make lawyers but to make lawyers who would be socially useful. If we wants lawyers to be socially useful, we must make legal education socially relevant. In order to achieve this goal we should impart them that training in

9 D.D.Sharma,Legal Education and Students Legal Aid Clinics, 3 Kurkushetra Law Journal 221(1977).

10 AIR 1979 SC 1369.

the law schools, The scheme of legal education therefore be carefully framed keeping in view that legal education should be such as would make the students socially conscious lawyers when they go out of the University. For this the law students should be made to appreciate the social and economic problems of the society in which they live and work as a lawyers.

Conclusion and Suggestion

There is growing trend in today is world that education in order to be useful, must have relevance to the needs of the society. The country to-day needs not only lawyers but jurists, thinkers, legislators, business executives, scholars and there is a potential with the legal education that it can produce above. The need for excellence of legal system has increased to a great extent. The function of State has changed from passive role of keeping peace and maintenance of law and order has changed to social and economic transformation of society. We have to plan our legal education system in such a way that we can meet the demand of a global world not only in legal field but national development also. The Indian legal system has vast challenges ahead. We must plan and co-relate the legal education to social and national development. Legal education cannot keep disassociate itself to the problems concerning society, so we have to establish the legal education in right perspective. The role of lawyers was limited to represent clients in an adversary system of litigation after charging heavy fees. They are accused, often justifiably, for adopting dilatory measures to prolong cases and thus earn more fees. There is saying that is benefitted from litigation because the loser loses the case while the winner has to spend so much that there is nothing left for him to win. The lawyers forget their responsibility towards the society. Following are some of the measures that could successfully be undertaken in order to make legal education more relevant in the present socio and economic revolution:-

- Operative Legal aid clinics must be setup in all law schools;
- The purpose of Law schools should not be just to make lawyers but to make lawyers who would be responsive to social needs;
- More and more legal literacy camps should be organized by law schools to spread literacy about recent development in law;
- The Law Schools should adopt the village for providing legal knowledge and to help the villagers in case of dispute in their village. The law students may refer the case to the legal services authority;
- Legal education should be responsive rather than purposive.

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Causes of Divorce in India : An Analysis

Dr. Vijender Kumar *

Introduction

Marriage is presumed to be a union of a man and a woman to the exclusion of all others but this exclusive union does not mean that it provides a certificate to its members to behave inhumanly and / or each of these members have a right to treat the other party to it with unlimited, unrestricted and unreasonable behaviour. If a marriage does not work out for the objects and purposes it is meant, in such a situation, the parties to it have no other option but to go for divorce. The divorce is the final and formal termination of a marital union, cancelling the legal status, duties and responsibilities and dissolving the bond of matrimony between the parties. Though divorce laws vary considerably designed and executed around the world yet in most of the countries it requires the authority of a court or other authority in a legal process. The legal process for divorce may also involve issues of alimony, child custody, child support, distribution of property and division of debt. Where monogamy is law of marriage among Hindus, divorce allows each former partner to marry again once a formal decree is granted by the court of competent jurisdiction; limited polygamy is legal among Muslims but polyandry is not, divorce allows the woman to marry another man. In India married couples are governed by their personal laws, viz, Hindu, Muslim, Christian, Parsi and Jew. Whereas inter caste marriage may be solmnised under the provisions of the Special Marriage Act 1954 but if a Hindu male marries a non-Hindu female under this Act, he loses his joint status, ownership and inheritance rights in the Hindu joint family though it does not apply in case of marrying a Hindu female under the same Act.

It is interesting to note the number of divorce cases have been coming to the courts in India where these courts are working even on the Saturdays and Sundays to dispose off these matters. What is clearly apparent in this scenario is that the divorce rates in India are burgeoning to a point where the present setup of family courts are finding it hard to deal with the increasing number of cases that are coming before them. It seems that the divorces are on the rise, all over India and spread throughout the upper and middle classes especially in the metros and semi-urban areas but it touched the rural folks as well. It is important to look at the socio-cultural and

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economic contexts in which the divorce matters are thought of and consequently divorce rates are increasing. As young couples in their 25-35 age group account for over 70% of the divorce cases, and around 85% of them were filed in just the first three years of their marriage. This statistic can be explained by delving into the causes of this rapid increase in divorce cases in India.

Not only the sanctity of marriage but also people's attitude towards marriage itself is changing, and as a result they do not work as hard as they used to before for stable and peaceful married life. Family as a social institution in India, while very strong in the rural areas is losing its strength and sanctity in the urban areas, especially among the working class in the pretext of ultramodern lifestyle. Also to be considered is the steady migration of population from rural to urban cities in search of jobs and ample business opportunity provided by these cities. Around 30% of India's population now resides in cities and metropolitan cities. Not only this; women, especially in urban areas are also working fulltime like men. Having to manage both at work and at home simultaneously has become a common phenomenon throughout the country. Rather to say, men are in search of women for marriage, who are well qualified, working and ready to share equal financial responsibilities.

Generally, there is a lot of pressure from the community to run the family properly and in case of disputes, the families of the bride and the groom sit together and sort out the matrimonial problems. Moreover, most of the marriages in India are arranged marriages, rather forced marriages as the parents of the couple chose the life partner of their daughter or son. In such a scenario, there comes the issue of compromise, which means that the couple must adjust and find a solution to their issues themselves. Seema Hingoranny a psychologist observed that 'tolerance level is very low among the couples today which was not the case before. They take even trivial issues seriously and end up fighting. Also, women are more vocal today about their thoughts and what they feel, and many men do not accept this attitude easily. Besides this, couples today jump into the relationship too fast, without properly knowing the prospective wife's or husband's nature. And so, after marriage they have bitter fights and end up getting divorce'.[1]

In metro cities like Delhi, Mumbai and Bangalore rate of divorce is more than 30%. Also, the highest rise of divorce cases is in IT and related software industry sectors. This means that most divorces take

1 Rashmi Sanzgiri, The 'C' mantra for Successful Marriage, Sunday Times of India, 8 (Hyderabad,12/4/2015).

place in families which earn a lot of money, but still get to spend a lot less time together due to the work load of both the husband and the wife. Earlier, cruelty, desertion and adultery used to account for two out of three cases of divorce. But in the recent times, compatibility has been cited as a major cause in a majority of cases of divorce. It links to the fact that most of the cases have been filed by young couples, who mostly complain of attitudinal problems while filing petition for divorce.

Causes for increasing Divorce Rates

There are so many reasons for breakdown of marriage among unhappy couples which attribute divorce finally but the main reasons for the increasing divorce rate in India may be as follows :

Economic Causes

Marriage Expenses

Marriages in India are organised on a grand scale and are usually very lavish. A large number of people are invited and a massive amount of money is spent just on the marriage ceremony and functions which go in row for three to five days. This may cause significant economic strain later on as most middle and lower class people tend to take loans to marry off their children. All these expenses, in almost all the cases are incurred in cash only for which hardly there is a record of the expenses incurred by the parents from both the sides. The situation is worst in case of purchase of jewellery as parents do not take receipts of these purchases, as advised by the shop-owner not to take it otherwise they need to pay certain amount of VAT and Service taxes over it. Consequently, once caught in a debt trap, they find it extremely hard to come out. This makes the just married couple dependant on the partner's family, and the partner's family may feel compelled to satisfy the demand but beyond a point the parents may not be in a position to do so which results in breakdown of the marriage finally. Also, in some cases, the husband's side demands more gifts from the wife's side even after marriage on several customary and religious occasions. When they express their inability to pay, cruelty to the wife is very often a consequence. It has been seen in most of the dowry harassment cases that the bride/wife was making tea or preparing food in the kitchen over the kerosene stove or gas stove where stove busted and consequently she burnt herself in the kitchen and was brought dead to the hospital but we have not seen any mother-in law, sister-in law and the husband die like this, it looks like the stove manufacturing companies have something to do with the wife's death only.

Conspicuous Consumption

Conspicuous consumption is spending on goods, e-gadgets and services acquired for the purpose of displaying income or wealth. Such display serves as a means of attaining or maintaining social status in the conspicuous consumer's mind. The excessive spending on unnecessary items may cause either the husband's side to demand dowry due to the wife's spending habits or might leave the household with significantly less money due to wasteful spending by the husband. Though taking and giving dowry is a criminal offence in Indian penal laws but the people find the ways to demand in the form of gifts which has no legal sanction attached to it.

Differences over Property Issues

In some of the families in the country, gifting a piece of agricultural land, housing plot, and/or a flat at the time of the marriage to the would be son-in law is a common practice among Hindus and gifting a large amount of gold jewellery, silver and other form of costly stones/pearls is also a common practice. Though most of the marriages are fixed by the parents and / or family members or relatives but there is nothing in writing on the paper with regard to the property in any form is being gifted to the in-laws of their daughter which leads the matter to property disputes after marriage, such as sharing of gifted land and other movable or immovable property between the couple, may lead to tensions between them and eventually end up in a divorce. As the pre-nuptial agreement is not an accepted norm in India, though each and every matter about the prospective marriage is being discussed between both the families but nothing is put on paper as the Indian prospective bride and bride-groom think negatively about the pre-nuptial agreement and by chance any person points out about the written form of these matters, others think that there is a possibility of the marriage is not going to survive for long, rather it may give more clarity and stability to their marriage. In fact, this is one of the most common reasons for divorce, especially in rural areas or in low-income groups, where property is valued higher and clubbed with the family honour when compared to other financially stable classes of Indian society.

Economic Independence

When one of the spouses' income especially the husband, is low, the wife may sometimes feel dissatisfied with the amount that she gets to spend. Moreover, youngsters get married at a young age[2]

2 33% of married women tied knot before 18, The Times of India, 1 (Guwahati/ Northeast, 4/4/2015).

without verifying the financial stability of other spouse. This leads to tension between the couple and also between the families. As women are now more economically empowered than ever before to walk away from abusive and cruel relationships due to their capability to earn on their own and not to be dependent on the income of the husband. Where both the spouses are working, though it is a welcome move in the society, but it has its own negatives; if the financial matters are not discussed by the spouses with open minded it may lead to financial problems in the matrimonial home. Nowadays, most of the young people acquired their higher education, especially professional education on loans which if not disclosed at the time of entering into marriage union, may create financial burden on the married couple and with high cost of living style it becomes difficult to survive with one income in the family. Eventually, it makes both the spouses to work and lead their married life happily. Whereas it has been seen in number of cases that the married couples fighting over these financial matters as they failed to satisfy their basic needs.

Social Causes

Society is a very sensitive group of people; it is governed by certain social norms, customs, usages, and codified laws. Whereas marriage is a basic and fundamental but very fragile unit of a society which regulates the fate of any country, i.e., developing or developed, as there are many evils in society that demolishes the health and wealth of any developing or developed society, dowry is one such evil among many.

Dowry Practice

Dowry is a major cause of divorce, both directly and indirectly. It leads to harassment of the wife by the husband's side and the wife is usually treated with cruelty-mentally and physically, till the dowry amount is paid in full. Sometimes, the brides' family take loans to pay dowry and get caught in a debt-trap. Also, the groom's side may ask for more dowries later on in the marriage, in case where the bride's family either refuses or is unable to pay at the time of marriage. Most middle-class and lower middle class divorce cases are sparked by demand of dowry. The bride is mentally, physically and psychologically abused by the groom's family and is pressurised. This obviously leads to the bride seeking a decree of divorce to save her life. Though there are laws to curb dowry practice in society, yet this social evil still continues in different forms in society. Surprisingly, the present union government is planning to relax the dowry laws as existing in the country in the pretext that these laws have been misused by the women.

Family Re-structure

Recent changes in the family structure, from a joint family system to a nuclear family have caused an increase in the rate of divorce. Earlier, to resolve disputes and to mediate between the parties, a large number of elderly people were present. Nowadays, this support base is unavailable and in metro / cosmopolitan cities, especially, the young couples are left to themselves and whenever they get into the arguments, there is nobody to help them; even minor arguments lead to divorce. Not only this, but the joint family system had a way of supporting family members in situations of hardship or loneliness. Whereas nuclear families have meant loneliness for the non-working partner, compounded by moving away from familiar environments, may result in estrangement and illicit affair. Also, a joint family meant a stable source of social support and income to the whole family and children too could be taken care of by someone or the other in the family. Nowadays, in nuclear families, it has become imperative for the parents themselves, with their occupational commitments, to simultaneously support and take care of their children's needs. A recent study indicates that 'more and more parents are joining Facebook to connect with close friends in a bid to give and seek emotional, social and parental advice'. The findings further indicates that 'while 75 percent of parents log on to the social networking site daily, mothers tend to use it more than fathers... parents are also more likely to have their children, neighbour, colleagues and their own parents added on Facebook than non-parents who tend to have more of their current friends on Facebook.'[3]

Extra-marital Affair

Marriage union is considered to be a sacrosanct union between the parties where there is no scope of unfaithfulness of its members but when one of the spouses breaches the faith of the other and develops physical sexual intimacy with other person than the spouse, the sacrosanctity of marriage comes to an end. Illegal and illicit romantic or sexual relations outside the marriage very often cause the opposite party to seek a legal remedy through a decree of divorce. This type of divorce is common more among urban areas within the upper-income classes. This also leads to a severe mental and psychological trauma on both sides and the parties split bitterly more often than not. Most of the metros in the country nowadays have variety of pubs and clubs especially corporate clubs where young couples visit very often and exchange their spouses with others for the sake of

3 Parents 'Like' Facebook Friends, The Hindu, 20 (Kolkata, 18/7/2015).

sexual pleasure. They do not mind to enjoy consensual non-monogamous sexual life which subsequently leads to disaster in their personal life.

Live in-relationships are fast catching up in the recent times. It is however not being provided with the legal protection in the country but still young people are getting into it without bothering about the socio-economic and legal consequences. SribalaVadlapatha reported that 'cheating cases in live-in relationships have increased in Andhra Pradesh and Telangana, where statistics show 90% of cheating cases registered relate to live-in partners. Hyderabad has recorded the maximum number of cheating cases in both states. Data available with the state women's commission shows 47% of live-in cheating cases are registered in the common state capital'. Further Kota Siva Kumari opined that 'statistics in the state sponsored women counselling centre in the police control room in Hyderabad shows a similar upward trend. This year we have registered 2000 cases including sexual harassment, cheating in live-in relations comes second only to domestic violence'. Whereas M. Sumitra of a city based NGO opined that 'live-in relations are common in the age group of 25-35 year old people. Though society is not open to such relations yet women with modern thinking enter into this relationship thinking it to be for a short time. The problem arises when they get married'. P. Sarala opined that 'in many cases trouble begins when the woman gets pregnant and the man refuses to take the responsibility'. She further gives an example of 'a 25 year old girl came to us after she became pregnant. Her parents disowned her. We had no other option but to ask her to abort the child'.[4]

Recently the Pam Rajput Committee has submitted its report to the Ministry of Women and Child Welfare Department where the Committee has recommended that Section 125 of the Code of Criminal Procedure be amended to ensure equitable rights for women. It builds on the Supreme Court's recent order that a woman in a live-in relationship and her children are entitled to maintenance. As the present provision under Section 125 of the Code of Criminal Procedure mandates provision for maintenance of wife, children and parents in case of divorce or when spouses live separately by mutual consent.[5] The Supreme Court over the years has recognised live-in

4 Cheats Undermine Live-in Relationships, The Times of India, 5 (Hyderabad, 21/7/2015).

5 Government Penal Wants Women in Live-in to get Maintenance, The Sunday Times, 1 (Guwahati/Northeast, 19/7/2015).

relationships and has recently held that if a man and a woman 'lived like husband and wife' for a long period and had children, then the judiciary would presume that the woman would be eligible to inherit the property after death of her husband.[6]

Changes in Lifestyle and Values

Recent trends in urban areas, especially with the influence of western social norms and values and globalisation are rapidly absorbed by young people. The west does not have a stable institution of marriage as strong social construct as in India and this effect of imbibing of these values about ephemeral marriages which is often seen in the divorce couples of urban areas. A typical scenario is that both partners get married in a love marriage where two families are not taken into consideration, may be for any reason, as both the spouses are working and generally busy all the time and get very little time to spend together. The workload of their job demands all their time and reminds them to concentrate on their job. Whereas the busy lifestyles of the couple mean that they do not understand each other and there is greater chance of misunderstanding resulting into fighting to take place over minor personal issues. Moreover, financial freedom of both sides makes them not to tolerate other's inhuman and unreasonable behaviour and finally leads it to the option of divorce.

Common folk understands that modernisation is the main cause of divorce as with modernisation, comes new ideas and independence. The younger generation is more likely to stick to the new ways of life and do away with 'out-dated' methods of traditional marriage. The fact that they are young and often get married on impulse, hence they end up divorcing one another. As dowry played a major role in the idea of traditional marriage, instead of getting divorced, the main trend is for the individuals to find their own life partner before they get into marriage. So, the majority is not getting divorced because of dowries, rather they are choosing their own life partner before they get married. The incorporation of love marriage in the Indian society has caused a major rift in the sanctity of marriage institution. This rift has resulted in more divorce within the society. As modernisation rises in India, so does the idea of love marriage - inter / intra caste marriage emerged; but there is still no direct evidence to suggest that as the love marriage rises, so does the divorce rate in India.

As the world is getting closer as a global village, the globalisation is bringing about trade of cultures and ideologies; there has been a

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6 Amit Anand Choudhary, Live-in relationships now Acceptable in Society : Supreme Court, The Times of India,1 (Guwahati/Northeast, 24/7/ 2015).

significant change in the attitude towards marriage in modern times. Due to the presence of a workaholic environment in common households of urban India, marital incompatibility is the obvious consequence of such a situation. Hardly spouses get the time to share their feelings and affections with each other and a growing dissatisfaction instigates the sacred and stable marriage to turn into a grim divorce.

