NLUA LAW REVIEW

Volume 2 July-December 2018 Number II

MESSAGE FROM THE PATRON

NLUALR is the mirror of quality research orientation of students of NLUJAA. Like any other national Law University this University represents India with talented students from all over the country pursuing multi discipline studies and forming inter disciplinary approach towards pertinent national issues. As good students acquiring and disseminating knowledge in different shades of life, the contributors to this journal are serving the great cause of societal aspiration to accomplish right to know more and updated information regarding socio-legal problems and their solutions.

The first issues of NLUALR left their unmistakable imprints on the legal fraternity and registered its noble presence in different libraries in the country. This issue covers a wide range of research area containing adequate and relevant data, appropriate analysis, thought provoking ideas and new insight along with deep vision into the socially desired pursuit of Justice. Articles published in this issue contain contribution both from faculty and students. Articles are full of information and critical evaluation ranging from indigenous problem of tribal people in Mizoram and Meghalaya to the finer issues arising out of interface between bio-diversity and intellectual property and registration of Geographical indications. The special feature of journal is the discussion threadbare of internationally significant issue of the Rohingya, struggle for asylum in India.Case comments add more lively discussion on judicial creativity.

The National Law University, Assam Law Review is the result of untiring and relentless efforts of the Editorial Board consisting of talented and good students devoting their precious time without impairing the high pursuit of learning and study. The students involved in publication of the Review and having taken keen interest in bringing out this issue deserve special congratulations.

As a patron of NLUALR, I wish all success to this issue and hand over to readers to read, evaluate, comment and encourage the budding scholars to work with new zeal for social service and community welfare through constructive, creative and innovative suggestion to solve social-legal problems and eradicate social evils.

MESSAGE FROM THE FACULTY ADVISORY BOARD

The National Law University and Judicial Academy, Assam has come out with the second volume of its student run peer reviewed journal. It is one of the flagship journals of our University that has helped towards providing a platform to the legal fraternity in giving a concrete form to their academic labours. Law plays a very distinctive role in maintaining and regulating the society in all spheres. Therefore it is very important that different stakeholders unite and collaborate on issues which confront the society and its growth. The Journal is a compilation of outstanding papers from numerous disciplines submitted by legal academicians, students and scholars associated with the legal and other disciplines. A remarkable breadth in terms of disciplines, experiences and backgrounds will help to enrich legal scholarship.

One of the key objectives of research should be its utility for the upliftment of the individual and the society. This journal attempts to capture and document debates around topics of law and other multidisciplinary fields such as Jurisprudence, Intellectual Property Regime, International Relations, Personal Laws, History, Economics etc. This journal is an endeavour of the University in incorporating different ideas into a single platform, with the sole aim of making a contribution towards legal scholarship and policy formulation.

Here, we would also like to acknowledge the guidance and support of our Patron and Vice-Chancellor, without whose support such an intellectual endeavour would not have been possible. We would also like to acknowledge the support of the Editorial Board for their hard work and dedication in bringing forth this issue. The journal has been fortunate to draw upon their individual and collective knowledge, talent and judgement in creating the compilation of this issue. We would also like to thank our esteemed Authors for their valuable contributions to our journal and hope to enjoy their support and contributions in the future.

Lastly, we would like to state that we are still a work in progress and have not yet covered a completely charted course in engaging actively with the legal academia. We are still seeking ideas from the community in terms of structure, goals and vision. At the same time, an enormous amount of work has been done towards bringing forth this issue and we hope that our efforts will be reflected in this edition. We shall welcome all valuable feedback and suggestions.

EDITORIAL

NLUA Law Review has established itself as a platform for sharing interdisciplinary and multidisciplinary research. As has been the hallmark of our review, this issue also upholds the benchmark set up by the previous issues. We had received an amazing response to our 'Call for Papers' for this issue and had a tough time selecting these articles from the range of quality articles submitted.

In this issue, we have selected articles on numerous topics such as *inter alia* International Law, Constitutional Law, Human Rights Law, Environmental Law, and Business Law. Since one of our aims is to establish our journal as a platform for research focused on matters related to North-East India, we have selected one article on the environmental-legal facets of inland water transport system and the enormous potential that it holds in the state of Assam.

VaishnaviRanjana in her article, "*Legislative Paralysis in Parliament: A Critical Analysis Of Disruptions in Lok Sabha*" makes an analysis of how the disruptions in the parliament not only impacts the productivity of the Parliament but also degrades the institution and incurs huge cost to the public exchequer. She tries to highlight how disruption is detrimental to the ideas of debates, discussions and deliberations which are necessary for the smooth functioning of any Parliamentary democracy. To address the significant issue, she further explores the roles, scope and responsibilities of members inside the Parliament by analyzing the Rules of Procedure and Conduct.

Chiradeep Basak in his article, *"The Enviro-Legal Facet of Inland Waterways in Assam"*explores the importance for developing an efficient inland waterways transport system over the river Brahmaputra in Assam. In addition to discussing the immense potential that the river Brahmaputra carries for inland waterways transportation, he has also highlighted in detail the environmental concerns which need to be addressed. To provide a better understanding, he brings into analysis the various existing Indian legislations and policy frameworks on waterways and also draws in a comparison from the American legal framework.

HimangshuRanjanNath in his article, "*Civil Liberty: A Conceptual and Jurisprudential Analysis*" attempts to explore the different contours of the Civil Liberty. He discusses the ideas of liberty as well as freedom in great detail and thereafter tries to analyse the relation of such concepts on an individual with regards to the society. He therefore, tries to make an analysis of how the idea and impression of civil liberty is also subjected to the surroundings of an individual. He examines every possible significant aspect to define, delimit and analyze civil liberty from both conceptual and jurisprudential point of view.

MayashreeGharphalia in her article, *"The Relationship Between Development and Human Rights: An Analysis"* attempts to explain the convergence between human rights and development by tracing the trajectory of the development debate and by identifying certain key essential points. The author from the perspective of a human rights approach discusses the various ingredients which are essential in making development an all inclusive process. While establishing a strong linkage between human rights and development thought, she also highlights the importance of adopting such an approach in ensuring that justice is more inclusive.

Devapreeti Sharma in her article, "*India's Liaison with International Criminal Court*" extensively explores the reasons of India's abstinence from adopting the Rome Statute of International Criminal Court Act, 1988. She attempts to extrapolate the grounds of abnegation from two perspectives. Firstly, she endeavors to justify India's reasons for not adopting the Rome Statute and how those reasons may lead the International Criminal Court to violate certain principles of international law and secondly, she emphasizes on the need to ratify the Rome Statute for bringing desired reformations in India's Criminal Justice Administration regarding mass-atrocity crimes.

Aditi Singh Kavia in her article, "*Legality of Armed Drones under International Law*" analyses the legal issues confronting the proliferation of unmanned armed drones in military combat operations. She drags our attention to the question of legality of armed drones in a scenario where international customary law is unsettled. Presenting a balanced

view, the author, apart from discussing the benefits of using armed drones, brings home the impediments involved in the use of armed drones. She also attempts to discuss India's position with regard to armed drones and urges the international community to come up with a robust regulatory mechanism for the regulation of armed drones in military operations before it becomes catastrophic. Finally, she deals with the threat posed by commercialization and privatization of armed drones.

Masroor Ahmed in his article "*Reviving the Indian Fiscal Structure by Strengthening the Constitutional Pillar: An Empirical Answer*" tries to provide a way to revive the fiscal structure of India by channelizing and strengthening the financial institution of India, majorly the revamped Niti Aayog which is much likely the predecessor not a constitutional body but a resolution born body. The author breaks down the rhetoric surrounding the planning commission and its failure to safeguard and ensure the neutrality and political independence of its own mechanisms, financial duties and public tasks through a much detailed empirical analysis employing the variables of the running structure.

Ayushi Gupta in her article titled, *" Jurisprudence around the Promoters Bid under Insolvency and Bankruptcy Regime: Analysis"* reflects upon the background of the Insolvency and Bankruptcy Code, 2016 and the lacunae's therein which often led to opaque proceedings during the execution of resolution plans. On the basis of this premise, the article goes on to explore the inadequacies of the aforementioned statute in light of the Amendment Ordinance promulgated by the President 2017 to overcome the hassle of biased and corrupted insolvency proceedings. Alongwith a thorough and detailed analysis of the Ordinance, the author also provides a comprehensive background to the Ordinance along with the modal resolution plans which led to its promulgation.

Jayanta Boruah in his article, *"Kasab's Death Penalty: A Review or its Validity",* discusses the concept of 'death penalty' from the perspective of human rights. The author through his article has sought to provide his opinion on the issue of Kasab's Death Penalty. He examines the status of death penalty in India from the perspective of the 'Human

Rights' discourse and by taking into account the Supreme Court's decision in the Kasab Case. He attempts to explain as to whether 'death penalty' may or may not be enough to deter future terrorist activities.

Nitish R. Daniel in his article,*"Finding a Balance between Trade in Hazardous Wastes And Environmental Protection"* explores the issue of hazardous waste and examines whether the laws for the protection of the environment have any bearing on the regulation of such waste. The article also looks at the various reasons that may have contributed towards the apathy of developing natures in adhering to regulations of environment protection.

Wasif Reza Molla in his article,"*Judicial Policy-Making: A myth or Reality*" delves into the much debated issue of judicial policy-making and whether it may infringe upon the legislative powers of the Indian legislature. It also enquires into certain circumstances that may have propelled such a step by the judiciary in contemporary times.

We sincerely hope that this unique set of articles will propel further research in their respective areas. We are extremely to all our authors for contributing to our journal. Through this issue we take yet another step to academic excellence.

Editorial Board

CIVIL LIBERTY: A CONCEPTUAL AND JURISPRUDENTIAL ANALYSIS

Himangshu Ranjan Nath*

Abstract

The difference between human and other living creatures according to Lord Chancellor Henry Peter Brougham is that humans are rational animals. Therefore they should be left free to decide about themselves. This developed the notion of liberty and the importance of it in the day to day life of a human being. Liberty, later, has been interpreted and classified into different categories of which 'civil liberty' is prominent one. With the emergence of democracy as a standard form of government, civil liberty also got popular attention. It has been said that civil liberties call for a progressive nation and vigilant citizenry. The loss of civil liberties inescapably trails a general state of complacence and lack of watchfulness. Many scholars tried to define civil liberties according to their understanding of the same. Some are of the opinion that civil liberties are legal guarantees established by the citizenry of a democratic society and are assurances that the basic freedom of the individual will not be curtailed or reduced by the government. Some on the other hand, tried to define it as 'freedom from all the restraints'.This is a humble endeavour to define, delimit and analyse civil liberty from both conceptual and jurisprudential point of view.

Key Words: Liberty, Freedom, Classification of Liberty, Civil Liberty,Constitution of India.

1. INTRODUCTION:

Liberty is a force possibly, behind every social change.[1] It is the voice of the oppressed, it is the voice against injustice, and it is the voice to re-establish human values as against the rules of the animal kingdom.[2] Champions of liberty have always marked the evolution of liberty as

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1 Isaiah Berlin, *Two Concepts of Liberty*(Clarendon Press 1966) 16.

2 O.P. Gauba, *An Introduction to the Political Theory*(Macmillan 2013) 389.

the greatest thing that ever nourishes mankind.[3] The struggle between 'liberty' and 'authority' is the most conspicuous feature of the history of development of state and democracy. But, in those days the war of 'authority' over 'liberty' was predominantly between subjects, or some classes of subjects, and the ruler.[4] In those days, both freedom and liberty were used interchangeably to portray freeness of human being as a social animal. A reference in this context can be pinched from the text of holy *Vedas* which recognises the existence of three seminal liberties for an individual living under a noble monarch in the form of liberty of body, dwelling house and life.[5] However, in a democracy, where people rule themselves, forming a *general will*, the extent and meaning of liberty may differ from what it was known for. For example, the evolution of the concept of civil liberty is said to be undoubtedly associated with the birth and raise of democracy.[6]

Civil liberties call for an enlightened nation and a vigilant people. Loss of civil liberties inevitably follows a general state of complacence and lack of vigilance.[7]When Aristotle in his celebrated work *Politics* talked about liberty, he meant certain peculiar forms of government and he uses these as tests to decide whether liberty does or doesn't exist in a polity which he contemplates at that time.[8] Even today, *legal eagles* measure the existence of *constitutionalism* in a state by scrutinizing the civil liberties enjoyed by its citizens as protected under the Constitution. The presence of civil liberties is also evident in the constitutions of different democratic countries of the world.

Civil liberty also occupies a conspicuous place in the international legal regime. Starting from the seminal *Atlantic Charter* (1941) that resolved to provide 'four freedoms'[9], there are dozens of international

3 Supra 1, 17.

4 J. S. Mill, *On Liberty*, (Penguin 1974) 59.

5 A. K. Ganguly, 'Tagore's Vision on Civil Liberties and Duty of Constitutional Courts' 6 SCC(J) (2011) J-1, J-2.

6 Jonathan Riley, 'Liberty' in Catriona McKinnon(ed)*Issues in Political Theory* (OUP 2008) 111.

7 H. R. Khanna, 'Civil Liberties and Democratic Rights' 1 SCC (1986) J-18.

8 H. J. Laski, *A Grammar of Politics* (HarperCollins 1967) 40.

9 The freedom of speech and expression, the freedom to worship God in his own way, freedom from want and freedom from fear.

documents that obliges the concerned state parties to secure civil liberty of its subjects through municipal laws. Several *General Assembly Resolutions*[10] and *Conventions*[11] of the United Nations are also being adopted to promote the idea of protection of civil liberty both in international and municipal level.

A constitution is said to be the amalgamation of or collection of rules, legal or partly legal to govern the people and the government.[12] The main purpose of a constitution, worldwide, is to give people a break from the past and a fresh start for future.[13] The Constitution of India is not an exception to it. It provides a break from the British colonial rule and provided us a fresh democratic start. To maintain the democratic temper intact, our Constitution, *inter alia*, provides *fundamental rights* for both citizens and non-citizens encapsulating many civil liberties. The *constitutional courts* in India though reluctant in its initial days, is doing a great job in protecting and increasing the ambit of those civil liberties. In this context Markandey Katju, J. (as he then was) opined "Courts both in India and America have taken an activist approach in upholding the civil liberties and rights of the citizens because freedom and liberty is essential for progress, both economic and social"[14]. The recent experiences of judicial interpretation of civil liberties in India has however, portrayed a great deal of judicial activism scarcely seen in the past.[15]

Civil liberties are ideally, legal guarantees established by the citizenry of a democratic society and are assurances that the basic freedom of the individual will not be curtailed or reduced by the government.[16]This

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10 *E.g.*, Resolutions on Freedom of Information, Freedom of Opinion and Expression, Arbitrary Detention etc..

11 *E.g.*, International Convention on Civil and Political Rights, International Convention on Right to Information, United Nations Convention against Torture etc..

12 K. C. Wheare, *Modern Constitution* (OUP 1971) 1.

13 Ibid, 6.

14 *Govt. of Andhra Pradesh v P. Laxmi Devi*(2008) 4 SCC 720.

15 *Shreya Singhal v Union of India* AIR 2015 SC 1523, *K. S. Puttaswamy v Union of India* (2017) 10 SCC 1, *Safin Zahan v Ashokan K. M. and Others* SLP (Crl.) No. 5777/2017.

16 R. C. Cartwright and H. V. Conde, *Human Rights in the United States: A*

means that an examination on civil liberties includes a discussion about 'basic legal protection' of persons from 'state actions'. But,in most of the times, it appears that the terminologies like *civil liberties*, *personal liberties*, *human rights* and *civil rights* are used interchangeably as if they are having same meaning which is definitely a wrong connotation**.** In several constitutional law books civil liberty has been found to be equated with personal liberty. Even the outright judges of Supreme Court of India in their judgments have been seen to have used the term civil liberty and fundamental rights synonymously.[17] The birth of the idea of this discussion is a product of such delusion. This endeavour is a humble approach to provide a definite shape to the ambit of civil liberties by analysing its *facets* conceptually and jurisprudentially.

2. RESEARCH METHODOLOGY:

The methodology adopted for the present work is doctrinal, analytical and descriptive. The author mainly depended on the primary sources like Statutes, Judgments, commentary and secondary sources like books, journals, articles, case laws etc. Opinions of research scholars, experts in respective fields are used as primary contribution to this work. In this endeavour, internet has provided a major contribution of most relevant and latest information on the web and helped the author to analyse the subject through different dimensions.

3. MEANING, NATURE AND SCOPE OF CIVIL LIBERTY:

3.1 Liberty:

It is important to understand the meaning of liberty before attempting to explain the concept of civil liberty. Liberty is derived from a *Latin* word 'liber' which means 'free'. In other words, liberty denotes 'freedom' or 'a state of being free'.[18] The *Human Rights Dictionary* defines liberty as, "the quality or state of being free; the power to do as one pleases; the positive enjoyment of various social, political, or economic rights or privileges; freedom from arbitrary or despotic control; and freedom

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Dictionary and Documents, (Vol. 1 Grey House 2000) 26.

17 *BhutNath Mete v State of West Bengal* (1974) 1 SCC 645, *Maneka Gandhi v Union of India* AIR 1978 SC 597.

18 A. S. Hornby and Anthony Paul Cowie, *Oxford Advanced Learners Dictionary* (OUP 1987) 486.

to be subject to and follow the rule of law"[19].

Scholars, across the world, tried to define liberty depending on the circumstances they faced in the society of their time.Laski observed that liberty means the power to expand the choice by the individual in his own way of life without imposed prohibitions from outside.[20] The famous British political philosopher Thomas Hobbes defined liberty as absence of all kinds of restraints.[21] G.D.H. Cole explained liberty as freedom of every individual to express himself without external hindrance to his personality.[22] John Locke, on the other hand, described liberty as "freedom for every man to do what he lists...but, a freedom to dispose, order as he lists, his person, action, possession and his whole property, within the allowance of those laws under which he is a subject"[23]. Locke believed that where there is no law there is no freedom and therefore, he advocated for restrictive liberty that enables everyone living in a society to test their share of freedom. Depending on this connotation of restrictive liberty, Isaiah Berlin later developed the notion of *positive* and *negative* liberty.[24]

From these instant definitions the notion of liberty can be determined as, "when a human being applies his rational faculty and comes to know what is best for him (and also for the society because as a rational being he cannot think of something which is good for him, and not for the society) and he has the ability to achieve it, his activity should not be hindered by any external(unreasonable) restraint"[25].

Liberty as a condition of human progress however, is not absolute even though the liberty-lovers put it in a high pedestal amongst all other things. It is subjected to certain conditions and reasonableness.

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19 Supra 16, 145.

20 Supra 8, 142.

21 Philip Pettit, 'Liberty and Leviathan', 5 Politics, Philosophy and Economics(2006) 131, 137.

22 G. D. H. Cole,*Essays in Social Theory* (Macmillan 1950) 34.

23 John Locke, *Second Treaties of Government* (Awnsham Churchill1690) 57 .

24 Supra 1, 15.

25 Supra2, 388.

As without reasonableness, liberty becomes a license.[26] When liberty is defined as 'freedom from all the restraints', it not only becomes a licence but also spoils the rational approach of liberty.

3.2 Liberty and Freedom:

The concept of *liberty* and *freedom* denotes a very important principle of political and legal philosophy. Liberty is sometimes regarded as the distinctive principle of liberalism whereas freedom is always acclaimed as universal principle.[27] Liberty can be said as a condition for making one's all round development. It is an act of freedom to exercise one's rights as human being without any restriction or limitation. Liberty is said to be "a right designates a sphere of freedom, a circumstance or environment in which one is authorized to act in a certain way"[28].

It has been seen that scholars used both the terms liberty and freedom interchangeably. F. A. Hayek in his celebrated work *Constitution of Liberty* used the terms liberty and freedom interchangeably. He argued that a man possesses liberty or freedom when he is not subject to coercion by the arbitrary will of another.[29] Categorising liberty into two different compasses, Berlin stated that negative liberty is 'freedom as the quality of human being' and positive liberty is 'freedom as the condition of human being'.[30] Here, in this discussion also the author wishes to use both the terms interchangeably.

3.3 Classification of Liberty:

Liberty, from conceptual point of view, may formally be described as 'absence of restraint'. This means that in order to maintain liberty of an individual, the state should not impose any unreasonable restraints on his activities in different spheres of his life.[31] In order to identify the proper sphere of such activities scholars demarcates *civil*, *political*,

26 Supra 23, 65.

27 Supra 2, 387.

28 Craig Duncan and Tibor R. Machan, *Libertarianism: For and Against* (Rowman & Littlefield 2006) 13.

29 Biswaranjan Mohanty, *Dynamics of Political Theory*, (Vol. 2 Atlantic Publishers 2010)468.

30 Supra 1, at 18.

31 Supra 2, 393.

economic and *cultural* liberty of an individual. Political liberty has been defined as the power of the people to be active in the affairs of the state.[32] This liberty is closely associated with the concept of citizenry and democracy. Universal adult franchise, free and fair election etc. are the components of political liberty. Economic liberty on the other hand permits an individual in his capacity as a producer or worker, whether manual or mental, engaged in some gainful occupation or service.[33] It mainly emphasises on providing security and opportunity to find reasonable worth in the earning of one's daily bread. Equal pay for equal work, minimum wage, participation of workers in the management of industry etc. comprises the sphere of economic liberty. Cultural liberty encapsulates all the freedoms of an individual that he can exercise as a social animal.[34] It includes liberty of food, cloth, language so on and so forth.

3.4 Civil Liberty:

The notion of restricted liberty (positive liberty) generated the concept of civil liberty. It represents the liberties which are essential for a person to live in a civil society.[35] Civil liberty consists of the rights of individuals as protected against the united force of society, the majority, the governing power.[36] It is freedom of a person in his civil capacity as a member of human society. It is a set of those basic liberties in the absence of which men can never be at their best selves.[37]

Civil liberty, applied to *political man*, practically means, protection or checks against undue interference, whether this is from individuals, from masses, or from government. The highest amount of liberty comes to signify the safest guarantees of undisturbed 'legitimate

32 J. C. Johari, *Principles of Modern Political Science* (Sterling Publishers 2013) 148.

33 Ibid, 147.

34 http://unpan1.un.org/intradoc/groups/public/documents/unssc/unpan021953.pdf48 accessed 13 April 2018.

35 Sevend-Erik Skaaning, 'Defining and Founding Civil Liberty'(2006) CDDRL Stanford University Working Paper 56http://cttrl.stanford.edu accessed 14 April 2018.

36 Francis Lieber, *On Civil Liberty and Self-Government* (J. B. Lippincott & Co.1883) 37.

37 Supra 8, 142.

action' and the most efficient checks against undue interference. Men, however, do not occupy themselves with that which is unnecessary. For example, breathing is unquestionably a right of each individual, proved by his existence; but, since no power has yet interfered with the undoubted right of respiration, no one has ever thought it necessary to guarantee this elementary right. When society got advanced and the people comprising the society practically considered freedoms essential to live in, find that it chiefly consists in guarantees (and corresponding checks) of those rights which experiences has proved to be most exposed to interference, and which are very dearest and most important for men to live in a civilised society, they termed those freedoms as civil liberty. With the advent of democracy, civil liberties became part and parcel of a civilised life.

Scholars at different times, guided by their perspectives about civil liberty tried to limit its facets. J. S. Mill in his celebrated work *On Liberty* opined that civil liberty in any free society should be comprised of (i) liberty of conscience in the most comprehensible sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects; (ii) liberty of taste and pursuits, of framing the plan of our life to suit our own character, of doing as we like (so long as what we do does not harm others); (iii) freedom to unite for any purpose (not involving harm to others).[38]

Ernst Freund observed that civil liberty comprises of (i) liberty and integrity of the body, (ii) liberty of private conduct, (iii) liberty of social intercourse and of opinion, and (iv) liberty of assuming legal relations with other persons.[39]

Ernest Barker reduced it to three different aspects (a) physical freedom from injury or threat to life, health and movement of the body; (b) intellectual freedom for the expression of thought and believe; and (c) practical freedom of the play of will and the exercise of choice in the general field of contractual action and relations with other person.[40]

After analysing the concept of civil liberty from both dogmatic and

38 Supra 4, 71.

39 Ernst Freund, *Police Power* (Callaghan & Co. 1904) 23.

40 Ernest Barker, *Principles of Social and Political Theory* (OUP 1951) 77.

jurisprudential point of view; to sum up and bring precision in this endeavour, the author wishes to broadly categorise civil liberties as: (i) the liberty of body (physical freedom), (ii) the liberty of mind (mental freedom), and (iii) the contractual liberty (contractual freedom). This classification is obvious due to the nature of uniqueness of the catena of freedoms that are ideally available to the subjects of a constitutional democracy in the form of civil liberties. These facets of civil liberties are further subdivided, discussed and conceptualised in the subsequent headings.

4.THE LIBERTY OF THE BODY:

The first facet of civil liberty is the 'liberty of the body'. It is also known as physical freedom. The history of mankind is the history of struggle for physical freedom. It is regarded as one of the seminal right along with food, cloth and shelter that an individual in any society deserves. It comprises mainly of two broad categorical freedoms. These are: (i) freedom from injury to human body, threat to the life and health, and (ii) freedom of movement.

It is a well-accepted fact that in a society governed by rule of law no physical injury can be inflicted upon a person except as a punishment for a crime duly proved and in accordance with provisions prescribed by law. This universally accepted connotation of procedural law at different times termed as *due process*, *proportionality*, *natural justice* and in ancient India we called it as *Dharma* of a good monarch. Kautilya in his *Arthashastra* opined that the king is under a moral duty not to inflict any injury or physical harm to his subjects without reason.[41] Learned author A. V. Dicey stated that a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification is violation of his liberty.[42] The UDHR[43] in Article 3 states, "Everyone has the right to life, liberty and security of person". Apart from it Article 9 of the same Declaration provides that, "No one shall be subjected to

41 https://csboa.com/eBooks/Arthashastra_of_Chanakya_-_English.pdf 61 accessed 13 April 2018.

42 A. V. Dicey, *Introduction to the study of the Law of the Constitution*(Universal Law Publishing Co. 2008) 189.

43 The Universal Declaration of Human Rights, 1948.

arbitrary arrest, detention or exile". Therefore, any physical injury on anybody without a valid process of law is considered to be against the established principles of civil liberty.[44] Any unlawful injury to human body, a threat to one's life, a threat to one's health etc. comes under this category of civil liberty. This also includes within its ambit right to life and right to privacy (right to seclusion). The liberty of body is regarded as the most important aspect for human life and in the absence of it mankind cannot attain their best.

Freedom of Movement, on the other hand, implies free mobility of a person without any restrictions.[45] Plato in his celebrated work *Republic* remarked that man comes to the station of life with his capacity and to allow a person to showcase his capacity without any hindrance reflects *justice*.[46] That justice as depicted by Plato can only be attained if there is a free movement in a society. Therefore, freedom of movement since time immemorial has been regarded as a seminal right of humankind. In a democracy, the right to move freely is a civil liberty of a person within the territorial limits of the state in where he is a citizen. Unless a reasonable restriction is made against such movement, he is free to move around the country. The right to movement not only allows a person to move freely within the country where he is a citizen but it also coupled with rights such as 'to buy a piece of land' and 'to build a home for his family'. The ambit of right to movement is so wide that it also encapsulates within its sphere the freedom to assemble peaceably (without arms), freedom of taking part in procession or march, freedom to form associations or union and freedom to reside and settle in any part of the state. Thus, freedom of movement as a civil liberty not only deals with the kinetic movement of a person but also extends to movement in rest.

The Constitution of India, under Part III encapsulates this first facet of civil liberty with modifications and restrictions. Articles 19, 20, 21, 22(the list is not exhaustive) of the Constitution of India recognises

44 M. C. Setalvad, *War and Civil Liberties* (Indian Council of Foreign Affairs 1946)5.

45 Ibid, 8.

46 http://www.idph.net/conteudos/ebooks/republic.pdf 17 accessed 15 April 2018.

this civil liberty as fundamental right in India. It has been witnessed that the higher judiciary in India through their judicial craftsmanship and zeal has widened the scope of these liberties.[47] However, there are exceptional cases where the judiciary has reluctantly discarded to interpret these liberties in their widest possible magnitude.[48]

5. THE LIBERTY OF THE MIND:

Liberty of mind or freedom of mind is the second facet of civil liberty. The competence of an individual as a rational being is mostly dependent on his ability to think, determine and act freely. In a democracy, liberty of mind is pertinent as it enables citizens as a part of democracy to exercise their political liberty. This is a universally accepted fact that men are the best judge of their capacity therefore they should be left free to decide about themselves. They are bestowed with power of reasoning by the nature and thereby they can detect right from wrong. They do not need any outside interference in their private affairs and lives. However, while living in a society driven by rule of law men has to follow certain reasonable restrictions. This paved the way for the emergence of the concept of liberty of mind as the second facet of civil liberty. It generally comprises our broad freedoms. These are: (i) freedom of speech and expression, (ii) freedom of conscience and belief,(iii) freedom of thought, and (vi) intellectual freedom.[49]

While, the freedom of speech indicates freedom to speak without any limitations or censorship, freedom of expression denotes both verbal and written communications.[50] Because of its universal nature, the freedom of speech and expression is recognised as fundamental right worldwide. The life breath of democracy is dependent on this civil liberty. Freedom of speech and expression denotes the liberty of an

47 *Maneka Gandhi v Union of India* AIR 1978 SC 597, *Manoj Narula v Union of India* (2014) 9 SCC 1, *K. S. Puttaswamy v Union of India*(2017) 10 SCC 1, *Lok Prahari v Union of India* WP(C) 784/2015, *Safin Zahan v Ashokan K. M. and Others* SLP (Crl.) No. 5777/2017 etc..