Work Stress among Married Couples

Today's working environment has changed drastically the facets of marital life of working spouses. The economy having opened up in the free and open market, most companies are facing intense competition and this leads to tremendous pressure on employees. High rates of stress in the workplace gets transferred back home and even the slightest alteration can snowball into a major fight. Moreover, constantly being on the edge requires family support that is unavailable and this leads to dissatisfaction with the spouse. This is especially true in the IT sector where constant deadlines and unusual working hours lead to a very high rate of stress. Working late nights, 6 days a week, without holidays and with a boss who breathes down your throat can create a lot of frustration and tension. Even in some of the cases, the working couples are extended work at their home for 24x7 hours which literally takes away their personal marital life. This can destroy a marriage, whether it's just one spouse working, or both.

In the traditional situations, where it was the families coming together, may be the spouses tried harder to adjust, because they could not even think about getting out of the marriage, it was for the sake of the family and children, the married couples lived together for life. There was a lot of giving and sacrificing, rather enjoying their married life ever. For example, when recession happened in the whole world in 2008, many young couples who were working in corporate, multi-nationals and IT sectors and living their life on very high salary packages had broken up their marital ties in divorce. As they were living individually their life away from the parental support and the parents could not extend their support to the young children and their family, but nowadays these young couples say, 'I'm an individual... I have my needs and my living styles'.

Ego Issues among Married Couples

Apart from the economic, social, liberal and modern trends, there exist micro-factors that contribute their share in rising divorce rate in many ways, such as ego of the husband or the wife where both of whom are well educated, working, well to do financially, is easily hurt when the other says or acts in a hurtful manner. Though this has a

serious connection with the kind of relationship one spouse has with the in-laws of his / her life partner. As one small comment about the in-laws may lead to a situation where 'cannot live without you' relationship may convert into 'cannot live with you' as one does not care, respect and matter for other not because of their own cordial relationship but they misunderstood the relationship with the in-laws. It may create serious irritations or inconveniences in their married life and it may lead to dissolution of their marriage, if not settled their differences amicably. As there exists a mutual trust between the married spouses but nowadays the married couples do not trust each other in most of the family matters rather they think that life can be managed by themselves alone. There is no sharing of problems or experiences between the couples, because they feel it is not right to burden the other with their problems. However, this eventually leads to frustration and dissatisfaction of trust with the other couple.

Shared Responsibility

In the past, the married couples used to share family responsibility in a mature and traditional way where even their parents and grand-parents also contributed equally. Whereas nowadays, the family responsibilities have changed dramatically as both the parties are supposed to be working one, may be in the pretext of economic survival or not to waste their educational qualifications while setting at home ideally. The patriarchal system has not yet changed absolutely. If the wife is a working woman, there exists a gender roles change in the family and a conflict arising from sharing the work load at home adds to the stress faced at work. Tensions often arise if the husband imagines that the woman's career is temporary or the woman imagines that her husband will lend helping hand at home. The campaigns on gender equality are now giving rise to ego clashes between the husband and the wife, especially if the wife too is the bread earner in the family. Prior to 90s our country was a male dominated country where the women were made to be within the four walls of the matrimonial home and were tortured, harassed and underestimated. However, males find this hard enough to accept this change and changing roles of women in our society but they have no other option than to accept the change. In traditional India or the emancipated west, men are still not comfortable with the strong independent modern women working next to them. Men might feel that they are ready for a working spouse but not for a highly powered career oriented woman. Men might not feel comfortable when his wife earns more than him, and is thus, not dependant on him. Eventually, under the garb of being ultra-modern, a spouse may give a go-by to family obligations and stress on being independent and focus on their career.

Empowerment of women has been seen as one of the most important initiatives for the dissolution of marriage in urban areas as financially educated women are now open to the option of ending the relationship rather than to bear lifelong abuses silently. With the speed of women education in India, women are getting the privilege to work and earn for their own living. Well paid women are even at the advantage of supporting their own children. So, if the woman undergoes unbearable mental and physical torture, she can now easily move away from the marriage without giving much thought on the post-divorce financial and social conditions.

Societal Acceptance of Divorce

With the changes of modern society, the divorce among the young couples is accepted as a normal course of their routine life. In urban areas gradual acceptance of divorced daughters by the natal families, though not in rural areas, because families have started to believe that perhaps their child can have a better life after divorce and without a spouse. A generation ago, women had little choice but to stay in bad marriages. Most would not have received any support either from family members or relatives. Earlier a woman when divorced was subjected to social criticisms or it was the wife who was to be blamed for the breakdown of the marriage. Even spouses often reluctantly accepted the divorced woman when she had returned to her parental home. But now the views are changing, parents now believe that it is definitely not the end of their daughter's life even after her marriage is being dissolved. The anonymity of big cities has helped divorced people avoid the glare of judgmental friends and relatives.

Conversations with marriage counsellors, divorce lawyers, social scientists and couples themselves suggest that, if divorce is rising, it is because of an underlying transformation of love, care, commitment, communication and protection styles. Traditional Indian marriages have little to do with romance in marriage. Often but not always arranged; they merged between families of similar backgrounds and beliefs, and their principle purposes were baby-spawning and in-laws care. Ever more couples marry each other for each other, out of personal enthrallment rather than a sense of family duty, and even arranged marriages come with new expectations of emotional fulfilment. Eventually, it is this new notion of love, with the couple at the core that makes marriage both more riveting and more precarious than ever before, many Indians believe.

It is only the lack of mutual understanding, family problems, freedom concerns, conservatism and stereotyping way of family life leads to increase in divorce. They do not want to put more efforts into

a relationship to fix the issues. The married couples are concentrating more on the careers building and less on their family lives. In most of the couples lack of patience and tolerance is becoming a norm and they feel that escapism is the solution of all matrimonial problems. Many young married couples to do what was once scandalous earlier, as they choose their own spouses and move away from their parents but this often encourages divorce in its own way; family lawyers and experts opined that by cutting out the web of kin ties that once served to bind couples. Ever more couples marry people different from them instead of family-vetted spouses of like backgrounds, then compound the risk by living apart from their parents and relatives, socialising with friends rather than family and postponing parenthood-all of which reduce the social cost of abandoning a marriage.

Some young people think this is because of the doing away with traditional methods of getting married, which is the arranged marriage, and the adoption of the western method of the love marriage. The recent trend of love marriage or marriages where the prospective bride or bride-groom chooses their partners is seen mostly in the younger (up to 25 years of age) section of society. This leads to the responsibilities of marriage when one may not yet be ready to take on the amount of work required to keep up or support a family. It is clear now that most divorce cases are coming from young couples within a relatively short period of their marriage. The younger the age of marriage, there are the more chances of divorce.

Media-electronic or print and film industry, especially television, films and newspapers tend to depict the ideal couple or the ideal family in a way that is unbelievable and impractical in real life. This may lead to dissatisfaction with the couple. More issues are breached in the media that may encourage divorce between couples. The media personnel visit the court to get personal details of the disputing couples - why and for what reasons they are fighting in the court - and without analysing about the private life of the disputing parties and their personal and confidential details are published in the newspapers and also displayed over the electronic platforms which creates a lot of mental stress over the disputing couples.

We see that the courts in India are trying to prevent divorce as much as possible and prefer it only when all other options have failed to avoid it including reconciliation between the parties. The major hurdle comes in the way that the hon'ble judges belong to mature age group and the disputing married couples belong to much young age group and think that what they are asking for is their right to which the court is not supposed to deny, hence, they must win the legal battle. In spite of this, the divorce rates are spiralling upwards.

Evaluation

The increasing socio-economic independence of women, smaller families and emphasis on individual choice, as well as self-fulfillment with relationships are shifting the trend toward less stable married relationships. There is a dire need to think about the trend of spiraling divorce rates which poses a grave threat to the stability of society and in a way it will have serious impact on the overall development of Indian democracy and its fiscal policy, as a lot of divorce matters are settled out of the court with huge monetary involvement for which there is no record of income and expenses and hence, nothing is disclosed to the government for any income tax or for any other purposes.

One step that can be taken immediately is to create awareness among young married couples about the possibility of divorce that may occur when marriage decisions are taken in haste. Marriage counseling before taking a final decision of divorce is also essential as it provides an understanding between the parties to think of the consequences of divorce it can have and rethink about rebuilding of their matrimonial ties. Also, pre-nuptial agreements can help in reducing the conflict and bitterness that might occur after divorce. The awareness about the pre-nuptial agreement may provide a healthy and close knit family is the probable and most feasible solution to reduce the stress on the disputing married couples and settle their matrimonial properties on divorce amicably.

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NRI Marriages and Private International Law: An Analytical Overview with Special Reference to 1978 Hague Marriage Convention

*Priti Rana**

Introduction

In this era of globalization, the transnational migration of people is on the rise. About 30 million non-resident Indians (NRIs) have settled and thrived in almost 180 countries on the globe. The lure for setting in foreign jurisdictions attracts a sizeable Indian population, but the problems created by such migration largely remain unsolved.[1] There are cases, where a citizen of this country marries here, and either, one or both migrate to foreign countries. With the increasing number of foreign marriages and divorces, a significant rise in matrimonial disputes is taking place.[2] The problems in NRI marriages are manifold and is not only about the woman being abandoned in India but includes demand for dowry, cruelty and forms of harassment, non-consummation of marriage, marriage of convenience, concealment of pre- existing marriage, *ex-parte* divorce etc. Over the last decade a trend is being observed, marriages solemnised in India are now wantonly dissolved abroad. The problems in the field of marriage and divorce have been confronted by Indian Courts many a times. The parallel adjudication of their matrimonial disputes in the Courts simultaneously in India and abroad activates a new *inter se* marital discord. Nevertheless, there is a need for the unification and codification of rules of conflict of laws relating to matrimonial matters so as to prevent limping marriages. Requirements of Rule of Law and gender justice on one hand, and the need to protect the basic human rights of parties to a marriage on the other, also demand internationally accepted norms to deal with inter personal and international disputes. This paper attempts to analyze the Hague Convention that seeks to harmonise the different marriage laws, that was concluded at The Hague on 14 March 1978. Further this paper attempts to analyze the complications surfacing out of NRI marriages and the measure to overcome the lacunae in our legal mechanism to address such problems.

The issue of "NRI marriages" has gained paramount importance over the years as the problem of Indian women trapped in fraudulent

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1 209th Law Commission of India Report, Need for Family Law Legislations for Non-Resident Indians (2009).

2 (1991) 2 SCR 821.

marriages with Non- Resident Indians (NRIs)[3] and people of Indian Origin (PIOs) has assumed alarming dimension. In this era of globalization and liberalization, the transnational migration of people is on the rise. This trend is to be seen more so in India, where a job proposition abroad has historically been seen as a more lucrative measure for a better life. There have always been a large number of Indians living abroad. Recently a substantial number of Indians have settled in the West and are prospering in places like the United States, Canada, Australia, the Federal Republic of Germany, France and the United Kingdom. Hindu Dharamsastras define marriage as a sacrament which is created so that the parties entering into this bond could lead happy marital and familial life. But, the spectrum of globalization has led to the fragmentation of the institution of marriage, to an extent, in India with high incidences of abandonment of wives by their NRI husbands. With the increasing number of foreign marriages and divorces, a significant rise in matrimonial disputes is taking place.[4]The problems in the field of marriage and divorce have been confronted by Indian Courts many a times. The lure for setting in foreign jurisdictions attracts a sizeable Indian population, but the problems created by such migration largely remain unsolved.[5]

Though matrimonial disputes are one of the most challenging and complex areas for legal intervention within any system, what makes the situation complex particularly in the Indian context is the fact that in the absence of uniform civil laws, the personal laws of various religious communities continue to be different, thus making the matrimonial disputes, even more difficult to deal with. In this already complex scenario, the legal complications get multiplied manifold when a marriage steps beyond the borders of a country and its legal system, in a phenomenon that has come to be known as "NRI marriages". These marriages have to then enter the domain- often called the 'maze'- of private international law that deals with the interplay and conflict of laws of different countries, which makes the issues therein much more complex.

NRI Marriages and Status of Women

Violence against women has always remained a part of patriarchal value system combined with the societal mechanism by

3 Though a gender neutral term, NRI marriages, generally and for the purpose of this paper, is to be understood as a marriage between an Indian woman and an Overseas Indian man (which would include NRIs and foreign citizens of Indian origin).

4 Supra n. 1.

5 Ibid.

which women are forced into a subordinate position. Thus, it can be said that basically it is a manifestation of unequal power relation. Abandonment of married women by their non- resident Indian (NRI) husbands is an emergent, unique form of violence against women. The problem of women being abandoned by their NRI husbands is prevalent especially in the States of Punjab, Haryana, Gujarat, and Kerala among others. The phenomenon of women being abandoned by the bridegroom of Indian origin is not new, earlier also there have been instances of bigamous marriages, entered into by men. Thus, what was earlier restricted to isolated cases has now become a major social problem.

With the characteristic Indians' penchant for migration to foreign countries, such alliances are seen as the most coveted ones in Indian society, promising greener pastures for not just the woman but her entire family.[6] They are seen as the easiest way to migrate abroad. Further there are allurements by marriage agents and families feel that such unions would elevate their status in the society. In the eagerness not to let go of such opportunities, the families totally ignore even the common cautions that are observed in traditional match making.[7] Marriages are therefore rushed into, and as the statistics show that up to two out of ten times they turn out to be fraudulent. In several other instances there have been reports of mental and physical abuse. Most of these marriages which are solemnized in a hush rush situation, ending up being treated as honeymoon marriages and there is barely any commitment on the part of the bridegroom or his family. Further, the Ministry of Overseas Indian Affairs warns, that there are certain risks involved in such marriages. Families who hurriedly marry off their daughters ignore that in case of things going awry in an NRI marriage, the woman's recourse to justice is greatly constrained by the reason that such marriages are not governed any more only by the Indian legal system but by the far more complex Private International Law involving the legal system of other country too.[8] They even ignore the plain and simple fact that just logistically for a woman to negotiate her way to justice across thousands of miles would be a thoroughly exasperating experience. The aggravated risks in such marriages, the woman being isolated far away from home in an alien land, inevitably facing constraints of language, lack of

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6 Ministry of Overseas Indian Affairs, Marriages to Overseas Indians- A Guidance Booklet.

7 Kul Bhushan, NRI Marriages: Dreams to Nightmares, Indo-Asian News Service, London, 113(2006).

8 National commission for Women, The Nowhere Brides:Report on Problems Relating to NRI Marriages 3 (2011).

knowledge of local criminal justice, police and legal system, lack of support network of friends and family to turn to, are issues that no one likes to talk about at the time of marriage. Nearly 30,000 women have been abandoned and 15,000 cases registered in the Northern State of Punjab alone.[9] It is therefore hardly surprising that there is growing evidence today that even as the number of NRI marriages is escalating by thousands every year, with the increasing Indian Diaspora, the number of matrimonial and related disputes in the NRI marriages have also raised proportionately, in fact at most places much more than proportionately.

The problem in NRI marriages is manifold and is not only about the woman being abandoned in India but includes demand for dowry, cruelty and forms of harassment, non-consummation of marriage, marriage of convenience, concealment of pre- existing marriage, *ex-parte* divorce etc. A most conspicuous disturbing trend, however, appears to be the easy dissolution of such marriages by the foreign courts even though their solemnization took place in India as per the Indian laws. The process of such divorce is full of problems for women who are abandoned outside the country where their husbands reside. This is because in many cases, the women may never receive the legal notice of filing, a copy of the complaint or summons to appear. It has also been suggested that in some cases men's family may suppress such notices from being served in India and forge the recipient's signature to indicate legally binding acceptance.[10] Even when a notice is served properly, it may reach to the woman late with only couple of weeks left to respond. This time may not be sufficient for the woman to obtain visa, travel requirements and legal representation in the country of her husband's residence. Therefore, she is unable to defend her own and in some cases her child's legal and financial interests in the case. Further, most women are unaware of foreign laws and often do not have easy access to appropriate legal advice in India.[11]

Even when an abandoned woman has lodged legal complaint in India either before or in response to her husband's legal case, foreign courts may not be aware of these proceedings as there may be miscommunications or delays which allow the husband to obtain the *ex-parte* decrees without contest. Further, the two countries involved may have different laws- for instance, fault- based divorce is no longer

9 Ibid, at 6.

10 Shamita Dasgupta, Woman Abuse in a Globalising World: Abandonment of Asian Women, Indian Journal of Research, 4 (2011).

11 Ranjana Sheel, The Migrant Indian Community, 28 Indian Journal of Gender Studies, 12 (2011).

recognised in Canada (which now recognises only irretrievable breakdown of marriage as grounds of divorce) while India still has fault- based divorce and does not recognise irretrievable breakdown of marriage as a separate ground of divorce. The courts may also ignore each other's judgements, and thereby issue conflicting orders- for example, the Indian law of restitution of conjugal rights[12] has no equivalent in most US and Canadian jurisdictions and therefore courts in these jurisdictions may not consider this law. Such jurisdictional disagreements and legal contradictions often endanger the rights of women who are not in a position to protect them in the first place. Since there is no comprehensive and special law to govern such aspects, women are being deprived of justice.

Issues in NRI Marriages

The problem of Indian women who are trapped in fraudulent marriages with overseas Indians are being increasingly reported and coming before the Courts of law. Following are some of the typical instances of such problems[13]:

i) Woman married to NRI who was abandoned even before being taken by her husband to the foreign country of his residence- after a short honeymoon he had gone back, promising to soon send her ticket that which never came. In NeerajaSaraph v. Jayant Saraph,[14] the wife who got married to a software engineer employed in the United States was still trying to get her visa to join her husband who had gone back after the marriage, when she received the petition for annulment of marriage filed by her NRI husband in the US court. In many instances the woman would already have been pregnant when the husband left so both the wife and the child (who was born later) were abandoned. The husband never called or wrote and never came back again. The in-laws who could still be in India would either plead helplessness or flatly refuse to help.

ii) Women who went to her husband's home in the other country only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill-treated by the husband in several other ways. She was therefore either forced to flee or was forcibly sent back. It could also be that she was not allowed to bring back her children long. In many cases, the children

12 S. 9, The Hindu Marriage Act, 1955.

13 National commission for Women, The Nowhere Brides:Report on Problems Relating to NRI Marriages (2011).

14 (1994) 6 SCC 461.

were abducted or forcibly taken away from the woman. In Venkat Perumal v. State of A.P,[15] the wife has alleged that she was subjected to harassment, humiliation and torture during her short stay at Madras as well as US and when she refused to accept the request of her husband to terminate the pregnancy, she was dropped penniless by her husband at Dallas Airport in the US and she returned back to India with the help of her aunt and on account of the humiliation and agony she suffered miscarriage at Hyderabad.

iii) Woman who was abandoned in the foreign country with absolutely no support or means of sustenance or escape and without even the legal permission to stay in that country. In Harmeeta Singh v. Rajat Taneja,[16] the wife was deserted by her husband within 6 months of marriage as she was compelled to leave the matrimonial home within 3 months of joining her husband in the US.

iv) Woman who learnt on reaching the country of her NRI husband's residence that he was already married in the other country to another woman, whom he continued to live with. He may have married her due to pressure from his parents and to please them or sometimes even to use her like a domestic help. In Dhanwanti Joshi v. Madhav Unde[17] .

v) Woman who later learnt that her NRI husband had given false information on any or all of the accounts of his job, immigration status, earning, property, marital status, and other material particulars to lure her into the marriage.

vi) Woman whose husband, taking advantage of more lenient divorce grounds in other legal systems, obtained *ex-parte* decree of divorce in the foreign country through fraudulent representations and/or behind her back, without her knowledge, after she was sent back or forced to go back to India or even while she was still there. In Veena Kalia v. Jatinder N. Kalia,[18] the NRI husband obtained ex-parte divorce decree in Canada on the ground not available to him in India.[19]

vii) Woman who was denied maintenance in India on the ground that the marriage had already been dissolved by the Court in

15 (1998) DMC 523.

16 102 (2003) DLT 822.

17 (1998) 1 SCC 112.

18 AIR 1996 Del. 54.

19 Supra n. 1. See also AIR 1985 Guj. 187; 100 (2002) DLT 682.

another country or due to conflict of jurisdiction. In Dipak Banerjee v. Sudipta Banerjee,[20] the husband questioned the jurisdiction of Indian courts to entertain and try proceedings initiated by the wife under section 125 for maintenance, contending that no court in India had jurisdiction in international cases to try such proceedings as he claimed to be the citizen of USA.

viii) Woman who approached the Court, either in India or in the other country, for maintenance or divorce but repeatedly encountered technical legal obstacles related to jurisdictions of Courts, services of notices or orders or enforcement of orders or learnt of the husband commencing simultaneous retaliatory legal proceeding in the other country to make her legal action.[21]

Rules of International Private Law

The rules of international private law relating to solemnization of foreign marriages and recognition of such marriages differ from one legal system to another. With difference of approaches to the nature and scope of the grounds for nullity of marriages the question arises as to which choice of law rules should apply in the case of transnational marriages. The other related question is: which law should determine whether a marriage is void or voidable? Should it be the law of domicile, nationality, habitual residence or *lex loci celebrationis*?

Formal Validity

The rules of international private law of many countries recognise that the *lex loci celebrationis* should determine the formalities for the validity of marriage.[22] However, there is disagreement on the issue as to whether *the* law of *lex loci* should be its internal law alone or it should be to the whole of country of celebration.[23] In English Private International Law, leaving aside the few exceptions, the rule of *lex loci* is a must. On the Continent of Europe the test is facultative, namely, the requirement is that the marriage should be formally valid either by the *lex loci celebrationis*or by the personal law of the parties, which is noteworthy.

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20 AIR 1987 Cal 491.

21 AIR 1963 SC 1521.

22 Skyes, The Formal Validity of Marriage, 2 International & Comparative Law Quarterly 78 (1953).

23 M. De Costa, The Formalities of Marriage in the Conflict of Law, 7 International & Comparative Law Quarterly 217 (1958).

Material Validity

With respect to the material or essential validity of marriage number of rules been evolved and applied from time to time in different countries. Among those, the first and foremost is the rule of *lex loci celebrationis* which was a governing law in England for many years till the decision of House of Lords in *Brook v. Brook*.[24] It still continues to apply as the choice of law principle in the United States, and in most Latin American countries. In the United Kingdom and in some Commonwealth countries the 'dual domicile test' regulates the matrimonial relationship for the last many years. According to this rule, a marriage is valid when each of the parties has the capacity to marry, according to the law of his or her respective domicile.

Civil law countries apply the nationality test for determining the capacity of the parties to marry.[25] There is yet another concept, namely, the 'intended matrimonial home', the chief protagonist of which is G.C. Cheshire.[26] According to this theory, validity of a marriage is to be determined on the basis of the law of the land where the parties want to set up their matrimonial home. Of the several objections to this concept the most serious is uncertainty surrounding the intention of the parties to the marriage with respect to their matrimonial home. The 'habitual residence' is yet another test which commands increasing international acceptance and which has been the chief contribution of the Hague Convention and is adhered to in many countries determining the essential validity of a marriage. It ensures the application of the system of law of that country with which the parties to the marriage have closest and continuing connection.

Indian Private International Law Relating to Marriage

In India, the law of marriage is essentially a personal law. In other words, the governing law of a marriage in India is not the Indian law or the State law but the law of the religious community to which the parties belong without any bearing as to domicile or nationality. The majority community, the Hindus, have their own family law, so is the biggest minority community, the Muslims. Other religious minorities like the Christians, the Parsis, the Jews, too have their own separate personal law based on religion. There is the Special Marriage Act, 1954[27] under which 'civil marriage' can be performed

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24 (1861) 9 HL Cas 193.

25 M Trimann, J Zekoll, Introduction to German Law (2005).

26 P.M Peter & JJ Fawcett, Cheshire and North's Private International Law, 721 (1999).

27 Act No. 43 of 1954.

between any two persons. If the parties to the marriage choose to marry under the Special Marriage Act, its validity is determined on the basis of the said Act even if the parties are domiciled elsewhere. There is still another statute the Foreign Marriage Act, 1969[28] which allows the marriage in a foreign country, between parties, one of whom at least is a citizen of India. Section 11 of the Act has a bearing on the choice of law rules. It lays down that the Marriage Officer will refuse to solemnize the marriage if *lex loci celebrationis* prohibits such a marriage, or if the solemnization of marriage is inconsistent with international law or the comity of nations.

The rules of international private law as applied in this country are not codified and are scattered in different enactments such as the Code of Civil Procedure[29], The Special Marriage Act, The Foreign Marriage Act, The Indian Divorce Act[30], The Indian Succession Act[31] etc. Besides, some rules have been evolved by the Indian courts over the years but their overall approach to the matrimonial disputes with foreign elements has been deeply influenced by the English rules of conflict of laws, whether they be the common law rules or the statutory rules. In some cases, Indian courts have endeavoured to develop rules relating to the recognition of foreign judgements in matrimonial causes by adopting innovative interpretations of the state laws. Marriage between a nonresident Indian and an Indian girl is one such problematic area.

The Supreme Court of India in the case of Y. Narsimha Rao v. Y. Venkata Lakshmi,[32] has ruled that 'the jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married'. Another proposition set out by the Supreme Court in Neeraja Saraph v. Jayant Saraph,[33] namely 'no marriage between a non-resident Indian and an Indian woman which has taken place in India may be annulled by a foreign court'.

Harmonization and Unification of International Private Law

The internal laws of different countries differ widely from each other. The difference is not only in respect of the internal laws of the countries, but also in respect of rules of conflict of laws, due to which

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28 Act No. 33 of 1969.

29 Act No. 05 of 1908.

30 Act No. 04 of 1869.

31 Act No. 39 of 1925.

32 (1991) 2 SCR 821.

33 (1994) 6 SCC 461.

conflicting decisions have emerged in various countries on the same issues. There are two models for the unification of private international law: (i) unification of the internal laws of the countries of the world and (ii) unification of the rules of private international law. On account of basic ideological differences among the countries of the world, it is not possible for achievement of unification of all private laws. Therefore, the unification of the rules of private international law gains grounds.[34] Before 1951, the main effort was directed to the unification of rules of private international law of the Countries on the continent of Europe, since most of them follow the civil law system.[35] On the other hand, nothing could be done towards the unification of the rules of private international law of the countries of Commonwealth and the States of United States and the continental countries on account of fundamental differences between the common law and civil law system. After 1951, however, some serious attempts have been made at the unification of rules of private international law of all countries of the world. In 1951, a permanent bureau of Hague Conference was constituted. The Bureau works under the general direction of the Standing Governmental Commission of the Netherlands which was established by a Royal Decree in 1897 with the object of promoting codification of private international law. The Bureau has done some commendable work in the area of the unification of the rules of family law.

To deal with a large number of foreign decrees in matrimonial causes, India like other countries, is in need of a well-developed body of international private law rules in respect of the solemnization and recognition of marriages, recognition of foreign decrees of divorce, nullity of a marriage etc. The Hague Conventions have already laid down certain common principles which are basic to a marriage. But India has not so far chosen to accede the convention.

Conclusion

In a globalizing world people are increasingly moving across national frontiers and are also engaging in inter-territorial legal transactions. As Indian men and women migrate to foreign countries, the enjoyment and infringement of their rights occur in transnational spaces- that is, spaces that extend beyond national boundaries and encompasses psychological, legal, emotional, cultural and economic areas spanning different nations. Due to such straddling of boundaries, special issues and problems arise for individuals and families who

34 P Stone, European Union Private International Law: Harmonization of Laws, 5 (2006).

35 Ibid.

live in transnational domains. Unfortunately, abandonment of wives has grown significantly in the wake of increased mobility of Indian workers. Changes in international advocacy, law and policy are required to ensure justice and a viable life, especially to women in this situation. The Law Commission of India has emphasized the need to examine the relevance and adaptability of 1978 Hague Marriage Convention and has indicated that India should sign it. The National Commission for Women asked the Indian government to sign the international convention of Hague on laws of marriage as well as safety of women to help protect NRI brides.[36] A number of Hague Conventions offer legal remedies that could provide abandoned women in India with financial relief, custody, divorce and ultimately, a semblance of justice. As India was not a member of the Hague Conference on Private International Law at the time of its Thirteenth Session, the Convention is not open to it for signature, ratification, acceptance or approval, but if it wished to become a party, it can do so by depositing an instrument of accession with the Ministry of Foreign Affairs of Netherlands.

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36 Available at, http://zeenews.india.com/news/nation/ncw-asks-govt-to-sign-international-convention-of-hague_594306.html, last seen on 30/04/2014.

Gender Justice: Third Gender and Right to Work

*Gurjinder Singh**

Introduction

The rationality inherent in human beings has given the sense to judge what is right and what is wrong. Injustice in any form is no longer tolerated. In the era of constitutional governance, every State is legally bound to eliminate injustice of any kind that has been done to its citizens. But still we see that some communities are fighting for their basic rights even for the recognition[1]of their identity. There are still some communities whose upliftment, society never ever intended. One such community is the community of transgender. The Hon'ble Supreme Court recently while pronouncing judgment[2]has stated in the opening lines that "*Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disowns their biological sex".* Transgender community (later on TG community) people can be seen at marriage ceremonies asking for *Badhai*,[3] demanding money at the time of birth of a child, begging at railway stations, etc. They are neglected people of the society; they are forced to do these kinds of things. Societal abuse and economic depression led their life to destitute and vagrancy.

Transgender: Definition

According to Merriam-Webster[4] dictionary, Transgender means relating to or being a person (as a transsexual or transvestite) who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth.

Expert Committee on Issues relating to Transgender[5], commissioned by the Ministry of Social Justice and Empowerment,

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1 Art. 6,Universal Declaration of Human Rights, 1948.

2 National Legal Services Authority v. Union of India and others, W.P. (Civil) No. 400/2012 at Para 1, available at http://judis.nic.in/supremecourt/CaseRes1.aspx, last seen on 01/07/2015.

3 Hijras earn through their traditional work: 'Badhai' (clapping their hands and asking for alms), blessing new born babies, or dancing in marriage ceremonies.

4 Merriam-Webster online dictionary, available at http://www.merriam-webster.com/dictionary/transgender, last seen on 01/07/2015.

5 Report of the expert committee on the issues relating to "Transgender", Ministry of Social Justice and Empowerment, An order for the constitution of the Expert committee on the issue relating to "Transgender" was made on 22nd

defines terms Transgender persons as: All persons whose own sense of gender does not match with the gender assigned to them at birth. They will include trans-men & trans-women (whether or not they have undergone sex reassignment surgery or hormonal treatment or laser therapy, etc.), gender queers and a number of socio cultural identities, such as *kinnars*[6], *hijras*[7], *aravanis*[8] etc.

Right to Work and Transgender

Work is the necessity of life. It serves two purposes, one is for the survival of humankind and other is for the growth of a Nation. For both these reasons human beings need a guaranteed environment where they can achieve the same. These purposes led the nations to grant some of the basic rights to its masses. The right to work is a fundamental right, recognized in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR), deals more comprehensively than any other instrument with this right in Article 6[9]. The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. The right to work contributes at the same time to the survival of the individual and to his/her family, and in so far as work is freely chosen or accepted, to his/her development and recognition within the community.[10]Universal Declaration of

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Oct. 2013, the report of the committee is submitted to the Ministry of Social Justice andEmpowerment on 27th Jan. 2014, available at http://socialjustice.nic.in/transgenderpersons.php, last seen on 11/07/2015.

6 Kinnars are same as Hijras. This term is used in Delhi region.

7 Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not-men", or "in-between man and woman", or "neither man nor woman". Hijrascan be considered as the western equivalent of transgender/transsexual (male-to-female) persons.

8 Aravanis are same as Hijras. This term is used in Tamil Nadu.

9 Art. 6, International Covenant on Economic, Social and Cultural Rights.

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

10 Icelandic Human Rights Centre, Committee on economic, social and cultural rights, General comment No. 18, The Right to work, available at http://www.humanrights.is/the-human-rightsproject/humanrightscasesandmaterials/generalcomments/generalcomments/committeeoneconomicsocial/nr/1347, last seen on 05/07/2015.

Human Right (UDHR) has come up with the Right to work under Article 23[11] decades before. Along with right to work under Article 23 (1) UDHR has provided other various kinds of rights related to work and employment which can be found in the Indian Constitution but in part IV[12]. Various countries all over the World and particularly India have specifically given space to Right to work in the Constitution. The Right to work as a fundamental right is an altogether different matter of debate which is not concerned here. The extended view of Article 21[13] of Indian Constitution brings right to livelihood under its premises. Article 16 secures equality of opportunity in matters of public employment. Further part IV Directive Principles of state policy gives directions to states through Article 39[14] and 41[15] of the Constitution of India. Moreover, the principle of Equality enshrined under Article 14 is of utmost importance which saves unequal from barbarism. Much has been debated since decades on the right to work, especially with regard to vulnerable sections of society, but TG community has always been kept aloof from this debate. The latest census has recorded 4, 90,000 citizens as TGs. The working group in the transgender community is (38%) compared to 46% in the general population. Only 65% of the total working population is main workers — those who find work for more than six months in the year — compared to 75% in the general population.[16] But a survey carried out by Salvation of Oppressed Eunuchs (SOOE), the number of eunuchs in India is around 19 lakhs, as of March 1, 2011.[17]

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11 Article 23. 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.....

12 Part IV of the Indian Constitution deals with "Directive Principles of State Policy". Article contains under this part (Article 36 to 51) are merely guideline to the centre and state governments to be kept in mind while framing policies.

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

14 Article 39. The State shall, in particular, direct its policy towards securing (a) that the citizens, men and women equally, have the right to an adequate means of livelihood.

15 Article 41.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

16 First count of third gender in census: 4.9 lakh, Times of India, May 30, 2014. available at http://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms, last seen on 02/07/2015.

17 Dr. Piyush Saxena, "Life of a Eunuch" Shanta Publishing House, Navi Mumbai (1st 2011) chapter VII at P.48.

Newspapers are full of stories that how TGs are discriminated by our society at each and every level, how they are compelled to beg at railway stations/bus stands. Unemployment in TG community is one problem, but once they get employed their harassment at workplace is another problem. There are no separate toilets for them. They cannot assert their sexuality openly at workplace for fear of ostracism and being evicted from employment. Society has never considered them as human beings and given them a chance to gain public employment. There are so many reasons that, why this community has been kept away from jobs and discriminated at workplaces.

Access to employment: key barriers.[18]

- Exclusion from family and society;
- Stigma and discrimination at workplaces;
- No educational avenues further resulted in unskilled labour or unemployment;
- Lack of opportunities;
- Lack of confidence in engaging them by employers;
- Lack of awareness in the society.

Mohsin Sayeed, a Pakistan based activist, while giving an interview to Deutsche Welle, Germany's international broadcaster, said that *in the entire South Asian region, discrimination against the transgender people is deeply ingrained in people's minds. They are economically and socially marginalized, and are not even treated as humans.*[19] Laxmi Tripathi[20] while giving an interview to The Tribune very sadly said that "*there is not even a place where I can be buried*".[21]

A report by People's Union for Civil Liberties (Karnataka)[22] revealed so many instances of exploitation of TGs at workplaces. In

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18 Supra n. 1.