48 *A. K. Gopalan v State of Madras* AIR 1950 SC 27, *M. P. Sharma and Others v Satish Chandra* AIR 1954 SC 300, *A. D. M. Jabalpur v Shivkant Shukla*, AIR 1976 SC 1207, *A. K. Roy v Union of India* AIR 1982 SC 710, *Krishna Kumar v State of Bihar* WP(C) 6675/2016, etc..

49 Leon Whipple, *Our Ancient Liberties* (H.W. Wilson Co 1927) 11.

50 *Union of India v Naveen Jindal and Another* AIR 2004 SC 1559.

individual to express his opinion about anything under the sun. One can disagree with what others are saying but he can't deprive them from their right to freedom of speech only on that ground. Voltaire said that I may disagree with what you are saying but I will defend your right to say so until my death.[51] From this statement only we can understand the gravity of this liberty. The freedom of speech is not however an absolute right. Different restrictions (reasonable) can be put in the exercise of this right for the sustenance of a healthy democracy. This freedom is also not a stand-alone kind of right. Right to publication of the opinion, right to circulation of the opinion published, right to information (so that opinion can be expressed) etc. are integral component of the freedom of speech.

The freedom of conscience and belief has been the most debatable issue since time immemorial. Many scholars are of the opinion that it should not be a part of the civil liberty. Karl Marx while propagating his theory of economic liberty has held that religion as opium of the masses.[52] Although, freedom of religion is directly concerned with the personal liberty of an individual, the author has placed this freedom as a component of liberty of mind mainly for two reasons. Firstly, freedom of religion is directly connected with the freedom of speech and expression and secondly, it debars the state from propagating a specific religion. Thus, in the present context the liberty of conscience and believe includes: (i) liberty of conscience; (ii) free exercise of religion; (iii) religious pluralism; (iv) religious equality; and (v) separation of religion and the state.

The freedom of thought is an act of thinking freely on an issue without any undue restrictions and holding an opinion or idea even though, others do not like it. To deny a person to have the freedom of thinking is not only a sinister activity in religion but a crime equal to homicide.[53]

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51 Marek H. Dominiczak, Rationalism, Science, and Freedom of Speech: Voltaire http://clinchem.aaccjnls.org/content/62/5/789 accessed on 13 April 2018.

52 Karl Max,Contribution to the Critique of Hegel's Philosophy of Right, https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm accessed on 17 April 2018.

53 Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* (OUP 2017) 219.

It is, however not to be mixed with freedom of expression. In fact, freedom of thought is the root of freedom of expression. Therefore, freedom of thought is an essential condition of human growth and in the absence of it there will be no formation and creation in the society.

The intellectual freedom is an aspect of freedom of thought and thus falls in the category of civil liberty and hailed as a basic individual liberty worldwide. It is the intellectual freedom that enables scientists, innovators, scholars, writers etc. to create new avenues of thought to nourish the mankind.

Liberty of mind is thus, a set of special freedom in the absence of which no man can be at his best. The Constitution of India under Articles 19, 21 and 25 (again, the list is not exhaustive) recognises this liberty as fundamental right. Though, there are restrictions in the exercise of these instant freedoms as per the constitutional mandates; the constitutional courts in India have tremendously widened the ambit of it through judicial zeal and craftsmanship.[54] However, there are still some age old restrictions attached with this civil liberty which the judiciary must address.[55]

6. THE CONTRACTUAL LIBERTY:

The Contractual liberty or freedom of contract connotes the liberty of citizens while assuming legal relationship with others in their day to day affairs.[56] This third facet of civil liberty, though in recent times endured in abeyance from its ambit, held a very important place in the evolution of civil liberty. It encapsulates within its ambit three categories of freedoms. These are: (i) the freedom to contract and to do business, (ii) the freedom to marry a person of one's choice (as marriage is regarded as contract), and (iii) right to property.

The law of contract is in fact not only restricted to the offerer and offeree relations, rather it comprises of terms and conditions, promises

54 *Shreya Singhal v Union of India* AIR 2015 SC 1523, *Bijoe Emmanuel and Others v State of* Kerala AIR 1987 SC 748, *Shayara Bano v Union Of India and Others* Suo Motu Writ (Civil) No. 2 of 2015.

55 Defamation, sedition etc. under Article 19(2) of the Constitution of India.

56 John T. Carvell, 'The Evolution of Civil Liberty and Equality'(1953) 6 University of New Brunswick Law Journal 7.

and executions. It talks about a mutual agreement between parties to do certain thing or abstain from doing certain things. But, the trouble arises when the freedom of contract is exploited by a stronger party. Such situations may arise when the stronger party imposes certain disadvantageous terms and conditions on a weaker party. There emerges conflict and the notion of freedom of contract is violated. Thus, the modem judicial systems consider the freedom of contract as a civil liberty which must operate under reasonable restrictions and without any undue influence from any quarter.[57]

Another aspect of this liberty is that the citizens should be left free to decide with whom and for what they want to enter into a contract. As John Rawls said, "persons are at liberty to do something when they are free from certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other persons".[58] From this aspect, the freedom of doing business and occupation emerges as intrinsic to the liberty of entering into any contract.

The institution of marriage in modern times is viewed not as a religious rite but as a civil contract. Modern law recognises marriage as a social activity of two persons agreed to perform their side of contractual obligations.[59] The violation of which may led to termination of the contract. Therefore, the same principles of freedom of contract can be applied here also. Right to choose one's companion according to his/ her wish and absence of any restriction while doing so comprises the freedom to marry a person of one's choice.

The third component of contractual freedom is right to property. Though initially right to property was regarded as a basic liberty of individual but it has been excluded from the purview of civil liberties in the modern pseudo-socialist states. For this however, constitutional mandates like one of USA prior to its fifth amendment is responsible whereby slaves were regarded as the property of their masters. But, in a democracy we are enjoying today, it seems to be very fundamental to the author to consider right to property as a part of contractual liberty

57 Supra 2, 395.

58 John Rawls, *A Theory of Justice* (Harvard University Press1971) 202.

59 The Hindu Marriage Act, 1955; The Special Marriage Act, 1954.

as it is associated with the right to life and livelihood which is directly related to the freedom of occupation, business and trade. The right to property in this context, however, implies the possession of property owned rightfully. This is an act of ownership of physical and tangible things to which the owner can use, consume, rent and sale at his own will without any unreasonable restriction.

The contractual liberty has found its place in many democratic constitutions. The Constitution of India with modification partly accepts this civil liberty under Articles19, 21 and 23 as fundamental rights and in Article 301A as a constitutional right. The higher judiciary in India so far has not provide us with significant judicial interpretation accept in one aspect[60] of this civil liberty. Nonetheless, there is scope for more vigilant courtroom dynamics by our constitutional courts in this regard.

7. CONCLUSION:

An individual's civil liberty depends on his or her social and legal status.[61] The impression of civil liberty in a dictatorial or monarchical state will be absolutely different from that of a democracy. The right to freedom of speech and expression is a universally accepted civil liberty in democracy however the same definitely be not in the case of a dictatorship. Depending on the status of an individual in a state civil liberty differs. Even in a democracy, both the citizens and non-citizens may not be allowed to exercise similar kinds of liberty. Here, in this endeavour, the author only stressed on civil liberties that are supposed to available to citizens in a democracy.

Change in the lifestyle, technology, culture in the advent of time also may vary the notion of civil liberty. The right to choose one's own companion as a civil liberty may have to face defiance if claimed few decades earlier. Moreover, in any case an individual has to exercise his or her civil liberties by complying with laws and conventions of justice that distributes the rights and correlative duties in the society he or she lives.[62] The only thing that should be observed in this regard is that there shall not be any kind of unreasonable restrictions in the exercise of civil liberty.

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60 *Safin Zahan v Ashokan K. M. and Others* SLP (Crl.) No. 5777/2017.

61 Supra 6, 110.

62 ibid.

THE ENVIRO-LEGAL FACET OF INLAND WATERWAYS IN ASSAM

Chiradeep Basak[1]

What makes a river so restful to people is that it doesn't have any doubt- it is sure to get where it is going, and it doesn't want to go anywhere else-

Hal Boyle

Efficacy of Inland Waterways and North East India

The River route of North Eastern India is spread across 1800 kilometers. This river route has immense potential to be used by large country boats and steamers for water transportation as well as commerce. Both, central and state government have been endeavoring to promote and improve water transport system up lately.

When it comes to North East Waterways, river Brahmaputra, and its tributaries comes up front. Currently, it has several small river ports in existence along with 30 pairs of crossing points (commonly known as ferry Ghats).

As per the National Transport Development policy Committee Report, "*Northeast India has many large and small rivers providing facilities for water transport, especially in their plains sections. From the ancient period until roads were constructed, the Brahmaputra and Barak rivers were commonly used as the medium of transport.*"[2] Even during British period, these rivers were used extensively for trade and transport between Calcutta (Kolkata) and northeast India. In the year 1847, East India Company was active in this water route. Silchar, Dibrugarh were linked to Calcutta through this water route. Unfortunately, a major jolt to waterways was due to partition of 1947.

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1 Assistant Professor of Law, National Law University and Judicial Academy, Assam.

2 Planning Commission's Final Report- Working Group on improvement and Development of Transport Infrastructure in the North East for the National Transport Development Policy Committee, June 2012 at p. 88.

This riverine part of India offers great scope for development of Inland Water Transport. However, there are certain issues associated with the same. The issues are multi-faceted, viz:

- Inland waterways transport didn't receive attention in investments and policies;
- No private participation in inland waterways due to lack of any policies;
- Integration of north eastern region as an economic market like pre independence era vis-à-vis riverine transport system;
- Dire need of a multi model transport planning in North Eastern Region to take inland waterways transport to its maximum potential

The aforesaid issues can be addressed through certain effective strategies. However, while promoting waterways, environmental concerns cannot be discarded at any cost. An effective regulatory framework can only address the given environment and safety concern without jeopardizing economic development. Government of Assam, backed by World Bank's support is already in pursuit to ensure the safety and environmental conduct of waterborne transport operations in Assam. A new legislative framework is under its drafting process to regulate the transport services for the public benefit and support economically viable development of the industry. National Law University and Judicial Academy, Assam has been entrusted with this legislative drafting responsibility, with the aid of Government of Assam's Inland Water Transport.

The existing Indian legislations on waterways & its environmental provisions

Safety, Environment, and Economic factors are the three major prongs of this legislative trident. The Environmental scope mainly covers the issues relating to emissions by vessels, dumping of wastes and impact on aquatic species. In addition, there are certain common issues such as most of the big rivers of India enter the sea via shallow sand chocked delta channels and proper navigation is possible after dredging. The volume of water is another important component for

inland waterways; irrigation and agrarian aspects are also integral components in the entire scheme of inland waterways.

The Union Shipping and Surface Transport Ministry has aimed to boost nation's inland waterways just like national highways. The Inland Waterways Authority of India (IWAI) was established on 27th October 1986, for the development and regulation of inland waterways. IWAI is a statutory body that deals only with National Waterways while the other waterways are under the purview of State Governments. On 25th March 2016, the National Waterways Act was adopted. The said legislation has recognized 111 National Waterways. The government of India has approved 2.5% of total budget allocated for Centre Road Fund for National Waterways, which is equivalent to 2000 Crore. IWAI estimated that approximately 25000 crore would be required for development of identified projects on National Waterways till 2022-23. Under *Jal Marg Yojana*, following works are under process:

- Establishment of Multi modal terminals;
- New Navigation Lock;
- River Information System and development of fairways.

It has also been estimated that around 1.8 lakh persons would be employed with IWAI in next five years. Given economic prospects in the field of waterways portrays a positive picture. However, we cannot discard the precautionary measure that has to be adopted while drafting a law in regulating waterways.

At present there are following legislations in operation, which actively and passively deals with waterways:

- Inland Waterways Authority of India Act, 1985 and rules of 1986;
- National Waterways Act 2016;
- Merchant Shipping Act, 1958;
- National Waterway (Sadiya- Dhubri Stretch of the Brahmaputra River) Act;
- Major Port Trusts Act, 1963;
- Indian Ports Act, 1908;

- Major Ports Regulatory Authority Act, 2009;
- Inland Steam Vessels Act and its amendments;
- Multimodal Transportation of goods Act, 1993;
- The Indian Carriage of Goods by Sea Act, 1925;
- Coasting Vessels Act, 1838;
- Indian Bills of Lading Act, 1856;
- Marine Insurance Act, 1963;
- Merchant Shipping (Forms of Certificate of Insurance for Civil Liability for Oil Pollution Damage) Rules, 1985;
- Prevention of Collision on National Waterways Regulation, 2002;
- National Waterways, Safety of Navigation and Shipping Regulations, 2002

Amongst the aforementioned laws, some of the provisions exclusively touch upon environmental concerns.

Inland Waterways Authority of India Act, 1985

The given legislation primary empowers and imposes certain functions to the IWAI. The chapter III of the said legislation deals with transfer of assets and liabilities.[3] Albeit, there is no specific mention of environmental protection in the entire legislation but section 14 (1) (d) of the same, deals with waste dumping.[4]

Merchant Shipping (Forms of Certificate of Insurance for Civil Liability for Oil Pollution Damage) Rules, 1985 and 2008 amendments

As the title suggests, the given rules particularly deals with the civil liability factor associated with oil pollution, caused by any ship. The Director General of Shipping is the designated authority to ensure the compliance provisions of these rules. As per rule 3 of the 1985 rules,

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3 Section 11.

4 The authority may control activities such as throwing rubbish, dumping or removal of material, in or from the bed of the national waterways and appurtenant land, in so far as they may affect safe and efficient, shipping and navigation, maintenance of navigable channels, river training and conservancy measures.

a financial clause has been enunciated both for Indian and Foreign ships.

Inland Vessels Act, 1917 (amended in 2007)

This legislation primarily deals with survey and registration of the inland vessels. In addition, it also deals with carriage of goods & services, navigation and prevention as well as control of pollution. The amendment to the legislation in 2007 under its Chapter VIAB exclusively deals with prevention and control of pollution and protection of inland water. Section 54D of the same defines, hazardous chemical and obnoxious substance. Section 54E of the act deal with prohibition as to discharge of oil, oily mixture in inland water.[5] Under subsection 3 of section 54F, 'for the purposes of minimizing the pollution already caused, or for preventing the pollution threatened to be caused, the state government may direct, by order in writing, the owner or operator of an inland port, at cargo or passenger terminal to provide or arrange for provision of such pollution containment equipment and pollutant removing materials at such inland port, cargo and passenger terminal as may be specified in the order'.[6]

Inland Water Transport Policy

The given policy portrays Inland Water Transport being economic, fuel-efficient and environmental friendly mode of transport

Environment Impact Assessment Notification 2009

Item 7(e) in the list of projects mandating environmental clearance (EC) mentions *Ports, Harbors, Breakwaters, and Dredging*. The notification is silent about waterways. Maintenance dredging is exempted from EC provided it was part of the original proposal for which EC was obtained after preparation of an Environment Management Plan.

The Environmental Appraisal Committee while delivering its Terms of Reference(ToR) for the EIA for development of stretch of *Zuari* River, *Cumberjua* Canal and *Mandovi* River, clearly highlighted that

5 No oil or oily mixture, hazardous chemical or obnoxious substance from a mechanically propelled vessel shall be discharged in inland water.

6 Section 54E (3), The Inland Vessels (Amendment) Act, 2007.

"all projects related to ports and harbor >five million tonnes per annum of cargo handling capacity as well as capital dredging are listed at 7 (e) of EIA 2006 notification covered under category A and appraised at central level"[7]

However, in an affidavit of Ministry of Environment, Forest and Climate Change (O.A.No.487 of 2015)to honorable principal bench of National Green Tribunal, it has been stated that, "*as per EIA notification of 2006 and its subsequent amendment from time to time, ports, harbors, breakwaters, dredging falls under item 7 (e) are required to obtain prior environmental clearance.*"

The EIA notification has not incorporated anything on multimodal terminals, jetty and Inland Waterways and hence not covered under EIA 2006 yet. Albeit, Coastal Regulation Zone Notification 2011 deals with environmental clearance for estuarine and coastal areas but EIA's ambit needs to be widened and inland waterways should find a place in it to greater extent.

Environmental concerns vis-à-vis Inland Waterways

Environmental concerns related to navigation maintenance activities center largely on water quality issues.[8] Few problems with respect to Inland Water Transport are:

- River needs depth, all throughout the year for its viability for waterway. Unfortunately, we do not have enough level of water all throughout the year. For this problem, extensive dredging will be necessary, which might have tremendous impact on the ecological system of the river. Species like the blind Gangetic Dolphin (*Platanistagangeticagangetica*), which navigates by echolocation, already endangered, may be wiped out.[9] Although estuaries are ecologically sensitive areas but

7 *See* Ministry of Environment, Forest and Climate Change, letter dated November 26, 2016 to IWAI, available at http://environmentclearance.nic.in/writereaddata/public_display/circulars/56_UniEIANoti2006.pdfaccessed 20 July 2017.

8 Fowler R., Wood J., *et al*, Maintaining the Navigability of America's Inland Waterways 21 Nat. Resources & Env't 16 2006-07 p.17.

9 *See* Omar Ahmed, The Perils and Opportunities of Water Bases Transport, available at https://thewire.in/153314/perils-opportunities-water-

in addition to that, certain other specific areas have also been declared valuable with an impact on the ecosystem in its vicinity. In Assam (NW2), the Dibru Saikhowa National Park, Majuli River, Rajiv Gandhi Orang National Park and Dolphin Habitat, Kaziranga National Park are such eco sensitive areas.

- Dredging can also be very costly. The report prepared by RITES Ltd stated that to fully develop six National Waterways, it would require INR 227.63 billion (USD 3.53 billion) in government investment and INR 655.99 billion (USD 10.2 billion) in private investment, 80% of this during the five-year period of 2017-22.[10]

- In addition, there will always be a socio cultural impacts on the people dependent on the rivers and the creeks for livelihood.

All these might appear like hurdles but there are endeavors too to overcome these hurdles. A balanced approach is required for the same and analyzing the pros and cons properly before going ahead with any program can do that. The need for dredging river Brahmaputra also calls for precautionary measures. On April 4th, 2017 Union Ministry of Road Transport, Highways and Shipping has declared that government will dredge the Brahmaputra river from *Sadia* in Assam to *Chittagong* in Bangladesh.[11] One of the core issues as regards dredging is the determination of assessment and measurement of contaminated sediment to ensure that disposal of dredged material is safe.[12] The safe disposal of dredged material can cause incidental effects by disbursing pollutants and contaminants settled on the bottom of the ocean floor into the water column, changing the water flow and disturbing bottom living communities.[13] In addition, the analysis between commerce and

based-transport/accessed 17 July 2017.

10 *Id.*

11 *See* India to dredge Brahmaputra from Assam to Chittagong in Bangladesh, available at http://www.hindustantimes.com/india-news/india-to-dredge-brahmaputra-from-assam-to-chittagong-in-bangladesh/story-sPSbaRIPrizEwIuFICzh3H.html (last visited on July 19, 2017).

12 Melnick, Robert S., Dredging: Making Waves for Commerce or Environmental Destruction, 19 Vill. Envtl. L.L. 2008 p. 145.

13 *Id* p. 146.

environmental impact should be balanced, while considering dredging projects.

Dredging and aquatic ecosystem: Lessons from United States legal framework

Dredging maintains navigable waterways for commercial, recreational, and national defense purposes.[14] Unlike United States of America's National Environment Protection Act and Clean Water Act, Indian legislations are silent about the environmentally acceptable dredging process. In India, the one and only *mini ratna* category I public sector undertaking, Dredging Corporation of India (DCI) deals with major dredging services for the waterways departments and Ports. DCI was incorporated as a private company at first in the year 1976. However, on March 10th, 1992, it was converted in to a public company. DCI is actively rendering five major services, which includes: Capital Dredging, Maintenance Dredging, Beach Nourishment, Land Reclamation, Shallow Water Dredging and Marine Construction.

Since, we don't have an exclusive legislation in India with respect to dredging that takes care of both environmental concerns and economic benefits, we should consider enshrining one. National Waterways 2 will be a major economic boost for, not only Assam but also North East India.

In order to enshrine a comprehensive legislation for establishing a Regulatory Authority for Inland Water Transport and two subsidiary companies for ports and vessels regulations, a series of problem articulation is already underway.

Reflecting back on the legislative frame on dredging, we came across Marine Protection, Research and Sanctuaries Act (commonly known as Ocean Dumping Act). This is the primary law in United States of America in addition to the aforementioned Clean Water Act, which governs transportation of dredged materials. The disposal part however

14 *See* United States Environment Protection Agency, Evaluating Environmental Effects of Dredged Material Management Alternatives: A Technical Work, available at https://www.epa.gov/sites/production/files/2015-09/documents/2004_08_20_oceans_regulatory_dumpdredged_framework_techframework.pdfaccessed 24 July 2017.

comes later because Environment Protection Agency has guidelines for dredging, which cover planning, testing, evaluation, beneficial uses and ocean dumping sites. EPA and Corps Regulations enshrine the procedures for ocean dumping permits.[15]

The planning stage involves the local groups and a National Dredging Team. This team comprises of members from EPA, Corps, Maritime Administration, National Oceanic and Atmospheric Administration's National Marine Fisheries Service, Fish and Wildlife Service and United States Coast Guard. The testing and evaluation stage covers a manual, which is commonly known as 'Green Book'. This manual guides the process for ocean disposal of dredged material. The disposal mechanism also provides an alternative in form of a roadmap, where EPA and Corps identify environmentally sound/acceptable management of dredged material. Here, comes a major step, which we also wish to incorporate; i.e. an Environmental Impact Assessment of the dredging. At present, in India, we have an Environment Impact Assessment Notification, which involves, screening; scoping; public participation and publication of environment assessment report before establishing an industry. A similar frame shall be proposed in this draft legislation for dredging and inland waterways transport which shall be in consonance with the Environment Impact Assessment Notification 2009 (as mentioned above). However, alternative should be a least expensive plan with strict compliance with an environmental regulation.

For dredging in NW-2, IWAI has employed two cutter suction dredger units and two hydraulic surface dredger units in the different stretches of NW-2 as per the requirement for maintenance of Least Available Depth (LAD). Dredging in NW-2 is undertaken, whenever and wherever required, for ensuring smooth navigation of vessels.[16] India and Bangladesh have also signed a protocol on Inland Water Transit and Trade on June 6th, 2015. Indian government would dredge the Brahmaputra river on its side and the Bangladesh authority would

15 Supra 6, p. 149.

16 Press Information Bureau Government of India Ministry of Shipping, Development of Inland Waterways in Assam, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=159375accessed 25 July 2017.

dredge the river on their side.[17] India shares fifty four transboundary rivers with Bangladesh. Bangladesh's inland water transport can also be a lesson for India. More than 30% of Bangladesh is through inland waterways. In addition, BBIN (Bangladesh, Bhutan, India, Nepal) group should have a multilateral agreement with respect to waterways. There is one motor vehicle agreement within BBIN group but Bhutan objected for the same but with respect to waterways that might not be an issue, as large vessels do not navigate in Bhutan Rivers. Inland water transport is much more environmental friendly than road transport. The reasons are quite legit and clear. As RITES-IWAI report rightly mentions that Inland Waterways have least fuel consumption per tonne-km, CO^2 emission is 50% less than trucks, creates less noise pollution, land requirement for the same is negligible and it is safer mode for hazardous and over dimensional cargo.[18]

Safety dimension of the proposed legislation & concluding remark

Following activities will prevail within the scope of activities under the legislation:

- Operators' safety and sustainable environment management systems;
- Emergency response procedures; &
- Precautionary and preventive regulations.

Operators' safety and EMS- flood is a major challenge in Assam. Promulgation of climatic information and warnings shall be necessary. Disaster management authorities and even companies shall have a mandatory well-designed and strategized ready-made action plan in case of emergencies. In addition, the law intends to

17 *See* India, Bangladesh to Establish New Waterways Using Brahmaputra (Northeast Today, July 23, 2017) available at https://www.northeasttoday.in/india-bangladesh-to-establish-new-waterways-using-brahmaputra/accessed 25 July 2017.

18 RITES Final Report, Integrated National Waterways Transportation Grid Study Stage 1 of phase II, available at http://www.iwai.nic.in/WriteReadData/l892s/INT_NAT_WAT_TRA_GRI_STU_Part1_3-26947128.pdfaccessed 25 July 2017.

impose responsibilities upon the operators/companies for safety and environmental compliance.

Emergency response procedure- Coordination among the agencies will be the backbone of this aspect. The communication and coordination amongst fire fighting, medical support, disaster management authority and other environmental protection agencies like pollution control board and state biodiversity board.

Preventive measures- the proposed legislation will also encompass preventive and precautionary regulations for vessels designing, passenger ferries, and hazardous cargo vessels. Navigation rules, loading/unloading hazardous cargoes, waste discharge/disposal are some of the other key components that will be within this framework.

Hence, the ambitious legislation will not only give birth to a regulatory body for Assam's inland waterway transit but also two subsidiary companies for vessels and ports management. With the objective to ensure safe and ecologically sound waterborne transit operations in Assam, this legislation will try to attain sustainable development goals and benefit maximum people of India, without jeopardizing environment.

KASAB'S DEATH PENALTY: A REVIEW ON ITS VALIDITY

Jayanta Boruah[1]

Human beings are blessed by the Nature to have the abilities for thinking rationally, acting intelligently and living a life with a dignity which is above all other living creatures. This is why we call for a separate domain of rights to be enjoyed by a broader humanity which is none other than the infamous 'Human Rights'. But as time passed, we entered into a generation where most people including the eminent scholars, jurists, academicians, social and political activists, and such other people are advocating that certain sections of humanity shall be deprived of all kinds of human rights, since they do not deserve to be held as human beings, and this section include broadly the cross border terrorists for whom killing people and violating their human rights is just a matter of bread and butter. This is the cause for which several country courts besides showing a high standard of legal civilization favours for death penalty. But on the other side there are Human Rights Activists who oppose the notion of 'Death Penalty' on the ground that it is derogatory to the status of present human civilization and so therefore the legal mechanism shall avoid such measures as a kind of penalty. Based on some of such arguments, I will try to provide an opinion on the issue of Kasab's death penalty by virtue of this article. My aim is not to criticize any of the stands for or against this activity but rather will just try to express my views as a citizen of India in general and as a student of law in particular.

In India the status of death penalty was decided to be enforceable in "Rarest of rare case"[2] where the aggravating grounds were laid down by the Supreme Court but that case involved a national citizen. But here in this case an international terrorist Ajmal Kasab belonging to Pakistan who killed near about 169 people in 26/11 attack in Mumbai with a conspiracy of waging war against the territory of

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2 Bacchan Singh v State of Punjab [1980] 2 SCC 684.

India, it is even more than just being a rarest of the rare case so his death penalty was absolutely held justified. While R. Jagannathan advocating this sentence of death penalty said "I would argue that all cases involving political assassinations, terrorism, or pre-planned mass murder of any kind are deserving of the death sentence. Keeping such people alive poses greater dangers to society and outweighs the moral compunctions involved in hanging them"[3] This shows an urgent need for putting an end to the life of such terrorists in order to avoid dirty game over citizen's life by few indecent politicians. However, this decision was criticized by several Human Rights activists, for instance Human Rights Watch South Asia Director Meenakshi Ganguly said "Kasab's killing marked a concerning end to the country's moratorium on capital punishment. Instead of resorting to the use of execution to address heinous crime, India should join the rising ranks of nations that have taken the decision to remove the death penalty from their legal frameworks"[4] This argument holds a good stand for defending our legal civilization in contemporary times.

Above arguments are valid in their own ways, I am neither criticizing the death sentence on Kasab nor am I supporting it with any partial pre-conceived notion. What I am trying exactly is to highlight some of my opinions as regard to this issue. As we all know that if Kasab remained alive then it may have caused a threat to the security of the nation, since we are well aware about the plane hijacking incident for liberation of some dangerous international terrorists during the tenure of the then Prime Minister of India Mr. Atal Bihari Vajpayee, similar incidents may be repeated again. Further advocating Kasab's human rights make no logic since he could not be treated as a human being only because he possesses physical attributes as that of a human

3 R Jagannathan' For terrorists like Kasab is the death penalty justified?' [23 November 2012] Firstpost <https://www.firstpost.com/india/in-kasab-type-terrorism-case-death-should-be-mandatory231493.html> accessed 15 October 2018 22:45:55.