19 Transgender people "not even considered human"; available at http://www.dw.de/transgender-people-not-even-considered-humans/a-17568119, last seen on 08/07/2015.

20 Laxmi Narayan Tripathi is a transgender rights activist. She is the first transgender person to represent Asia Pacific in the United Nations.

21 No longer the others? The Tribune, Sunday spectrum (27/04/2014), available at http://www.tribuneindia.com/2014/20140427/spectrum/main1.htm, last seen on 11/07/2014.

22 Human rights violations against sexuality minorities in India: A PUCL-K fact finding report about Bangalore, (Feb-2001) available at http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf, last seen on 10/7/2014.

Bangalore, as in South India generally, the hijras do not have the cultural role to play as in North India and take up sex work to earn their living. They usually run 'hamams' (bath houses). It is a demeaning and dangerous profession, as they are often subjected to the depredations of brutal customers, report disclosed. Report further disclosed instances of police brutality, sexual exploitation in the hands of local goons, no access to desired work etc.

Lack of Legal recognition: A stumbling block

Along with the other key barriers which prevent them to get employment, TGs face a major problem of legal recognition. It is pathetic when you do not know who you are. Lack of legal recognition of gender identity has direct impact on their exclusion from working environment. Until 15th April judgment, TGs were not given the status of "third gender". They were compelled to mark either in men column or women's column at every official form of employment. There are number of important documents where we find only two options of gender preferences, male and female. Though the Constitution is not bias with any gender and talks about equality, equal employment opportunities, then why are the governments still sleeping on this issue. Articles 14, 16, 21 and Articles 39, 41, 42 and 43 of the Indian constitution secures employment and related rights for all. In all these Articles framers of the constitution have used "person" and "citizen" which is common sense based terminology. But these terms are still being interpreted only to include men and women. This directly affects the legal recognition of gender identity of TG community. The Hon'ble Supreme Court while referring two judgments of the Supreme Court of Nepal[23] and the Supreme Court of Pakistan[24] in *NALSA v. Union of India*said that "*Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently, refer to human-beings. Hence, they take within their sweep Hijras/ Transgenders and are not as such limited to male or female gender*".[25]

Even the report of the expert committee on the issues of Transgender has revealed that "*a harmonious reading of the*

23 Sunil Babu Pant and others v. Nepal Government (writ petition No. 917 of 2007)

24 Dr. Mohammad Aslam Khaki & Anr. v. Senior Superintendent of Police (Operation) Rawalpindi & ors (Constitution Petition No. 43 of 2009)

25 Supra n. 1, at Para 76.

Constitutional provisions as well as the provisions of the Citizenship Act, 1955 and the General Clauses Act, 1897 Act would show that in fact there is no conflict or limitation imposed on the concept of 'person' by any of these laws and a Transgender person would undoubtedly fall within the definition of 'person'. It is evident that the Constitution of India guarantees right to equality and non-discrimination for all including transgender persons".[26]

The Hon'ble Supreme Court has also cleared the position in recent judgment[27] while saying that *the TGs are also citizens of this country...[T]hey are entitled to proper education, social assimilation, access to public and other places but employment opportunities as well....*[28]

Towards Inclusion

Breaking the evil waves prevailed in the society and pulling out this society from dogmatic approach, the Supreme Court has come up with a revolutionary judgment. The court has directed the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and *for public appointments*.[29] Further the Court has also directed the Centre and the State Governments to frame welfare policies for TGs, to take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables. The judgment has fixed the period of six months for the implementation of measures suggested by the Expert committee[30] and this Court.[31]

The genesis of the problems of TGs in India lies in the stigma and discrimination they face in the society, resulting in their exclusion from socio-economic-political spectrum. The solution of their problems will, therefore, require concerted efforts to mainstream them and adoption of an inclusive approach in all spheres of life.[32] Accordingly the Twelfth Five Year Plan (2012-17), provides inclusive growth concept which emphasized on the equality of backward classes and marginalized groups of society and empowering them through employment opportunities.

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26 Supra n. 1.

27 Supra n. 1.

28 Supra n.1. at Para 110(c) and 111.

29 Supra n.1., at Para 129(3).

30 Supra n.1.

31 Supra n.1, at Para 130.

32 Supra n.1.

Tamil Nadu is the first state in India, which has taken initiatives by establishing a Tamil Nadu Transgender Welfare Board in 2008. The Board initiates various welfare programmes to empower the TG community. Obtaining funds from the State Government and to distribute to various projects approved by the Board; Issue ID Cards; give financial approval for various income generating programmes; initiate awareness programmes; and take decision on new initiatives taken by the Department. In order to empower them economically, loan up to Rs.15.00 lakh for Transgender Person's Self Help Groups with 25% subsidy and 75% as Bank loan is provided for self-employment activities by the Government of Tamil Nadu.[33]

The Times of India has reported that the Government of Punjab is planning to chalk out an inter-departmental strategy to implement Supreme Court's directions on TGs. For employment enhancement, the state government will set up vocational training centers and a helpline for career guidance. Loans at 25% subsidies to be provided to facilitate venture setups and pension schemes are to be initiated.[34]

Transgender at workplace: some suggestions

Various reports prepared by reputed organizations/committees have suggested some measures to improve the workplaces. Some of them are given below:

- Certificate that a person is a transgender person should be issued by a state level authority duly designated or constituted by respective State/UT on the lines of Tamil Nadu Aravanis Welfare Board;
- The certificate issued above should be acceptable to all authorities for indicating the gender on official documents like ration card, passport, birth certificate, aadhaar card, etc.;
- The Expert Committee has suggested some schemes which should be effectively utilized for TGs who are eligible under those schemes. Some of such schemes are;[35]
  - MGNREGA;
  - National Rural Livelihoods Mission (NRLM);

33 Supra n.1.

34 Punjab to comply with Supreme Court directions on transgender welfare, Times of India, Chandigarh (30/06/2014), available at http://timesof india. indiatimes.com/city/chandigarh/Punjab-to-comply-with-Supreme-Court-directions-on-tr ansgender-welfare/articleshow/37490856.cms, last seen on 01/07/2015.

35 Supra n.1.

- National Social Assistance Programme (NSAP);
- National Urban Livelihood Mission (NULM);
- National Policy on Skill Development, 2009.

- Workplace sexual harassment policies should be made transgender-inclusive;
- Create a supportive Environment by sensitizing all concerned stakeholders, government officials, private employers etc.;
- Right to privacy of TGs should be secured.

Conclusion

Despite being an indispensable part of this society since immemorial, TGs have never been recognized as human beings. Nevertheless, people always prefer newlywed couples and new born to be blessed by TGs even then they fear that they may curse them. But when it comes to giving them even the most basic human rights, our society takes a U-turn. They are abandoned by their families at their birth with no education, no health facilities and ultimately no job opportunities. Despite being in significant number our state has completely ignored their issues and concerns. The recent judgment of the apex court in which it upheld section 377 of IPC also gave a severe blow to them.

But recently the Supreme Court has shown them a ray of hope by recognizing them as third gender. The Supreme Court has also directed the union and the states to consider them as socially and educationally backward class for public appointments. But legal recognition alone is not going to change things overnight; it is the largest social acceptance in the society. In the words of Laxmi, 'The most terrible poverty of life is the poverty of feeling. The feeling that you are not loved.'

Once the society will start accepting them, the problems of education, health, jobs, work will automatically get resolved. Because the roots of discrimination are deeply ingrained in the mind of people. No legislation or any Court can win the elimination of discrimination from the mind of people until they want. Equality and respect for all genders can only be possible if each gender will understand the pain of another. Though it is a slow process, but not impossible. Always remember, Rome was not built in a day.

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Realizing 'Access to Justice for All' Through Alternative Dispute Resolution: An Imperative For Social, Economic & Political Justice

*Dr. Pardeep Singh**

Introduction

We must be ever mindful that yesterday is not ours to recover, but tomorrow is ours to win or lose. And therefore, let us get together, stand united, and strengthen our Bench and Bar's irrevocable unique partnership and make collaborative, concerted, cooperative, creative, collective and cohesive endeavours in popularizing, proliferating and pioneering, concept and philosophy of important institution-Alternative Dispute Resolution Mechanism - so as to strengthen our pluralistic Democratic values, Rule of Law and thereby invigorate the commandment, "Justice shall never be rationed."

Mr. Justice Jitendra N. Bhatt seem to be quite true in these thought-provoking lines for building a discourse for realizing the much awaited constitutional goal of access to justice for all.[1] After independence in 1947 and adoption of our Constitution on 26thNovember, 1949, we dreamt of being a 'welfare state' with social, economic and political justice. Our founding fathers and mothers devised some objectives and goals to be achieved in the very Preamble of our Constitution; which is known as a key to open the mind of our framers of the Constitution. The first and foremost objective as laid down in the Preamble of India is to provide Justice - Social, Economic and Political. The task of administration of justice has been assigned to the Judiciary which happens to be the protector and guarantor of the rights of the people. Our Constitution follows the democratic set up. Whenever we talk about democracy, the strongest pillar of it always remains the 'People.' To think of any institution is a democratic set up which is not responsive to the people is misnomer. Insertion of the words "we the people of India..." in the Preamble is evidence to it. No doubt, in a democracy, generally speaking, people are represented by the elected representatives. However, it may be noted that democracy does not comprise of elected people alone but also many institutions. To be responsive towards people is thus the responsibility of not only elected arms of the State but other institutions as well. Likewise judiciary too is supposed to be responsive to the people through Constitution. So the litmus test of the justice is to see the performance

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1 (2002) 1 SCC (Jour) 11.

of any adjudicatory system. James Bryce has rightly said that there is no better test of excellence of Govt. than the efficiency of its judicial system. In India we follow the Adversarial Court System which we have borrowed from the Britishers and under which one party win or other loose his/her case after duly adjudicated by judiciary. In India we do have a well-defined *modus operandi* for knocking the doors of the courts (access to justice) as described in various procedural codes of country.

Now, the question that arises is that by following the adversarial court system how much nearer 'we the people of India' are to the 'justice?' Let's have a look and see the side view mirror of the journey travelled so far by our adjudicatory court system which is adversarial in nature. Denial of access to justice is the greatest injustice done. If we see the workload of Indian Court system, then we find the mounting numbers of cases pending before courts. As per the Ministry of Law and justice there are 3.2 crore cases pending in our court system, which consist of Supreme Court, High Courts and subordinate courts. These facts and figures show that how entire court system is overburdened in India.

Further on the front of Judges: population ratio in India then we find that there are only 15.5 judges per million people. Whereas in some developed countries it is nearly 100 judges per million people. Supreme Court of India itself has directed policy-makers to enhance this ratio up to 50 judges per million, but due to the financial constraints this is still on papers.

Furthermore, the allocation of GDP to judiciary is too low to meet the golden objective of access to justice for all. Union Government's allocation to judiciary under 5-year plan is less than one per cent of total plan outlay. This allocation can never be justified particularly keeping in the mind the robust task of judiciary for being a protector and guarantor of our rights.

Having seen all these facts and figure perhaps, a Judge of Supreme Court of India Mr. Justice G.S Singhvi had to say that justice remains an illusion for millions of people. Adding fuel to it, very recently the outgoing Chief Justice Mr. Justice P. Sathasivam had to say that: "In India Justice is a Cynical Phrase for a common man." Equally crucial as the views of the eminent jurist Nani Palkhivala when he said: "If longevity of litigation is made an item in Olympics, no doubt the Gold will come to India." According to an estimate of Delhi High Court it will take nearly 324 year just to clear this backlog of 3.2 crore cases. World Justice Project, an NGO of US in its Rule of Law Index, 2014 ranked India very poorly. Indian civil justice system ranked

90th out of 99 countries surveyed, because of numbers of deficiencies it has suffered from.

Now, the question which arises over here is - where does the solution lies? Undoubtedly in ADR i.e. Alternative Dispute Resolution. As Mark Twain rightly said that if your only tool is a hammer, then every problem needs a nail. Likewise we are in a dire need to add some more tools and undisputedly one of the tools is ADR; which is not an alternative to the Court system rather an additional range of mechanism for amicable settlement of disputes outside the court. ADR is different from the adversarial court system as instead of having win-lose situation as there in adversarial court system there is always a win-win like situation in the field of ADR.

ADR fortify Access to Social, Economic & Political Justice

Most of the problems are the consequences of blindly following the Adversarial Court System which has been borrowed from the Colonial regime in India. However, a large number of disputes can be settled outside the courtroom with the help of ADR mechanism which will be less expensive for the parties. ADR mechanism seems to be a right approach for addressing the problems caused by the adversarial court system. With the potential of providing a speedy, inexpensive and fair justice, ADR system can be better utilized in India.

A dispute is a problem to be solved rather than a war to be won. Richard Hill has rightly highlighted the very homely example of dispute over an orange when he said: two persons have a legitimate claim to an orange but neither of them is willing to accept half of the orange. If the claim is resolved in accordance with judicial paradigm, one of them will get some portion of the orange, and the other will get the remaining portion. But then, a mediator is called in: who asks each person what they intend to do with the orange. The first person answers that she intends to use the rind to make perfume, while the second answers that she intends to use the pulp to make orange juice. The mediation process yields a solution that is fair and better satisfies the interests of the parties than any solution based on an adversarial process could.[2] Since both the disputants got the desired interest, that's why there is a win-win situation for both the parties. The wording of Woodrow Wilson represents the true nature of a dispute and gives solution when he said:

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2 Richard Hill, The Theoretical Basis of Mediation and other forms of ADR: why they work, 14 Arbitration International (1998). *Also* quoted by Fali S Nariman in Foreward in SriramPanchu, Mediation — The Path to successful dispute resolution.

If you come at me with your fists doubled, I think I can promise you that mine will double as fast as yours; but if you come to me and say, "Let us sit down and take counsel together; and if we differ from one another, [let us] understand why it is that we differ from one another [and understand] just what the points at issue are. We will presently find that we are not so far apart after all, that the points on which we differ are few and that if we only have the patience and the candor and the desire to get together, we will get together. (1916)

Best alternative to a settlement agreement may be to litigate. But if you don't know what that alternative is, what its burdens are and how much it costs, you are not prepared to negotiate, not prepared to know whether the offer on the table is better or worse or to know to walk away from the offer on the table.[3] So having knowledge of one's own BATNA[4] and WATNA[5] is of paramount importance in order to sort out the existing dispute between two adversaries. What might happen if you litigate and lose, etc. is a primary driver towards settlement. If either or both parties to dispute are poor, that fact drives them to settlement. Alternative Dispute Resolution is not an alternative to court's adversarial system in real sense. Sir Laurence Street once said that:[6]

[ADR] enable the court system to devote its precious time and resources to the more solemn task of administering justice in the name of sovereign.

In post-colonial period, India set out its goal of achieving justice—social, economic and political in the very Preamble of the Constitution of India. Further the Constitutional mandate of Article 21 of the Constitution of India as interpreted by Judiciary, read with Article 39A which provides for equal justice and free legal aid to economically backward classes, gives a space which really needs to be bridged in order to have access to justice. No doubt, the enactment of Legal Services Authority Act, 1987 and the Arbitration and Conciliation Act, 1996 and further the Code of Civil Procedure (Amendment) Act, 1999 played a remarkable role in order to make the reach towards justice a little bit speedy by dispensing with the technocratic legal procedure.

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3 Tom Arnold, Mediation Outline: A Practical How-To Guide for Mediators and attorneys, P. C. Rao & William Sheffield, ed. Alternative Dispute Resolution: What it is and How it Works 223 (2011).

4 Best Alternative to Negotiated Agreement.

5 Worst Alternative to Negotiated Agreement.

6 L. Street, The Language of Alternative Dispute Resolution, 66 Alternative Law Journal 194(1992).

But the research has witnessed some lacunae in the existing statutes which need to be healed. Further, it is important to note that ADR is not a panacea for all public sector disputes, it has its limitations and it is not always appropriate, like: in the cases which are criminal in nature and are so brutal and heinous, ADR cannot be approached. However, as noted by a former Attorney General of the United States:[7]

ADR provides for effective public participation in government decisions, encourages respect for affected parties, and nurtures good relationships for the future. Every ADR proceedings that reduces time or litigation costs, or narrows issues, or averts future complaints enables us to conserve our limited resources which must accomplish so much.

India has witnessed the success of informal justice administration system in past. The adoption of colonial adversarial court system with its procedural barricades contributed in tardy, expensive, complicated and unreasonable approach to justice and it requires special attention of all the stakeholders for its healing. The present paper favours and builds a strong case for the maximum utilization and upholding of ADR mechanism in India for the smooth functioning of justice delivery system. The wordings of President John Kennedy, "Let us never negotiate out of fear. But let us never fear to negotiate." – seems to be the panacea of all the problems in today's context. It is the high time to deconstruct the actual position of our country and to build a constructive paradigm for the active global participation in near future.

Deconstruction of obstruction for realizing Access to Social Justice

In the words of Sir Laurence Street

ADR is not in truth alternative. It is not in competition with the established judicial system. It is an additional rage of mechanism within the overall aggregated mechanisms for the resolution of disputes. Nothing can be alternative to the sovereign authority of court system. We can, however, accommodate mechanisms which operate as additional or subsidiary processes in the discharge of the sovereign's responsibility. Theses enable the court system to devote its precious time and resources to the more solemn task of administrating justice in the name of sovereign[8].

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7 Law Reform Commission of Australia Report, Alternative Dispute Resolution: Mediation and Conciliation (2010) available at www.adr.gov, last seen on 17/9/2015.

8 L. Street, The language of Alternative Dispute Resolution, Alternative Law Journal 194 (1992).

So it is not an argumentative issue that adversary system is not contributing, rather it has been contributing significantly in its own sphere. Though there may be some problems on procedural fronts, which can be addressed by adopting a different via media or procedure for reaching towards justice. E-Courts as a mode of ODR[9] can also be one of the effective tools for meeting the constitutional goal of access to Justice. When the present world is striving towards netizenship, ICT cannot be ignored at any cost even in the adjudication system. ICT can be used as a via media for justice delivery system and definitely it will act as an alternative to the obsolete and tardy proceedings which keeps on frustrating the disputants more than their real dispute. The substitution of e-Courts in place of traditional court can prove a boon for imparting justice without compromising valuable time. The following studies can be of great worth in understanding the importance of e-Courts, which only substitute the procedural bottlenecks.

Study at Tihar Jail

This study reveals that approximately 1,200 inmates taken to courts every day, at least 400 are under trials only seeking an extension of judicial remand. Jail vans have to make at least 10 trips to transport the under trials to court. We would save up to rupee 1.5 crore annually, the amount we spend on providing security and fuel. Earlier system costs around 20 Thousand Rupees per case but using e-Court only 3 Thousand rupees spends per case. We can save approx. 17 thousand rupees per case[10].

Study at Lal Bahadur Shastri Hospital

As per this study, on an average 10-12 Doctors travel to court daily from each Hospital. The average DA/day /head is 350 Rupees, whereas, average TA/day/head amounted to 100 Rupees. This makes an average per day cost to 5400/- per day (450 x 12). In this way the average monthly expenditure costing Rupees 1,18,000 and ultimately the average annual expenditure reaches to over 14 Lakhs per Hospital. This is the case when above cost does not include the salary part. The cost of patient care loss will always remain infinite. Further, support of other staff members involved in summons distribution, document gathering and logistic arrangements is not included in this study[11]. But if we use ICT and make all the doctors available through video

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9 Online Dispute Resolution.

10 Rishi Prakash, T. Mohanty, et al, ICT in Indian Court - Challenges & Solution", 1 International Journal of Infection Control (2011).

11 Ibid.

conferencing, which is quite feasible, the boulevard towards access to justice will certainly be smooth and speedy. Here it is pertinent to remember that a traditional court maintenance cost approx. Rs 8 Lacs 40 thousand annually, whereas an e-Court Server maintenance & capacity enhancement cost is approximately Rs 1.5 Lacs annually.[12]

No denial to say that ICT can reduce the duplicity of the paper world and make courts greener through electronic case filing and video conferencing. Online Disputes Resolution system (ODR) can expedite the proceedings which inter alia results in to speedy access to justice. Some believes that with ICT India's 300 year case backlog can be reduced to three years, in a span of only three years.[13] The following table differentiate the working style of traditional court and e-Court.

Traditional Functioning	e-Court Functioning
Physical carrying of Case File and evidences to Courtroom at each hearing.	No need to carry Case File and evidences at each hearing in physical form, same are available at click of mouse to Judge and concerned staff. Reduces the human load on the court premises also ease the maintenance of evidences and documents. Court authorities can avoid frequent physical movement of case related files and evidences
Physical carrying of Case Documents and evidences if required by Judge, Judicial Secretary for review.	
No provision of sharing case information online.	Different courts are able to share the information online.
Required Case documents and evidences of Case file are submitted manually in Court by Police, Hospital,Forensic Officials and other stake holders.	Through e-Court concerned Police, Hospital, Forensic Officials and other stake holders can upload the required documents to the case file from their premises itself. System provides adequate security mechanism like role based user access.
Case cannot be proceed due to the non-availability of accused/witness on the scheduled date and case delays many years for final hearing.	With the help of video conference facility accuse/witness can participate in court room proceeding.

*** Source:** Rishi Prakash, T. Mohanty, et al, ICT in Indian Court - Challenges & Solutions", 1 International Journal of Infection Control (2011)

Path-breaking initiative taken by the present Government for curbing inter-departmental litigations

Recently government has written to Secretaries of all ministries to desist from initiating inter-ministerial/inter-departmental

12 Ibid.

13 This bold assertion was made by Mr. C P Gurnani, CEO of Tech Mahindra, see The Role of ICT in Judicial Reform- An Exploration, available at http://www.cis-india.org/internet-gov, last seen 17/9/2015.

litigation in courts. It has been asked to the Secretaries to issue necessary instructions to all PSUs and government authorities under their administrative control to try to resolve disputes with other governmental wings amicably outside the courts. In the event of such disputes not being resolved amicably, the first endeavour should be to resolve them through empowered agencies or arbitration. The letter written explicitly covered that in case it is not possible to resolve the dispute amicably by mutual consultation or through the good offices of empowered agencies of the government or through arbitration, the same should be referred first to the Cabinet Secretariat, and then, if necessary, to the PMO. Initiatives like of present one need to be appreciated for striving towards curbing the mounting backlog of arrears upon judiciary in India as it has been seen that in most of the cases government happens to be the party to the suit.

Issues and Challenges with the existing Statutes

Legal Services Authority Act, 1987 requires to be given more popularity at the grass root level particularly by the students of Universities, Law Colleges etc. by organizing socio-legal survey, legal literacy Camp or by Legal Aid Clinic.

The horizons of Arbitration and Conciliation Act, 1996 needs to be expended from merely commercial disputes to the disputes like— family disputes, labour disputes, consumer disputes and even criminal offences of compoundable in nature.

Section 89 of the Code of Civil Procedure also needs to be altered in consonance of the judgment of Supreme Court in the case of M/s Afcons Infra. Ltd. & Anr.v. M/S Cherian Varkey Const. Pvt Ltd.[14] The sum and substance of what the Court discussed elaborately is that:

Know the dispute; exclude unfit cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to Judge–assisted settlement only in exceptional or special cases.

Consequently, the Law Commission of India (238th Report) recommended a number of changes to be made in the section 89 of Code of Civil Procedure, 1908. Now the ball is in the court of Policy-makers to alter the Code in consonance with the directions given by the Supreme Court for removing the ambiguity present therein and for promoting ADR for amicable settlement of disputes outside the courts.

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14 (2010) 8 SCR 1053.

Conclusion and Some Suggestions

It is worth mentioning over here that ADR does require an impartial environment for its best usage. A person, who negotiates, is requires to be impartial and follows the ethics of good negotiator. In India there is a saying about *'monkey's judgment'* means 'monkey's distribution' which depicted that the third person who intervenes to negotiate between disputants will have to be just,fair, impartial and without interest. Some ethics should be determined and the mediator or negotiator is required to act under the umbrella of these ethics. So the adoption of ADR i.e. Alternative Dispute Resolution with the assurance of equity and fairness are the need of the present hour. A poet who translated Divine Vedas into colloquial Telugu language says that: "life is nothing but adjustment or adjustment itself is life."[15] This is perhaps the true vision and need to be accommodated within the adversarial court proceedings also. The present adversarial system which became overburdened with the mounting arrears of cases needs a respite in the form of ADR.

Some more Suggestions

(i) The researcher in his study has found that there has been a gross misuse of *Lok Adalats* in some cases where parties to the *Lok Adalat* avoid the registration fee or in likewise cases keep on using *Lok Adalat*s a mode not to resolve dispute amicably; rather, with collusive motive or *mala fide* intention to escape from paying the fee to the concerned government authorities. The researcher has highlighted this concern in Chapter V also. The researcher proposes a pre-scrutiny of the matter before going to the *Lok Adalat* for checking the *malafide* intention of the parties. The researcher also is of the view that there may be a provision for the filing of an affidavit by both the parties about the declaration to the effect that they are acting with *bonafide* intention for resolving their disputes outside the courts in an amicable manner, which may be used as legal instrument for avoiding the collusive matters.

(ii) Judiciary particularly the subordinate judiciary should give due importance to the use of ADR as a dispute resolving mechanism and should not resist the use of it.

(iii) Law schools can rightly be said as great contributors towards building the effective justice administration system by imparting

15 Dr. Dasarathi Rangacharya, as quoted by Madabhushi Sridhar, Alternative Dispute Resolution Negotiation and Mediation. Lexis Nexis Butterworth Wadhwa: Nagpur (2011).

the value-based legal education to the law aspirants at their initial stage of learning. Since the Anglo-Saxon jurisprudence, which the Indian legal study follows, provides for the teaching that makes the legal persons capable enough to tackle the adversarial court proceedings, it requires a new form of pedagogy to be designed by the law schools for the law students, so that the ADR system may be understood in the required shape as compared to the present attitude of the law persons towards the ADR. It needs to be imparted particularly amongst the fresh legal minds that the adversarial nature is not the only remedy for getting justice rather there are other modes under the umbrella of ADR which may prove strong pillars towards building the bridge of fair justice administration. The researcher proposes the requirement of a bigger role for the law schools towards contributing in justice delivery system by encouraging the fresh legal minds for promoting and internalizing the ADR. This proposed pedagogy may be inclusive of some form of empirical study to be carried out at the very grassroots level by taking some villages etc. as a target group. This kind of approach may be of great worth by imparting the advantages of ADR mechanism. Law students may be encouraged to take part in ADR process mandatorily as on the panel of *Lok Adalats,* in arbitral proceedings or in mini trials etc.

(iv) One of the statutory provisions considered to be a revolutionary step taken towards strengthening the ADR mechanism in India is the inserting of section 89 in the Code of Civil Procedure, 1908 by amending the CPC in 1999. The researcher has found a number of ambiguities in section 89 of C.P.C., as also highlighted by the Supreme Court of India[16] and changes recommended by the Law Commission of India[17], which are required to be removed by amending the Code of Civil Procedure, 1908 for proper flourishing of the ADR system in India. Court intervention is required to be minimal for the proper thriving of the outside court settlement. Ministry of law and Justice' proposal for some amendments in the 1996-Act for comply with the directions of the Supreme Court require to be given a shape in the form of enactment/amendment with a speedy move.

(v) As far as backlog in subordinate courts is concerned, additional courts must be created and additional judicial officers must be

16 (2010) 8 SCR 1053.

17 238th Law Commission of India Report, Amendment of Sec. 89 of the Code of Civil Procedure, 1908 and Allied Provisions (2011).

appointed till the backlog is cleared. Ad hoc Judges under Article 224A of the Constitution of India should be appointed to clear the backlog in the High Courts for a period of five years or till the backlog is cleared. Furthermore, Article 247 of the Constitution enables Union Government to establish additional Courts for better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List and this Article is specially intended to establish Courts to enable parliamentary laws to be adjudicated upon by subordinate courts, but it has not been resorted to so far. The demand for increasing the number of judges in subordinate judiciary to the tune of 50: 1 Million populations is much awaited. Law Commission of India in its 120th Report recommended that by the year 2,000 India should have at least 107 Judges per million of Indian population. This anticipatory vision of Commission seems to be an un-quenching thirst by seeing the present ratio which is just 15.5: 1 Million. Though the deliberations held in a Joint Conference of CMs and CJs held on 7th April, 2013 to double the strength of existing judges in the next five years once again generated a ray of hope but it really needs to be backed by a strong political will of the policy makers. The expectation of golden days from present government does include some positive steps in the field of administration of justice.

(vi) All Courts should devote one full working day to the ADR mechanism in a week, so that Courts may provide a suitable platform wherein parties may settle the disputes amicably by adopting the tools of ADR mechanism in the name of 'ADR Day'.

(vii) Police authorities being the agency of maintaining law and order within a society, always play a very pertinent role by assisting the justice administration system. Since every case of criminal nature is mandatorily required to be investigated by the police authorities, so they may be the best judge to determine the scope of negotiation between the parties and contribute in arriving at an amicable settlement. At the same time it needs to be checked that no bogus or frivolous information is to be entertained by the police authorities for the purpose of harassing someone by adopting various ill methods. In this regard, there is a need for opening of Legal Aid Clinic, for resorting ADR if permissible by law, at every police station. The ADR system definitely requires attention by all the stakeholders for amicable settlement of disputes.

(viii) After 66 years of independence now it's high time to have a paradigm shift in the field of legal education to bring it in consonance with the aspirations of our founding mothers & fathers. The researcher would like to build a dialogue for the formation of a 'para-legal squad/force' within the civil society. This proposed para-legal force may consist of law students, law teachers, *pro-bono* advocates and retired judicial officers with other volunteers from the civil society. Presently the legal aid movement is being given a very narrow space as it seems to have been given limited space confined only to two or three judges of late 1980's and of initial 1990's. Rather it is not like that. Today also legal aid movement happens to be as contemporary as it used to be in earlier days. The horizon of 'legal aid movement' is required to be expanded in consonance with present day India and its needs. The proposed 'para-legal force' will definitely be one of the initiatives under the umbrella of legal aid movement. Law students will learn the art of resolving disputes amicably outside the courts through various mechanism of Alternative Dispute Resolution (ADR) like: LokAdalat, conciliation, mediation, negotiation etc, in the proposed para-legal force. This squad will orient the public at large particularly the villagers through the medium of skits, exhibition in the mother tongue language about the benefits of adoption of ADR mechanism. To meet this end, they should be given proper training by the experts in the field which may be selected lawyers on panel, law teachers, judicial officers including retired one etc.

(ix) Court should avoid the intervention as far as possible in the ADR process, so that the amicable settlement between the parties may prosper without confronting with the procedural hurdles.

(x) Appropriate education and training programmes for ADR practitioners should be carried out by the Universities on the pattern of other countries like US where many universities offer graduate, Master and Doctorate studies in mediation etc.

(xi) As highlighted earlier, in India we are in dire need of using the ICT tools in our adjudicatory system for expediting the procedural aspects by using E-courts; wherein paperless approach with video conferencing techniques can be of utmost importance for speedy and social justice.

(xii) The present day world of liberalization, privatization and globalization demands the big role to be played by the corporate

sectors including the multinational companies. This sector always needs a barrier free approach from the legal adjudication system for flourishing their business, which requires to be given a special treatment to them as far as their corporate matters are concerned. At present, section 15 of the Code of Civil Procedure, 1908 provides that every suit shall be instituted in the Court of the lowest grade competent to try it. This made the big corporate houses particularly MNCs disinclined towards approaching adversarial court system in India. Hence the researcher proposes that the corporate disputes involving alien parties should be mandatorily required to be resolved outside the courts through ADR mechanism.

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Conceptualising Justice in Indian Society

*Dr. Mayengbam Nandakishwor Singh**

Introduction

Despite the utmost prominence the idea of justice commands, it is unequivocal that justice defies consensus in terms of understanding as different communities and different societies have their own varied notions of justice. It is also fact that the concept of justice is not static; it is an ever evolutionary concept and it has not lost its lustre.[1] The idea of justice has excited scholars and thinkers for ages and justice continues to be an important and unavoidable part of every society, even to the extent that the nature of a society or a state is often assessed on the basis of how it administers the idea of justice to its subjects.[2] Justice is a living idea and it has been an integral part of human society. In Indian context too, the idea of justice has been the subject of discourse since the earliest days of its civilization. India, as understood in the larger ancient sense, not necessarily in the present geo-political entity, has traversed through many phases. The idea of justice has been constantly evolving from the ancient period to the contemporary times with fascinating salience. Unlike the western countries where there have constantly advanced enormous theories of justice of which some are quite influential, India, sadly, can hardly boast of itself for having any theorist who can propound a seminal theory of justice.[3] Nonetheless, as mentioned above, it is not to mean that the idea of justice is completely relegated in the Indian context. As the geo, political, cultural, linguistic, ethnic landscape of India is too diverse; there has never been a comprehensive or concordant idea of justice. Keeping such complexity into consideration, this study focuses on the question of how the idea of justice is conceptualized in some of the notable phases in Indian society. For this purpose, the present paper will concentrate on the idea of justice as understood in the three important periods, namely:

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1 Regarding the importance of justice, Rainer Forst (1994: xi) rightly argues that justice is the highest political-moral virtue by which legal, political and social conditions as a whole can be measured.

2 A parallel view can be found in Bayley (1981: 2) wherein he argues that even if there is no fixed meaning of justice; justice is used to evaluate states and societies.

3 On this argument, A. Sen may be cited as someone from India who has devised a theory of justice. But Sen's idea of justice can never be taken as a full-fledged theory of justice as he himself declares that a theory of justice is not required to enhance justice in society.

ancient as well as medieval, modern and contemporary. In other words, the methodology I apply here is to study the idea of justice evolving in these distinct phases in order to present a comprehensive view about the conceptualisation of justice in Indian society.

Justice - Earlier Trends in Indian Society

Justice in ancient India can be analysed largely based on three foremost stages, viz., the early Vedic phase, the later Vedic phase and the Buddhist era. In the ancient India, the idea of justice was related to the concept of divinity or God. The underlying belief was that God is the doer of right things and God symbolises the truth and righteousness.[4] It was perceived that justice is the manifestation of the Almighty. S. N. Dhyani (1984: 86) also points out that the idea of justice in ancient India was about the embodiment of God itself whose primary task is to uphold justice. In this way, the idea of justice was identified with the sense of truth, morality and righteousness. The significance of truth was highly emphasised, and often truth was interpreted in terms of being just. In fact, the values of truth, righteousness and justice were predominantly preached in the ancient scriptures such as Vedas, Puranas, Epics and Upanishads. Besides, there is another way of looking as to how the idea of justice was conceived in the ancient Indian tradition. In the ancient India, justice is associated with the idea of karma which generally refers to actions or deeds which result in generating appropriate outcome in future. In Hindu philosophy, actions and consequences are related and a person's future is shaped by the nature of his own actions. A person is solely responsible for what he was, what he is and what he will be. This means that when a person gets what is considered to be the result of his or her deeds, it is seen to be just. In this sense, the idea of justice is coterminous with the idea of karma. Also, *Dharma* broadly defined as acting upon in accord with what is established to be righteous and

4 Righteousness as conceived in relation to justice in ancient India is not to be confused with the sense of 'righteousness' as embodied in Confucius thought. In Confucius thought, the idea of justice appears to be associated with righteousness: righteousness understood in terms of moral oughtness on the parts individuals and society. F. Y. Lan (1966: 42) puts forward the point that righteousness, in Confucius, is about the oughtness of a situation which suggests that certain things are morally right which every individual in society ought to do and any actions based on non-moral grounds cannot be righteous. According to O.Leaman (2004: 157), for Confucius, justice represents the way of life we ought to seek to follow, which is opposed to any private gain advantages.