4 J. Balaji 'Human Rights Group Slam Government' [18 October 2016 15:13 IST] The Hindu <https://www.thehindu.com/news/national/Human-rights-group-slam-government/article12515883.ece> accessed 13 October 2018 20:34:45.

being,psychologically his mentality was more deteriorating than the most dangerous animal ever in existence in the whole universe. Again, India's reputation relating the abolition of death penalty, also in my opinion holds no good here, since India being a sovereign country shall have the right to defend her territorial integrity to her fullest possible extent including also the right even to punish those who create threat to such integrity and if needed then with capital punishment too.

However, I would also like to put my stand against such a penalty. It is not because of human rights advocacy, neither I am worried about absolute abolition of death penalties but because of certain other grounds. I believe that Kasab's death may satisfy the demand for justice for those who had suffered the loss of that 26/11 attacks as a source of reverence, but other than that I do not believe that it served the cause of deterrence to the future terrorists. In short, the punishment served only as a satisfaction to citizen's resentments but not a way for reducing such terrorism, because it is obvious that when those terrorists entered India they knew it very well that they won't be surviving this country's security defense for a long time, and also they were well aware about the fact that they will never be able to return back safely. As such they were sure about their death, in such a situation killing them, I do not think served the purpose of deterrence in any way. Therefore, besides killing him in reality, the government could have exposed about his death in fake and kept him alive so that in future no one commits any atrocities for his release. The government could have then asked for medical support team specially the psychological experts to influence his brain, if possible to control it in such a manner that he gets reformed and he himself calls for fellow generations not to choose the way which he had chosen, this might have worked in the way of showing the future generations the right direction to approach, since I believe besides the scholars educating them if they are exposed to real experiences where people belonging to their own community are requesting rather suggesting not to go in that direction which now that person believes to be a wrong way. However, it is just my assumption, it may not be possible to do it in practical but still I have immense faith on our medical science abilities.

Further, he could have been used as an object for experiments which involve risks of loosing human lives, since he was already going to be killed or in fact he does not deserve to be kept alive. Therefore besides using our own citizens in such risky experiments, he could have been utilized, since there arises need of such persons on certain occasions where human life is to be taken for granted. Moreover, the great academicians, psychologists, criminal investigators and such other scholars could have used his presence for conducting research to study the grounds and behaviour of such dangerous terrorists which might have been of greater use for future encounter of terrorism, since terrorists are not born as terrorists from their mother's womb, besides they are made terrorists by several economic, social, political and such other psycho-physical factors. A study in this matter would have been a great achievement.

However, we must acknowledge the fact that it is much easier to comment by sitting at home while in reality it is much difficult to execute such ideas into action. I therefore appreciate whatever has been done by all those who are both in support and also in against of this decision but at the same time I just believe that this article will enlighten to some extent the rationality of the decision takers while taking such decisions again in future, if situation arises.

JURISPRUDENCE AROUND THE PROMOTER'S BID UNDER INSOLVENCY AND BANKRUPTCY REGIME: AN ANALYSIS

Ayushi Gupta[1]

Abstract

The Insolvency and Bankruptcy Code, 2016 is one of the game changer legislations in India in the field of corporate governance. It has undergone many major amendments recently. These were the consequence of the inputs received from the market members. Inadequacies will undoubtedly exist in this new enactment. However, these are in effect taken care of in an attempt to maintain the sanctity of the process.[2] *One of the challenges that credit delivery mechanism of India faces today is the rise of Non-Performing Assets (NPAs)*[3] *which is estimated to be a total of 8.4 lakh crore.*[4] *One of the main criticisms faced in the working of the Insolvency and Bankruptcy Code (IBC) until now has been the claim that former promoters collude with resolution professionals and members of the committee of creditors (CoC) to subvert the IBC process to take control of the corporate debtor.*[5] *In an endeavor to address these growing concerns the President of India on 23rd November 2017, introduced the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 ("Ordinance"). The Ordinance, in addition to other things, has come up with safeguards to*

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1 B.A., LL.B.(Hons.) 6th Semester, Institute of Law, Nirma University.

2 Swati Sharma and others, 'Bankruptcy Code: Ghost of Retrospectivity Returns To Haunt' (*Nishith Desai Associates*, 2017)<http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single view/article/bankruptcy-code-ghost-of-retrospectivity-returns-to-haunt-1.html?no_cache=1>accessed 23 March 2018.

3 S.G Choudhary, 'Insolvency and Bankruptcy Code – Role Of Promoters in Resolution Process' (*Business Economics*, 2018) <http://businesseconomics.in/insolvency-and-bankruptcy-code-%E2%80%93-role-promoters-resolution-process> accessed 23 March 2018.

4 Prannav Khanna, 'Debarring Promoters from bidding for their Own Company' (*TaxGuru*, 2018) <https://taxguru.in/corporate-law/insolvency-bankruptcy-code-amendment-ordinance-2017-debarring-promoters-bidding-company.html> accessed 23 March 2018.

5 Uday Khare, 'Resolution Plans Under The IBC – Who Can Propose, Who Is Affected? Here Is What We Know So Far' <http://blog.mylaw.net/resolution-plans-ibc-propose-stakeholder/> accessed 23 March 2018.

keep unscrupulous people (comprised of promoters, persons who manage the company and connected persons) from exploiting and contravening the provisions of the aforementioned statute. Thus, the promoters who assets have been termed as non performing for a year or more and who could not repay the overdue amount and interest have been barred from taking part in bid. The object[6] is to prevent willful defaulters from submitting resolution plans. Thus, it meant to strengthen what is known as insolvency resolution process[7] which can help India to scale up its rank of 103 in ease of doing business[8]. The ordinance raises some questions which are should the promoters of the company be prohibited from the resolution process since they have a non performing asset(NPA) account? Is it certain that all the non-performing assets (NPAs) are consequences of poor management? Are all promoters unscrupulous and crookwho siphon away public money? These questions will be examined in detail in the later part of the paper.

BACKGROUND

Need for the Ordinance

Rise of NPAs in banking industry works as catalyst for the economy of nation. They are not only responsible for country's financial intermediation, but they have the extra duty to achieve the government's social agenda. Because, of this connection between banking and economic development,the growth of the whole economy is essentially related to health of the banking sector[9]. The rise of the NPAs has become one of the main concerns for the banks in the country. They are one of the best criteria for assessing the health of banking sector. High levels of Non-Performing Assets (NPAs) are indicative of high

6 Sharma (n 1).

7 Anant Bakkliwal, 'Recent Changes in the Insolvency and Bankruptcy Code' <https://blog.ipleaders.in/recent-changes-in-the-insolvency-and-bankruptcy-code/> accessed 23 March 2018.

8 Vatsal Khullar, 'Doing Business in India' <http://www.prsindia.org/theprsblog/?tag=insolvency-and-bankruptcy-code> accessed 23 March 2018.

9 *Growing NPAs In Banks Efficacy Of Credit Rating Agencies* (ASSOCHAM 2018) <https://www.pwc.in/assets/pdfs/publications/2014/growing-npas-in-banks.pdf> accessed 24 March 2018.

probability of innumerable defaults which affects the ability of banks to give loans and willingness to further lend money. Thus, it influences the profitability and liquidity of the banks. Efforts should be made to reduce and control NPAs so that the efficiency of banks can be improved.

Presently, *India ranks at fifth with Non-Performing Assets (NPAs) ratio of 9.85 as of 2017 among the countries with the highest Non-Performing Assets (NPAs).* These countries include Russia, Hungary, Spain, Italy, Greece, Ireland, and Portugal. It also stands top among the BRICS nations[10].

Before, going into analyzing the credibility of the 'Ordinance' it is necessary to understand the basic terminologies associated with it.

- *Resolution plan*-A resolution plan is considered a proposal which seeks to present resolution to the problems and issues of the corporate debtor's insolvency and its subsequent failure to repay the debts.[11] Approval of seventy-five percent of the Committee of Creditors is needed, and it has to abide by some mandatory prerequisites stipulated in Insolvency Bankruptcy Code.[12] Once it is approved, the Resolution Professional (in short RP) after ensuring that the plan satisfies those conditions will send the plan to NCLT. NCLT can then pass an order approving the plan after being convinced that the plan satisfies the conditions.[13] Apart from the prerequisites, the IBC does not put any restriction on the form and manner of a resolution plan. A plan could therefore be about the purchase of the equity shares, corporate debtor's assets, financial "haircuts" which creditors take and infusion of additional debt etc.
- *Committee of Creditors (CoC)* - It consists of *non-related*

10 Mradul Mishra, *NPAs a Global View* (2017) <http://www.careratings.com/upload/NewsFiles/SplAnalysis/NPAs%20Globally%20speaking.pdf> accessed 24 March 2018.

11 Khare (n 4).

12 ibid.

13 ibid.

financial creditors.[14] It, is the duty of the CoC to make best attempt towards the resolution at least in situations where the enterprise value is more than liquidation value[15]. The task of the Committee of Creditors (CoC) is to select the best resolution plan which may come from the promoters i.e., a *plan that balances each stakeholder's interest and maximizes the value of assets even though it may come from the promoters*[16]. In, the case of *Prowess International Ltd. Vs. Parker Hannifin India Pvt. Ltd.* The NCLAT said, "*Rather than intervening with the order, we are remitting the case to the adjudicating authority to satisfy whether the interest of every stakeholder has been satisfied."*[17] Committee of Creditors has also been relied on to prepare a due diligence to ensure that persons who submit and implement the plan are reliable to keep the company from going into liquidation in case if it did not stick to the resolution plan.[18] These disclosures have been set down to permit this committee to evaluate the credibility of applicant. This will help them take a prudent and informed decision while considering the resolution plan for its approval.[19] Therefore, CoC is put in a unique position of a custodian of a corporate structure[20].

First Resolution Plan

The purpose to enact the Insolvency and Bankruptcy Code, 2016 is to clean up the mess made in repayment of the loans by the defaulters who takes a huge amount of money from the banking and financial institutions.

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14 Khare (n 4).

15 Dr. M.S Sahoo, *Insolvency Resolution Process* (5th edn, 2017) <http://www.ibbi.gov.in/news_letter_Oct-Dec17.pdf> accessed 23 March 2018.

16 ibid.

17 Choudhary (n 2).

18 Choudhary (n 2).

19 Anupam Choudhary, 'The Ability of Promoters to Bid for their Own Companies in Insolvency' <https://indiacorplaw.in/2017/11/ability-promoters-bid-companies-insolvency.html> accessed 24 March 2018.

20 Dr. M.S Sahoo, *Balancing the Interests of Stakeholders* (4th edition, Insolvency and Bankruptcy Board of India 2017) <http://www.ibbi.gov.in/IBNNOV2017_13.pdf> accessed 23 March 2018.

This object was jolted when the National Company Law Tribunal (NCLT) approved the very first case of resolution plan.[21] The case relates to the leasing of assets of Synergies Dooray Automotive Ltd., a Hyderabad based company to Synergies Castings. Later on, Synergies Dooray to get control over the insolvency resolution process transfers its debt from Synergies Castings to Millennium Finance who ultimately gets a position in the Committee of Creditors (CoC). One of the[22] creditors i.e. Edelweiss Asset Reconstruction Co. objects to this, however, NCLT dismisses its contentions and approves the resolution plan under which Synergies Castings gets the right to acquire Dooray for Rs. 54 crore while the company owes debt of 900 crores to its lenders[23]. The persons who were the promoters have shown their interest in submitting resolution plan for their own companies.

The case portrays how the management purchased its own assets at a huge discount while the lenders (bankers) had to suffer. In short, *Committee of Creditors consisting of Millennium Finance was a related and interested party to Synergies Dooray*. It could not have in any circumstance considered the interest of all stakeholders, one of which is the secured creditor Edelweiss Asset Reconstruction Co. Even after this NCLAT disregarded the contentions of Edelweiss and approved the plan. In, the case of *M/s Nowfloats Technologies Pvt. Ltd*. NCLT held that the *"Purpose of the resolution process is to benefit the general body of creditors. It is a representative suit which is not limited to recovery of money of an individual creditor."*[24] Thus, NCLAT in the instant case not only disregarded the condition that committee of creditors should consist of non-related financial creditor but also overlooked the fundamental principles which were laid down by the NCLT in the earlier cases.

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21 Khanna (n 3).

22 Payaswini Upadhyay, 'Has India's First Insolvency Resolution Approval Set a Dangerous Precedent?' (*BloombergQuint*, 2018) <https://www.bloombergquint.com/technology/2018/03/23/tesla-shows-signs-of-a-model-3-surge> accessed 23 March 2018.

23 Khanna (n 3).

24 Sahoo (n 14).

The centre by passing the ordinance changed the rules of the game so that cases like this never occur again.

AMENDMENT IN THE INSOLVENCY AND BANKRUPTCY CODE,2016

Position before the Amendment

Before the passing of the ordinance, "any person" could present a resolution plan to the resolution professional and be named as resolution applicant. By, becoming[25] a resolution applicant the person can give suggestions in regard to the way in which insolvency resolution process could be carried out. In the majority of the situations, the case was that the existing promoters who was responsible for damaging the assets and at the same time didn't repaid the money to lenders happen to be interested to purchase the same asset at a low price because of the huge discount. If this was permitted, *it will promot the system to first default then regain the same asset at a huge discount. As, we know that such assets are funded by the bankers which use the public money it will be public money on which the promoters will be taking advantage*[26].

Post Amendment

Now, the ordinance has made it compulsory for a resolution professional to call for the invitation of the potential resolution applicants (who fulfill the required criteria and conditions) to submit resolution plan.[27] Additionally, a resolution professional with the prior permission from the committee of creditors may set down strict eligibility criteria for the applicants submitting resolution plan according to Section 25(2)(h) of the code. As, per the amended Section 30(4) it is the duty of the committee of creditors to reject a resolution plan which was submitted

25 Kumar Saurabh Singh and others, *Insolvency Code Amendment | A Follow up with Clarity* (2018) <https://www.khaitanco.com/PublicationsDocs/Mondaq-KCOCoverage8Feb18KSI.pdf> accessed 23 March 2018.

26 Khanna (n 3).

27 *President Promulgates Amendment to Insolvency and Bankruptcy Law* (India Business law journal 2018) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/180124_Q_President-promulgates-amendment_India-Business-Law.pdf> accessed 24 March 2018.

prior to the commencement of the ordinance if the applicant was found to be incompetent under Section 29A. Thus, the ordinance is retrospective in nature[28]. The intention behind this amendment was resolution plan should come from a person who has credible record and can deliver the same.

The new Section i.e., 29A of the code now bars certain class of persons from submitting the resolution plan. A person shall be disqualified from submitting resolution plan if such a person or any person operating jointly with such a person or any promoter or in the management or control of such a person[29]:-

- Is an undischarged insolvent.
- Has been recognized as willful defaulter by the Reserve Bank of India (RBI).
- A person whose account is termed as non-performing asset by the RBI and period of one year or more has been passed from such classification. Additionally,one who has not paid their overdue amount with interest and charges with respect to NPAs before submitting the resolution plan.
- If the person has been previously convicted of any offence the punishment for which is two years or more.
- If under the Companies Act, 2013 one is prohibited from acting as director.
- The Securities and Exchange Board of India has barred any person to trade in securities or evaluating the securities market.
- Has involved in any kind of preferential or undervalued or fraudulent transaction relating to which an order has been passed by the adjudicating authority.
- Under insolvency resolution process or liquidation under the IBC has put into effect an enforceable guarantee to a creditor.
- Lastly, any connected person in relation to aforementioned

28 Sharma (n 1).

29 Khanna (n 3).

persons shall also be prohibited from submitting resolution plan.

Connected persons include:-[30]

- A Promoter of a company or in management of a resolution applicant or in control of business of a corporate debtor
- A holding, subsidiary, associate company or any person who is the related party of the resolution applicant or of corporate debtor including few exceptions.

However, the act also provides for certain exceptions. The act exempts scheduled commercial banks and asset reconstruction companies considering that they have diversified holding and investor base.

ANALYSIS

This amendment does not put a total ban on promoters trying to get control of their companies. The Restriction is put only to them whose accounts have been termed as "non-performing assets" for more than a year. Thus, it means that promoters of the company who have been barred before from repurchasing the stressed assets can now bid in auctions, but they have to pay their dues on NPA accounts. So that means that only those promoters are prohibited to participate in a bid that didn't pay the interest on loans. Promoters who are not declared willful defaulters and who doesn't own an NPA account will not be disqualified. Thus, it settles the earlier position in this respect.[31]

Positive Consequence-No Misuse

The ordinance to amend the Insolvency and Bankruptcy Code, 2016 efficiently tightens the screws around deceitful promoters to take control of their companies as soon as they are compelled to file for bankruptcy.[32] Earlier, the eligibility criteria used was pretty facile.

30 ibid.

31 Khanna (n 3).

32 Nidhi Singh, *Why Bankruptcy Ordinance May Need More Fine-Tuning* (2017) <http://www.ibadvisors.co/wp-content/uploads/2017/11/Why-bankruptcy-ordinance-may-need-more-fine.pdf> accessed 24 March 2018.

For example, Section 36 of the IBBI regulation incorporates the word "any potential applicant" to submit a resolution plan. This is very vague word and any person by hook or crook can become a resolution applicant[33]. In a simple language, this new change will bar the willful defaulters to regain control over their insolvent companies which was easily possible before.[34] In some cases, promoters used the shell companies to get control over their companies.[35] This step will prevent promoters from misusing the bankruptcy law.

Transparency Maintained

The amendment act of 2017 not only includes borrower who is at default and whose account has been termed as NPA for more than one year but also covers a person who manages or controls such a defaulter. Now, before submitting the resolution plan it would become mandatory for the applicants to reveal details not only about themselves but also of the persons operating jointly with them. Furthermore, this move impacts and tries to cover persons who may be impacted by disabilities in jurisdictions apart from India thereby it broadens the scope of 29A.[36]

Negative impact

This amendment has imposed stringent limits and restraints on prospective suitors to be able to submit a bid for stressed assets.[37] Imposing such broad qualification criteria as required to be achieved by the ordinance, will limit the participants and will ultimately influence price discovery[38]. It will be surprising to see the reaction of the promoters, who are now barred from submitting the resolution plan, who have defaulted because of the factors which are outside of their control especially in a sector such as Infrastructure (for instance litigations relating to land, taking long time in obtaining approval).

33 Bakkliwal (n 6).
34 Singh (n 24).
35 Choudhary (n 17).
36 Sharma (n 1).
37 Sharma (n 1).
38 ibid.

Moreover, the ramifications of who is now considered incompetent to submit the resolution plan might have inadvertent repercussions might also bring in its ambit financial investors[39].

Voting Rights of Operation Creditors

It is very unfortunate to note that the role of operational creditor is constrained to a mere spectator in spite of the amount of the debt due. He doesn't have a say in approving the resolution plan. Section 21(2) lays down that committee of creditors (CoC) will consist of financial creditors only in case a person is both i.e., financial and operational creditor then that person is permitted to vote to the extent of his financial debt. Besides, those operational creditors who have a total due of not less than 10% of the aggregate debt can attend the meetings so all the operational creditors do not have the right to attend the meetings of the CoC. Even, though these creditors are given the right to present a resolution plan, but the committee consisting of financial creditors only will approve it[40].

Possible Outcomes

The period to which the applicants under Section 29A are disqualified has not been indicated. This could result in an interpretation where a permanent ban is imposed on disqualified persons from taking part in corporate insolvency resolution process (CIRP).[41] It is crucial to take note of Article 19(1) (g) of the Constitution of India which ensures all its citizens the fundamental right to practice any profession or to carry on any occupation, trade or business subject to reasonable restrictions according to Article 19(6). This ordinance might be argued and construed to impose unreasonable restrictions; thus, taking the fundamental right of a certain class of persons thereby violating article

39 ibid.

40 Bakkliwal (n 6).

41 Amit Ronald Charan and Satish Anand Sharma, 'Insolvency Ordinance: A Boon or A Bane?' (*India Business law journal*, 2018) <https://www.vantageasia.com/insolvency-ordinance-boon-bane/> accessed 24 March 2018.

19(1)(g)[42].

TWO SIDES OF THE COIN: WHAT AMENDMENT FAILED TO ADDRESS

- **Impact on other Enterprises:** The ordinance promulgated by the government shows an absence of faith in the organizations and system engaged in the prevention of collusion and corruption.[43] Though the former promoters might not be preferable resolution applicants many times considering the number of cases wherein fraud of creditors and mismanagement of the accounts are suspected, they remain a chief source of the resolution plans.[44] Enterprises where the promoters are the only probable bidders will be largely influenced. This includes micro, small and medium-sized enterprises. These unsought outcomes may not just push the company further to go into liquidation rather in resolution and will, likewise, be impeding the interests of various stakeholders including exchequer[45].
- **Impact on the business:** In various sectors – *sector specific knowledge, understanding and technical know-how of that particular sector is significant to run the business.* There are many issues and challenges which arise in a business which a person having experience in that business can address. Due to the knowledge and emotional association with the corporate debtor and its business the promoters remain not only the most reliable candidates but the most competent and skilled ones[46]. They must be relied and trusted by the creditors.
- **Impact on honest promoters:** Though the purpose of the ordinance appears to guarantee that promoters who are a delinquent and persons associated with them are kept from recapturing control of business assets of corporate debtor,

42 ibid.

43 Khare (n 4).

44 ibid.

45 Sharma (n 37).

46 Choudhary (n 2).

it might likewise, have unfavorable outcomes for promoters who are law abiding to meet their commitments. *This may discourage honest promoters to enter into the business or make the promoters reluctant to borrow for business development either of which hinders the culture of entrepreneurship and startups which the government hopes to promote.*The ordinance may restrict employment generation and economic growth.

- **Impact on potential bidders:** The option which potential investors had to bid together or in association with the existing promoters is removed. The move by prohibiting promoters to participate in the bid might also considerably reduce the number of bidders who have expressed interest, in this manner the competitiveness of the corporate insolvency resolution process (CIRP) is hindered.[47] This ordinance tries to persuade the promoter to pay off the creditor's dues so that they can come clean although it might; likewise, influence business valuations coercing the creditors to agree to substantial haircuts.
- **All promoters are not the same:** The fact that company defaulted in its payment of debt because of the promoter can't be criteria for the Committee of Creditors (CoC) to reject a resolution plan which was submitted by the promoter[48]. There might be variety of business factors due to which stable companies are declared insolvent for which the promoters are not solely responsible. *These factors can be increase in the cost of production, new competition, economic slowdown, change in policies and factors outside their control.*[49] It should not be assumed that only mala fide intent can result in Insolvency[50].

47 Sharma (n 37).

48 Choudhary (n 17).

49 Khanna (n 3).

50 Khare (n 4).

- **Learning from other country(possible solution):** Countries that have very low level of NPAs could set great precedent while trying to bring any change in India's legal regime. Some of these countries include *U.S., Sweden, Singapore, Norway, Japan, and Malaysia. These countries have ratio of NPAs in the range of 1.6 to 1.04 as of 2017* [51]. The legal framework of these countries can be taken into consideration. For, example in U.S. bankruptcy system the preexisting promoters can be permitted to have a stake in the reorganized company provided they put a new value which is equivalent to the new stake and this plan is accessible to other prospective bidders. Moreover, it is the duty of the presiding court to ensure that the reorganization plan is neither unreasonable nor biased to the creditors who objects to the plan. These standards are not without controversy in the US though they illustrate a rational way to deal with the problem of promoters taking part in reorganized firms rather than forbidding them.[52]

CONCLUSION

In recent times, there has been so much deliberated about whether the promoters of insolvent company can participate in a bid for an auction for their own company. In the given context the capability of promoters for bidding their own companies creates several debatable issues. For instance on specific events it may be that money has been transferred by corrupt promoters from the companies or the precarious financial situation of the company is the result of the promoter's action. In these circumstances, it becomes extremely unreasonable for the creditors who have taken a large haircut to let the promoters to have their company without paying any cost.

In this context, On 7 November 2017, a notification was issued which amended the Insolvency and Bankruptcy Code, 2016. This amendment came in the background of recent debates which is related to the credibility of the applicants (consisting of both the financial and legal)

51 Mishra (n 9).

52 Choudhary (n 2).

submitting the resolution plan. The Insolvency and Bankruptcy Board of India (IBBI) by way of this notification made that the resolution plan should contain the details of the applicant submitting the plan. *These details include identity of the applicant, any prior conviction, identification as to willful defaulter by any of the bank, information with respect to the implementation of the resolution plan i.e., who will be the promoters or who will be managing or controlling the business of the corporate debtor or in case of holding, subsidiary, associate companies or related party etc.* Previously, a simple majority of seventy-five percent could approve the plan, however, now it has to be checked to what extent the plan is feasible and viable in light of the eligibility criteria of the applicants. Section 29A will not affect the future resolution applicant but will undoubtedly influence each and every resolution plan which is not in consistence with 29A notwithstanding when no other resolution plan is available. Thus, IBBI has laid down a procedure to review and assess the past record of a person who is putting forward a resolution plan. The aim is to look into the creditworthiness and to establish the identity of the applicant. The amended code expands the ineligibility criteria and it likewise presents some valuable exemptions in respect of which a disqualified person can bid subsequent to paying off the dues. Promoters have been permitted to submit their resolution plan provided that they make the required disclosures. It is to be seen that whether such a pragmatic exemption could benefit the promoters. Thus to conclude, the present move is a well deliberated decision taken by the IBBI to handle situations wherein promoters submitted the best resolution plan or where only promoters submitted the resolution plans. Consequently, strict disclosures have made it hard for the defaulters to misuse the present situation by getting away without paying off the creditors.

The ordinance, however,fell short to address the issue in respect of genuine promoters who actually are credible and whose past record has been good. While the ordinance is intended to become a boon for the CIRP, it might end up being a bane for a large part of stakeholders, containing virtuous promoters who may oppose the ordinance to seek protection of their fundamental right and business interests. This

disclosure framework of a resolution plan which has been set up will in turn influence roughly 300 insolvency proceedings in the country. The possibility to constitutionally challenge the ordinance should also not be disregarded. *It should be kept in mind that resolution plan should be viable and feasible in order to be sustainable*. It is yet to be observed whether there will be any further changes to the ordinance. If the amendment properly addresses the aforementioned problems and issues would bring in an effective revival as opposed to salvation and would definitely improve India's rank in ease of doing business index.

Though the ordinance is planned to streamline the procedure of credible bidding by eliminating the backdoor entry of the promoters, the objective of the said ordinance in making an efficient sale of stressed assets is yet to be observed.

THE RELATIONSHIP BETWEEN DEVELOPMENT AND HUMAN RIGHTS: AN ANALYSIS

Mayashree Gharphalia[1]

ABSTRACT

Nations across the world today are embarking on massive economic activities for their growth and progress. The idea of developmentalism might be behind such pursuits which is premised on the notion that certain economic activities are more conducive to the progress of a nation than others. Rooted in post-World War II era and inspired by the modernization theory, developmentalism has been criticized for having a liner view of progress and neglecting the deep inequalities in the world. This kind of progress is in question because of neglect of human rights of the people. Human Rights and development have a separate evolution. They are rooted in separate philosophies. Human rights are concerned with granting rights to the individuals and enhancing their inherent dignity, whereas development is concerned about the linear progress of a nation. Research related to development and human rights are scant because the discipline of development was not originally based on rights. But development as we see today is in flux because of the ecological damages, health hazards destruction of local culture it has resulted in. Therefore human rights and development has to be brought closer .In the present era the two disciplines operate within the same subject areas and with the same target groups. This article is an attempt to explain the convergence of human rights and development. The researcher does so by tracing the trajectory of development debate, to identify the essential points. It explains as to why the convergence of human rights and development is happening now by placing international human rights development alongside the development debate

Keywords: Human Rights, Development, Developmentalism, Convergence, Progress.

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INTRODUCTION

Human Rights are those rights that a person has by the virtue of being a human being. They are non-derogable moral claims, are inalienable and cannot be abrogated by the state. These rights are inherent in a human being by the virtue of humanity alone irrespective of caste, creed, sex or place of birth. In the present times, states are embarking on economic development covering development of infrastructure etc. The idea of '*developmentalism*' might be behind the pursuit which is premised on the idea that active economic policy and economic activities improve the productive structure of a nation. However the problem is that this kind of development is in question because it is no longer an obvious ambition in the light of ecological problems, at a time of revaluing local culture and cultural diversity. Human Rights and Development theories have different origins but they do diverge at a point. If development is all about the third world countries and their modernisation then human rights do connect the third world counties with this method of modernisation. Development, conventionally as we understand is economic growth, linear progress of the country towards modernisation. The success of such development is then assessed by indicators relating to an increase in gross domestic product, average income or investment in industry. However this way of measuring development ignores the other facets such as social or political dimensions. Factors like whether the kind of development that takes place is sustainable or not are not considered. In the light of such limitations, human rights have been used as a guiding framework for development. This article is an attempt to explain the convergence between human rights and development. It traces the history of development and its intersection with human rights regime

THE 1990s AND THE TWO TENDENCIES

Research relating to Development and human rights can be said to be connected because of two tendencies that shaped much of the world during the 1990s[2] . The first tendency was that the developing nations's

2 Hans Otto Sano, 'Development and Human Rights :The Necessary,but Partial Integration of Human Rightsand Development',2000 22 ,HRQ,734

demands for social provisions won recognition as internationally acclaimed norms or entitlement. The United Nations Social Summit Meeting held in Copenhagen in the year 1995 and the World Conference on Human Rights held in Vienna in 1993 were the clarion call that focussed on common principles on social initiatives. It was in the final declaration of the Vienna Declaration that the principle of indivisibility and universal nature of human rights and the right to development were reaffirmed[3]. In other words, right to development was accorded a status of legitimacy and once again it was reiterated that economic, social and cultural rights are as much justiciable and important as the civil and political rights.