5 In this context, I am referring to the idea of *Dharma* as understood in *Hinduism*. One must be aware of the fact that the term *Dharma* has different connotations in other schools of thought like *Buddhism*, *Jainism and Sikhism* and so on. My focus here is not to address how *Dharma* is interpreted in other schools.

virtuous is closely associated with the idea of justice.[5] *Dharma* signifies what is right and virtuous; *Adharma* symbolises immoral, unethical, wrong etc. Upholding one's *Dharma* is deemed to be just. And going by this, the idea of justice in ancient India was closely conceptualized in relation to the idea of God, *Karma, Dharma* etc.[6] In the Later Vedic period, one salient feature was that of the emergence of caste system. During that period, the notion of justice was closely associated with the practice of caste system. The notion of justice came to be identified with the strict enforcement of caste rules and practices. In *Manusmriti*, *Manu* pronounced that men who attend to their own occupations, performing each his own occupation, become dear to the world even though they are far away (Hopkins 1971: 183). And emphasising the importance of justice, Manu pronounced, 'justice must be preserved; justice must not be violated because violation of justice destroys us. The only friend who follows men even after death is justice' (Muller 2006: 255).[7] Likewise, *Kautilya* proclaims that justice lies in society when individuals strictly follow their respective duties and occupations which are clearly prescribed in the *varnashramadharma*. *Kautilya's* point is that justice exists in society as long as one performs one's prescribed duty.[8] In *Arthashastra*, *Kautilya* observed that while the king has the final authority to arbiter justice, judges are to be guided by law in delivering justice in the court (Chande 2004: 50). *Kautilya* also inscribed that one of the cardinal duties the king is not only to protect justice, but also to administer justice with impartiality. Thus, it was perceived during the later Vedic phase that justice would exist in society when the four castes groups namely *Brahmin*, *Kshatriyas*, *Vaishyas* and *Shudra* stick to their respective occupations and roles. Then, there was an era where India was predominantly *Buddhist*. The Buddhist idea of justice embodies the idea of equality for all in society. It is against the discrimination of any kinds based on birth, caste, gender and so on.[9] Justice in Buddhism advocates the idea of equal

6 Scholar like J. M. Koller (1970: 14) also argues that there was a profound tendency in Indian thought to perceive that the whole universe revolves around the moral justice and the need to presuppose a universal moral justice.

7 For details see, Muller (2006: 255).

8 In this context, B. P. Sinha (1976: 117) highlights that, for *Kautilya*, justice lies in when one strictly adheres to his respective duties as prescribed in the *varnashrama-dharma*.

9 One way of looking at the idea of justice in Buddhism is that Buddhism was against the Brahminical caste practices and Buddhism is opposed to any social hierarchy based on caste and birth. Buddhism preaches the equality of all and it considers hierarchical caste system as morally wrong. In fact, the genesis of Buddhism can be traced from the reactions to Hinduism.

10 On Buddhist idea of justice, P. Lakshmi Narasu (1976: 72) lucidly argues that justice in Buddhism advocates the idea that we not only respect and protect our own rights by lawful means, but we should also do the same to others.

treatment for everyone in society without any sort of distinction.[10] In Buddhist philosophy, justice can be also drawn from following its eight-fold path of morality. They are—'right views, right resolve, right speech, right action, right livelihood, right effort, right mindfulness and right meditation' (Keown 1996: 57; Carus 1972: 33). The Buddhist concept of Middle Path, which annotates the idea of adopting the moderate way, a balance between pleasure and suffering, is also seen as a way of seeking justice in society. Buddhist idea of justice inclines towards spiritual and moral path.

Regarding the administration of justice in ancient India, S. D. Sharma is of the view that there was ancient Hindu jurisprudence and the administration of justice was performed through the courts (1988: 164-65). But he has not explained clearly as to what kind of justice was administered in ancient Indian society. It must be noted that justice as conceived in the ancient India is more or less Indo Aryan centric. The ancient idea of justice as presented here does not reflect other conceptions of justice prevalent in other Indian societies. What can be noticed is that the idea of justice in ancient India has conceptually progressed with different manifestations. But one notable facet is also that any specific idea of justice stemmed in each of the subsequent phase had not completely eclipsed other precedent ideas. In this context, Amartya Sen's (2010) analysis of two different concepts of justice in early Indian jurisprudence—niti and nyaya—is a simplistic way of looking at justice in ancient India.[11] It is because these two distinctive concepts are drawn from classical Sanskrit which is largely in tune with the Hindu philosophy and these concepts cannot necessarily represent other ideas of justice which have genesis in different edifice.

Medieval period in India was marked by the confluence of Hindu and Muslim cultures and it was the period in which Muslim established their foothold in India. It was during Qutub Uddin Aibek that Islamic law was first introduced in India as earlier Muslim invaders left the control of the country to those who did not follow Muslim religion (Ahmad 1941: 25). In the medieval period, rulers were mostly autocratic in nature and king was seen to be the upholder of justice. Justice was what the ruler pronounced. Right from the Qutub Uddin Aibek to Mughal rulers, there had varied approaches to justice. There are views that most of the Muslim rules, barring few of them, were autocratic and theocratic; the faithful of Islam were rendered preferential treatment. However, in general Islamic thought, idea of social justice is based on the equality and fraternity of all Muslim citizens. Islam

11 According to Sen (2010: 20-2), "*Niti*" basically deals with ideal behavior, ideal institutions etc. and "nyaya" is concerned with actual life conditions in society.

preaches the recognition of equality among men irrespective of any distinction and Islamic thought does not prescribe any rule for inherited social order among believers.[12] In the Islamic view, according to D. R. Jatava (2006: 62), development and justice, economic progress, social justice and welfare all go together. The notion of justice under Islam stresses on inner faith in God and holy book *Quran.* As Haran Yahya says, "The true justice described in the Qur'an commands man to behave justly, not discriminating between people, protecting others' rights and not permitting violence, no matter what the circumstance, to side with the oppressed against the oppressor and to help the needy" (2003: 12). However, this is also true that there were many Hindu rulers in the medieval times. While in the Muslim ruled regions, there were law courts and the Sharia law was applied to everyone equally; in the Hindu ruled areas, there was still the prevalence of justice system based on orthodox caste practices and other norms.

Justice - Tendencies in Modern Indian Society

In the modern India, the idea of justice got transformed into new dimensions. It was basically due to the overwhelming influences of western ideas and civilizations. With the arrival of British in India, the social, economic and political outlook got to absorb new perspectives. During the British rule in India, the western concept of justice had come to be established for the first time.[13] Along with it, the British brought the practice of western English education, idea of equality, idea of liberty, rule of law etc. More importantly, they introduced western political and legal systems in India. In fact, they instituted the modern judicial system for delivering justice in India. The process of delivering justice through western legal practice of court was largely given by the British. It is true that during the freedom struggle, many Indian freedom fighters went to England to study law and in turn, they fought against the British for the injustice meted out to Indians. Thus, the practice of western legal justice in India has its origin in the British rule. The British, however, did not impose to Indians the medieval Christian notion of justice of which the primary basis was theological belief in Christian God.

In the modern India, there emerged some thinkers who professed their ideas of justice in various contexts although only some

12 A. Mannan (2005: 48, 284-5) points out that Islam implies two principles: to each his due and treat equals equally. Islam believes in the principle that all human beings are brothers.

13 When I say western concept of justice, I certainly mean the western idea of justice drawn in connection with the fundamental concepts such as liberty, equality, rule of law, law etc. I am aware that there are varied notions of justice in western countries too.

of them could inculcate them to the psyche of Indian masses. In modern India, the ideas of M. K. Gandhi and B. R. Ambedkar on justice often get widespread attention even as they espoused two antagonistic stands. Gandhi's notion of justice stresses on fellow-feelings, compassion and mutual love. Gandhi says, 'Pure justice is that which is inspired by fellow-feelings and compassion. We in India call it the eastern or the ancient way of justice.'[14] Gandhi was against the western concept of justice. According to him, modern western idea of justice has no place for fellow feelings and compassion. In western idea of justice, it is just that everyone should look after his own interest and expect others to take these into account. Gandhi terms western idea of justice as "satanic or despicable" idea of justice. Gandhi also argues that any action is just which does not harm either party to a dispute (1965: 232-33). Gandhi also believed that man is blessed with a sense of justice. God has endowed man with understanding, with a sense of justice.[15] Gandhi's notion of justice goes against any form of coercion. Gandhi (1947: 23) says, "Social justice, even to the least and the lowliest is impossible of attainment by force."[16]Gandhi believed that social justice can be attained through nonviolence but not by violence. Gandhi was against all kinds of unjust socio, political, economic order. For Gandhi, the practice of untouchability is unjust. According to Gandhi, "Untouchability as at present practised is the greatest blot on Hinduism. It is against the Shastra. It is against the fundamental principles of humanity, it is against the dictates of reason that a man should, by mere reason of birth, be for even regarded as an untouchable, even unapproachable and useable."[17] However, there are also others who argue that Gandhi's idea of justice is vicious because while Gandhi was opposed to untouchability, he was not willing to dispense with caste system which he was not convinced to be wrong. On the contrary, B. R. Ambedkar's idea of justice is to do a lot with his complete abhorrence towards caste practices prevailing in Indian society. Ambedkar was advocating for the abolition of caste system in India. Ambedkar was for the establishment of social justice in society. Ambedkar's idea of justice is against the hierarchical caste practices. Ambedkar rebuts the *Varna* system because it promotes social inequality and establishes hierarchical status in social order.[18] Thus,

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14 See *The Collected Works of Mahatma Gandhi*, vol. XIV (1965: 232).

15 See *The Collected Works of Mahatma Gandhi*, vol. VIII (1962: 337).

16 Also see, *Harijan*, 20-4-1940.

17 See *The Collected Works of Mahatma Gandhi*, vol. LIII (1972: 262). Also see, *Harijan*, 11-2-1933.

18 For L. S. Ainapur (1992: 163), the basic point that Ambedkar contested is that of Varna system assigning the highest and sacred status only to the Brahmins and which relegates the rest to the inferior lower status in society.

Ambedkar rejects both the philolosophy of Hinduism and Gandhi. Ambedkar did not see any fundamental difference Hinduism and Gandhism. Ambedkar argued that "there is caste in Hinduism, there is caste in Gandhism" (1991: 296). Therefore, for Ambedkar, the idea of justice is based on the fulfilment of liberty, equality and fraternity. Ambedkar argued that 'justice is another name for liberty, equality and fraternity' (1987:25). In the modern India, the reason why the ideas of Gandhi and Ambedkar on justice are noteworthy is not just because both their ideas are ideologically dichotomous but because they posit their stands based on their practical experiences coupled with their humongous mass appeal. While the idea of justice as expressed by Gandhi is some kind of eulogizing for Indian culture and its very civilizational values which is often considered to be antithetic to western ideas, Ambedkar's idea is more of to do within the ethos of Indian society itself. For instance, when Gandhi did not see it as unjust to perpetuate caste system even as he openly rebuked untouchable practices, Ambedkar expressed his abomination towards caste practice as purely unjust, which itself begets the inhumane sense of untouchability.

Apart from Gandhi and Ambedkar, there were other social reformers and spiritual leaders who also promoted the idea of justice in India. For instance, the idea of social justice was also ingrained in the philosophy of Swami Vivekananda. Though Vivekananda did not denounce caste system outright, he was of the conviction that caste system is a dividing factor in Indian society. For Vivekananda, "The idea of caste is the greatest dividing factor and the root of Maya: all castes either on the principle or birth or of merit is bondage" (1978: 394). As Vivekananda was for harmonising the caste distinctions, he was disgruntled with modern caste. According to Vivekananda (1973: 198), 'modern caste distinction is a barrier to India's progress. Modern caste distinction narrows, restricts, separates and it will crumble before the advance of ideas.'[19] Vivekananda believed in social harmony and he insisted that everyone has the same rights and they have freedom of thought and actions in all ways. Emphasising on the concepts of mercy and selfless charity, Vivekananda linked justice with mercy as mercy is itself heaven (Vivekananda 1977: 59).

So, during the modern India, the unprecedented influence of western concept of justice was ensued which was because of the pervading contact with the western countries, particularly with the

19 It is also fact that Swami Vivekananda did not find much problem with the original caste system though he despised the modern degenerated caste distinctions. Vivekananda appears to have believed that caste is not by birth, but it is by quality originally.

British. Many years of British rule caused several impactive influences in India. Above all, I would argue that the idea of justice in the modern period was sailing in two broad streams: internal ambit and external ambit. In the internal domain, justice was sought within communities internally. There was the vigorous call for social, economic and political justice by the lower castes and the so called dalits which was directly hurled against the upper caste groups. This pursuit of justice was basically based on the argument that those who belong to the lowest strata of society have been suppressed and denied their natural rights for centuries by the upper caste groups and this called for the upheaval of the caste hierarchical arrangements and restoration of justice for the oppressed groups. Such call for justice was not only confined to social arena, but it also entailed political, economic and legal spheres too. In the exterior domain, justice was pursued against the foreign rule, that is, against the British. The indication of such pursuit for justice was the large scale outcry for justice by Indians against the colonial rule. This seeking for justice was under the conviction that the alien colonial reign was totally unjust and the Indians have been unfairly subdued. So, the call of independence by the Indians was to regain the complete justice for Indians in all arenas. But this can be inferred that while the quest for justice in the exterior realm has been achieved, the call for justice in the internal arena still eludes the full attainment.

Justice-Terrains in Contemporary Indian Society

The idea of justice being sought to achieve in contemporary India is comprehensive in nature. Several ideas which had their roots in the ancient and modern times are not completely dispensed with in formulating the idea of justice in contemporary times. Today, citizens are assured of legal, political, economic and social justice despite other lacunas. As a matter of fact, citizens enjoy impartial privilege to access the court of law. Everyone is equal in front of law and citizens can seek justice through legal procedures. Retributive justice that basically deals with the process of punishing the wrong doers is in practice. Second, no citizen has any extra political rights in any political process in India. Everyone has the free and equal political rights to participate in the democratic political set ups. Citizens possess ample political rights to scrutinise the political system. Third, every citizen has the equal right to benefit from economic opportunities and resources. No citizen possesses exclusive rights and privileges on the basis of income and wealth. Even if it looks ambivalent as to whether the idea of 'distributive justice' is

applied in its true sense, there are taxation policies and several governmental welfare programmes and schemes today.[20] Furthermore, any kind of social discrimination and exploitation of those who are vulnerable in society is prohibited. Effective legal and constitutional ways are available to eliminate any social discrimination in India.

From the point of the Constitution, one of the main objectives of Indian state is to secure justice to all its citizens. In the preamble of the constitution of India, justice - social, economic and political is enshrined (Kagzi 1988: 67; Basu 2001: 21). As mentioned in the preamble, universal adult suffrage is in force, every citizen enjoys equal rights to participate in political sphere and there is no arbitrary distinction among citizens in the political realm. The preamble alludes that equitable distribution of natural wealth, resources and assets must be ensured to all citizens. The state has the goal to remove barriers seeking economic opportunities and eliminate the poverty. Along with this, the idea of proscribing any social discrimination based on caste, creed, race, sex, gender etc is enshrined in the preamble. The aim of bringing social justice is to usher a kind of social harmony in India which is otherwise deeply diverge. Moreover, the concept of social and economic justice with the aim of establishing a welfare state is considered to be a part of the basic features of Indian constitution which is not amendable.[21] The fundamental rights also guarantee all citizens the equal constitutional rights to justice. So the idea of justice administered in contemporary India is not simply theoretical; the constitution of India highlights the needs to provide impartial justice to every Indian citizen. Today, from the practical point of view, justice is acquired in three major ways: first through legislative approach which enacts various progressive laws related to important matters like agrarian, marriage, divorce, women, schedule caste, schedule tribe, minority, health care, land reforms and son on; secondly through judiciary which interprets laws and pronounces judgements in the right spirit, and thirdly through political participation in which citizens get represented or choose their representatives by exercising their voting rights in elections.

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20 Distributive justice basically means the distribution of resources: goods, income, wealth and opportunities among the members of society. Often distributive justice prescribes some principles for distribution of things. J. R. Lucas (1980: 163) describes distributive justice as the tradition concerned with sharing of good and bad things, benefits and burdens, among members in society.

21 However, I would argue here that the question of ensuring political justice to all Indian citizens has been settled by and large with the adoption of liberal democracy and the journey of cementing social and economic justice is also making headway though there are seen and unseen hiccups.

However, I would argue that even if citizens today enjoy the equal privileges to all kinds of justice, all dimensions of justice do not carry equal weight. In the contemporary Indian discourse on justice, the idea of social justice appears to generate much visibility as compared to other dimensions of justice. The unfolding of social justice is not a new phenomenon in India; it has its roots in the deep rooted social tensions prevailing in all strata of Indian society which are sharply ruptured specially from the point of social scale. Prominent figures such as Periyayr, Phule and Ambedkar have long sprouted the idea of social justice in India. It was Periyar E. v. Ramasamy who led the anti-caste movement, also known as non-Brahmin movement, in the erstwhile Madras Presidency whose main purpose was to restore the self-respect of non-Brahmins and oppose the hegemony of Brahmins in all fronts. Periyar believed that non Brahmins groups have been suppressed and denied their fundamental social rights by the rigid practice of Brahmanism which is inhumane and unjust. Ramachandra Guha (2010: 243, 249) rightly points out that Periyar was, in particular, critical of Brahmin priests who, according to him came later in southern India, are cunning, corrupt and they cheated and enslaved the innocent Dravidians. Equally, Periyar was also critical of the Hindu texts and epics as they promoted caste distinctions. Periyar advocated that non Brahmins must destroy them to reassert their self-respect and be the masters of their own affairs.[22] Periyar urged the non-Brahmins groups to be rational in their thinking and approach to life. Periyar believed that with the abolition of caste system along with the restoration of aborigine culture, the non-Brahmins would regain their dignity and sense of pride in society. In essence, Periyar laid the foundation for asserting the sense of social justice among non-Brahmins communities. Jyotirao Phule spearheaded various social reformation movements to uplift the status of Dalit community. Phule attributed the genesis of the injustices and sufferings of the lower castes to the Aryan invasion to India. Phule considered Brahmans to be the descendants of Aryans invaders, whose origin is from a region beyond the Indus, who conquered the indigenous people of India and impose their religion and caste system to perpetuate their rule (Hanlon 1985: 141-2). For Phule, the presence of caste system has produced social antagonism in Indian society and dalitsare deprived of social justice.[23] Strongly propounding the view that caste system is immoral, Phule exhort the lower caste groups especially the dalits and women

22 For details, see Guha (2010: 243, 249).

23 For Phule, *Brahmans* were not indigenous people; they had come from outside India and deceitfully converted the original inhabitants into slaves. Phule (2002: 36, 45) argued that Brahmans deceive *shudras* and *atishudras* and

to take up education in order to liberate themselves from the unethical clutch of caste. Phule was convinced that education is a means to achieve social justice in society. Like Periyar and Phule, B. R. Ambedkar, as discussed above, vouched for the abolition of Hinduism and caste system. Ambedkar took the legal and constitutional route to secure the social, economic and political rights of the oppressed groups. The constitution of India, for which B. R. Ambedkar was the chairman of the drafting committee, stresses the need to provide social, economic and political justice to all sections.

The reservation policy, a form of affirmative action, for deprived sections: scheduled caste, scheduled tribe, other backward class and minorities is reckoned to be a constitutional means to ascertain social, economic and political justice in India. Reservation policy for SC, ST and OBC in government jobs, along with the reservation in legislature, is promoted with the view to uplifting their status in all levels. Besides, there are other legal devices through which the rights of these groups are safeguarded. One example in this aspect is the SC and ST Prevention of Atrocities Act 1989 with subsequent amendments in the recent times. Interestingly, various caste based political parties have sprung up in India since independence which claim to champion the cause of their respective caste and some of them have come to power.[24] With the new political set ups infused with the sense of caste pride and identity, the idea of social justice is gaining ground as never before and thus exuding the scope wherein the ancient idea of justice based on caste is profoundly challenged in the contemporary India. However, justice in the contemporary India is the culmination of the ideas of justice cognized in ancient as well as modern India. The idea of justice perceived in connection with God, *Dharma* and *karma* has not till today faded away and the idea of social justice endures to occupy a primary space in the contemporary discourse on justice. A momentous element with regard to the idea of justice as administered in the contemporary India is its legal and constitutional framework.

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exploit their labour. In order to sustain their comfortable life, Brahmans created caste system and composed books to legitimize the caste practices. Further, Phule asserted that the untouchables were once the downtrodden people who revolted against the *Brahmans* and *Brahmans* turned them untouchables by poisoning other *shudras* to despise them. For Phule, the untouchables are the devious creation of *Brahmans*.

24 To name some of them: parties like Samajwadi Party (SP), Bahujan Samaj Party (BSP), Rashtriya Janata Dal (RJD) etc in the Northern Indian states claim to stand for the rights of *dalit bahujans*, SC, ST and OBC; and parties like DMK, AIADMK and its several offshoots in the southern Indian state adopt the ideology of preserving the *Dravidian* cultural values and rights. However, how far these parties are able to fulfill their promises are anybody's guess.

It is also obvious that any comprehensive study on the idea of justice in contemporary society appears to be elusive. Beyond the studies of how the ideas of justice are conceptualized in different important phases, there emerge various schools of thought that have given varied connotations on justice in contemporary times. Some of the prominent schools that defined the idea of justice in contemporary are Marxist, Liberal, and Feminist etc. Even the "subaltern" study has come to stay in India even though the very exercise of locating the idea of justice in the context of subaltern looks equally sloppy.[25]

Concluding Remarks

A mention must be made here that writing about the idea of justice in Indian context is an onerous exercise. The reasons are inherently multifarious. Even what commonly makes up of the entity called India is still vague given its widely diverse multitude of cultures, religions, caste structures, languages, economic disparities, histories, to name a few; and its negligible commonalities among all. Whether the notion of India is constructed purely on political or geographical or cultural or historical account etc. is still contentious. In this sense, a concrete idea of India is yet to be settled consensually till this day Sunil Khilnani (2004: 152-94) cogently argues that the idea of India lacks any common identity or any basis of unity that are the essence of the modern nation state. There are societies in India having unique notions of justice since ages. With such enormous complexities, to define the idea of justice in the context of India *per se* is more of a difficult endeavour. The fact is that different communities, ethnic religious groups, regions had devised their notions of justice and even today many tribal communities continue to hold their conviction on justice firmly. Nonetheless, this study attempts to throw light on as to how the idea of justice has been evolving in all the predominant epochs in India.

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25 Interestingly, justice in the context of "Subaltern" who are broadly described as those oppressed groups who are outside the mainstream discourse and those suppressed groups who are at the margins of the larger society, is not theorized comprehensively in India as subaltern discourse itself is relatively new. One reasongiven by Ranajit Guha (1998: xiv, xv) is that the discourse on Indian nationalism has been in the hands of elitism—colonial elitism and bourgeoisie nationalist elitism and it has failed to identify many important aspects India's past. Subaltern studies emerge as the alternative method to fill that gap.

Union of India Versus Purshottam: An Anticipated violation of the Principle of Double Jeopardy

*Shashank Chaddha**

Introduction

Within a legal landscape relating to the fundamental rights of the citizens of India, the Hon'ble Supreme Court of India[1], in Union of India v. Purshottam[2] has rendered the Fundamental Right of 'Protection in respect of conviction of certain offences',[3] Art. 20, the Constitution of India.1950, which reads as: " Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

(2) No person shall be prosecuted and punished for the same offence more than once as vulnerable to be misused by the officials such as Police or other officials, with certain vested interests. This case pushes the very meaning and essence of this Fundamental Right[4] as being infructuous[5]. The case had been pronounced with a particular as well as a narrow reference to the clause (2) of the Article 20 of the Constitution of India. It is also concerned with the interpretation given to the relevant law and the citations that had been pondered upon by the hon'ble judges, who have adjudicated upon this matter. The method of interpretation

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1 *herein after* "the Court".

2 (2015) 2 SCC 779.

3 Art. 20, the Constitution of India.1950, which reads as: " Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

(2) No person shall be prosecuted and punished for the same offence more than once

(3) No person accused of any offence shall be compelled to be a witness against himself.

4 Ibid.

5 The word "infructuous" is derived from the Latin word "*fructus*" (fruit). Infructuous means ineffective, unproductive. See, (1973) 4 SCC 183.

employed in this matter, which is Literal Rule of Interpretation had been made up which presents some challenging questions to Indian Constitutional Law jurisprudence with regard to the power of the officials to re-initiate a *trial* after an acquittal, concerning itself to the settled principle of *double jeopardy.*

This case comment argues that, while the conclusion of the Supreme Court may be correct, in reference with the facts of the matter, however the Court has failed to give cogent reasoning to support its decision. The Court in its judgment, basically, placed reliance on *'atrefois convict and atrefois acquit'.* This comment argues that instead of using the method of literal interpretation to the citations and the authorities used, the Court should have addressed the Constitutional and legal issues arising in the matter to objectively analyse the probable effect of this matter on the society, as a whole.

The critique *firstly* describes the background of the case, giving in brief the facts of the matter and its judgment, wherein it also examines whether the intention of the legislature has been correctly applied by the court. *Secondly*, it examines the scope of the Article 20 (2) of the Constitution of India and the interpretation given to it. On the basis of the analysis, this critique shall *thirdly*, highlight the flaws and implications of the Court's reasoning by correlating departmental enquiry and double jeopardy, and *finally*, shall suggest the approach that it should have adopted instead.

Background

In Union of India v. Purushottam,[6] a division bench (DB) of the Apex Court was called upon to decide whether a person who had previously been prosecuted for a charge can be made subject to a new departmental enquiry based on the same set of facts and materials. The question arose when the High Court of Judicature at Delhi, quashed a Show Cause Notice (SCN) which had been served by the appellant to the respondent, in the instant matter, on the same set of charges as had already been adjudicated by the Summary Court Martial under Army Rules. Accordingly, the Union of India filed an appeal to the Supreme Court of India challenging the order of quashing of the Notice (SCN). This Notice was served to the respondent based on the findings of a Court of Inquiry, convened by the Chief Engineer in-charge, making the Respondent guilty of the charges, *firstly* of extortion[7] and *secondly*, of misappropriation. The Respondent was arraigned as per the Army Act, 1950 and the evidence was recorded[8].

6 (2015) 2 SCC 779.
7 S. 53(a), The Army Act, 1950.
8 Rule 23, Army Rules, 1954.

The Respondent was subsequently summoned for trial by Summary Court Martial, where the Respondent pleaded guilty of the charges. Thereafter, a "reviewing authority"[9] decided that the matter was not adjudged on merits and therefore had intervened[10], acquitted the Respondent from all the charges that were earlier levelled against him. It was in this impasse that a Show Cause Notice (SCN) was served. It was made known to the Respondent that his continued presence in the Army would possibly be detrimental to maintaining discipline and hence his retention in service was considered undesirable, and the Respondent was required to show cause as to why his service should not be terminated under the provisions of Army Rule 13. The Respondent has submitted that he replied to this notice but it is not on record.[11] The said Notice was challenged by the Respondent at Delhi High Court[12], which rejected the Show Cause Notice by reasoning that, *"the Show Cause Notice relied on exactly the same set of charges as had run their course in the Court Martial, resulting in the Respondent's acquittal"*[13].

The Supreme Court was therefore, called upon to judge whether the Appellants could have issued a Show Cause Notice to the Respondent and discharged the Respondent from the position on the basis of the same set of facts and materials.

The Supreme Court rejected the contention of the Respondent that the Show Cause Notice suffered from the vice of the principle of double jeopardy. This stand was substantiated by the Court by making a reference to the intention of the framers of the Constitution by Constituent Assembly Debates and also by references to laws of other countries in that respect, which ultimately lead the Court to uphold the conviction of the Respondent and to permit a re-initiation of an enquiry on the Respondent relating to the Show Cause Notice.

Scope of Article 20 (2)

Article 20 of the Constitution of India reads as under:

20. Protection in respect of conviction for offences

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(2) No person shall be prosecuted and punished for the same offence more than once

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9 S. 162, Army Act, 1950.
10 Rule 115, Army Rules, 1954.
11 (2015) 2 SCC 779.
12 WP (C) No. 4254 of 2003.
13 WP (C) No. 4254 of 2003.

The scope of the above article rests with the protection of a person from certain extraneous acts. The second clause of the Article 20 founds its origin from a Common Law maxim, *Nemo dabetbisvexari,* which means "a man must not be put twice in peril for the same offence".[14] The principle had existed even prior to the enactment of the Constitution of India which is evident through various British enactments.[15] This rule against double jeopardy is the outcome of *autrefois convict* and *autrefois acquit*[16]*.* This principle had been misinterpreted by the Apex Court in the Union of India v. Purushottam[17]. The Apex Court in this case had indirectly set a principle that a trial can be reinitiated against the accused for the same offence. The Apex Court had already, in Mukhtiar Ahmed Ansari v. State (NCT of Delhi)[18], said that *"once the accused was acquitted in kidnapping case, the doctrine of autrefois acquit gets attracted."* This principle which should have been ideally followed was not adhered to in this case by the Apex Court.

> *It appears to be beyond debate that the framers of our Constitution were fully alive to the differing and disparate concepts of autrefois acquit and autrefois convict and consciously chose to circumscribe the doctrine of double jeopardy only to prosecution culminating in a conviction.*

This proposition is fallacious due to the basic reason of the misinterpretation of the Constitutional Assembly Debates. The fact that, in the case, the Court had gone on to establish this point of the knowledge of the *autrefois convict and autrefois acquit* to the drafters of the Constitution, however the same cannot be deciphered. The Court had made several references in this respect to the U.S. Constitution and the difference of the same rule as against the India Constitution. In the case, where the court had gone into the validity of the quashing

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14 M.P. Jain, Indian Constitutional Law, 352 (7th ed. 2014).

15 S. 26, The General Clauses Act, 1897; S. 403, The Code of Criminal Procedure, 1973.

16 S. 403, the Code of Criminal Procedure, 1973, governs the entire principle of autrefois convict and autrefois acquit. But apart from this the Australian 'principle of issue estoppel' has been followed in India. *autrefois convict* and *autrefois acquit* are pleas concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. *'Issue of estoppel'* is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control re-litigation of issue which are settled by prior litigation in King and Wilkes, 77 CLR 511. See, AIR 1970 SC 771.

17 (2015) 2 SCC 779.

18 (2005) 5 SCC 258.

of the order of the Deputy Judge Advocate General. As per the Court, *The Discharge Certificate, issued under Section 23 read with Rule 12, being the conclusive step of the discharge proceedings, cannot therefore stand*, which therefore, reinstalls the conviction of the accused, Purushottam,[19] in the instant case. It is already a settled principle that once someone had been punished for an offence, to attract the Article 20(2), the punishment due to reinstatement of prosecution must be of identical offences,[20] and therefore, by the same principle, the fact that the accused, i.e. the Respondent of this case, had been punished and his subsequent order of acquittal had been found *ultra vires,* then that would easily imply that the earlier order had been reinstated.

The principle of *autrefois acquit* has to be emphasised. This principle is not included in our Constitution.[21] However, this had been partially followed by in this case. This is because, the fact that, quashing of the order of the Deputy Judge Advocate General would render the erstwhile conviction valid, though the Court had not emphatically stressed upon this issue. The principle by the Apex Court that, in order to invoke the rule of issue-estoppel,[22], the facts and the offence must be the same as of the earlier trial.[23]

Departmental Enquiry and Double Jeopardy

This judgement, in itself will render the Fundamental Right[24] of an individual, infructuous. This may be evaluated against the peril that, once a person had been acquitted or if his erstwhile conviction had been restored, the whole process of prosecution can be re-initiated against him. The fact that what actually is meant by departmental enquiry, it is similar to what is a trial, where a charge sheet and evidence is shown, and this enquiry is conducted by an enquiry officer, where evidence is also acknowledged[25]. Further, the act of dismissal, removal or reduction of rank shall not be passed without any enquiry[26],

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19 *Hereinafter* "the Respondent".

20 AIR 1961 SC 578; AIR 1965 SC 87.

21 AIR 1954 SC375.

22 A principle that, where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of the accused, such a finding would constitute an *estoppel* or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact. See, AIR 1974 SC 28.

23 AIR 1975 SC 856.

24 Art. 21, the Constitution of India, 1950.

25 AIR 1964 SC 719.

26 Rule 55, The Civil Services (Classification, Control and Appeal) Rules, 1965.

however, this is as similar to a trial[27], which means the stage of proceeding where the evidence is taken into consideration[28].

It is worth noting here that a departmental enquiry and a criminal trial, are obviated to be operated at the same time[29]. It is incumbent to look upon the touchstone of departmental enquiry being barred by a subsequent enquiry. The fact that, when an earlier enquiry had terminated into conviction, then a subsequent enquiry on similar facts and offence will be barred,[30] whereas, in this case, the earlier enquiry by the Summary Court Martial had terminated into the conviction of the Respondent in the Purushottam's case, the Apex Court had given a green light to another enquiry by the department of Army, without acknowledging the principle of double jeopardy. A shown cause notice will amount to double jeopardy, based on the same set of offences as earlier[31]. Another important aspect must be noted that, the Apex Court by saying:-

"Another Three-Judge Bench in Union of India v. Harjeet Singh Sandhu, 2001 (5) SCC 593, considered Kukrety and then concluded that if the decision of the Court Martial is not confirmed, the disciplinary action, whether a dismissal (or, for that matter, a discharge) may be resorted to."

However, this judgement is not apposite in the concerned matter due to the fact that, in the instant matter, the review of the order was not required as the Court itself said that, *The Court Martial finding and sentence ought to have been left undisturbed by the Reviewing Authority, self-sufficiently valid as it was under Section 161 (1).* By this, it is easily implied that it was not incumbent to review the order of the Summary Court Martial (SCM), and therefore, restored the *status quo* of the order holding the Respondent, in the instant matter, guilty. Further, pronouncing that *we allow the Appellants to proceed in accordance with law,* will be seen as a touchstone on the principle of Double Jeopardy.

Conclusion

There exists no doubt in relation to the fact that, double jeopardy principle exists in the scheme of the Constitution and has been, time and again applied in various cases,[32] however such principle must be

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27 Trial means an act of judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging the guilt or innocence of the accused. See AIR 1996 SC 1340.

28 AIR 1959 SC 837.

29 199 5 SCC (L&S) 196.

30 AIR 2007 SC 906.

31 (2004) 13 SCC 342.