The second tendency that intensifies the connection between human rights and development is that after the disintegration of USSR focus shifted to democratization of the development process. In this dialectic, democracy is seen not merely as a form of government which again may be an import from the west, rather a behavioural norm of recognising collective rights, individual rights and participation in the political process which enjoys a greater consensus globally today[4]. Human Rights today connect this behavioural norm to a global political order and hence they are the code of values for such an order. means an event constituting a new stage in a changing situation[5]. At this point it is pertinent to browse through the history of the development discourse to bring home the point that development as we speak today has a history in the Indo American western liberal thought and though development and human rights have different origin,the multiple meanings of both the concepts grew in tandem with each other.

THE GENERATIONS OF HUMAN RIGHTS

Human Rights thought can be said to be rooted in the philosophy of natural rights of Europe. The contemporary meaning of Human Rights is that it is "*a set of individual and collective rights that have been*

3 Prakash Shah, ' International Human Rights :A perspective from India',1997,21 ,FILJ,24.

4 Supra note 1.

5 The meaning according to the English Oxford Dictionary.

formally promoted and protected through international and domestic law since the 1948 Universal Declaration of Human Rights".[6] Important Human Rights tradition has a long evolutionary history and today scholarly endeavours divide these rights into four generations. The rights in terms of their number, content and comprehensiveness is connected to the disequilibrium and imbalance of the relationship between the individual (the citizen) and the social group (state)[7]. The First Generation of Rights consist of civil and political rights. They are Right to Life, Right to Freedom of Speech and Expression, Right to own property etc., They were acquired through the force of writing .The Magna Carta(1215),Petition of Rights (1628),The Bill of Rights(1689), the American Declaration of Independence (1776), the French Declaration of Human and Citizens Rights (1789) ,and the works of John Locke, Jean Jacques Rousseau, Montesquieu are the chief legal forces that backed the fight against the absolutist stance of the state .The Constitutions of all the countries of the world, The Universal Declaration of Human Rights 1948 and The International Covenant on Civil and Political Rights,1966 enshrine such rights. The Second Generation of Rights like the Right to Work, freedom of association, the right to education, learning, the right to insurance of sickness, old age and disability are derived from state made laws and have consecration in International law mandated by International Covenant on Economic, Social and Cultural Rights .The consecration of these rights which make the first generation rights more meaningful requires significant effort from the state. The third generation of human rights go beyond the political, civil, or economic and cultural rights and are expressed in more progressive documents of International Law like the Stockholm Declaration of 1972, Declaration on the Right to Development,1986, Declaration on the Rights of the Indigenous People, 2007.These rights are collective Rights, something that everyone within a group collectively enjoys[8]. The status of the solidarity rights as to whether they are merely aspirational statements or entitlements is a mooting

6 Adrian VasileCornescu, 'The Generations of Human Rights',2009,1,DP.

7 Ibid.

8 Right to peace, right to self determination, right to environment.

point. However Johan Galtung[9] says that the first generation rights belong to the bourgeoisie class represented by colour blue, the second generation belongs to the working class represented by red and the third generation belongs to the social movements i.e. green. Galtung by his scheme based on colour seems to associate the third generation rights with the grassroots movements, but this cannot be said to be completely correct because many of the developing countries have 'promoted' right to development.

Development means a desirable change, either generally or in a constitutive element by agents or authorities ordered to achieve development. Development of one constitutive element may be detrimental to the other. According to Hettne, it may also be defined as a social change in accordance with societal objectives. Development as a concept had a long normative history in the Euro American Liberal thought[10]. A reading of R. Srivatsan's *A History of Development Thought* provides the following: First, the framework for development of the Third World Countries crystallised with the end of Second World War and shifting of balance of power from USSR to United States. This had tremendous impact on world politics as the nineteenth century paradigm of master race dominating the world dwindled away. The Soviet Union's stance on the liberation of the colonies of Asia and Africa was based on the premise that they should liberate as 'nations'. This had two consequences: first it meant that like the western liberal discourse the Soviet model was also a linear model of development driven by an elite hegemony and next, in order to compete with the Soviet Union ,the First world had to be more generous in terms of its assistance to the third world. These factors including the fight by India and similar countries on the horizon against colonialism worked well in favour of America becoming super power and Britain slowly losing its foot as a race superior. A reading of Prakash Chandra Mahalonobis who is known as the father of Indian Planning, shows that after India won independence, planners stressed on indigenous production of

9 Norwegian Sociologist, founder of the discipline of peace and conflict studies.

10 Jan Nederveen Pieterse, *Development Theory* (2nd edn, Sage 2010).

capital goods to substitute its import. The Mahalonobis era marks the advent of state capitalist in the country[11] On the international front, W.A Lewis theorised that a tiny market grew alongside with the large subsistence economy in the third world economies and it was this market that acted as the ground for germination of industrialist [12]. During 1970s development paradigm underwent a shift influenced by Neo Marxist idea about the world order and within this legacy Paul Baran who is an American Marxist economy and one of the founding fathers of Neo Marxist school asserted that the Third World countries were characterised by a different dynamics of backwardness and Industrial development is the only way to improve the living standard but in the absence a functioning economic system, a new venture should break virgin grounds to develop with its own efforts[13]. Within the same legacy, Andre Gunder –Frank asserted that underdevelopment was a historically linked process and it was by exploiting and under developing the economy of the colonies that the nations in the Europe progressed.[14] Another important thesis in the Neo Marxist thought was that of Ernesto Laclau who emphasized that under development in the backward countries was an active product of the metropolitan rule and the periphery economy was not an independent entity that needed to be developed and brought closure to metropolitan, it was only maintained in a crippled condition by capital[15]. These theorisations fleshed out the concept of '*core*' and '*periphery*' to explain the developed and the underdeveloped countries respectively. The structured and western model of development began to decline owing to its loose and

11 Prakash Chandra Mahalonobis, "Papers on Planning" in R.Srivatsan(ed) *History of Development Thought A critical Anthology*(Routledge 2012).

12 W.A Lewis,"Economic Development with Unlimited Supplies of Labour"in R.Srivatasan(ed) *History of Development Thought A critical Anthology*(Routledge 2012).

13 P.Baran "On the Political Economy of Backwardness,"inR.Srivatasan(ed) *History of Development Thought A critical Anthology*(Routledge 2012).

14 AndreGunderFrank,"OnCapitalistUnderdevelopment"inR.Srivatasan(ed) *History of Development Thought A critical Anthology*(Routledge 2012).

15 ErnestoLaclau,"PoliticsandIdeologyinMarxistTheory"inR.Srivatasan(ed) *History of Development Thought A critical Anthology*(Routledge 2012).

incoherent methods. Dividing economics into two disciplinary claims Albert Hirchman on rise and decline of development economics within the "classical" mould said that market was the '*economic system*' that was applicable throughout the world. Study of economics has only one set of rules to be discovered which he called the mono-economics claim and in every economic system all participants benefit mutually. Based on the assertion and rejection of this claim there were four possible positions: mono-economic and mutual benefit both asserted results in classical economics, mono-economics asserted and mutual benefit rejected results in Marxism, mono-economic claim rejected and mutual benefit claim asserted resulted in development economics and both claim rejected resulted in neo-Marxist theories. These resulted in the claim that special principles were needed to understand the problems of developing economies and it was possible for a mutual benefit to occur only when an advanced economy and a developing one worked to resolve the economic problems of the latter. Such an '*ideal*' situation was rejected by Raul Prebisch. An Argentine economist known for the contribution to the dependency theory of Economics said that the accumulative agendas, industrial growth etc driven by western liberal thought outran the distributive agendas and resulted in atavism in the developing nations. With the passage of time social movements changed, the demands of rights changed and as pointed earlier the prominence of the '*non western groups*' grew because states began to resort to authoritarianism to push their agendas on them, being perceived to be ones who can be *sacrificed*

Towards this '*decline*' which can be attributed to its own crisis, the Third World Countries began to think about their rights seriously. In the 1990s the demands of the developing countries for social support were recognised as internationally accepted norms or entitlements.[16] Human rights thought thus emerged in the natural rights philosophy while development theories has its roots in the decolonisation process and took its own peculiar colors in different region in tandem with larger socio economic and political phenomenon[17]. Theories emerged

16 Supra Note 1.

17 John Harris, 'Development Theories'www.developmentideas.info/.../

in different context and locations which in turn helped understand the context in terms of complex political and social change. Development theories study much more than goals, resources and its control .It studies economic growth, local and global changes and the influence of politics on such change. The subject matter of human rights is protection of individual's rights from those in power and the duties of the state and the international actors in relation to such rights. The subject matter is principally universal but in reality different regions has different relation with this subject matter and human rights today can be called as that which governs the relation of the third world with the west,emphasising on participation and dignity as grand essentials of this rights complex. The reason behind browsing through the history of development trajectory is to bring home the point that though development and human rights have different origin, the evolution of the multiple meanings in both the concepts took place in tandem with each other.

THE IMPORTANCE OF GENERATION THEORY

The Generation Theory of subjective rights connotes two things. First, human rights are the result of constant evolution and secondly human rights are universal only at the declaration level. As discussed above, during the 1990s there were questions regarding focus on the individual that shaped the development discourse in the west. Rights were social oriented and it was also emphasised that it is a human right of an individual and group to participate in the development process. It is true that these are a part of what jurists would call as 'soft law', meaning they are not binding, yet the changes show a paradigm shift that places an individual's and group's development as a singular focus of the human rights tradition. These changes posit two things. First the shift stresses on "development from below" means development from the grass root level. Second, the conventional individual state thinking that dominates human rights discourse does not find a place here.

Ch02_DevelopmentTheories_JohnHarriss_2013.pdf accessed 27 April 2018.

The Declaration on the Right to Development is not indifferent towards the states actions but since development means different things to different states, individuals, groups, and people, avenues are created for enhancing the relationship between individuals or groups and donors or corporations based on minimum standards of human rights rather than with the state. Such an opportunity helps make human rights more relevant in the relationship multi-nationals and individuals or groups.

CHANGES IN DEVELOPMENT TRADITION

Development theories do not have the same roots as that of human rights thought. Development theories grew from the decolonisation process after the Second World War. The early development theories were influenced by economist and their focus was on creating a just world. As an immediate remedy to the war torn nations,they focused on macroeconomics like employment generation. The social aspects were secondary to the economic goals .During the 1970s as discussed above development research underwent a paradigm shift under the influence of the neo Marxist legacy. Neo Marxism's class and structuralism theories had significant influence on the idea of the new world order[18]. According to neo Marxism the modernisation theory of the west had western prejudices that served only their economic and foreign policies. The 1980s was a decade of the World Bank which was characterised by structural adjustment, economic efficiency and macro regulation. This era was different from the neo classical era in the sense that unlike the neo classical era that put the weakest nations under administration, this era shifted their focus from social sectors. Such a focus was opposed during 1987 with the UNICEF's slogan of Adjustment with a Human Face.[19] In 1990 the UNDP published its Human Development Report and the World Bank released its World Development Report and both these two had poverty as its central focus. Unlike the 1980s that was inspired by economic development, the UNDP's report was premised on human development and ability of people to choose their

18 Supra note 1.

19 Ibid.

livelihood.[20] The goal was to provide opportunities to people to develop with the ability to choose, while according to World Bank it was not necessary to trade economic growth for reduction of poverty. This era saw the return of social and environmental issues back on the agenda. This era stressed on the point that development came from below i.e. from the choices made by the development actors themselves. Agendas during 1990s was not that liberalist as it used to be during the 1980s. The intervention of state as opposed to a minimalist state, that shaped the framework for an active environment was reaffirmed. The 1990 s thus saw more state intervention in the affairs of the people ushering in an era of good governance, people's participation and institutional change. Human rights thus found a central focus in this actor social oriented order.

COMMON THEMES IN DEVELOPMENT THOUGHT AND HUMAN RIGHTS

The subject matter of development theories is much more than mere desirable process of change, allocation of resources etc.[21] It also discusses complex regional and global changes. Among a host of others, some of the central focus of development theories are efficiency, economic growth cultural and social conflict,global and local change and influence of politics on such process of change. Similarly, in addition to protection of individuals and groups against those in power, human rights also cover the duties of the state and the non state actor in relation to the individuals and the groups[22]. Therefore it can be said that Human Rights thought governs this relation. The subject matter in principle is universal but the reality is that states in north,east, west, south have different relations to different types of rights. Human Rights in 1990s have set a norm that regulates the relationship between the state and the society. Human rights have become a part of the global world order where the common norms and goal are constantly debated. Differences do exist in the goals of both the traditions. For example human rights is about protecting

20 Ibid.

21 Debraj Ray Hans, Introduction to Development Theory, 2007, 137, HRQ, 2.

22 Ibid.

the rights of the individuals and groups against those in power whereas development theories deal with process of change ,conflict and resource allocation. Convergence of the two exists, however in the common discussion about goals and values that should globally regulate tensions between the third world and the west and in the significance of governance in process of change that emphasize socio economic standards as a part of the rights complex.

CONCLUSION

The researcher here would like to ask a question as to what would mean by human rights approach to development. From the above discussions it becomes clear that among a host of others the following ingredients are the essentials in making development an all-inclusive e process.

1) Protection of individual and group rights from encroachment of the state along with the developers like the Multi-National Corporations, NGOs and international organisations

2) Equal right to every individual for participation irrespective of caste, creed, language, colour, place of birth, political opinion or religion

3) Supporting individuals and groups to live a life of dignity, free of poverty where they have access to certain minimum standard of living, health, water and education. The people must also have the capability to organise and demand their rights.

Thus human rights approach to development would mean people having livelihood security, personal integrity and equal opportunity. But such an approach to development may not solve all problems and injustices. For example because human rights initiatives are related only indirectly to interstate relations they are not adept in addressing issues of efficient resource allocation and in reconciling different strategies and struggles for development. A kind of space of dignity needs to be created around the human person for everything mentioned above to come to fruition. Human Rights and development are mutually reinforcing when it comes to the individual actors and their participation against those in power like the state and the corporates.

Human rights can make the human person the focus of development. Thus there exists a strong linkage between the development paradigm and human rights thought. During the 1990s development paradigm and human rights thoughts were brought together and when the aims and objectives within the two changed in the new world order, human rights became the main ingredient of such a system. Consequently this have had great influence on both the disciplines. This tendency can be said to be positive in the sense that Non Western ways of integrating socio economic and empowerment objectives has been reaffirmed. This suggests that in order to achieve an integration of human rights and development entitlements and empowerment processes has to be created. The International Covenant on Economic, Social and Cultural Rights provides entitlements to basic health care, education along with hosts of others. But nation states have resorted to only a progressive realisation of these rights owing to lack of funds and resources. The scope of such entitlements must be broadened. Minimum standards of human rights must be adhered to by the international organisations, donors and corporates other than the nation states. Another way of integrating human rights and development is to use human rights in the strategy of empowerment. There is a dire need for justice to be more social and less legal, thus moving away the discourse on human rights from court rooms to spaces where its fulfilment is utmost required.

JUDICIAL POLICY MAKING IN INDIA: A MYTH OR REALITY

Wasif Reza Molla[1]

Abstract

Policy making may be characterized as picking among possible strategies where one's activity influences the conduct and prosperity of other people who are subject to the policy maker's power. No one disputes that legislators, executive officials and bureaucrats make policy in every democratic country. But we resist the idea that judges are also policy makers and often raise certain serious questions against judiciary for acting like a policymaker. It is also often seen as dereliction of judicial duty whenever judiciary come out from its conventional shell and plays dynamic role in nullifying the policy of government as unconstitutional. Nevertheless, the criticisms of judicial rulings is based on common belief that judges merely find or discover what the law is, they should not make law.[2] Policymaking is the responsibility of the other branches of government, so judges who engage in policymaking are acting ultra vires.

In any case, another perspective is that judicial policymaking is neither outstanding nor derived. Courts "say what the law is", over the span of deciding cases, and indealing with cases definitely entangles them in policy debate. Their decisions may report definitive legitimate measures that characterize public policy within the jurisdiction they serve.

In the aforesaid back drop this paper endeavors to examine the quintessence and the Constitutional point of view of policy making function of the judiciary in elegance with the constitutionally conferred legislative powers of the legislature. It then turns to the second issue on discussions of the reason which justified the judiciary to indulge in policy making issues. It goes on to discuss whether judicial policy making is a myth or reality in reference to the decisions conveyed by the Supreme Court in the post emergency period.

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2 G. Alan Tarr: *Judicial Process and Judicial Policymaking*(5th edition Wadaworth Cengage Learning 2010).

INTRODUCTION

In our nation since time immemorial Judges are seen as bloodless incarnations of human integrity. From their lips streams a constant flow of insightfulness. From their pens streams not ink but instead moral fortify into which their judgments are set. We treat legal decisions with high regard, basically non discretionary, and objective. At the time when Constitution of India was drafted the framer of the Constitution made every move to draw Montesquieu's philosophy of autonomy of organs of the state. Montesquieu was absolutely right when he said, "By division of powers, government becomes the servant of the people and not the master." It means that the legislature shall by no means exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers, or either of them. The judiciary shall never exercise the legislative and executive powers or either of them[3]. Though there is no specific provision in the Indian Constitution regarding separation of power,under Article 50 of the Indian Constitution state has been conferred separate judiciary from the executive. The judiciary, the executive and the legislatives are given distinctive fields in the Indian Constitution and their capacities are separated. The descriptions of their areas of functioning keep running crosswise over various portrayals of the Indian Constitution. It is the executive and the legislature, who are directed to involve in policy making and the Indian judiciary has been given the tough task of maintaining the Constitutional rights of citizen. The Supreme Court should make rules governing the administration of all courts in the state and, subject to law, the procedure and system in such courts.[4]

Be that as it may, since post emergency period a dynamic role of Indian judiciary over the subject matter falling constitutionally within the administrative ability of the executive brings up certain genuine and noticeable issues. It might be on account of the way Supreme Court of India has many a time sets course of action to the government by framing guidelines in a way just like legislature. Such judicial

3 James Madison, John Jay, Alexander Hamilton, *The Federalist* (1st edition The Gideon Edition1787).

4 Roscoe Pound: *The Ideal Element in Law* (1st edition Liberty Fund1958).

indulgence call for a need to closely analyze the constitutional point of view of policy making function of the judiciary in consonance with the constitutionally conferred legislative powers of the legislature. The Constitutional route by which court can intervene in the legislative process is by judicial review and when we look at the premise of judicial review it raises the everlasting debate between constitutionalism and democracy. Constitutionalism accepts that Constitution is supreme and it can supersede the decision of any body. Though democracy is pillared on the rule that an elected body has the privilege to take decision for the country. It is without a genuine doubt that in the current set up of separation of power the legislature under the Indian Constitution goes about as a prime mover in framing laws according to the demand of the changing situation of the civic society. But the role of judiciary is additionally to a great extent recognized, since judges of superior courts while dealing with practical cases, what we say as legal realism in genuine situation to settle upon dispute, not just move on to decipher the current laws and apply them in a given circumstance yet as well make up innovative judgments with creativity to provide justice keeping pace to the changing needs of the conflicting societal conditions. The primary reason that can be credited to such a basic element of judicial functioning with undoubted authenticity is that since law by its extreme nature is typical, no legislature can foresee with sensible sureness the future and anticipating the outcomes which the law tries to address. For all intents and purposes, each sanctioned law on a testing examination uncovers certain gap which the judges is required to fill up by method for interpretation.

This is prominently known as judicial legislation. Such filling up is however anticipated to be done in consonance and congruity with the Constitutional command. Judicial Legislation has been accepted by every modern democratic country as its necessary to uphold the democratic values but in the last few decades courts have made basic decisions in the area of agriculture, banking, commerce, communication, criminal justice, education, fiscal policy, industry, labour, manufacturing, mining, national defense, natural resource, public health social welfare. Thus court is now not confined with interpretation of the Constitution but also comes up with innovative

ideas and framing polices in many issues which come under the domain of the government.

REASON FOR JUDICIAL POLICY MAKING

Though there remains a consensus of opinion that within certain narrow and clearly defined limit new policies are framed by judiciary through their creative and innovative decisions.[5] But those who refuse to recognize the fact of judicial law making take in account only one side of the story. Equally important is an understanding of the reasons why Indian Judiciary has virtually untrammeled policy making authority which allows them authoritatively to resolve public issues with less interference from other governmental officials than do judges in any other country. Few factors directly related to the India experience provide an answer.

Fundamental Law

A major contribution that the English colonists made to Indian Legal system was the concept of fundamental law which postulated that all governmental action was to be compatible with the colonial charters and now the Constitution. From colonial times to the present day we have lived in and many times recognized the existence of an extremely political volatile environment especially at the time of emergency period but the belief in a fundamental law continued. As Constitution remains at the zenith of the pyramid and the Judiciary being a definitive watchman of the constitutional rights of the general population of this crowded land has consistently entertained itself whenever it has discovered that the enlightenment of the Indian Constitution has begun losing its sheen. Confidence rested on the Judiciary by the general population of India, remains on a considerably higher rung than on any other organ of the state. Subsequently Judiciary is considered by the citizen as the place that is known for final resort to secure the fundamental law of the nation. The Court has shown in the past that the Constitution can likewise be bent to frustrate the necessities of democracy.[6]

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5 Harold J.Spaeth: *Supreme Court Policy Making* (1st edition W.H Freeman and company1979).

6 Raoul Berger:*Government by Judiciary: The Transformation of the*

Distrust of Governmental Power

In many democratic countries distrust of Government has come up as a new phenomenon, India is not also exception, now our faith in government is far less than it was in the immediate years of independence of the country. Social researchers have now begun asking whether individuals "believe the administration to make the wisest decision" reliably or more often than not. As before, generous dominant majority population of the country endorse numerous scrupulous things government did like giving standardized health, employment and education. In any case, now the general marks of trust are much lower than in the 1960s. Most experts assume that declining confidence in government is due to other basic reasons like the coverage of governmental issues by the media, or political scandals, or the mounting every day financial battles of the working class. Due to this suspicious environment issues that customarily were viewed as within the space of the lawmaking body have come to be considered by courts. The reasons forwarded to legitimize this progress is that there are vital areas of public policy in which the political procedure can't be trusted to accomplish a proper determination of the contending claims. On the other hand unfettered flow of money in politics and mounting cost of political campaigns has further complicated the situation. The consequence, in the view of many observers, is that the outcomes of political campaigns have become dangerously dependent upon the support of those individuals and interest groups that can most easily raise funds to promote the candidates or causes that they favor. This tendency may be viewed as the most important reason of corruption in India, but the deeper concern is that if money permits some individuals and interest groups to exercise disproportionate influence on the formation of public policy then there will be potential distortion of democratic processes. No less as the privileged class they were paramountly concerned lest they lose their position on the top of the heap. They were also concerned that governmental power not be used against them. They logically assumed that they could perpetuate their position in society having their possession and control of economic power and the social status that accompanied it.

Fourteenth Amendment(2nd edition Liberty Fund1997).

Separation of power

Separation of power compartmentalizes governmental activity into three separate chambers. But the framers of the constitution went a step further and gave to each branch of government some power that typologically belong to one of the others, thereby creating a system of check and balances.

Montesquieu wrote:

"When the legislative and executive powers are united in the same person or body,here can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body,whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals".[7]

Rising up out of Montesquieu's teaching in the mid eighteenth century, the idea of Judicial independence keeps on holding a position of conspicuousness in every single present day of all modern democracies. The framer of the Constitution of India found that it as basic to consolidate in the Indian Constitution arrangements for establishing and maintenance of Judicial Independence[8]. Dr. B. R. Ambedkar, the Chairman of the Drafting Committee epitomized the sort of Judiciary that the Constitution of India would stand to the general population of India in the accompanying words:

"*There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself."* In this manner, to some degree amusingly, we discover

7 Charles Louis de Secondat, Baron de Montesquieu:*The Complete Works of M. de Montesquieu* Vol. 1 (London: T. Evans, 1777).

8 S. S. Naganand 'Independence of the judiciary' **(**Sri P.G.C. Chengappa Memorial Lecture, Bangalore,November 2012).

contentions for independent judiciary, which do bode well with regards to the more hardened ethical quality, transposed to help the thought of judicial supremacy[9]. The significance of judicial autonomy is reinforced by its innate associations with democracy, separation of powers and the rule of law[10].Independence of judiciary in genuine sense implies that the judges are in an impartial state so they can render justice in similarity with their pledge of office and just as per their own particular feeling of equity without submitting to any sort of influence or impact be it from official or authoritative or from the seniors and colleagues.

JUDICIAL APPROACH ON POLICY MAKING ISSUES

The role played by judiciary in the changing circumstances has denoted a critical move from its traditional role to a more participatory one to take into account the changing needs of the general public. Among every single democratic nation the Supreme Court of India is conceivably notable as the most confident and capable court when dealing with issues of government and its policy. In a series of legal encounter with government in the 1970s, the Court announced and settled the ability to nullify Constitutional amendments that violate the basic structure doctrine and after the end of emergency rule, the Court in the 1980s built up the idea of Public interest litigation to guide the legislature to embrace social welfare polices and ensure the Constitutional rights of the citizens are protected. In the 1990s, the Court in a sequence of PIL cases asserted and assumed dynamic role in challenging and investigating government corruption as in *Vineet Narain versus Union of India*[11], and in subsequent cases including the 2G Telecom Scam and the Coal Block Scam cases. The Court has also played a very proactive role in regard to the policies to maintain a balance between ecological and sustainable development, including water and air pollution, deforestation, and vast scale of hydroelectric

9 George W. Carey: *In Defense of the Constitution,* revised and expanded edition, (Indianapolis: Liberty Fund, 1995).

10 Rebecca Ananian-Welsh and George Williams,"Judicial independence from the executive: A first-principles review of the Australian Cases"(2014) 40 (3) Monash University Law Review 593.

11 [1997]1 SCC 226.

dam projects cases. For instance, in *T.N. Godavarman Thirumulkpad versus Union of India*[12], the Court acted like the ministry of forests in implementing Forest Act and controlling cutting of timber in forest and in the Narmada Dam suit, the Court has issued orders identifying with the development of the dam and its impacts on nature and human[13]. All the more as of late the Court has likewise perceived rights to nourishment, education, information and through its decisions,complied the legislature to enact new laws and implement regulatory and administrative structures for effectuating these rights[14]. Post-2000, the Court extended Constitutional right to information and directed the proclamation of required informational disclosure regime for all Parliamentary and state authoritative. As of late conveying a historic ruling in *Abhiram Singhversus C. D. Commachen (dead) by Lrs. and Ors*[15] Supreme Court held that seeking votes in the name of religion, caste or group added up to corrupt practice and election of a candidate who indulged in it can be set aside. In a noteworthy push to streamline and acquire straightforwardness into the way toward assigning advocates as "seniors", the Supreme Court in *Ms. Indira Jaising versus Supreme Court of India through secretary general and ors*[16] decided that hereafter all issues identifying with assigning advocates as "seniors", will be managed to begin with by a board headed by the Chief Justice of India. In Dr. S. Rajaseekaran (II) *versus* Union of India and Ors[17]. Supreme Court issued rules to diminish the number of deaths that happen because of road accidents. In *Rajive Raturi versus Union of India and others*[18] the petitioner, who is a visually impaired individual, is resident of Gurgaon (now 'Gurugram') and works in Delhi with a human rights association. He has filed the petition in public interest on behalf of the disabled persons (however

12 [1997] 2 SCC. 267.

13 Narmada BachaoAndolan v Union of India[2000] A.I.R. 2000 S.C. 3751.

14 *See* Mohini Jain v. State of Karnataka[1992]3 S.C.C. 666, People's Union for Civil Liberties v. Union of India, [2007] 1 SCC. 719,Ass'n for Democratic Reforms v. Union of India, [2002] 5 S.C.C. 294.

15 [1992]2SCC. 37.

16 [2015]1SCC. 454.

17 [2012]3SCC. 295.

18 [2006]2SCC. 228.

better articulation to depict these people is 'differently-abled people') for appropriate and satisfactory access to public places. The Supreme Court issued some crucial orders and set due dates while disposing of a petition filed by a visually disabled persons seeking proper and adequate access for such persons to public places In *Youth Bar Association of India versus Union of India*[19] Supreme Court held FIRs, unless the offence is sensitive in nature, as sexual offenses, offenses relating to insurgency, terrorism of that classification, offenses under POCSO Act 2012 and such types offenses, ought to be uploaded on the police website. In *Narendra versus K. Meena*[20] Supreme Court of India held that persevering exertion of the wife to compel her husband to be isolated from the family constitutes an act of 'cruelty'. In *Voluntary Health Association versus State of Punjab* [21] Supreme Court issued additional directions to curb female foeticide and successful implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. In *Swaraj Abhiyan versus UOI* [22] a two judge bench of the Supreme Court of India issued historic judgment for disaster /drought management. Incomparable Court held individuals with disabilities have the privilege to live with reverence in *Jeeja Ghosh versus UOI* [23] Court ordered the SpiceJet Ltd to pay Rupees Ten Lakhs to Jeeja Ghosh, a famous activist engaged with disabilities rights, for de-boarding her by force. Supreme Court in *State of Tamil Naduversus K. Balu* [24] ordered closure of all liquor shops along National and State highways stressing on the need to enhance road safety and check danger of intoxicated driving. In *National Legal Services Authority versus Union of India and Others*[25] a land mark decision by the Supreme Court of India which perceived transgender individuals to be the "third gender" and asserted that they were ensured major rights guaranteed by the Constitution of India. In

19 [2016]2SCC68.

20 [2008]1SCC325.

21 [2006]1SCC. 349.

22 [2015]2SCC. 847.

23 [2012]2SCC. 98.

24 [2016]2SCC.12164.

25 W.P No. 400 of 2012with Writ Petition No. 604 of 2013.

Shahid Balwa versus Association of India and Ors [26] the court said that Article 136 read with Article 142 of the Constitution of India empowers this Court to pass such orders, which are vital for doing complete justice in any cause or matter pending before it and, any order so made, shall be enforceable all through the domain of India. The ability to do complete justice under Article 142 is in the idea of a remedial measure whereby value is given inclination over law to guarantee that no injustice is caused[27].

In the above referred cases court has turned out from its conventional shell of adjudication and conjured its discretionary jurisdiction to mediate and guarantee that rights of people are appropriately secured. But in many event Supreme court was hesitant to interfere with policy making body even in exercise of its jurisdiction under Article 142 of the Constitution of India which would be in contrary to the law. A similar view was taken on *Modern School versus Union of India and Ors*[28] wherein Supreme court held that when any enactment is working in the field, the courts ought not be willing to force any further confinements. Once the lawmaking body has set out an educational scheme, the work of the court is simply to interpret the same. It can't and ought not issue some other or further direction. In *Manohar Lal Sharma versus Main Secy and Ors*[29] wherein the Supreme court held that public auction is a more preferable strategy, the state can't be constrained by Judiciary to follow any specific technique for distributing its natural resources for development. Estrangement of natural resources is a policy decision and the methods embraced for the same is subsequently executive rights, it isn't the space of court to assess the benefits of competitive bidding or different strategies for distribution of natural resources. In any case, as the policy for distribution violates Art. 14 apex Court scratched off the coal blocks distribution made by the screening committee. In *Medical Council*

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26 [2014] 2 SCC 687.

27 Supreme Court Bar Association v. Union of India & Anr.[1998] AIR 1998 SC 1.

28 [2004]AIR SC 2236.

29 [2014]2 SCC 532.

of India versus Sarang and others[30] Supreme Court held that in academic issues court ought not regularly intervene with or decipher the standards and ought to rather leave the issue to the expert in the field. Court was hesitant to meddle in policy decisions of the academic or expert bodies. It is settled law that where an approach has been figured by the State or its instrumentality upon expert advice, it isn't for the Courts to substitute its opinion to that of an expert body. In the case of *Ugar Sugar Wroks Ltd. versus Delhi Administrative and others*[31], the Apex Court has held as follows:

"18. .....It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy...."

In *St. Mary S Engineering College...versus The All India Council For...* [32]Supreme Court held that in academic matters, so long as the policy adopted by the state or an academic bodies is in accordance with the provisions of the statute, Courts would not interfere, however, except in cases where it is established that the decision is contrary to the provisions of the statute or the intendment of the enactment. The AICTE was established with the purpose of controlling and organizing the advancement of specialized instruction all through the nation and furthermore for foundation of legitimate and uniform standard of technical education in India. In achieving the object it has the power to formulate policies for implementation across the country. The power to formulate policies by the Council is within the domain of the AICTE. So long as the policies are as per the provisions of the AICTE Act, Courts have no power to interfere in such policy decisions of the Council. The Supreme Court in a catena of decisions uniformly held that Courts shall not interfere in policy matters taken by academic

30 [2000]2SCC 202.

31 [2001] 3 SCC 635.

32 [2012]3SCC 326.

bodies particularly where such policy decisions have been taken on expert advice.

But all Government Orders can't be named as policy decisions. In the event that any decisions is taken on a policy matter, the same might be just subject to following certain method and endorsement by the Government in the way as given by the statute. For example, if the Government needs to take policy on a specific issue, it is the ordinary procedure that there must be an endorsement by the Government through its cabinet.

In drawing out the difference between policy matters amenable to judicial review and those where the courts would decline to interfere, the Supreme Court in *Bennett Coleman and Co. versus Union of India*[33] has held that when a state activity is challenged, the duty of the court is to look at the activity as per law and to decide if the legislature or the executive has acted within the powers and capacities provided under the Constitution and if not, the court must strike down the action. Notwithstanding accepting as contended by the State that the impugned action is a policy decision, the Supreme Court, in the said case, has held that the Courts can interfere with the policy decision of the State, if the policy neglects to fulfill the test of reasonableness; the policy must be made reasonably and ought not give the impression that it was so done arbitrarily with any ulterior objective; the policy can be contested on grounds of malafides, unreasonableness, arbitrariness or unfairness, and so forth; if the policy is observed to be against any statute or the Constitution or runs counter to the philosophy behind the provisions; if the delegate has acted ultra vires then the courts will venture in to intervene with government policy.

Balco Employees Union (Regd.) versus Union of India and Others[34] Supreme Court held that the Courts cannot interfere with policy decisions unless it is opposing any legal provision or the Constitution. In *State of Kerala v. Manager, Nirmala Public School Karimannoor and another*[35] Supreme Court declared the Government order to

33 [1972]2 SCC 788.

34 [2002]2 SCC 333.

35 [2008]AIR 197.

be irrational and unreasonable as the said order was unworkable. Further it was held that the reason that new schools can be started only where there is concentration of Muslim population as they are socially and economically backward was found to be discriminatory and violative of Article 14 of the Constitution, as there were other socially and economically backward communities. In another judgment *N.Kunjichekku Haji v. State of Kerala and Others*[36] in which the Supreme Court upheld the upgradation granted to a school observing that when the Government finds that there exists need for upgradation of an existing school into upper primary the Government must be allowed to exercise its statutory power unless it is mala fide or colourable exercise of power. In *Union of India and others v. S. Sreenivasan*[37] it was held if a rule was beyond rule making power conferred by the parent statute or if a rule supplants any provision for which power is conferred it becomes ultra vires. While declaring a statute ultra vires the court should consider the source of power which is relevant to the rule. Another imperative judgment is *Academy of Nutrition Improvement and others v. Union of India*[38] wherein Supreme Court held that courts will be hesitant to interfere with policy decisions taken by the Government in issues of general public health, nor will courts endeavor to substitute their own perspectives in the matter of what is insightful, safe, judicious or legitimate in connection to technical issues relating to public health in inclination to those prescribed by people said to possess specialized ability and rich experience. However in another judgment *Bannari Amman Sugars Limited v. Business Tax officer and others*[39] the Supreme Court held that the discretion to change policy in exercise of executive power, if unrestricted by any statute or govern is sufficiently wide, however what is basic and understood as far as Article 14 is whether the change in policy is made reasonably and not discretionarily or with any ulterior intention.

Apart from the decisions rendered by the Supreme Court in the supra referred judgments, in series of different cases, the court has held

36 [1995] 2 SCC 382.

37 [2012] 7 SCC 683.

38 [2011] 8 SCC 274.

39 [2005] 1 SCC 625.

back to entertain itself with issues those fall under the domain of the executive and the legislature.

CONCLUSION

From the above discussion it may be concluded that judicial policy making is not completely a reality because a judicial decision either 'criticizes or legitimizes' a policy of the government. In any way the court neither favors nor denounces any policy approach of the government, nor is it worried about its intelligence or practicality. Its worry is just to decide if the enactment is in congruity with or opposite of the arrangement of the Constitution. It often incorporates the thought behind the objectivity of the statute. So likewise, where the court strikes down an executive order, it does all things considered not in a soul of experience or to express its predominance however in light of its obligation to ensure Constitutional commitments and the majesty of the law. From the cases referred to above in this paper it creates the impression that Supreme Court has actually kept up an almost negligible difference of boundary between the policy making issue of the executive and issues which are of assurance of social intrigue. Court has effectively engaged with the situation where question of maintaining rule of law and assurance of Constitutional esteems is there. Be that as it may, numerous times the action of court has been seriously reprimanded by the legislature as obstruction of their space. Actually there is an established concept called “Colourable Legislation” which says that under the pretext of power given for one specific purpose, the legislature can't look to accomplish some other purpose which it is generally not competent to legislate on. But the problem arises when executive use all its mechanism to nullify this cardinal principle of administration. Thus court has no way but to indulge, as court is the observer and has the power of judicial review. In any democratic country where rule of law prevails government can take any policy as per their will but that policy must be taken according to law and the policy as well the law according to which the policy has been framed must be just fair and reasonable. The landmark English case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[40] sets out the standard of unreasonableness of public-

40 [1948] 1 KB 223

body decisions that would make them liable to be quashed on judicial review otherwise called Wednesbury unreasonableness. The Court held that it couldn't intervene to overturn the decision of the public-body just on the grounds that the court couldn't help contradicting it.Also, in conclusion a definitive obligation of the judiciary is to see that justice is done as is cherished in the preamble to our Constitutionand if justice be not a natural principle, it is no principle at all. If it be not a natural principle, there is no such thing as justice. If it be not a natural principle, all that men have ever said or written about it, from time immemorial, has been said and written about that which had no existence.[41]

41 Lysander Spooner:*Natural Law; or the Science of Justice* (1st edition Boston: A. Williams & Co., 1882)

REVIVING THE INDIAN FISCAL STRUCTURE BY STRENGTHENING THE CONSTITUTIONAL PILLAR: AN EMPIRICAL ANSWER

Masroor Ahmad[1]

Abstract

The framers of Indian constitution have not envisaged any institution other than Finance Commission for deciding the transfer of funds to sates and had seen merit in one single authority for such purpose. Planning Commission was created as an extra constitutional body for transfer of resources hardly after 50 days of promulgation of constitution, by government resolution (and not legislation) during the time of then Prime Minister Jawahar Lal Nehru, on March 15, 1950. After playing a historic role Planning Commission finally came to the end of road and announcement in this context was made by Prime Minister (Narendra Modi) from the ramparts of the Red Fort on August 15, 2014. Critics argued that far from being the think-tank for providing the strategic vision to the country, the commission was reduced to a political tool of the central government. Present study is an empirical exercise in this direction wherein we tried to examine whether Planning Commission was used as a tool to meet the political objectives of the ruling party at centre. In this context we have used data (related to transfer of resources from centre) from fourteen major Indian states and after applying Panel data analysis we found evidence for planning Commission, having the power to allocate resources among states, was being used as a tool by central government for playing Pork barrel politics (empirically measured by various proxy variables related to number of votes, party alignment etc. in this study). As such showing more faith on the Constitutional body (Finance Commission) as an institution for transfer of resources and replacing Planning Commission by NITI Aayog (without a patronage purse) is empirically justified. Study ends with some more suggestions in this direction that may further strengthen the fiscal system of country if implemented in near future.

Key Words: Intergovernmental Transfers, Planning Commission, Finance Commission, Political manoeuvering.

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INTRODUCTION

Over the last few years, especially since Narendra Modi led government came to power at centre in May 2014, a remarkable shift in the federal relations was observed[2]. A potentially momentous step in this direction was shuttering of the venerable Planning Commission[3]. Although abrogated in 2014, it has been in the eye of storm for very long time and years before its formal demise it had become evident to all that if the Planning Commission did not reinvent itself it was bound to fall into desuetude.[4] It has been accused of having promoted 'top-down' or inverted plan process, ignoring the concerns of the states while formulating the plans, functioning sans accountability, proving to be a roadblock in the path of federalism, allocating the resources without sufficient correlation with the local needs, no tie-up of intended benefits with the targeted recipients and with practically no feedback on actual delivery. All this resulted in wide spread dissatisfaction that was portrayed as 'implementation failure' (also labeled as delivery deficit) and the Commission has finally to bear the cross.

In fact the framers of constitution had not envisaged any institution other than Finance Commission for deciding the transfer of funds to sates and had seen merit in one single authority for such purpose. Hence there is no mention of planning commission in Indian constitution. The commission was by a government resolution (and not a legislation) during the time of then Prime Minister Jawahar Lal Nehru[5]. While some claim that Nehru's idea was to create at arm's

2 This change in fiscal relations between centre and state is reflected through various measures like-abrogation of Planning Commission, implementation of FFC recommendations, Setting up of NITI Aayog Formation of GST Council and roll out of GST w.e.f. April 2018.

3 After playing a historic role in the Indian economy Planning Commission finally came to the end of road and announcement in this context was made by Prime Minister (Shri Narendra Modi) from the ramparts of the Red Fort on Independence Day [August 15, 2014].

4 Rajeeva Ratna Shah, 'Reorienting the Plan Process and Revitalising the Planning Commission' Economic and Political Weekly, [Sep. 2014], p.20.

5 Introduction of the economic development-oriented multi level planning has created demand for an extra constitutional body for transfer of resources; consequent to this Planning Commission came into being

length a body of experts to advise him on the public policy as he would not have been able to get the best from cabinet or the ministers other label it as greatest of all Nehruvian follies. Further, Planning does not figure emphatically in the discussions of the Constituent Assembly but it was not altogether forgotten[6]. It was put down as item no. 20 in the concurrent list which reads as "Social and Economic planning". But when Planning Commission was set up it was not done under this item; instead Article 282 came to the rescue of Planning Commission for making grants to the states for plan purposes[7]. Article 292(3), which permits GOI to make loans out of consolidated fund of India, is invoked for disbursement of loans by the Planning Commission for the states.

One of the fundamental criticisms that the commission had to face right from its birth was the absence of statutory/constitutional authority and as the Commission started to work it was criticized for a number of other reasons also. During the seventh Five Year Plan(1985-90) when Rajiv Gandhi was Prime Minister of India and Dr. Manmohan Singh was Deputy Chairman of Planning Commission former was not impressed with the working of Commission (especially with its incremental approach) and called them as 'bunch of Jokers

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hardly after 50 days of promulgation of constitution, by an executive order on March 15, 1950.

6 In the popular imagination national planning is strongly associated with the names of Jawaharlal Nehru and P C Mahalanobis with a strong connotation of Soviet –style centralization. [Nachane M D, EPW, September 13,2014].

7 The invocation of article 282 for this purpose was earlier objected as these grants (i.e., referred under Article 282) to be made available at discretion of government were different from general purpose grants made available under Article 275.These grants were intended by the constitution makers to meet unforeseeable emergencies (like drought, famines, natural calamities or partition holocaust) and were not envisaged as a part of normal centre state relations . Central grants to the states to help settle persons displaced due to partition of country was a typical example of the purpose contemplated by the Article 282. Grants of such type were considered different from general unconditional grants which are lumped together in the domain of finance commission a constitutional body supposed to deal with all major questions of centre state financial relations.

who were bereft of any modern ideas of development'.[8] The role of Commission soon became a topic of intense debate when in early 1990's India adopted the path of liberalisation. It was realized that after liberalization planning in the way it was practiced in the first four decades after independence was no longer tenable.[9] Following the liberalisation process, the role of public sector in the Indian economy has palpably shrunk and more than three fourths of investments in the economy are flowing from private sector. Financial constraints emanating from FRBMA coupled with the inefficiencies and waste in the service deliveries have led to the demand for the state to vacate many areas which were earlier thought to be its prerogative. PPP has emerged a preferred vehicle for initiatives in the development. In this changing scenario Planning is necessary to provide the information necessary as a guide to action. In other words planning has a very useful indicative role and for that Planning Commission with all its functions may not be a necessity.

To further justify the abrogation of Planning commission this study is an empirical attempt to show that funds routed through erstwhile Planning Commission were significantly motivated by political considerations as compared to the funds routed through Finance Commission, the original body envisaged by framers of the constitution for intergovernmental transfers. Results of the study favour the decision of government of India to increase the devolution of funds through Finance Commission and replacing former by NITI Aayog- a think tank without any patronage purse.

THEORETICAL UNDERPINNINGS REGARDING POLITICAL MANOEUVERING OF FEDERAL TRANSFERS:

Existing literature in the realm of fiscal federalism in the last few decades is dominated by public choice theories that emphasise the use of transfers from upper to lower tier governments as a pork barrel device. This approach is contrary to the a normative set of theories

8 The incident is documented in Somiah's book, *The Honest Always Stand Alone*, 2010.

9 Amaresh Bagchi 'Role of Planning and the Planning Commission in the New Indian Economy', Economic and Political Weekly' [2007], P.92.

that conceive inter governmental grants as a way of correcting the potential resource misallocation caused by interjurisdictional externalities, the response to the need for national standards in public goods and the way to address interjurisdictional equity goals and a number of other national welfare goals. Literature dominated by the normative theories postulates that intergovernmental transfers should be governed by efficiency and equity considerations so as to ensure an even distribution of basic services across all regions (Musgrave,1959; Oates,1972; Gramlich,1977). It assumes that central government is a benevolent identity interested in maximizing social welfare. However, many public choice models which found a good deal of empirical support has overshadowed the normative theories which could not explain the differences in allocation shares of subnational governments and growing inequalities among them.

In a widely cited study, Riker and Schaps (1957) argued that if the executive officials of the central and constituent governments are controlled by the same party, then they might be expected to attenuate the level of conflict within a federation by enhancing centralising moves. In such an environment, whether governor (at a lower tier) belongs to a political party which is similar or different to that of the president has a major influence in the unfolding of intergovernmental fiscal relations. This is because many policies of the central government require legislation to give them effect which inturn often requires a coalition that is broader than the members of the incumbent party alone thereby legally binding the president to captivate the other parties' governors' support. The latter, largely unaffected by incumbent's intra-party rules and the effect of legislative party discipline, are likely to behave in an opportunistic manner, trying to extract higher transfer payments from the national government than governors from the president's party would. Thus this study points out that partisan disharmony affects the federal transfers and it is non aligned constituents which gain from bargaining[10]. Diaz-Cayeros, Magaloni and Weingast (2006), provided

10 Contrary to this, the distribution of grants on partisan grounds is also influenced by the fact that voters have incomplete information about which tier of government is the source of the grant. In such a situation, the upper tier (granter government) may not be able to claim much

a different argument for alignment hypothesis to be correct. They opine that in certain circumstances the incumbent party may have strong incentives to use a mechanism of punishments and rewards to maintain electoral support. Hence the lower tier units which defected in previous elections (i.e., are unaligned) and supported the opposition party (contesting against incumbent party) receive lower transfers as a means of punishment.

To be brief, in empirical sense these alignment focused type of models suggest party alignment between politicians at different tiers of government influence budget allocation among states/constituent units. The empirical evidence extracted from some of the studies (related to developed as well as developing countries) concludes that the allocation of intergovernmental grants is, indeed, skewed in favor of aligned municipalities. For instance, Khemani (2003) finds that transfers subject to less stringent rules (more discretionary like that of planning commission) are positively affected by alignment while Arulampalam et al. (2009) observe that being an aligned and swing state translates into 16% higher center-state transfers (compared to being unaligned and non swing). Rizzo and Testa (2004) state that party alignment between president and state governors significantly influence budget allocation among states. Duchateau and Aguirre (2006) showed that party alignment shows significant influence in Brazil's budgetary allocation.

This notion of modeling of electoral politics as a redistributive or zero sum game has also been followed by Shepsle and Weingast (1981); Weingast, Shepsle and Johnsen (1981); Aranson and Ordeshook (1981); Kramer (1983); Frohlich and Oppenheimer (1984); Cox McCubbins and Sullivan (1984); and Coughlin (1985). Cox McCubins (1986) used

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political credit (and at times not credit at all) for the higher devolution towards a constituent unit. If there is no credit leakage (i.e., because of incomplete information public is not able to develop goodwill about granter government), granter government finds it more profitable to devolve higher transfers towards political units governed by same party members. However, if the leakage is large enough, the incumbent grantor may consider sending funds to unaligned political units so as to reap benefits in the future elections.

two party game theory model to prove that ideological relationship between governments at different tiers affects the volume of transfers from upper to lower tier governments. In this study, voters in any region are classified into three different groups: support voters, swing voters and opposition voters. Transaction costs in "vote buying" can vary between groups and states. In case of voters that systematically support party, transaction costs of vote buying or uncertainties about voting behaviour of electorate are very low compared to swing groups. Also Spending resources in states (regions) where there are large supports for the incumbent party (i.e., people have same ideological preferences) only mobilizes the supporters. While spending in regions with a larger number of uncommitted voters (opposition voters) or areas that are evenly inhabited by different kind of voters would mobilize some supporters as well as some opponents. As such spending resources in an area where there are many opposition voters would clearly be counter-productive. The best strategy, then, is to devote disproportionately more resources to areas where there is high concentration of a party's core supporters. For this reason it is also called as *loyal voter hypothesis*[11]. In brief this hypothesis states that expectations by a contesting candidate are lower from swing voters and even lower from opposite voters thus giving them little incentive to invest in those groups. This strategy of mobilsation of core voters of a party has been labeled as " *Hold what you got" or " Take care of your*

11 This study refers to the stable electoral relationships (as elaborated upon by Fenno, 1978 in US context) between individual candidates and the groups which compose their constituencies. Study aims at explaining the stability of such electoral relationships from the point of view of redistributive conception of electoral politics or to be simple this study seeks to answer the simple question: why does a congressman continue to reward a given group. Authors argue that candidate's own ethnic, cultural or socioeconomic group often furnishes the initial bedrock of his support; and he may stick with them and they with him for the same reasons. But these factors can not explain the coalition stability in totality and a kind of stability can be predicted without these factors This notion of modeling of electoral politics as a redistributive or zero sum game has also been followed by Shepsle and Weingast [1981]; Weingast, Shepsle and Johnsen [1981]; Aranson and Ordeshook [1981]; Kramer [1983]; Frohlich and Oppenheimer [1984]; Cox McCubbins and Sullivan [1984]; and Coughlin [1985].

own". Anderson and Tollison (19991) and Couch and Shugart (1998) in their studies found a positive correlation between Roosevelt's share of votes and spending at state level that is compatible with the hypothesis of rewarding loyal rather than swing voters. As an alternative to McCubbins model we have many theoretical models (Lindbeck Weibull, 1987,1993; Dixit and londregan, 1996,1998)[12] which support what is popularly known as *Swing voter hypothesis*.

Many studies taking these theoretical concepts to empirical framework have found support for these theoretical concepts. Wallis (1987) and Wright (1974) have found that states which have shown high volatility during presidential elections received more federal support, which is consistent with the idea that president might try to target swing voters. Dahlberg and Johansson (2002) have shown that the Swedish regions that are Swing in the national elections receive a higher share of a specific transfer programme.

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12 [Lindbeck Weibull, 1987,1993; Dixit and londregan, 1996,1998] which favour this kind of hypothesis assume that voters cast their votes considering not only their ideological preferences but also consumption levels promised by different political parties. On the other side political parties commit to a platform of public policies and their aim is to win elections. Models distinguish between core supports with strong party alignments and swing voters who are indifferent between parties on policy positions and more often switch their party preferences on the basis of particularistic benefits. Authors suggest that incumbent party will invest in a district until reaching to a point where swing voters decide to vote for them. Under some assumptions about the distribution of voter preferences, the political balance that emerges in these models is that a greater amount of funds will be channeled to districts with more swing voters. Dahlberg and Johansson, [2002] remarked that optimal point will be correlated with the closeness of last elections (close election results reflect larger number of marginal voters). As such Swing states will be the primary target of strategic resource allocation because in those districts where there is high competitiveness in an electoral contest marginal utility of public investment is also higher. Also a narrow margin of victory is a measure of an incumbent's vulnerability, and the incumbent party will target higher public funds to vulnerable districts so as to reap the voters' favour in future elections.

EMPIRICAL ANALYSIS

Sample:

The Indian constitution describes India as a "Union of states" and presently it is the largest democratic federal republic inhabited by about 1.3 billion people spread over 29 states and 7 union territories, covering an area of 3.29 million square kilometres. Among these 29 states 11 states were as categorized as special category states[13]. These states have been given special attention and additional funds of different magnitudes were channeled to them with due consideration to their hilly and difficult terrain, low population density sizeable share of population as tribal, strategic location along borders, economic and infrastructural backwardness and non-viable nature of state finances. Again in case of Goa[14], Uttarakhand, Chattisgrah and Telangana we do not have separate figures for various years (pertaining to different fiscal and political variables) as they came in to existence as separate states after 1980. Leaving this group of Special category states and newly born states our sample reduces to set of 14 states that may be treated as homogeneous for devolution of central funds. In terms of population these states constitute about eighty seven percent (87.18%) of total Indian population while in terms of geographical area they together about seventy five percent (74.95 %) of total area of India.[15] The fourteen states are:

1) Andhra Pradesh, 2) Bihar, 3) Gujarat, 4) Haryana, 5) Karnataka, 6) Kerala, 7) Madhya Pradesh, 8) Maharashtra, 9) Orissa, 10) Punjab 11) Rajasthan, 12) Tamil Nadu,13) Uttar Pradesh, 14) West Bengal.

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13 All eight states of north east plus Jammu and Kashmir, Himachal Pradesh and Uttarakhand, with Uttarakhand being last addition to list in 2011.

14 Goa became a state during 1989-90 and was not considered as a special category state for the purpose of Central Assistance for the state plan as it happened to have highest per capita income in the country. But the Finance Commission treated Goa as a special case, and separately from other non special category states.

15 Calculations are as per census 2011. Actual figures were collected from the website http://censusindia.gov.in/2011census/censusinfodashboard/index.html,accessed on 21/01/2016.

Variables:

In an attempt to assess whether upper tier governments were in a better position to use transfers through planning commission for political gains, as compared to transfers routed through Finance Commission, we developed many proxy and dummy variables to capture different political situations. As a proxy variable for swing nature of a state we have used the difference between votes acquired during previous elections (Lok Sabha) by the ruling party/ major coalition party at centre and the next best party (if party at centre has won)[16].

To capture the impact of affiliation of between political parties ruling at different levels we have introduced a variable 'Alignment' in this study. This variable captures the nature of political affiliation between party (or coalition group) at centre and ruling part (or Coalition group) at state. Considering political institutions of Indian politics various types of affiliations are possible between government at centre and government at state level. For lucidity purposes we have defined two dummy[17] variables.

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16 If the winning margin for the ruling party is not big it may not be sure about its success in next elections and in order to woo additional voters, while retaining the previous voters, it may channel extra funds towards that state. Similarly if the ruling party has lost in a particular state by a big margin in previous elections it may count it as core state of some rival party where it has little chance to garner more electoral support and hence may divert discretionary funds to some state where from it expects political gains. Thus margin of difference in absolute terms which shows its extent of lead or lag can have an impact on central transfers and in order to empirically verify this we have developed this proxy variable and will be represented as **WMLV** in this study.

17 **Alignment Dummy of type I**(here after ALG1): if the ruling party at centre (or leading coalition party in case of coalition government at centre) is same as that of ruling party (or leading coalition party in case of coalition government at centre) at state level we say state is having an alignment of type I. In any particular financial year for a state with type I alignment dummy variable ALG1 will be given value one otherwise zero.
Alignment dummy of type II (here after ALG2): This type of alignment besides including the relationships of nature captured by ALG1 also includes political affiliations of the following types:

1. Ruling party at centre (or leading coalition party at centre in case of coalition government) is a coalition partner at state level but is not the leading coalition party at state.
2. Ruling party at state level (or leading coalition government in case of

Ruling party may resort to disproportionate transfer of funds during election years so as to get the benefit interms of higher votes. For this we have introduced the variable *'Legislative Assembly Election Year Dummy (LAED)'.*[18]

In order to categorise the voters of a state as swing or non swing and in order to capture the swing behaviour of voters and categorise a state as swing or non swing state during a particular financial year we have developed a dummy variable (represented as SDAM) using the voting pattern of previous election. If during the previous elections ruling party/major coalition party at centre has won or lost by a small margin of votes it implies that for the ruling party it is not a core supporter state and voters at the margin (small fraction because of which party has lost or won last time) may swing to any side during next elections. One way to categories a state as swing would have been the 50% mark, i.e., if votes earned by ruling party/major coalition are near to 50% mark it would have been labeled as a swing state. But because of multiple party system in India it will not be appropriate to

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coalition government at centre) is a coalition partner at centre but is not the leading coalition party.