32 See, (1988) 4 SCC 655, Criminal Appeal No.1660 OF 2007, 284 U.S. 299, 304 (1932).

given a holistic and an interpretive approach. It is a matter of interpretation that must be given so as to consider what should be the impact of the principle pondered upon. While the rule under Art. 20(2) of the Constitution is that when a person is acquitted, he cannot be tried again for the same offence, the rule of *res judicata* means that the verdict of acquittal shall be conclusive as between the prosecution and the accused in all subsequent proceeding,[33] so far as the acquittal may be relevant to the defence of the accused in such proceedings[34].

It is worth mentioning that if the order of acquittal passed by a competent court, though wrongly, it would be binding unless set aside in appeal[35]. Even if this principle is to be followed, it must be noted that, the Apex Court should have created or ventured upon creating a clear dichotomy between a trial culminating in conviction and a trial culminating in acquittal. This is important because, in Union of India v. Purushottam,[36] there was no clear indication as to do the trial be upheld or not. This will create a ruckus of confusion if it will act as a precedent to subsequent cases and will lead to violation of, not only Article 20(2) but also of Article 21 of the Constitution[37]. Although the adjudication by the Court was correct, the typically flawed reasoning behind it, casts varied questions which may not merely be academic, but may also at the same time, be seen to pose serious implications in reference to practical aspect of the society. A broader and conjunctive view of the principles discussed or rather, evaluated, would have made the judgment and its reasoning to be acceptable at the first instance.

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33 AIR 1956 SC 415.

34 (1950) SC 458 (Supreme Court of Malaysia).

35 AIR 1949 PC 264.

36 (2015) 2 SCC 779.

37 Art. 21 reads: "21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."

BOOK REVIEW

Pleadings, Drafting and Conveyancing**

*Dr .Vijay P. Tiwari**

Pleadings are the backbone of legal profession. They are the basis of claims of the parties. A well drafted pleading is very important for complete justice. Pleading occupies the highest place in the profession of a practicing lawyer. Eminent jurists have time and again stressed the need that the pleadings should be concise and to the point. Every legal professional, practicing or otherwise, is expected to possess the art of pleading which requires a great drafting skill. A finding cannot be sustained which is based on no pleading. It has been emphasized by Apex court time and again that no relief can be granted in respect of which specific mention has not been made in the pleading. Pleading gives fair chance to both the parties to know the case of each other – points of agreement and disagreement. It helps in eliminating vagueness and ambiguity. And hence it is sine qua non for every lawyer to be well versed with the principles of pleading. Due to this Drafting, Pleading and Conveyancing has been prescribed as one of the compulsory clinical papers by Bar Council of India for students graduating in law.

This book named Pleadings, Drafting and Conveyancing authored by Shri R.N. Chaturvedi has made a valuable contribution to the general understanding of drafting, pleading and conveyancing. The first edition was published in 2002 by Central Law Publications, Allahabad. The fourth edition of the book revised by Dr. Sunder Singh Shilwant was published in 2009 and reprinted every year since 2009. The present book which is re-printed in 2015 has 380 pages divided into 25 chapters**.** This book is an addition to the existing resources. However, this is not just an addition in the existing wealth of knowledge, but is significant addition from the students' point of view. The simple language of the book, short sentences and summary of substantive rules before drafting of the plaint, written statement and conveyance deed makes drafting easy to understand. This book is a complete code on Pleading, Drafting and Conveyancing and contains all essential and useful material on the subject. The book is divided into 25 Chapters. Chapter 1 and 2 deal with General Principles of Drafting and Pleadings respectively. The subject matter has been written in

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** R.N. Chaturvedi, Fourth Edition 2009, Reprint 2015, Published by Central Law Publications, Allahabad, pp.- xii + 380 Price 250/-.

such a manner that it is very easy to understand. Chapter 3 to 8 deal with Plaint, Written Statement, Interlocutory Applications, Original Petition, Affidavit and Execution Petition. Chapter 9 deals with Memorandum of Appeal, Revision, Reference and Review. Chapter 10 contains Petitions under Articles 32 and 22 of the Constitution of India. Chapter 11 includes model forms of complaints and chapter 12 is devoted to interim applications in criminal cases. Chapter 13 covers important provisions of bail and also bail application forms. Chapter 14 contains rules and memorandum of appeal in criminal cases. Rest of the chapters are devoted to conveyancing and various deeds and covers, description of the deed and sale deed, mortgage deed, lease deed, gift deed, promissory note, powers of attorney, will, adoption and agreement deeds.

The book is presented in a good style of fine printing in a legible font and binding by which a reader can update the subject with utmost satisfaction. The chapters in the book have been given in very lucid manner and are easy to comprehend and learn drafting for law students, teachers, researchers, lawyers, judges and also the layman who is eager to know the subject. However, it does not cover pleadings before quasi-judicial bodies such as NCDRC, Information Commission, NGT, CCI etc. It would have been good, had it included some more information such as rules and forms for copy right, patent, registration of company, trust, registration of marriage, application for birth/death certificate etc. This would have been very helpful to the students of law and also to general public.

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BOOK REVIEW

Equity, Mortgages, Trusts and Fiduciary Relations**

*Dr. Ishrat Husain**

The objective of this book is to provide students with an overall understanding of the law of equity, mortgage, trusts, and Fiduciary Relations. The book has considered the basic principles of these laws which dominate its jurisprudence and the relevance of these laws in practice. Within the unwritten law, equity developed to modify the rigidity of the law with the objective of achieving, in relation to individual transactions, fairness between parties. It now exists as a body of principles that seeks to produce individual transactional fairness and just outcomes. The concept of a trust is a major emanation of equity. The aim of the book is to enable students, through the study of cases, statutes and other material, to acquire a comprehensive knowledge and understanding of, and competence in, equity law, mortgages, trusts and fiduciary relations. After reading this book, students will be able to understand the historical evolution of the equity jurisdiction and appreciate the distinction between legal and equitable principles and remedies. They will also be able to apply equity and the law of trusts to factual situations and effectively advise and communicate with clients and others about their rights and obligation.

The book "EQUITY, MORTGAGE, TRUSTS AND FIDUCIARY RELATIONS" authored by Dr. S. C. Tripathi and published by CENTRAL LAW PUBLICATION has considerable importance for the students of law and practising lawyers as well. It has made a valuable contribution to the general understanding of "EQUITY, MORTGAGE, and TRUSTS AND FIDUCIARY RELATIONS. This book offers an overview approach to these subjects and at the same time recognises all the complexities in said subjects. This single volume contain four parts and further divided into chapters. The different juristic concepts are historically and systematically analysed and put clearly. Efforts have been made to make the book easily understandable and attempt has been made to keep the size within the limits.

Part-I contains 21 chapters dealing with the topics relating to Equity. Chapter(s)1, 2 and 3are about the definition and concept of equity. These chapters are really helpful in understanding the concept of equity providing in brief the definition and various meanings of

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** Dr. S.C. Tripathi, Second Edition 2011, Reprint 2015, Central Law Publications, 107, Darbhanga Castle Allahabad-2, pp. xx + 264 Price Rs. 180/-.

equity which are easily understandable. Equity is fair, just and reasonable interpretation and application of common law as it originates from original civil law. The concept of equity cannot be properly understood unless one has idea about its historical background. Author adds colour by giving its historical background. There is no universal recognised definition of the term equity. Different jurists defined it in different ways. However, the term equity is synonym with the honesty, righteousness and natural justice. The author has mentioned about the definitions given by jurist-cum-philosophers which ultimately helps to understand the concept of equity. The concept of equity developed through various legal systems. It is not the product of one legal system. In India, equity is borrowed from England and in England it is borrowed from Rome. The author has rightly presented the relevancy of studying the origin and development of equity in Rome, England and India. In Chapter 3, the author should have devoted at least one page on transformation and systematization of equity. There is no mention about Lord Nottingham (1673-16820) who is called as father of modern equity and one of the architects of modern system of equity in England. Lord Hardwick (1737—1760) and Lord Eldon (1801-1827) are known for carrying on the work of systematization of the equity. They have not been mentioned about their contribution. It may be helpful to the students to understand that how the equity developed.

In Chapter 4, the author speaks of the classification of equity jurisdiction in right perspective. Equity contributed in removing the shortcomings of the General Law. Equity contributed in removing the shortcomings of the General Law. In 18th and 19th centuries a number of principles were laid down under which equity provided remedy and these principles emerged as the classification of equity jurisdiction. Chapter 5 entitled as "Equity and Common Law" is devoted to the equity and common law relationship. It is essential to discuss the shortcomings of common law, due to which equity was originated. This chapter draws the attention of the readers to the various facets of equity and common law. Moreover, the author should have mentioned the spheres in which equity supplemented the law. The object of the Judicature Act was to check the multiplicity of litigation. The author in Chapter 6 titled as "The Judicature Act, 1873" has dealt with changes and effects carried out by the Judicature Act, but he has not elaborated the object of Judicature Act properly. It is important to inform the students why it was enacted.

In England the double system of law as administered before the passing of the Judicature Acts gave rise to two distinct types of the rights and interests *i.e.* "Legal and equitable". Legal rights were

recognised by virtue of the common law and equitable rights were recognised by the equity. By the Judicature Act attempts were made to unite both the systems but till today both the systems are existing maintaining their identities. In Chapter 7 the Legal Rights and Equitable Rights have been properly differentiated but there should have been a little bit more elaboration. However, a separate chapter should have been devoted to the classification of Equitable Rights. In chapter 8, he discusses the maxims of equity. The maxims of equity are the legal proverbs which highlight the principles of equity. The subject matter of equity can be grouped round the twelve maxims which embody general principles on which the court of chancery exercised its jurisdiction**.** These maxims are derived from those essentials principles of rights and obligationswhich have ajudicial relation with the society. Every maxim underlines a separate doctrine of equity. These maxims have been incorporated in many Indian enactments like Specific Relief Act, Indian Trust Act,and Indian Contract Act etc**.** However, there is no sufficient elaboration of application of maxims in Indian laws, Moreover, some maxims have not been explained properly like equity follows the law, delay defeats equity, equity acts in *personam*. These are important maxims but have been explained in few lines. Chapter 9 lays down the conversion and its effects and reconversion and mode of reconversion. The doctrine of reconversion depends on the maxim "that equity regards that as done which ought to have been done". The author has defined the doctrine of conversion summarily. This is the area where students feel very uncomfortable. So it should have been more elaborative. In Chapter 10 and 11 author has nicely defines the doctrine of Performance, Satisfaction and Ademption and the differences among three. When a person dies, his estate vests in his heir or executor or administrator as the case may be. The executors are appointed by the deceased before his death, to carry out his direction and to distribute his property but administrator are appointed by the competent court in the absence of to perform the functions of an executor. The author in this chapter has dealt the topic well. However, he should have devoted at least one paragraph each on "Marshalling of Assets and Marshalling of Securities".

Chapter 12 evaluates Mistake, Misrepresentation, Fraud and Undue influence. They have a significant bearing on transfer of property and contracts. The author has covered these topics thoroughly. The students will be able to understand the concept and differences of these topics. In Chapter 13, the "Penalty and forfeiture" have been defined well. The Chapter 14 provides about "Lien" which means a right to hold and retain another property until a claim is satisfied. Liens are of two types, either legal or equitable. Legal liens are those which were recognised by the common law whereas lien which are

recognised by the court of equity, are called equitable lien. Chapter(s) 15, 16, 17, 18, 19, 20, and 21 describe about the doctrines of Election, Equitable Estoppels, Equitable Assignments, Set off, Accident, Married women and Guardians, Infants, Idiots and Lunatics respectively. In these chapters author gives these topics in very precise manner but students will be able to understand the topics.

Part II contain 3 chapters devoted to Mortgage, Rights and Liabilities of Mortgagor and Rights and Liabilities of Mortgagee. It is really wonderful job of author. He has devoted three chapters to these topics. This is very important branch of court of chancery. The important feature of a mortgage is that it has a transfer of interest in immovable property, such immovable property being distinctively specified and there is a consideration involved in the transfer of such interest. In this part author has tried to give his best.

Part III relating to trust is too short, it should have been more elaborative. It consists of only one chapter. The trust is the highest and most distinctive achievement of equity jurisprudence in England. It was originated and developed by the court of chancery in England. It became very popular and was considered to be the most powerful instrument of social experimentation. Trust is an equitable obligation which imposes on a person described as a trustee certain duties of dealing with property held and controlled by him for the benefit of the persons described as the beneficiaries, or if there are no such persons, for some purposes recognised and enforceable at law. It is very important branch of law developed by court of chancery. The Indian Trust Act, 1882 is completely based on principle of equity. It is necessary to know the principles of equity to have proper understanding of Indian Trust Act.

Finally, Part IV concludes with Fiduciary Relation. Fiduciary Relations are based on trust or confidence. Relations between the trustee and beneficiary, mortgagor and mortgagee, lessor and lessee, solicitor and client, members of religious order and their superior and creditor and debtor are regarded as fiduciary relations. The author has defined fiduciary relations well and put the kind in very articulate manner. However, he has not mentioned about fiduciary principles. The fiduciary principles are as (a) fiduciary transaction must be good faith transaction (b) fiduciary must not be purchaser (c) fiduciary may not profit at the expense of the beneficiary whose interest he is bound to protect. (d) Gratuitous nature of fiduciary services (e) onerous nature of fiduciary office.

The Specific Relief is the sphere in which equity supplemented the law. The equitable doctrines of the specific performance,

injunctions, cancellations, or rectification of instrument enriched this branch of law. Indian Specific Relief Act, 1963 incorporates so many equity principles. It is very important branch of equity. Author missed this aspect. He should have devoted at least one chapter on the law of specific relief. The said book is presented in a good style of fine printing in a legible font by which a reader can update the subjects with satisfaction. At the end, index is given for reference purpose on various topics. The author has dealt the Equity, Mortgages, Trusts and Fiduciary Relations very precisely, concisely with accuracy touching all the important aspects of the area. On the whole this book serves a meaningful purpose in attaining the knowledge over the above said subject.

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CALL FOR PAPERS

NLUA LAW & POLICY REVIEW, VOL. 1, No. II, 2015

The NLUA LAW & POLICY REVIEW (NLUALPR), is peer reviewed Journal published bi-annually by the National Law University Assam, Guwahati. It is a faculty run bi-annual Refereed Journal whose primary objective is to serve an important academic forum for legal scholarship. The NLUALPR will promote reflective thinking by providing a socially relevant legal knowledge. This review is an earnest attempt to provide an effective research tool by sparking scholastic conversation among a diverse group of academicians, judges, jurists, practitioners, students, activists, scholars and prominent thinkers.

The review will publish scholarly articles, comments on recent decisions by courts, short notes, legislative analysis and solicit reviews of latest books from renowned connoisseurs of law.

All submissions will undergo a rigorous editorial process devised to hone and strengthen tone and substance.

Research paper should be thematic and identification of sub-themes will be highly appreciated. It should have proper research questions and should also reflect the findings. The submission can be sent under the following category:

1. **Research papers :** Between 7000 and 10000 words, inclusive of footnotes. It is advisable, though not necessary, to choose a theme that is of contemporary importance. Purely theoretical pieces are also welcome.
2. **Notes/Comments :** Between 3000 and 5000 words, inclusive of footnotes. This section should include a thought provoking and innovative piece consisting chiefly of personal opinions and analysis.
3. **Case/Report Comments :** In between 2500- 3000 words, inclusive of footnotes. This part should entail an analysis of contemporary Indian or International judicial pronouncements relevant to the themes and comment on implications for the evolution of that branch of law.
4. **Book/Reports Review :** Word limit is 2000- 3000 for review of a book relevant to the themes. The review should identify the relevant arguments put forth by the author and present a comprehensive analysis of the same.

Guidelines for Submissions

- Submissions should be in Times New Roman, font of size 12 with 1.5 line spacing, justified text and 1 inch margins on all sides of an A4 sheet. (page number)
- Footnotes should be in Times New Roman, font of size 10 with 1.0 line spacing. Endnotes are not allowed.
- Graphics, Charts, Tables, and Diagrams should be numbered consecutively and included in the body of the work. Submission must be compatible with Microsoft Word.

❖ Submissions must be emailed at nlualpr@nluassam.ac.in or nlualpr@gmail.com(preferably in .docx format) alongwith a covering letter addressed to Dr. Naresh Kumar Vats (Editor, NLUA Law Review Publication Committee 2015-2016) latest by February 01, 2016. The covering letter should include *the author's contact information and a short abstract (250-300 words) that outlines the main questions or themes addressed in the paper.*

❖ Authors shall be required to submit an author profile, post submission of 200 words before their contribution can be considered for publication.

❖ The submission must be the original work of the authors. Any form of plagiarism will lead to disqualification.

❖ Submitted entries must not have been sent for consideration at any other place for presentation or publication.

❖ Co-authorship is allowed. Maximum number of Co-author for a submission shall only be one.

❖ Authors should provide their contact details, designation and institutional affiliation in the covering letter for the submission.

❖ Footnotes must conform to the *Standard Indian Legal Citation Manual (SILC),* Rules of legal citation (Latest edition attached).

❖ Copyright of all entries shall exclusively vest with NLU ASSAM. The submission would imply that the author has assigned such rights to NLU ASSAM.

All submissions will go through an initial round of scrutiny and shortlisted contributors will be informed by February15, 2016. We are exploring the possibility of organizing a writers' workshop if we receive a sufficient number of quality submissions. Please note that we will make the final selection of contributions on the basis of comments received from external reviewers. We will expect the selected contributors to incorporate this feedback. We aim to publish this issue in May 2016. A hard copy of this issue as well as a letter of acknowledgement will be sent to each contributor.

FORM-IV

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