18 If elections for state assembly are supposed to be held during a financial year there is the possibility that ruling party at centre may channel additional funds towards politically important states. If elections are supposed to be in the very beginning of a financial year the preceding financial year may witness increased fund flow and lax tax efforts on part of states on the other hand if elections are supposed to be in the latter half of current fiscal year additional funds may be channeled during the current FY. If such situations are to be captured simultaneously it would tantamount to considering two years for a single state election that might distort the results. To avoid labeling two consecutive years as election years we consider a financial year to be an election year if either election was held in latter half of that year or in the first half of next year. Thus for any particular state "S" a financial year (say 1985-86) will be assigned value 1 if assembly elections in state "S" were held during second half of FY 1985-86 or during first half of FY 1986-87. Since there is no fixed calendar for state elections we assume them to be uniformly distributed. Following the same logic we created a dummy variable LOED for capturing the effect of Lok Sabha election year on federal transfers. However considering the fact that during assembly elections (usually not all the states have same assembly election year) central government is in a better position to devolve funds discriminately we will concentrate more on LAED.

use this mark and as such we have resorted to a different tactics. We assume that if winning margin for a ruling party during last elections in comparison to next best party (in case it has won highest percentage in previous elections) was small it will be categorized as swing state. Similarly if ruling party/major coalition has not gained highest % of votes then if the difference between votes obtained by leading party and those obtained by central party/ major coalition party is small again we categorise it as a swing state because in that case central ruling party may take it as an opportunity to swing the marginal voters to their side by flowing additional funds towards that state. Keeping in view the fact that competition levels may differ from state to state, so a winning margin in one state may be considered as small where as in other state it may be considered as a fairly good margin. To consider these differences in competition levels we have made use of mean and mode[19]. Also if election history of any state reveals that during some particular election for some reasons election results were entirely different from what has been usual case this may prove out to be an outlier and the average figure obtained for reference might be a distorted one. To avoid such cases we have obtained the average figure for reference based upon the mode values of said differences also. However actual data compiled shows that mean has not been significantly different from mode values in case of any state.[20]

19 For developing a demarcation mark in numerical terms for a particular state we examine its voting behaviour during the entire period of analysis. We consider different election results (both assembly as well as Lok Sabha) during entire analysis period, find difference in votes (in % terms) between ruling party/major coalition party at centre and next best party in terms of vote percentage secured, we add up these differences and take their mean. The average figure so obtained is considered as normal difference and in case during a particular election, winning (or losing) margin is greater than this mean figure party ruling at centre will not treat it as a swing state. In case this margin is less than mean figure then party at centre is doubtful about the voters at margin whose vote can turn the results to any side and as such state will be categorised as a swing state. Based upon this reasoning we use a dummy variable and assign it a value 1 if during a particular financial year state is categorised as swing state otherwise zero.

20 Only in case of one state (Madhya Pradesh) we found the difference between mean and median to be near two digit number (8.9%) while for most of states it was less than 5% and in many cases around 1%.

Using the same logic we have developed another dummy variable (represented as CDAM) to classify a state as core and noncore state. Making use of behaviour of voters in various election as is evident from previous election results we develop this variable with reference to the ruling party/major coalition party at centre. i.e., a state may be a core state during some financial year for one party and may not be so for other party at the same time. Like in case of Swing dummy variable we again find average difference between vote percentage of central ruling party and next best party and take this average difference as demarcation point between core and non-core states. A particular state during a particular financial year is treated by central ruling party as a core state if during previous election ruling party/major coalition party at centre has won and margin of difference between this party and next best party has been greater than average difference taken as reference[21].

Also higher representation of a state in the ruling party/coalition at centre may enhance its bargaining power for extra funds. As such higher the number of elected representatives higher may be the transfers in per capita terms. States that have voted for ruling party at the centre in the previous election will have higher representatives even after removing the population differences. To capture the impact of higher representation we have developed the variable 'Representation in Central Government' represented as 'RCGM'. It refers to the percentage of representatives in the ruling government during any particular year. Also in case two states with differences in population numbers have voted for central party more populous states will naturally have higher representation to neutralize this effect we will be taking the transfers in per capita terms only. It has happened in more recent coalitions that some parties withdraw their support from ruling coalition resulting

21 In case of states that were bifurcated during the analysis period we have made the necessary adjustments by ignoring the smaller bifurcated parts. Treating the both divisions as a single division was not possible because of differences in political behaviour of divisions. As such necessary decrease in number of number of representatives for bifurcated states was duly considered and core and swing behaviour was captured using the election data of bifurcated divisions.

in decrease in percentage of representation. Data compiled is duly corrected for such changes. If a member withdraws his support before completion of first half a financial year he is not counted for that FY as a representative from state.

Besides these proxy and dummy variables for political factors which are qualitative in nature we have also used the fiscal and demographic variables defined in the same way as in annual budget of India[22]. One additional fiscal variable used is the 'Discretionary grants' which has been defined as sum total of grants received for central schemes (CSs), Centrally Sponsored Schemes (CSSs) and Special plan schemes. Data is calculated in per capita terms and variable is represented as 'PCGD'

We collected the data for various variables for the period 1980-81 to 2012-13. A year in this stands for the financial year as used in India. Data for some of the variables beyond 1980-81 in case of certain states was not available and necessary adjustments have been made in case of states that were bifurcated during the period of analysis[23].

Methodology:

Considering the nature of data (fourteen different states for a period of 23 years)we have chosen panel data analysis for comparing the significance of various political factors in determining the allocation shares of states, in the central funds routed through erstwhile Planning

22 These include: 1) **Plan grants**: it includes all grants that are routed through planning commission. Besides discretionary components grants for state plan schemes are added in it. Figures are represented in per capita terms and variable is represented as 'PCGP'. 2) **Non plan grants:** Also called as statutory grants include transfers through Finance Commission including grants for relief on account of natural calamities. Figures are taken in per capita terms and variable is represented as 'PCGN'.

23 Data was collected from the following secondary sources. Annual and occasional state finance reports available at http: //www.rbi.org. in/Public Finance statistics, published By Ministry of Finance, GOI. available at http://www.finmin.nic.in/Ministry of Statistics and Programme implementation http://www.mospi.nic.in/Ministry of Home Affairs, Office of the Registrar General and Census Commissioner, India. http://www.censusindia.gov.in/Election results from election commission of India available at http:// www.eci.nic.in/India Reference Annual published by Information and Broadcasting Ministry**.**

Commission and Finance Commission. The general representation of the model used is:

$$Y_{it} = \beta_{1i} + \beta_2(pol_{it}) + \beta_3(fis_{it}) + \beta_3(dem_{it}) + u_{it} \ldots\ldots(1)$$

i= 1, 2, 14; t= 1980-81,.....1912-13

Where subscript 'i' stands for i^{th} state and't' for the t^{th} time period observation for that particular state or to be general 'i' is cross sectional identifier and 't' is time period identifier.

likelihood ratio test statistic, (both F and chi square) were used to check the need for introducing different intercept terms for different cross sectional units. We have made use of both Fixed Effects Model (FEM) and Random Effects Model (REM) specifications of panel estimation Technique and choice between the two for any particular case is made on the basis of "Hausman test"[24].

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24 While dealing with panel regression an important issue that arises is to make a choice between FEM and REM. Appropriate choice of the model hinges around the assumption one makes about the likely correlation between individual or cross section specific error component () and the regressors on right hand side. As Wooldridge contends, "In many applications, the whole reason for using panel data is to allow the unobserved effect to be correlated with the explanatory variables." If is correlated with any of regressors () the random effects estimator is inconsistent while the fixed effects estimator remains consistent. Thus in a large sample we expect that fixed effects estimator converges to a true parameter value while random effects estimator converges to some value other than the true parameter value. Therefore, in case there exists some correlation between and any of regressors (, one could expect that there will be significant difference between random and fixed effect estimates. Using this logic Hausman (1978) developed a test to check for any correlation between and any of regressors in a random effects model. The test compares the coefficient estimates of random effects with those of fixed effects with the null hypothesis that FEM and REM estimates do not differ significantly or in other words there is no correlation between and any of regressors. Since there can be one or more than one regressors in a panel regression for comparison of estimates we can use both t test (in case comparison is made for a single variable estimate) and F-test or Chi Square test. But what is commonly used in case of Hausman test is a statistic with Chi square distribution which jointly tests how close the differences between pairs of coefficients (i.e., FEM and REM coefficients) for various regressors are close to zero. If the null hypothesis is rejected it

RESULTS AND DISCUSSION:

We started with the following model to test for impact of voting behaviour (along with other economic variables) during previous elections on the allocation shares of different states.

$$Y_{it} = \beta_{1i} + \beta_2(PSDP_{it}) + \beta_3(RUPP_{it}) + \beta_4(SHNP_{it}) + \beta_5(WMLV_{it}) + u_{it} \ldots\ldots$$

Where Y_{it} represents per capita grants through Finance and Planning Commissions. Results for equation are presented in table 01.From the results table it is clear that cross section Chi square and F statistics show the presence of different state specific effects thereby necessitating the introduction of different state specific intercept terms. Hausman test suggests the use of Random effects model for both PCGP and PCGN models. The results from different models used are presented in Tables. In case of transfers through Finance Commission WMLV is insignificant while for transfers routed through Planning Commission this coefficient is significant and sign is negative. This implies that as the winning/losing margin for party ruling at centre (or major coalition party at centre) decreases the concerned state gets higher transfers through Planning Commission. In other words close election results (as depicted by voting behaviour) fetch higher transfers for a state. This may be in the interests of ruling party (major coalition party) at centre as it helps later in retaining the swing voters that increases its probability of winning in the next election. However, transfers through Finance Commission are not significantly affected by voting behaviour of state. This gives the first indication of planning commission transfers being used for political motives.

In the next model we introduced more dummy variables to capture the role of political factors, separately for different kind of transfers, in determining the allocation shares of different states. We have used the total population of the state and share of the non primary sector in SDP as control variables. While latter is to capture the level of economic

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implies significant differences between two type of estimators or in other words presence of correlation between error component and regressor(s). In such situation we should use FEM because REM is suitable for cases where we have no correlation.

development the reason for considering former factor is the fact that it has been used in various devolution formulas and also represents political power of a state when evaluated in terms of voting strength. Among the political variables we have used the nature of affiliation of the state government with central government, both in narrower and wider sense as explained earlier in this study. To find the impact of voting behaviour of voters in previous elections on the different kinds of transfers used we have made use of Swing and core dummy variables. Further political representation of a state as measured by percentage of members in ruling party has also been tested for its possible impact on devolutions through both these agencies. In all the three cases we found that Cross Section Chi Square and Cross Section F statistics suggest use of state specific intercepts. Hausman test statistic is significant in all the three cases implying that Fixed Effects model coefficients will be more efficient. Coefficient of population of a state is significant at 1 per cent level of significance in all the three cases implying that more populous a state is higher is the quantum of receipts in per capita terms. Like many other previous studies we have found that coefficient of share of non primary sector is significant with positive sign implying that more developed states manage to receive more of transfers in per capita terms. In case of alignment (in narrower rather strict sense) we found that for all the three kind of transfers coefficient is not significant. Coefficient for swing dummy is significant at 1 per cent level of significance in case of per capita grants for state plan. Upon adding the funds for central plan schemes coefficient continues to be significant at 1 per cent level of significance. But in case of grants through Finance Commission coefficient for swing dummy is not significant. From this we could infer that swing nature of a state as depicted by voters behaviour in previous legislative assembly elections has a significant impact on transfers through a political body (Planning Commission) but is absent in case of transfers through a constitutional body (Finance Commission). In other words Planning commission funds are allocated in a manner so as to achieve the political motive of retaining/gaining power in states with close election results. Results of the analysis do not change if swing dummy is created on the basis of election results in Lok Sabha elections. We tried to examine the

significance of core dummy in case of different kind of transfers but it turned out to be insignificant. Coefficient for interaction effect between assembly election dummy and core state dummy also is insignificant showing that even during the election years central government does not devolve relatively higher funds to core states for political gains. Combining these results one may argue that government at centre targets swing states for political gains using transfers (of Political body) as an instrument. In case of interaction between non alignment and assembly election year we found that coefficient is significant with positive sign at 5 and 10 per cent levels of significance respectively for PCGS and PCGSC. However for grants through Finance Commission this coefficient is not significant at an acceptable level. This further confirms the notion that transfers through a non constitutional body are subject to political maneuvering and hence can be used for political gains . The last interaction coefficient considered in the study is for the representation and political affiliation in wider sense. We have taken alignment of type 2 for the reason that alignment of type 1 has turned out to be insignificant. At 5 per cent level of significance coefficient is significant in case of PCGS and at 10 per cent level of significance it is significant in case of PCGSC. However for PCGF this coefficient is again insignificant at an acceptable level of significance. This implies that states with higher representation (in percentage terms) in central government are able to procure relatively higher funds for state plan schemes (in per capita terms) while such is not the case for grants through Finance Commission.

From these results it is clear that transfers through Planning Commission are subject to more political manoeuvering as compared to grants through finance Commission. Being a body of political executives transfers are directed towards non aligned states during election years so as to garner the higher political support from such states and widen the ruling area for party in power at centre. Also swing states are targeted through such transfers and higher representation of a state implies higher funds (in per capita terms). But such effects are not significant for funds through Finance Commission which is a constitutional body.

CONCLUSIONS AND POLICY SUGGESTIONS

A potentially momentous step undertaken by the present government regarding intergovernmental transfers was the replacement of Planning Commission by NITI Aayog, with no powers of financial transfers for latter. Besides many reasons cited for its abrogation it was also criticized for being used as a political device by ruling party to promote its political interests. This study empirically revealed that transfers through Planning Commission were significantly affected by political considerations as compared to transfers through Finance Commission. As such replacing the political body NITI Aayog without patronage purse and increasing the quantum of devolutions through Finance Commission is expected to decrease the political manoeuvering of transfers from central to state governments. In this context we suggests for permanent status to Finance Commission. The members of the commission may be changed every five years and commission may have a regular secretariat enriched by well qualified technical staff that facilitates work of every new group of members by providing information and research base.

However, we also suggest that NITI Aayog should have been primarily entrusted with the job of serving as a think tank for better policy suggestions to the government, and Inter-State Council which is a constitutional body should have been entrusted with the responsibility of working towards the broader objective of promoting Cooperative federalism. This is in view of the fact that 12 chief ministers skipped the July 2015 meeting convened by NITI Aayog in an attempt to break the deadlock over land Bill. This warrants that if structure and domain of functions is not cautiously carved out at this earlier stage the NITI Aayog (vested with the responsibility of policy coordination and promoting federalism and having all Chief Ministers on its governing council) may be viewed as an another institution working to safeguard the interests of ruling government at centre. In the absence constitutional basis and patronage purse it may not be in a position to promote intergovernmental bargains, resolve issues and coordinate policies between the Union and states in the spirit of cooperative federalism. As such it is suggested that concerns about cooperative

federalism should be addressed in the Inter-State Council (ISC), which has for long lived in the shadow of the Planning Commission. ISC being a body with constitutional basis (Article 263) could be a better tool for fostering cooperative federalism provided it is properly restructured and empowered.

Table 01:

Explanatory Variables	**PCGN (Finance Commission)**		**PCGP(Planning Commission)**	
Per capita SDP (PSDP)	0.3079*	(0.0875)	-881.546*	(-5.845)
Percentage of rural population (RUPP)	4.486*	(1.0303)	10.706*	(5.760)
Share of non primary sector in SDP(SHNP)	0.997*	(0.3273)	2.133*	(5.018)
Per Capita Revenue Expenditures (PCRX)	0.1849*	(0.0661)	0.2536*	(2.863)
WMLV	-0.4021	(0.2720)	-0.718**	(-2.069)
Cross Section Chi Square	65.7139*		215.984*	
Cross Section F	5.210*		20.356*	
Hausman test (Chi Square test statistic value)	2.882		2.884	
Adjusted R Squared	0.437		0.58	
F Statistic	70.275*		124.371*	

Notes:

PCGN: Aggregate grants routed through Finance Commissions in per capita terms

PCGP: Aggregate grants routed through Planning Commissions in per capita terms

t- ratios of respective statistics given in parentheses

WMLV= vote margin in absolute terms during previous Lok Sabha electio--ns

PCRX= per capita revenue expenditure.

FE implies Fixed Effects Model, RE implies Random Effects Model

* Significant at 1% ; ** Significant at 5% ; *** significant at 10% level of significance

Table 02:

Explanatory Variables	Dependent Variables					
	PCGS	**(FE)**	**PCGSC**	**(FE)**	**PCGF**	**(FE)**
Population of state	0.195*	(0.032)	0.153*	(0.033)	0.094*	(0.017)
Share of non primary sector in SDP	3.578*	(0.337)	3.362*	(0.350)	0.901*	(0.185)
Alignment (ALG1)	-8.205	(10.552)	-1.491	(11.028)	-1.446	(5.816)
Swing state dummy	26.604*	(6.978)	26.770*	(7.278)	4.139	(3.821)
Assembly election dummy* core state dummy	- 16.817	(17.276)	-16.070	(17.951)	14.993	(11.383)
(1-ALG1)* Assembly election dummy	20.958 **	(10.613)	18.4552***	(11.109)	-1.260	(5.814)
RCGM*ALG2	2.058**	(0.931)	1.4083	(0.970)	- 0.699	(0.494)
Cross Section Chi Square	184.38*		187.933*		103.343*	
Cross Section F	16.650*		17.060*		8.612*	
Hausman test (Chi Square test statistic value)	52.269*		32.400*		41.472*	
Adjusted R Squared	0.61		0.60		0.65	
F Statistic	20.954*		18.790*		8.489*	

Notes: Three different dependent variables used for comparison: transfers for state plan schemes (PCGS), transfers for state and central plan schemes (PCGSC) and grants through Finance Commission (PCGF).

t- ratios of respective statistics given in parentheses.

FE implies Fixed Effects Model, RE implies Random Effects Model

* Significant at 1% ; ** Significant at 5% ; *** significant at 10% level of significance.

LEGISLATIVE PARALYSIS IN PARLIAMENT: A CRITICAL ANALYSIS OF DISRUPTIONS IN LOK SABHA

Vaishnavi Ranjana[1]

ABSTRACT

Disruption in the Parliament is an unprecedented behavior that results in discontinuation of the proceedings of the House. Disrupting the proceedings in the Parliament has become a regular practice by the legislators. Stalling of Parliament brings a disgrace and a foul name to the institution which is worshipped as a temple of democracy. The law making procedure is the most sacrosanct responsibility of the Parliamentarians. The huge amount of money spent in making the Parliament function goes down the drain when followed by disruptions. Not to forget, the unruly behavior of the politicians engaged in fisticuffs, jostling and flinging of footwear in our State Assemblies depicts the quality of the legislators that we have chosen. They perform such flagrant acts with impunity under the protection of a 'democratic state'. Having debates, discussions and even dissent from opposition is a sign of a healthy democracy. Indian Parliamentary system is imperiled and facing huge crisis, primarily in the light of continued disruptions that has substantially reduced the productivity of the House. Hence, there is a need to systematically study the performance of various facets of Parliament. This paper analyses the causes and reasons behind the Parliamentary disruptions, critically examine the role of the Speaker to control obstructions in the House, and the possible measures to regulate disruptions. The poor qualities of debates, niggardly attendances, and lack of participation are some of the major concerns that require immediate consideration and prompt action.

Keywords: Parliament, Disruptions, Dysfunctional, Political Parties, Legislative Deadlock

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INTRODUCTION

A. Overview

Indian Parliament is not solely the supreme law making body but also constitutes a body of representatives who serve the needs of the constituency which they represent.[2] In our Constituent Assembly, Dr. B.R. Ambedkar while advocating for a Parliamentary form of Government over Presidential Government epitomized the principle of "*more responsibility* to *more stability*".[3] Political parties are 'nerves and sinews' of Parliament.[4] Last two decades have seen proliferation of differences between the political parties, literally, converting the Parliament into a battleground. Indian Parliament has failed miserably in executing the responsibilities assigned to it by the Constitution. The number of hours the Parliament worked, hours of debates and discussions over passing a Bill has come down considerably. It has failed in ensuring responsibility, responsiveness and representation to the people. The country is facing an institutional crisis as stalling the Parliament by the political parties has become a ritual. The elected representatives of the people owe a duty to the people of India to enact laws through discussions, debates and brainstorming in sessions of the Parliament. But they seem to be shirking their responsibility. For a healthy democracy, it is imperative to have useful debates and proper discussions. But nowadays, debates lead to somewhat unacceptable- stalling of Parliament. This has led to a major public outcry mainly on two points: firstly, the legislative stagnation leading to non-productivity of the Members of Parliament (hereinafter referred to as MPs) and secondly, the wastage of the tax payers' hard earned money. Each minute of running the House costs Rs. 2.5 lakhs.[5]

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2 B L Shankar and Valerian Rodrigues, *The Indian Parliament- A Democracy at Work*, (4th edn, Oxford University Press 2014).

3 ibid 1.

4 ibid 1.

5 Press Trust of India, 'Each minute of running Parliament in sessions costs Rs. 2.5 lakh: Govt',*The Indian Express*, (New Delhi,September 07, 2012), https://www.ndtv.com/india-news/each-minute-of-running-parliament-in-sessions-costs-rs-2-5-lakh-govt-498784, accessed on 2 April 2018.

Whichever political party is in the Opposition considers its prerogative to cause obstructions in the functioning of Parliament. But, who is responsible for running the House smoothly? Is it just the ruling party or is it the duty of the ruling party as well as the Opposition to run the Parliament without disruptions. The political parties stack the blame on each other unabashed about creating disruptions. Opposition lampoons the Government by engaging in disruptions. The Government and Opposition continue making a mockery of the general public locked in stalemate.Differences of opinion, disagreements and constructive protests over an issue are the beauty of an ideal democracy. But as soon as the debate leads to stalling of Parliament, it leads to an undemocratic behavior. The Speaker's unwillingness to take disciplinary measures against unruly members encourages them to indulge in such mis-behaviour.An "unused" power is given to the Presiding Officer of Lower and Upper House under the "Rules of Procedure and Conduct of Business of Lok Sabha/ Rajya Sabha". The Speaker/ Chairman of the respective House have the power to take disciplinary action against the unruly MPs for his misconduct or "causing grave disorder" in the Parliament. In cases of misconduct or contempt committed by its members, the Speaker/ Chairman can impose a punishment in the form of admonition, reprimand, and withdrawal from precincts the House, suspension from the service of the House for the remaining day.[6] The legislative deadlock within the Parliament is due to lack of accountability of Parliamentarians. There is no sanction for the non-working days.[7]

6 Rules of Procedure and Conduct of Business of Lok Sabha (15th edn, 2014) rule 373, 374, 374-A, 375.
Rules of Procedure and Conduct of Business of Rajya Sabha (9th edn, 2016) rule 255, 256, 257.

7 Sunil Prabhu, 'As Parliament Nearly Washed Out, NDA Lawmakers Won't Take Salary', (*NDTV*, 5 April, 2018) https://www.ndtv.com/india-news/no-work-no-pay-nda-bjp-mps-lawmakers-will-not-take-salary-says-ananth-kumar-blames-congress-for-logj-1832967, accessed on 20 April 2018. Also see, DNA, 'No work no pay: PM Modi to forgo Rs 79,750 as Parliament's Budget session washed out, NDA MPs to follow suit', (*DNA*, 6 April 2018) http://www.dnaindia.com/india/report-no-work-no-pay-pm-modi-forfeits-rs-79750-as-parliament-s-budget-session-washed-out-nda-mps-to-follow-suit-2601793,accessed on 20 April 2018. Also see, S Meghnad, 'Parliament is Not a Shoe Factory, 'No Work, No

Legislative backlog is an outcome of dysfunctional Parliament. In 2017, Parliament sat for a total number of 57 days much lower than 70 days in 2016, and 72 days in 2015.[8] When compared with United Kingdom House of Commons and United States House of Representatives', the position is abysmal.[9] The Parliament of UK and USA clocked as many as 150 and 140 days annually to which Indian Parliament stands nowhere. Each successive Lok Sabha is aiming for a new low in terms of non-productivity, non-scrutinizing crucial bills skipping question hours/ zero hours, passing bills hastily without deliberation.[10] In true sense, we are in a '*Parliamentary Crisis*'. As defined by Prof. Upendra Baxi,

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Pay' Won't Work', *The Quint*, (New Delhi, 23 December, 2016) https://www.thequint.com/news/politics/parliament-is-not-a-shoe-factory-no-work-no-pay-wont-work-winter-session-demonetisation-lok-sabha-rajya-sabha,accessed on 20 April 2018 who states: "Only the MPs who totally survive on the salary they get from Parliament will be the ones affected by 'no work, no pay'. Others, well, not so much. The 'no work, no pay' solution also might not work because India does not have a law which says that MPs have to give up their professions and businesses to exclusively work as a legislator.To say that an MP is motivated by salary to serve as a legislator is an incorrect notion because elected leaders are, by virtue, required to think about the greater good and not just personal motivations. The only reasonable solution for ensuring our legislature functions is to review the manner of its functioning."

8 Rediff News, 'With 57 sittings, 2017 is the worst year for Parliament', (Rediff News, 1 April 2017)<http://www.rediff.com/news/report/2017-is-the-worst-year-for-parliament/20171214.htm> accessed on 22 April 2018

9 Meghnad, 'Indian MPs don't let Parliament work, and thus hurt democracy', (*Asia Times*, 23 March 2018) <http://www.atimes.com/indian-mps-dont-let-parliament-work-hurt-democracy/> accessed on 20 April 2018

10 M. R. Madhva, 'Putting the House in Order', (*The Hindu*, 25 December 2015) http://www.thehindu.com/opinion/op-ed/winter-session-of-parliament-putting-the-house-in-order/article8026141.ece accessed on 20 April 2018, states: "The previous Lok Sabha (15th Lok Sabha) had been the worst performing one till then in terms of time lost to disruptions — about a third of the total scheduled time was lost in its five-year term."

"***Where people desire change but are unable to initiate or attain it, there arises a perception of crisis. Crisis is not a situation - it is incapacity to act. The first and foremost is the crisis of legitimation of law and law-making institutions. Decline of Parliamentary culture is one perversion arising out of this crisis".***[11]

Unproductive hours, significant bills passed hastily without discussion, skipping Question Hour and Zero Hours are indicators of Parliamentary paralysis.[12] But this opportunity to hold a government accountable is lost in disruptions.The bills are "guillotined"[13] by the Speaker for want of time. This was not the first instance of guillotining, in 2003-2004 and in 2013-2014 also, the Budgets were passed without any discussion.[14] There are no checks and balances on the productivity of Parliament. A gigantic damage to the tax payer's money is incurred due to non-productivity of the MPs.[15] The total strength

11 Upendra Baxi, 'Parliamentary Crisis', (2015) PRS Legislative Research, http://www.prsindia.org/media/articles-citing-prs/parliamentary-crisis-3925/ accessed on 22March 2018.

12 The first hour of every sitting of Parliament is generally reserved for the asking and answering of questions. The Zero Hour is the time immediately followed by Question Hour. Members can, with prior notice to the Speaker, can raise issues of public importance. For more details on functioning of Parliament, see: http://myparliament.org/Docs/THE%20QUESTION%20HOUR%20AND%20THE%20ZERO%20HOUR.pdfaccessed on 21 April 2018.

13 "Guillotine" in legislative parlance is the fast track passing of a bill. The Speaker exercises his powers under Rule 363 of Rules of Procedure and Conduct where a debate, when goes unduly prolonged, and the government business is getting delayed then the Speaker puts the question to vote without further discussion. Recently, while passage of Financial and Appropriate Bill, 2018, the spending of 89.25 lakh crore was introduced, voted and passed by voice vote within a time frame of 30 minutes.

14 Gaurav Vivek Bhatnagar, 'Experts call BJP Using the Guillotine to Pass Finance Bill Without Discussion 'Inappropriate', (*The Wire*, 14 March 2018) https://thewire.in/government/bjp-guillotine-finance-bill-without-discussion-inappropriate accessed 26 April 2018.

15 Angel Mohan, 'Least Productive Lok Sabha Session In 4 Years Wasted Rs 198 Crore', *(The Quint*, 7 March 2018), https://www.thequint.com/news/politics/least-productive-lok-sabha-session-in-4-years-wasted-rs-198-crore, accessed on 21 April 2018.

of both Houses of Parliament is 788 members which costs around Rs. 52.5 lakhs of exchequers money for each day the Parliament is in session.[16] Their salaries and allowances are fixed whether or not any substantial work has been performed by them or not. Interestingly, any hike in salaries and allowances is decided by Joint Committee on Salaries and Allowances constituted by MPs.

KINDS OF DISRUPTIONS

Regular disruptions lead to the low productivity of the Parliament and opprobrium the system of democracy in India. The MPs have found means and ways to obstruct the functioning of Parliament. These ways of disruptions are-

a. **Shouting slogans:** This is the most common of all the disruptions. Members shout slogans for/against a particular agenda to voice their dissent in the House. This obstructs the smooth functioning leaving the House in a chaos resulting in adjournment. As the discussions and debates involve the sentiments of the people at large, the MPs, sometimes appear to be clamorous and vociferous. Most of the time, the object of the debate is to adjourn the House.

b. **Rushing to the *well* of the house:** In this kind of disruption, the MPs rush near the chair of the Speaker and create ruckus by shouting slogans.[17] The Rajya Sabha Chairman, Mr. Venkaiah Naidu demands for "**an automatic suspension of the members rushing to the well of the House**".[18]Even Lok Sabha Speaker, Sumitra Mahajan, demanded that "**they should be expelled *suo moto***. There should be a rule that if they walk into the well then they should be expelled."[19]

16 ibid 4.

17 Houses of Parliament, Lok Sabha and Rajya Sabha have the well of their House. It is simply a nodal point in hall where there is a round table and all secretarial staff, headed by chief secretary of that house sits. It is the position in front of Speaker's Table, who is alone allowed to control proceedings of the house. It is the central part in the House of Parliament.

18 Press Trust of India, 'Venkaiah Naidu Bats For Automatic Suspension Of Unruly Members', *The Republic* (New Delhi,11 December 2017) 3

19 Press Trust of India, 'Law should provide for expulsion for rushing into

Likewise, in State Assembly, this kind of disruption is rampant. In Gujarat State Assembly, an independent MLA Jignesh Mevani rushed to the well of the House demanding inquiries into wages paid to Class III and Class IV employees.[20] The Speaker warned the MLA that ***"this act cannot be tolerated*** *and since this was the first instance he was pardoned".*[21] Besides, the Speaker of Rajasthan State Assembly, Kailash Meghwal insisted that members should be banned from the well of the House and this is done to grab media's attention.[22]

c. Bringing in placards and other objects to protest: Placards is still tolerable form of protest. What the Parliament has witnessed is unruly, rather, ignominious behaviour. Hurling of shoes, pen stands, papers, flower pots, furniture, engaging in fisticuffs, spraying of pepper spray, abuses are only some acts that lead to disruptions.[23] The list is not exhaustive! The contemptible action of the Parliamentarians defames the institution of the highest law making body of the country. These acts of "disrobing democracy" is a slur to millions of population who happen to cast a vote contemplating that their representatives would use their hard earned money to enact credible laws for them.

d. Walk-outs from the house: Walking out of the House is a form of protest where a member or group of members walk out over a particular issue or statement issued by a MP. Recently, the Parliament has witnessed number of walkouts by the Opposition. The Opposition walked out of Lok Sabha to protect the recent targeting of minorities by extremist groups over the allegations

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well: LS Speaker Sumitra Mahajan', *DNA* (Delhi, 14 February 2015) 5

20 TNN, 'Speaker warns Jignesh Mevani for rushing into well of the house',*The Times of India* (24 February 2018) 4.

21 ibid.

22 Rohit Parihar, 'Media coverage encourages din, rushing to the well: Rajasthan Speaker',*India Today* (12 January 2018) 12

23 First Post, 'L Rajagopal and a brief history of Parliamentary battles', (*The First Post*, 6 September 2012)https://www.firstpost.com/blogs/the-rs-fracas-and-a-brief-history-of-parliamentary-battles-445885.html accessed on 23 April 2018.

that they were consuming or selling beef.[24] Yet another instance when the Trinamool Congress walks out of Rajya Sabha questioning the move of the Chairman to ask their leader Mr. Sukhendu Shekhar Roy to withdraw from Rajya Sabha, while 33 Congress MPs who were labelled for "gross disorderly conduct" were still not driven out of the House.[25] The issue of two Italian marines accused killing two fishermen of Kerala was produced in Lok Sabha. Sonia Gandhi and Rahul Gandhi walked out of the House as the Speaker did not allow them to ask questions.[26]

e. Boycott of individuals or specific meetings/sessions: This has been resorted to when specific individuals or meetings based on specific issues are boycotted for not adhering to their demands. Aam Admi Party Lok Sabha members boycotted President Ram Nath Kovind's speech to demonstrate protest against disqualifications of 20 MPs.[27] Moreover; the Congress MPs boycotted the session for the launch of GST.[28]

In a nation where disruptions are considered as 'legitimate' by the Opposition, where the proverb "not working is work too" is used to defend their actions, the downfall of democracy is looming. Disruption lead by silent protests or even walking out of the House is rather acceptable modes as compared to *spraying of pepper* which discomforts the fellow members. But any disruption cannot

24 The Intelligence Unit, 'Opposition Parties stage walkout from Parliament', (*The Economist*,29 July 2016) http://country.eiu.com/article.aspx?articleid=514458835&Country=India&topic=Politics&subtopic=For_1 accessed on 23 April 2018

25 FP Politics, 'Parliament roundup: From Sonia-Rahul walkout in Lok Sabha to TMC protests in Rajya Sabha', (The FirstPost, 3 May 2016) https://www.firstpost.com/politics/agustawestland-trinamool-congress-lok-sabha-rajya-sabha-sonia-gandhi-italian-marines- arun-jaitley-parliament-2761896.html accessed on 24 April 2018

26 ibid 24.

27 NDTV, 'AAP Lawmakers Boycott President's Speech In Parliament',(*NDTV*, 29 January, 2018), https://www.ndtv.com/india-news/aap-lawmakers-boycott-presidents-speech-in-parliament-1805889 accessed on 18 April 2018

28 Times of India, 'GST launch: Congress to boycott Parliament's mid-night session', *The Times of India*, (New Delhi, 29 June 2017) 6

pay the price of the public's hard earned money.The Opposition and the ruling party are in tussle. The tug of war is to obstruct the ruling party for passage of key laws which could garner them a public recognition. Each political party is furthering their own political agenda to gain political mileage disregarding the fact that people of India have chosen them with a hope and assumption that Parliamentarians will engage themselves in legislating laws that matter to the nation instead of serving their own ends.

SCOPE OF SPEAKER'S STATUTORY POWER IN REGULATING DISRUPTIONS

This section of the paper discusses the scope of Speaker's statutory powers to regulate disruptions in the House. Article 118 of the Constitution of India empowers each house of Parliament to make rules for regulating its procedure and conduct of the business in House.[29] The Speaker is armed with manifold powers under the Rules of Procedure and Conduct of Business. These discretionary powers are given to the Speaker to manage the disruptions in the House of People and improve the overall functioning of the House. To maintain decorum in the House, a Speaker acts as a disciplinarian. The following are some of his discretionary powers exercised by him for ensuring productivity and smooth conduct of legislative business.

Rules of Procedure and Conduct of Business in House of People (Lok Sabha)

Under the Rules of Procedure and Conduct of Business in Lok Sabha[30], *Rule 373* [31] states regarding *withdrawal of members* from the House. If the Speaker is of the opinion that the conduct of a member is 'grossly disorderly', he may direct the member to withdraw immediately from the House. The member shall remain absent during the day's sitting.

Rule 374 gives power to the Speaker to *suspend a member* who disregards the authority of the Chair or abuses the rules of the House

29 The Constitution of India 1950, Art. 118.

30 The Rules of Procedure and Conduct of Business in Lok Sabha (RPCBLS), 2014.

31 RPCBLS, r. 373.

by obstructing the business thereof.[32] The Speaker, by naming a member, shall put a question on motion for suspension of the member for the remaining period of the House. The member so suspended shall withdraw himself physically domain of the House. However, such power of the Speaker is not absolute as the House may resolve such suspension by motion.

Rule 374 A leads to *automatic suspension of a member* from the House. In the event of grave disorder caused by a member, wilfully abusing the rules of the House and wilfully obstructing the business by shouting slogans shall be suspended by the Speaker from the five consecutive sittings of the House of remainder of the session whichever is less.[33]

Rule 375 gives absolute power to the Speaker to *adjourn the House* or suspend the sitting in the event of grave disorder.[34] Rule 378 gives all powers to the Speaker to *maintain order in the House* for the purpose of enforcing decisions.[35]

If defamatory or indecent or un-parliamentary or undignified, the Speaker may order that such words may *be expunged from the proceedings* of the House.[36] The Speaker may *withdraw a stranger* from any part of the House.[37]

Scope of Speaker's Statutory Powers

The Speaker is an apolitical and neutral entity. Any member or group of members in the Parliament participating in "grossly disorderly" conduct or "undermining the dignity of the Chair" are liable to be suspended. The Speaker's reluctance to use his discretionary power against unruly members makes these powers futile. A public opinion should be created where any misconduct by the members is considered undesirable. The media should highlight the conduct of the disorderly members and the adverse impact it has on the functioning of Indian democracy.

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32 RPCBLS, r. 374.

33 RPCBLS, r. 374 A.

34 RPCBLS, r. 375.

35 RPCBLS, r. 378.

36 RPCBLS, r. 380.

37 RPCBLS, r. 387.

Invoking Rule 374 A of the Lok Sabha Conduct of Business Rules

By invoking Rule 374 A, twelve MPs[38] were suspended on the first occasion and nine on the next instance[39]. This rule is the brainchild of Former Speaker Late GMC Balayogi[40] was added in 2001. This power was used by the presiding officer, Meira Kumar for the first time. It is interesting to note that, Rajya Sabha has no such provision for automatic suspension of members. This provision suffers from defects. It puts the prestige of the speaker at stake as the House may reverse the decision of the speaker by motion. Hence, when the Speaker is the presiding over the House, he should be given complete charge to suspend/ dismiss a member if he finds him to be disrupting the proceedings of the House.

Another instance of invoking Rule 374 A, Lok Sabha Speaker Sumitra Mahajan, suspended 25 Congress MPs for five consecutive meetings for "willfully and persistently obstructing the meetings of the House".[41]

MEASURES TO REGULATE DISRUPTIONS

Indian democracy is jeopardized. A gradual annihilation occurs each time when Parliament is disrupted.Parliamentary democracy is a government by discussion. Healthy debates are the benchmark of a Parliamentary democracy. It seems that disruptions have become a contest of 'high decibel cacophony' where the 'loudest vocal cords' dictate

38 Those suspended include L Rajagopal, expelled Congress member who had earlier sprayed pepper gas from a canister in the House, causing chaos. TDP member M Venugopala Reddy, who broke the mike, was also among the MPs suspended.Others suspended are Sabbam Hari, Anantha Venkatarami Reddy, Rayapati Sambasiva Rao, SPY Reddy, M Sreenivasulu Reddy, V Aruna Kumar, A Sai Prathap, Suresh Kumar Shetkar, KRG Reddy, Bapi Raju Kanumuri and G Sukhender Reddy (all Cong), Niramalli Sivaprasad, Nimmala Kristappa, K Narayana Rao (all TDP), and Y S Jaganmohan Reddy and M Rajamohan Reddy (both YSR Cong).

39 J. Balaji, 'Speaker's power to suspend members suffers Constitutional infirmities', *The Hindu* (New Delhi, 2 June2016) 3.

40 Jinka Nagaraju, 'Rule 374(A) Balayogi's idea', *The Times of India*, (New Delhi, 24 August 2013), 4.

41 Anita Joshua & Smita Gupta, '25 Congress MPs suspended for 5 sittings',*The Hindu,*(New Delhi, 29 March 2016) 5.

the softer ones, merely because of noise and not content.[42]Parliament has become a "wrestling arena"[43]. The politicians have made a gimmick of privileges ushered by the Constitution on them. The trust and faith of the people of India is vanquished as and when the Parliament goes out of order. No doubt, our Parliamentarians possess brilliant legal acumen and debating skills which can be witnessed sporadically. Aptly,

"India's legislators are just rabble-rousing politicians. They are rewarded not for making good laws, but for making good waves inside or outside Parliament[44]."

\- Dr. Shashi Tharoor[45]

If we look at the causes of disruptions, the debates surrounding the role of the Speaker/ Chairman in curtailing disruptions, expenditure incurred to the exchequer due to disruptions and the inability of the Government to manage the floor of the house and coordinate with the political parties are addressed. The following are some viable solutions that can be adopted by Parliament to curtail disruptions, if not eradicate them fully.

Role of the Speaker- The role of the Speaker is pivotal in Indian Parliamentary democracy.[46] The Speaker is the presiding officer of the Lower House. Speakers are apolitical and neutral entities in

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42 Debu C,'Does Parliamentary disruption represent true democracy', (*The Maps of India*, 15 January 2015), https://www.mapsofindia.com/my-india/politics/does-parliamentary-disruption-represent-true-democracy accessed on 8 April 2018.

43 Editorial, 'Democracy in Peril',*The Hindu*, (New Delhi, 24 February 2014) 8.

44 Bhanu Dhamija, 'Why Lawmaking in India is so subpar', (*The Huffington Post*, 4 February 2016)https://www.huffingtonpost.in/bhanu-dhamija/indias-lawmaking-is-funda_b_9569060.html accessed on 23 April 2018.

45 Shashi Tharoor, Member of Parliament from Congress Party, cited in *Ibid.*

46 Subhash C Kashyap, *Office of the Speaker and the Speakers of Lok Sabha*, 1991 Shipra Publications; MN Kaul, SL Shakdhar, *Practice and Procedures of Parliament,* Lok Sabha Secretariat, Fifth Ed., 2001. Cited in The Hindu Centre for Public Policy, *Decisional Analysis and the Role of the Speaker*, (The Hindu, 2013).

Parliament with the sole aim of conducting the proceedings of the House in an orderly manner. As discussed in this paper, Speaker has wide discretionary powers to regulate the functioning of the House. Usually, his decisions are not taken well by the members and are not free from criticism.[47] Broadly, there are two challenges faced by the Speaker of Lower House:[48]

(a) Claim of Prejudice- There is a presumption amongst the political parties that the Speaker of the House is biased. A Speaker is doubted for being impartial. In the first Lok Sabha itself, when G.V. Mavalankar was elected as a Speaker from the ruling Congress party, there was dissatisfaction amongst the Opposition[49]. The motion was moved by A.K. Gopalan, the leader of the Communist Party, to nominate S.S. More for the office of the Speaker. It was contented that, "the Speaker was required to safeguard the interest of the oppositionparties, and should therefore not hail from the ruling party."[50] Even today, the allegation of bias persists.[51]

These accusation of biasness are due to structural issues in the

47 A precedent in support of this principle was established as early as March 9, 1953, when some members who were not satisfied with a decision by the Speaker Mavalankar, staged a walk out. These members argued that they had the democratic right to disagree with the Chair and to record their protest by retiring from the House peacefully. The Leader of the House, Jawaharlal Nehru, also proposed that such protest be accorded recognition by noting the names of dissenting members in the record of proceedings. However, Speaker Mavalankar observed that members did not have the right to protest against the rulings of the Chair.

48 Har Simran Kalra, 'Decisional Analysis and the Role of the Speaker', The Hindu Centre for Politics and Public Policy 2013 <http://www.thehinducentre.com/multimedia/archive/01587/Indian_Parliament_1587590a.pdf> accessed on 21 April 2018

49 ibid 47.

50 Ganguly Anirban, 'Wheels of Democracy on the Straight Road',(Rediff News), 27 August, 2012 http://www.rediff.com/news/column/wheels-of-democracy-on-the-straight-road/20120827.htm accessed on 21 April 2018.

51 Uttam Kumar, 'Speaker Interrupted Sushma 60 Times in 6-Min Speech', *The Poineer*, (New Delhi, 3 May, 2013). The then Lok Sabha Speaker Meira Kumar interrupted Sushma Swaraj 60 times in a 6 minutes speech when she start referring to several scams during the UPA regime.

appointment if the Speaker and tenure of his office. The election of the Speaker is done by a simple voting in the Lower House. Usually, the ruling party chooses one of its members to be elected as a Speaker after consultation with other leaders of Opposition parties. There is no consensus between the Opposition and ruling parties on the choice of the Speaker.[52] As per the Convention, the Speaker belongs to the ruling party and the Deputy Speaker belongs from the Opposition. The Speaker does not waive their party membership after being elected to the Chair. This is because Speaker re-election to the party is not ensured. All political parties campaign in the constituency of the Speaker. Even if the Speaker is re-elected to the House, the office of the Speaker in India is still open for elections.[53]

(b) Managing a Large Number of Political Parties and Coalition Governments- As the Speaker is the Presiding Officer of the House; he is bestowed with the enormous responsibility of managing the diversity political parties with different political demands. In the First Lok Sabha, the Opposition had a meagre number of 107 seats.[54] Today, in the 16th Lok Sabha, the Opposition has 261 seats.[55] There is no leader of the Opposition.[56]

In such a situation, the Speaker has to conduct the proceedings of the House keeping in mind every political partyinterest. With the plenitude of political parties, the time allotted to each one of them is

52 Rediff News, 'Thambidurai unanimously elected Lok Sabha deputy speaker', *The Rediff News,* (New Delhi, 13 August, 2014).

53 ibid 51

54 Party wise list of the Lok Sabha. http://www.indiapress.org/election/archives/lok01/lok01.php

55 16th Lok Sabha, Party Wise Representataion of Members, http://loksabha.nic.in/members/PartyWiseStatisticalList.aspx

56 Sunil Prabhu, 'No Leader of the Opposition in the 16th Lok Sabha: Sources', *NDTV*, (9 June 2014)
"According to Parliament rules, the biggest Opposition party in the House has to have at least 10 per cent of the total strength of the Lok Sabha, or 55 seats, to be eligible for the post of Leader of Opposition. The Congress, with 44 MPs is the largest Opposition party, closely followed by J Jayalalithaa's AIADMK at 37"

considerably reduced. The issues and demands that a party wishes to raise increases. With the limited amount of time in hand, it is difficult for the Speaker to prioritize the issues. The time allotted to each Speaker is distributed amongst the parties based on the strength of the House.[57] This clearly means that the political party with a lower strength gets smaller chunk of the time to speak in the House. It hampers the views of any member belonging to the smaller parties who is an expert on the subject. In one of the oldest Parliamentary democracies such as the UK, political parties cannot influence the choice of the participants in the debate. Members have to approach the Speaker and the Speaker chooses the members according to their expertise, constituency and previous speaking record.[58]

From the above discussion, we can conclude that the Speaker commands an authoritative position in Lower House. Belonging from a particular political party, he should be impartial and neutral at all times. He should be free from political afflictions without being guided by ulterior motives. The Speaker's role is pivotal in assigning the issues to be taken up in the House. Issues of public importance should be prioritized by the Speaker. Following the precedent in the UK, Indian Parliamentary Procedure can be amended to incorporate expertise based debates on issues instead of merely choosing members from the political parties on the basis of strength.

Empowering the Opposition Parties and Coordination- It is a known fact that for a dynamic democracy, a strong opposition is needed. In the 16th Lok Sabha, there is no leader of the Opposition. The Congress has officially denied leadership of Opposition in the Parliament.[59] To ensure

57 http://164.100.47.194/loksabha/writereaddata/Abstract/allocation_of_time_and_selection.pdf Allocation Of Time And Selection Of Speakers-An Abstract Series, Para 5.

58 ibid 51. Also see, Baroness Boothroyd, 'Role of the Speaker in the 21st Century in Speakers and the Speakership, Parliamentary History', Paul Seaward ed. (Chicester: John Wiley and Sons Ltd, 2010).

59 The Congress has 44 MPs which is the largest Opposition Party followed by J Jayalalithaa's AIADMK at 37. According to Parliament rules, the biggest Opposition party in the House has to have at least 10 per cent of the total strength of the Lok Sabha, or 55 seats, to be eligible for the post of Leader of Opposition. See, Mohua Chaterjee, '16th Lok Sabha won't

equality, freedom of speech and express, justice and democracy, there is a need to give voice to the Opposition.[60] If the Opposition's voice is curbed, the danger of an autocratic Government sweeps in. For a healthy democracy, there is a need for constructive criticism from the Opposition. Lack of Opposition lead dilutes democracy.[61] The issue is that the session of the Parliament or setting an agenda for debates are done by constituting the Business Advisory Committees. The members of the Committee are 15 to be nominated by the Speaker. In view of large number of political parties and limited number of members in Committee, the Speaker cannot nominate members from each and every political party.[62] With the view of inclusion of representation of a member from each political party, the Speaker must nominate one member from each political party on ad hoc basis as special invitees. However, they will not be counted for the purpose of quorum.

Another cause of concern is the quality of debates in the Parliament. This is because of two reasons, firstly, with the limited amount of time in hand, the Speaker lines up the MPs on the basis of party strength. A debated is fruitful if the MP who has 'expertise' in the subject is allowed to share his views. Secondly, there are several good speakers in the Parliament but the debate is constrained by the provisions of Anti Defection law which forces the MPs to vote according to the party's whip.

One of thevital tasks of the ruling party is to coordinate with the Opposition and work in symmetry with them. The Parliament cannot function well only by framing strict rules, the structural faults also

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have leader of opposition', The Times of India, 1 July, 2014.

60 Pushparaj Deshpande, 'The Opposition must rise up to safeguard the idea of India', (*Daily O*, 27 August 2017)https://www.dailyo.in/voices/indian-republic-democracy-dangers-communal-forces-divisive/story/1/19107.html accessed on 21 April 2018.

61 Sanjay Kumar, 'Why India Needs an Opposition Leader', (*The Diplomat*, 26 August, 2017) https://thediplomat.com/2014/08/why-india-needs-an-opposition-leader/ accessed on 21 April 2018.

62 Parliamentary Committees Handbook, Chapter XXVI, Rule 287- 292 of Rules of Procedure and Conduct in Lok Sabha http://164.100.47.194/Loksabha/writereaddata/membersbook/Chapter3.pdf.

needs to be set right. The Business Advisory Committee[63] recommends the time that should be allocated for the discussion of each issue that is brought up by the Government. The demands of the Opposition to bring an issue for discussion are essential for maintaining the decorum of the House. The substantial reasons for disruptions are the lack of agreement on agenda's between the Government and Opposition. We can learn from the best practices around the world, for example, in the UK, certain days are allotted for the discussion on the matters listed by the Opposition or if, 40 MPs demand for a matter to be listed for discussion.[64]

Display the name of the Disruptor in Public Domain and Ranking: A Parliamentarian represents the constituency from which he is elected. His role is quintessential in nature as he is responsible to voice the concerns and work for the betterment of his constituency.Every citizen hopes and trusts that the MP will act in the interest of the general public. Towitness him obstruct the proceedings of the House or not participate in debates and discussions, shatters the hope of millions of the people who have the conviction that their Parliamentarian would enact better laws for them. The act of unruly Parliamentarian would not only be unacceptable to citizens but also erode the faith of the people in the democratic institutions. This can prove fatal for his re-election.

This suggestion has been made by the Chairman of Rajya Sabha, Mr. Venkaiah Naidu. To quote him,

> *"While the Presiding Officers need to enforce the Rules of Business to ensure smooth functioning of the Houses, stopping members from entering the well of the House has come to be an intractable issue. I suggest that legislatures*

63 Rule 287 of Lok Sabha Conduct Rules- "At the commencement of the House or from time to time, as the case may be, the Speaker may nominate a Committee called the Business Advisory Committee consisting of not more than fifteen members including the Speaker who shall be the Chairperson of the Committee".

64 Baijayant Jay Panda, 'Parliament interruptus: Reform ambivalent rules from Raj era to reduce House disruptions', *The Times of India*, (New Delhi, 26 November, 2014) 5

> *may display the names of the Members in public domain with an observation that they have violated the Rules in disregard of the directions of the Chair and thereby adversely impacting the functioning of the House.*[65]

Another solution given by Mr. Vekaiah Naidu is to rank legislatures based on their performance. Some parameters can be framed for rankings to access the functioning and effectiveness of each legislator. Number of debates participated, number of bills passed, absenteeism, number of hours disrupted are some yardsticks to judge the efficiency of the legislator. For each month, a ranking board can be displayed in public domain. This can make the legislator conscious of the disruptions heralded by him.

Discontinuing Live Telecast when disruptions become excessive :

For ensuring the transparency in governance, the telecast of live debates is imperative. These live telecasts should be discontinued when the disruptions become excessive. It is observed that the disruptions are caused by the MPs to secure political mileage. Some MPs want to be in the public eye, even if it is for all wrong reasons. The MPs grandstand when there is live telecast of the debates.[66] The presence of audience has a huge impact on their behaviour. Hence, when the disruptions are excessive, stopping the live debates would have a considerable impact on their misconduct.

Therefore, the Opposition should be at least given one day in a week or few days in a session to discuss the issues of their choice. The right to dissent/ protest should not be taken away but innovatively regulated. The Speaker should exercise his disciplinary powers without hesitation. The provision of Anti Defection Law should be relaxed to a member expressing his views without the fear of his party whip.

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65 Special Correspondent, 'Venkaiah for automatic suspension of members disrupting Parliament',*The Hindu* (New Delhi, 11 December 2017) 6.

66 Ajay Pandey, 'The politics of parliamentary disruption', *The Livemint*, (New Delhi, 24 August 2015) 6.

Number of Sessions of Parliaments should be fixed : The productivity of the Parliament can be ameliorated by addressing some structural issues as well. The Indian Parliament only meets thrice in a year; Budget, Monsoon and Winter Sessions, with a gap of not more than six months. While the President convenes the sessions, the duration of the session is decided by the Government. In 1950s, the Parliament met for 130 days which has come down to 70 days in 2000s.[67] In the report of National Commission on the Working of the Constitution, it has been suggested that there must a minimum number of days fixed for every legislature. For Lok Sabha, a minimum number of sitting for 120 days and for Rajya Sabha, minimum 100 days in a year.[68] It goes without saying that time has come to implement this recommendation in letter and spirit to improve the stalled Parliament. In countries like UK and Australia, an annual calendar for meetings of Parliament is issued in the beginning of the year.[69]

CONCLUSION

Debates, discussions and deliberationsin the Parliament are foundations of a Parliamentary democracy. Disruptions are an impediment towards the smooth functioning of the House. The people of India have immense faith in the democratic process of the country but that faith is tarnished by the news of disruptions denuded by the media. It has become, rather an exceptional case, to witness the Parliament work for full sessions without any disruptions. The acrimonious Government and Opposition inculpate one another for obstructing the proceedings of the House. The bills are being hastily drafted, passed without any debates and discussions in a

67 PRS Legislative Research, 'Parliament and the Executive Background Note for the Conference on Effective Legislatures', (PRS, 29 November 2016) http://www.prsindia.org/uploads/media/Conference%202016/Parliament%20and%20the%20Executive.pdf accessed 27 April 2018.

68 Constitution Review, 'Summary of Recommendations, Parliament and State Legislatures, Chapter 5, National Commission to Review the Working of the Constitution', (The Outlook, 2 April 2002) https://www.outlookindia.com/website/story/summary-of-recommendations/215076 accessed 27 April 2018.

69 Ibid 67.

haphazard manner. Recently, in the budget session, Financial Bill and Appropriation Bill, 2018 were passed bythrottling democracy without discussions or debates within few minutes.[70]

Dysfunctional Parliament not only incurs huge cost to the public exchequer but also the unaccountable costs due to lack of debates and discussions which are of national interest. India is facing manifold problem across various sectors, the system of education is unsatisfactory, there is agrarian crisis, crime against women is aggravating, unemployment is on the rise etc. Stalling of Parliament is an injustice to these core issues and also to the people who have, ironically, immense faith in the Parliamentary democracy.

The Opposition is an indispensable feature of a healthy Parliamentary democracy. The role of the Opposition is like a 'watchdog' i.e. holding Government accountable, asking leading questions, discussing and debating issues of public importance. It is only then the true essence of Parliamentary democracy can be witnessed. Earlier and even now, Ordinances are being used sparingly to compensate for Parliamentary gridlock.[71] The first Speaker, G.V. Mavalankar had expressed his concern that Ordinances were "inherently undemocratic" and gave the Parliament "a sense of being ignored."

The Speaker is empowered to take disciplinary action against the agitating MPs. The presiding officers should "evolve and observe a code of conduct" creating strong disincentives against disruptions. Once Speaker had suspended 25 Congress MPs, but such a move often appears to be counterproductive.[72] The role of the Speaker is pivotal

70 Constitution of India 1950, Art. 109 (1) & (2):Technically, the two Bills also have to go to Rajya Sabha but since they are money bills they would be considered approved if the Upper House of Parliament does not return them within 14 days.

71 An ordinance is promulgated by the President only when the Parliament is not in session in case of an "emergency". It is used when a matter requires immediate action and not a measure to "bypass" the legislature. For more details, see, Harsimran Kalra and Kaushiki Sanyal, 'This shortcut weakens democracy', *The Hindustan Times*, (New Delhi, 24 July 2013) 3.

72 In Monsoon Session, Lok Sabha speaker Sumitra Mahajan suspended 25 Congress MPs for causing "gravedisorder", the entire Opposition

in regulating disruptions. To increase the efficiency and representative nature of the Parliament, the Speaker has to exercise his discretionary powers sparingly, within the framework of Rules of Procedure and guided by the principle of democracy.[73]

In the light of the above discussion, one can conclude that the rise in disruptions is undemocratic and undignified. It is the responsibility of both the Opposition and ruling party to minimize disruptions. The presiding Officer should have a strict enforcement of the Code of Conduct for members and should not hesitate in taking actions against an unruly member. The mud-slinging of Opposition and ruling party on each other serves no good except to malign the institution of Parliament. Pragmatically, trying to erode disruptions *in toto* may not be possible, but an endeavor to minimize the conundrum will not only serve the interests of the political parties but also, of the Indian electorate who looks up to the institution of Parliament vaingloriously.

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united which prior to the disciplinary action was ready to part ways on disruption agenda.

73 Gopal Krishna Shastri, *Speaker: His Office and Powers, Constitutional Development since Independence,*(1968)http://14.139.60.114:8080/jspui/bitstream/123456789/688/17/Speaker His%20Office%20and%20Powers.pdf accessed on 26 April, 2018.

FINDING A BALANCE BETWEEN TRADE IN HAZARDOUS WASTES AND ENVIRONMENTAL PROTECTION

Nitish R Daniel[1]

Abstract

The analysis of current International laws that deals with transboundary movement of hazardous wastes reveals that such laws have failed to achieve their goal of protecting environment. The article argues that the current laws are so stringent that instead of acting as a deterrent for such illegal activities, they incentivize conducting of illegal trade. Then, there exists a problem with respect to availability of reliable statistics as well, due to which this has not gotten much attention of the world. Economics of trade in hazardous waste is same as any business, the traders will try to maximize profit. In this case they do so by trading hazardous wastes to developing countries. To prevent these kind of trades bans on import have been imposed by different laws, but these bans have had the effect of just shifting the location trade and the pollution has continued. Many reasons come forward as to why we have failed in protecting these developing nations like, defects in the current hazardous waste law regime under Basel convention, United states of America not being its party, use of broad and vague definitions, giving national definitions to some terms, the Ban amendment stopping export for the purpose of recycling as well. There is a problems also of reconciliation of the current regime with WTO regime. We will have to accept the fact that industrial and economic activities will always produce wastes including hazardous wastes. Introducing such laws that allow such trade but regulate every aspect of such waste from the very production to the disposal and such laws are needed that maintain such a balance between environment protection and development. So that the people dealing with such wastes don't have to find ways to avoid the laws.

Keywords

Multilateral environmental protection agreements, World Trade Organisation, Basel Convention, Sustainable development, Hazardous wastes.

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Introduction

With rise in concern about climate change and environmental degradation, most of the world agree that there needs to be a balance between economic growth and environmental protection.[2] Most of the world works on free trade policy, but the merits and demerits of free trade can be better explained by economists.[3] Most of them agree that the whole world has benefitted from free trade, but in reality ethics of free trade are a little murky.[4] The free trade policy of international trade law has even treated hazardous wastes as tradable goods. There wouldn't be a problem with such a trade in such commodities if it was for some beneficial purpose, but the reality is that such a trade is undertaken by developed countries for disposing off such hazardous wastes in developing countries.[5] In these developing countries, the waste disposal laws are weak due to which the cost of disposal is low, and more land is available to be used as disposal sites. On the contrary, developed nations have lesser amount of area to be used as disposal sites and more stringent laws resulting in high disposal costs. The problem is that due to prevailing economic needs of such countries they are forced to accept such hazardous wastes in their boundaries despite not having sufficient measures to effectively and safely dispose off these wastes, so it can be said that their consent is vitiated in such agreements. Such trade has been described as 'environmental racism' by UN human rights commission.[6] Most of such waste disposal sites are located in poor suburbs of the developing countries, hence the poor communities bear the burden of industrialisation without receiving

2 Alan Fowler, *Striking a balance: A guide to enhancing the effectiveness of non-governmental organisations in international development* (first published March 1997, Routledge 2013) 12.

3 See generally Jagdish Bhagwati, *Free trade today*. (1st edn, Princeton University Press, 2003).

4 Werner Antweiler, Brian R. Copeland, and M. Scott Taylor, 'Is free trade good for the environment?' (2001) 91.4 American Economic Review 877.

5 Kofi Asante-Duah and others, 'ES&T Features. 'The Hazardous Waste Trade. Can it be controlled?' (1992) 26.9 Environmental science & technology 1684.

6 Robert D Bullard (ed), *Confronting environmental racism: Voices from the grassroots*. (1st edn, South End Press, 1993).

any advantages of it.[7].

Initially, even the World Bank found such a trade in hazardous wastes logical. The logic behind the trade of toxic trade could be deciphered clearly by the internal memo of World Bank.[8] The logic being that, such a pollution that might affect health of humans or other organisms should be done in the country in which least amount of money will have to be spent to deal with the damage caused by such pollution. Such country logically will be either be a least developed nation or a developing nation in which the wages are the lowest.[9]

Problems with the laws :

Since their very inception, the international environment protection laws have tried to promote sustainable development. Brundtland commission report[10], Rio declaration[11], Johannesburg World summit on sustainable development[12], Sustainable development goals[13] all have believe in balancing development with environmental protection and kept sustainable development at the centre of their agenda. Hence, the world community decided at the very outset to not completely prohibit developmental activities that causes environmental degradation, but to manage these activities in such a way that there is a balance between development and environment protection.

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7 UNHCR 'Rept on Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights' by Resolution 4/RES/1997/9 (1997).

8 See generally J Johnson, 'Potential Gains from Trade in Dirty Industries: Devisting Lawrence Summers' Memo' 2007 27 Cato J 397.

9 J Vidal, 'A Gaffe Over the GEF', *Guardian* (London, Feb 14 1992) 29; D Henwood, 'Toxic Banking; World Bank's Environmental and Global Policies',*Nation* (March 2, 1992), 257. (Memo was signed by the then Chief Economist of the World Bank Lawrence Summers).

10 G. H. Brundtland (ed), *Our common future. Report of the World Commission on Environment and Development,* (1st edn, OUP 1987).

11 UNGA'United Nations Conference on the Human Environment'by UNGA resolution A/Res/2994 (15 December 1972).

12 UNGA'World Summit on Sustainable Development' by UNGA resolution A/RES/57/253(21 February 2003).

13 UNGA'Transforming our world : the 2030 Agenda for Sustainable Development' by UNGA resolution A/RES/70/1 (21 October 2015).

This trend is also seen to some extent in international law regulating hazardous waste trade and its movement as well. The main international conventions dealing with hazardous waste management are Basel Convention on Transboundary Movement of Hazardous Wastes[14], Rotterdam convention[15], Stockholm Convention on Persistent Organic Pollutants[16]. The problem that arises is that all these conventions have some or the other defects or deficiencies that lead to exploitation of developing nations. These conventions do not criminalise such trade and have a lot of defects, due to these reasons BASEL ban amendment arose in 3rd Conference of Parties and many regional treaties have come into existence that have completely banned trade in hazardous wastes. For instance,Bamako Convention was created by African nations to put ban on all importation of hazardous wastes into any African nations.[17] This ban also covers radioactive wastes.

The overall effect of such partial or total ban by these treaties have been negative. They have not stopped trade in hazardous substances, they have just shifted the location of such trade to other areas in the globe like Asia. There is a general dissatisfaction among nations with respect to the limited ban imposed by the Basel Convention. Report by Greenpeace reveals that more than hundred countries have imposed complete ban on hazardous waste imports using either regional treaties or national laws.[18] Such as the Lome Convention which was replaced

14 UNGA 'Traffic in and disposal, control and transboundary movements of toxic and dangerous products and wastes'by UNGA A/RES/44/226 (22 December 1989).

15 Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted 10th September 1998, entered into force 24th February 2004)2244 UNTS 337; 38 ILM 1 (1999).

16 Convention on Persistent Organic Pollutants (adopted 22nd May 2001, entered into force17th May 2004) (Stockholm), 40 ILM (2001) 532.

17 Donald J. Wylie,'The Bamako Convention as a Solution to the Problem of Hazardous Waste Exports to Less Developed Countries' (1992) 17Colum. J. Envtl. *L.* 419.

18 Greenpeace, 'The Waste Invasion of Asia, A Greenpeace Inventory', Executive Summary (1994).

by Cotonou Agreement, [19] the Waigani Convention[20], and many more.

Due to this reason Asia has become the primary target of hazardous waste traders since it has the only non-OECD region which does not prohibit waste imports.[21] Greenpeace has reported that waste traffic is increasingly being directed at Asia and is claiming a 'devastating toll from people and the environment'.[22] Hence there is no doubt that regional bans do not have the capacity to ensure environmental justice.[23]

Effect of Regional or National Bans :

Restriction on trade in hazardous substances makes the people dealing with the hazardous wastes business to find ways to avoid laws. The economics of trade in hazardous waste is simple, the conventions impose such a high liability on waste dealers that it is profitable for them to take a chance of illegal trade using bogus 'Shell' trading companies and if they get caught they can just declare themselves insolvent.[24] Currently, to avoid such laws waste is disposed in unmonitored geological landfill disposal or dumped illegally in the sea. The reason being landfill disposal is the least expensive option

19 JT Gathii,'The Cotonou Agreement and economic partnership agreements' (2013) 31 Realizing the Right to Development. 259.

20 Convention to ban the importation into Forum island countries of hazardous and radioactive wastes and to control the transboundary movement and management of hazardous wastes within the South Pacific Region (adopted in 1995, entered into force 2001) UNTS Volume Number 2161 (p.91).

21 Note: The Association of SE Asian Nations (ASEAN) issued a Joint Communique at the ASEAN inter-Parliamentary organisation's 14th working committee and General Assembly, Kuala Lumpur, 20-25 September 1993 voting for a Regional Convention to prohibit imports but this has not yet occurred.

22 JenniferClapp, *Toxic exports: the transfer of hazardous wastes from rich to poor countries*. (1stedn, Cornell University Press, 2001).

23 Ann Leonard, 'South Asia: The new target of international waste traders', (*Multinationalmonitor*, 1 June 1993) <available at http://www.multinationalmonitor.org/hyper/issues/1993/12/mm1293_08.html> accessed 23rd September 2018.

24 Michael Carl Hector, 'Toxic Trade: E-Waste Disposal and Environmental Governance in West Africa' (MA thesis, Stellenbosch University, 2017) <https://scholar.sun.ac.za> accessed 23rd September 2018.

as it only requires land for dumping these wastes and in developing countries quite often land is abundant.[25] These landfills rarely meet the requirement of minimum safety standards, leading to contamination of the ground and surface water.[26] On the other hand marine disposal or simply dumping wastes at sea is also a cheap option of disposal. Wastes are sometimes incarcerated on ships while sailing at high seas to circumvent laws.[27]

Problem with respect to reliable statistics :

There exist problem of data collection on the matter as well. There is shortage of reliable data on production and disposal of hazardous wastes. Whereas the secretariat of the Basel Convention has been given the task of collecting data relating to generation of hazardous wastes from the parties under Basel Convention, the submission of data is not obligatory just voluntary.[28]Some studies reveal that the OECD countries produce 75% of the total hazardous waste around the world.[29] Further discrepancies arise due to variations in the definitions of hazardous wastes from nation to nation and untrustworthy data collection and submission by states. Often stark differences are seen in the data which can be attributed to the secretariat lacking monitoring and enforcement capacities. Only reasonable conclusion that can be drawn from the available data is that there is a constant increase in the amount of hazardous waste that is produced around the world in the ranges of four to five percent every year and that no significant

25 Paul T. Williams,*Waste treatment and disposal* (2nd edn, John Wiley & Sons, 2005).

26 Coconuts Bangkok, 'Toxic Trash: 75% of all hazardous waste in Thailand dumped illegally', (*Coconut Bangkok*, 24th March 2014) <available at https://coconuts.co/bangkok/news/toxic-trash-75-all-hazardous-waste-thailand-dumped-illegally> accessed 20th September 2018.

27 G. Y. S Chan and others,'Effects of leachate recirculation on biogas production from landfill co-disposal of municipal solid waste, sewage sludge and marine sediment' (2002) 118.3 Environmental Pollution 393.

28 Article 13(3)(b), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted on 22 March 1989, entered into force 5th May 1992) Volume 1673 1992 nos.28908-28913.

29 COP10 Doc. UNEP/CHW.10/INF/4, at 6; Basel Secretariat (ed.), Global Trends 2004–2006, at 8–10.

impact has been made by the multilateral environmental agreements in protecting environment.[30]

We will have to accept the fact that industrial and economic activities will always produce wastes including hazardous wastes. Introducing such laws that allow such trade but regulate every aspect of such waste from the very production to the disposal. Such laws are needed to maintain such a balance between environment protection and development. So that the people dealing with such wastes don't have to find ways to avoid the laws.

Economics of trade in hazardous waste :

The economic logic behind the trade can be further explained of these factors:

Firstly, the economic value of any wastes depends on the extent useful matter could be recovered by the different processes or recycling.[31] Non-hazardous wastes often have a considerable amount of such useful matter which makes them tradable product with economic value. On the other hand Hazardous wastes require positive investment to get rid of them. Such methods of disposal are often expensive treatment and do not yield any product that can be sold to get money back, as often the by-products of such processes are also hazardous.[32] Due to this reason the hazardous waste owner who has to bear the costs of disposal just wants to get rid of the waste as soon as possible at lowest rate.[33] For instance, the reason given by the US Chamber of Commerce in 1994 for not ratifying of Basel ban amendment was the blatant cost which was around US $2.2 billion a year[34] which would be required for

30 Alec Liu and others,'A review of municipal solid waste environmental standards with a focus on incinerator residues'(2015) Vol. 4, No. 2International Journal of Sustainable Built Environment 165.

31 Van Daele and others, 'Waste Management and Crime' (2007) 37 Envtl. Pol'y& L. 36.

32 Derek Kellenberg, 'The economics of the international trade of waste' (2015) 7.1 Annu. Rev. Resour. Econ.109.

33 Abrams, 'Regulating the International Hazardous Waste Trade'(1990) 28 Colum. J. Transnat'l L. 806.

34 'Chamber of Commerce Withdraws Support for Treaty on Waste Movement'(1994) 25 Envtl RepBNA 194.

disposal in accordance with Basel guidelines, we can just imagine the cost it would take now.

Secondly, the rules of liability created by different conventions add more financial burden on parties by imposing obligation of safe and sound delivery of hazardous wastes to the consignee. What this legal liability regime does is that it imposes such rigorous liabilities that even if a bona fide accident takes place the trader would have to bear cost for loss and take heavy insurance to bear such a cost in case liability arises. From a purely economic perspective since the owner and shipper of the hazardous wastes could lose all their profits just by one accident while handling or delivering the wastes (chances of which are always quite high), this creates an incentive for these owners and shippers of hazardous wastes to completely ignore the legal waste disposal and go for illegal trade. This is often done by creating bogus firms insolvent in case of liability. Due to these very reasons organized crimes has become predominantly involved in hazardous waste trade.[35] Therefore a better solution would be to create a chance for these trades to make profit by regulating every aspect of trade rather than completely outlawing such trade. This creation of positive economic interest in hazardous waste trade is what could save environment from degradation and curse of illegal dumping.

Historical Background

The early instances of hazardous waste trade arose in the 1980s, safety laws in USA and Europe had increased the disposal costs up to $2500[36]. It is argued that virtually every nation situated on the western coast of Africa received offers from American or European companies for making available sites on which hazardous wastes could be disposed off. Guinea-Bissau in 1988 was offered $120 million for allowing disposal of 15 million tons of toxic wastes from Europe, this amount was almost equivalent to Guinea-Bissau's GNP of $150 million

35 Derek Kellenberg,'The economics of the international trade of waste'(2015) 7.1 Annu. Rev. Resour. Econ. 109.

36 James Brooke, 'Waste Dumpers Turning to West Africa' *The New York Times* (New York, 16 July 1988).

at that time.[37] African nations like Nigeria and Ivory Coast adopted new laws to punish waste traders. The illiteracy prevalent in African nations made the trade unfair as Africans were not aware of dangers of toxic wastes. New York Times reports instances of illiterate people being given $2.50 per day without telling them what the barrels they were keeping in their backyard contained. At the same time Western companies didn't practice transparency and truth in the trade. For example contract between Republic of Benin and a company Sesco used words like "complex organic matter" and "ordinary industrial wastes" for referring to toxic wastes.[38]

Many toxic disposal instances and discoveries by some African nations(like Liberia and Sierra Leone) of illegal disposal in their territory brought the attention of international community towards the issue.[39] Negotiations for Basel convention started and the convention came into force in 1992. The original Basel convention just controlled and limited the movement of waste, it didn't ban it. Many nations especially developing nations weren't satisfied by it so the Basel ban amendment was passed but it still hasn't come into force. Ban amendment added article 4A and Annex VII which ban transfer of hazardous wastes from OECD to non-OECD countries.

The defects in the current hazardous waste law regime under Basel convention :

The main defects in the current Basel convention that prevent environmental protection are:

1) United states of America not being its party :

It is estimated that USA is the world's largest producer of hazardous wastes,[40] but it has only signed the Basel convention in 1988 but it hasn't ratified it. It is concerned about the cost it will have to bear

37 *ibid.*

38 *ibid.*

39 *ibid.*

40 Greenpeace, 'Report on Lead Astray: the Poisonous Lead Battery Waste Trade', (1994) 6A Greenpeace Report.

because of the ban amendment.[41] There are various reasons given by USA for this. According to the Basel convention's official website the reasons USA hasn't become member of Basel Convention are as follows[42] : *Firstly*, USA demands that the convention should apply to vessels and aircraft like warship, naval auxiliary, and other vessels or aircraft owned or operated by a State for non-commercial service (ships that are generally entitled to sovereign immunity under international law). *Secondly*, that the enforcement of Basel convention against such vessels given above should not impair the operations or operational capabilities of such sovereign immune vessels so far as it is practicable and reasonable. *Thirdly,*USA wants a changed definition of a 'transit state' in the Convention. Currently, the law states that even if a state is exercising its right of innocent passage carrying hazardous wastes through another state's territorial waters under international law, it will be required to take permission of such coastal state. USA demands that change be made in this regard that only if wastes are moved, or are planned to be moved, through its inland waterways, inland waters, or land territory, then only it may be considered transit state. United States also states that it will formally object prior permission or authorization provision if the hazardous waste transporting state exercised right of innocent passage through territorial sea or freedom of navigation in an exclusive economic zone. So no prior consent should be required to move under right of innocent passage. *Fourthly*. USA also demands that exporting state be given the power to decide the question whether it lacks the capacity to dispose of wastes in an 'environmentally sound and efficient manner'. *Fifthly,*USA has problem with respect to article 9(2) of Basel convention, it contends that under this article obligations for the exporting State do not goes beyond cleanup and taking such wastes back or disposing them in accordance with the Convention. Hence, the universal convention should incorporate such changes as required by US.

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41 'Chamber of Commerce Withdraws Support for Treaty on Waste Movement'(1994) 25 Envtl Rep(BNA) 194.

42 Charles W Schmidt,'Trading trash: why the US won't sign on to the Basel convention' (1999) 107.8 Environmental Health Perspectives 410.

2) Use of broad and vague definitions

i. The definitions of hazardous wastes

The definitions used in the convention are very vague, for instance Article 2 defines "Wastes" as "*substances which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law"*. Annex I,II and III to the Basel Convention define hazardous wastes in a very vague and broad manner this leads to uncertainty and allows parties to contest whether the exported waste is hazardous waste under Basel convention. Annex I says Hazardous Wastes include hospital and pharmaceutical wastes etc, then it classifies the wastes according to their constituents such as lead, mercury and asbestos. Annex II includes household wastes and ash from incineration of household wastes. Annex III classifies the wastes as hazardous wastes based on their characteristics like explosiveness, flammability etc.

ii. Unspecified meaning of "environmentally sound management"

The Basel convention creates an obligation that the hazardous wastes be dealt with in an 'environmentally sound manner'. Article 2.8 of Basel convention defines *'environmentally sound management'* as "*taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.*"[43]

The definition is so vague that it gives every party to argue that the procedure followed by it was in compliance with 'environmentally sound management'.

iii. Giving hazardous wastes national definitions

Article 3 Basel convention gives each party freedom to choose from the substances in Annexes that it will consider as hazardous. Such

43 Article 2.8), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted on 22 March 1989, entered into force 5th May 1992) Volume 1673 (1992) nos. 28908-28913.

freedom creates confusion and discrepancies. As some parties will consider some materials as hazardous while the same materials won't be treated as hazardous hence creating conflict between such states.

Use of vague terms should be avoided instead Basel secretariat should be given the power to define what exact material should be treated as hazardous by creating a separate scientific branch in the secretariat. The proposed universal convention shouldn't give the power to parties to decide what materials they want to ban, instead the overarching scientific body should decide by experimentations whether the material is hazardous or not. This would create uniformity in treatment of such wastes and most hazardous substances can then be separately dealt with globally without creating any discrepancies. This would allow newly discovered hazardous wastes to be included under the convention fairly quickly. Such overarching scientific body should also determine what procedure of disposal would amount to environmentally sound management.

3) The Ban amendment stops export for the purpose of recycling as well

Agenda 21, Ch 20.17(d) promotes recycling is an activity to achieve sustainable development, but ban amendment even bans import export of hazardous wastes for recycling as well. The current right of parties to prohibit the import of hazardous wastes should be kept, but if the party prohibits import of any substance from one state it shouldn't be allowed to import the said substance from any other state as well. To increase participation in the convention the export or import from non-party should result in WTO sanction on the member. Basel convention allows export of wastes only when exporting state doesn't have capacity or facility to dispose waste in environmentally sound manner, this provision should be removed.

4) Article 11

Article 11 to Basel convention gives a possibility to circumvent the ban it permits agreements allowing "*...the transboundary movement of hazardous wastes with Parties or non-Parties, provided that such agreements do not derogate from the environmentally sound*

management of waste as required by the Basel Convention". As we have seen above the definition of 'environmentally sound management isn't clear, this allows parties to implement such bilateral or multilateral treaties that can circumvent Basel Ban. So anyway the ban won't work while such provision exists. Such agreements shouldn't be needed at all in a regime where there are minimal bans and such agreements should be treated as infringement of most favoured nation principle.

Other suggestions

Traders in hazardous wastes should be registered with the secretariat and only these traders should be allowed to trade in such stuff. Incentive of this would be that legal traders would point out the illegal traders which pose competition to them. Provisions should be added for checking illegal traffic by international agencies like Interpol or world custom organisations. Currently the jurisdiction to criminally prosecute the offender lies with the state of export this should be converted into universal jurisdiction. Basel secretariat is criticized for not being transparent and lack public access and its role being limited to giving information to the parties. New secretariat should be given stronger powers like power of independent inspection. Allow setting up of disposal facilities in one state using investment by other state with permissions of concern states

WTO law and Environmental protection relation Current regime:

Environmental protection wasn't explicitly addressed in GATT 1947[44]. This shows the kind of importance trade was given over environment. Only after the Rio conference[45] of 1992 during which the Uruguay round (1986-1994) was going on environmental issues were taken up while establishing WTO at Marrakesh in 1994.[46]

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44 GATT 'General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization', Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

45 UNCED 'Declaration of the UN Conference on Environment and Development', UN Doc.A/CONF.151/26/Rev.l, *Report of the UNCED,* vol. 1 (New York) 2002.

46 John H. Barton and others, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO.* (1stedn, Princeton University Press, 2008).

WTO agreement serves as an umbrella agreement which entered into force on 1st January 1995. There are different annexes in WTO agreement. Annex-1A deals which trade in goods (includes GATT 1994[47] which is to be read with GATT 1947) it includes agreement on agriculture, sanitary and phytosanitary measures etc. Annex-1B contains General agreement on Trade in services[48], Trade related aspects of Intellectual Property Rights[49] are contained in Annex 1C, while Annex 2 contains Dispute Settlement Understanding (DSU)[50]. In the end Trade policy review mechanism is contained in Annex 3.

Significant improvements were made in the dispute settlement procedure given in GATT 1947 by the WTO agreement. The weak dispute resolution system of GATT 1947 was considered its greatest drawback, while previously recommendations of GATT panels had to be accepted unanimously now a Dispute Settlement board (DSU) has been made which works on 'negative consensus' that means recommendations will only be rejected if DSB unanimously rejects the decision of panels. Strict time limits and an appellate body has been introduced.[51]

To understand the relation of trade and environment protection we need to first understand some essential principles of trade law. First principle is Most-favoured nation principle which is contained in Article I GATT 1947, which is a non- discrimination principle which says that if a nation grants one of their trading partners a favour they must do the same for all other WTO members.[52] Second principle is National treatment principle that is contained in Article III GATT 1947, which is also a non-discrimination principle which prohibits

47 (1994) 33 ILM 28.

48 (1994) 33 ILM 44.

49 (1994) 33 ILM 81.

50 (1994) 33 ILM 112.

51 John H. Barton and others, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*. (1stedn, Princeton University Press, 2008).

52 Kyle Bagwell, and Robert W. Staiger,'Reciprocity, non-discrimination and preferential agreements in the multilateral trading system.' (2001)17.2 European Journal of Political Economy 281.

discrimination between imported and locally produced goods once they have entered the market.[53] Principle of General elimination of quantitative restrictions is contained in Article XI GATT 1947:

"bans prohibitions or restrictions other than duties, taxes or other charges shall be instituted by any contracting party on the importation or exportation or sale for export of any product destined for the territory of any other contracting party." [54]

There exist many exceptions of these principles in GATT 1947 few of them could be linked to environmental protection.[55] Article XI (2) provides that (i) for critical shortages of food or other products in exporting party the exports can be prohibited or restricted (ii) restrictions on import export can be introduced for maintaining standards for classification, grading or marketing of commodities in international trade (iii) import restrictions to preserve competition in agricultural industry and fisheries. Article XX says:

"nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health; . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The exceptions under Article XX are qualified by an introductory clause commonly termed the chapeau. Even if a measure otherwise falls within one of the exceptions in Article XX, it would be illegal under the chapeau if it constitutes

(i) arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

(ii) a disguised restriction on international trade."[56]

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53 *For more see* GaetanVerhoosel, *National treatment and WTO dispute settlement: adjudicating the boundaries of regulatory autonomy* (1st edn, Hart Publishing 2002).

54 Article XI GATT 1947.

55 Salman Bal, 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT' (2001) 10Minn. J. Global Trade 62.

56 Article XX GATT 1947.

PROBLEMS WITH THE CURRENT REGIME AND RECONCILING PROPOSED UNIVERSAL BASEL CONVENTION WITH WTO REGIME

It might seem that such provisions should sufficiently protect environmental concerns but they don't. The burden of proof that Article XX exception applies has been placed upon the partyasserting it as a defence. This burden has not often been discharged, largely because of the strictness with which its provisions are interpreted. Each of these provisions have some difficulty in implementation due to the words used.[57] Article XX para (b) only protects fauna, flora and bodily integrity of humans it doesn't cover environment as such. Also the word 'necessary' has created ambiguity.[58] The main problem with these exceptions in context of hazardous waste is that neither of the two exceptions specify the limitations of geographical region of the resource to be protected. The question arises that whether the environmental resources of territory of another member or resources of a transboundary or global nature could be protected under these provisions.

A case decided under GATT 1947 regime called *tuna-dolphin case*[59] the panel objected to the extra-territorial enforcement of environmental considerations under Article XX (b) GATT. It was held that:

"...GATT rules did not allow one country to take measures for the purpose of enforcing its own domestic laws for the animal health or exhaustible natural resources in another country..."[60]

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57 WTO, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*(12 March 2001)WT/DS135/AB/R (2001) [*Asbestos Case*];WTO, *US—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body* (29th April 1996) WT/DS2/AB/R (1996); 35 *ILM* (1996) 274 [*US Gasoline Standards Case*].

58 WTO, *EC—Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001) WT/DS135/AB/R (2001) [A*sbestos Case]*(The Appellate Body has held that a measure is 'necessary' under Article XX(b) if no GATT-consistent alternative is reasonably available and provided it entails the least degree of inconsistency with other GATT provisions.).

59 *United States--Restrictions on Imports of Tuna.* No. DS21/R, 30 ILM 1594 (1991).

60 *ibid.*

In the *Second Tuna dolphin report*[61] in 1994 the panel held that: *"... Article XX on the basis of Article 31 and 32 Vienna convention on law of treaties be interpreted in the light of new MEAs."*[62] Under the WTO dispute resolution mechanism the *shrimp turtle case*[63] opened up the possibility of extra-territorial enforcement of environmental considerations hence opening up the chance of MEAs to restrict some trade.

The Basel convention[64] uses trade restrictions as a means to pursue environmental protection, the concern here is if a party to Basel convention adopts a trade restriction against a WTO member who is not party to Basel convention. Article 30(4) VCLT[65] provides that: *"as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states govern their mutual rights and obligations".*[66] The result of this is that if a party doesn't sign a MEA like Basel convention it might be able to question trade restrictions against it by other states due to such MEA.

The import or export ban under the Basel convention is a non-tariff barrier such barriers are prohibited by Article XI(I) GATT. So, only way to legitimize such bans would be a recourse to Article XX(b) under which it might be claimed that hazardous waste ban is to protect human, animal or plant life or health. But here as well the essential of 'necessity' will have to be proved. We might argue that the ban is justified under Article XX (g) to conserve exhaustible natural resources like water near hazardous waste dumping area, but the

61 (1994) 33 ILM 839.

62 *ibid.*

63 *United States-Import Prohibition of Certain Shrimp and Shrimp products, Appelate body report and panel report,*(9 April 1999) WT/DS58/14.

64 WTO, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*(12 March 2001).WT/DS135/AB/R (2001) [*Asbestos Case*] ('necessity' has been interpreted by GATT/WTO dispute settlement as requiring that 'no alternative measures either consistent or less inconsistent' with WTO rules exist This requirement could potentially pose an insurmountable hurdle).

65 Convention on the Law of Treaties (adopted 23rd May 1969, enforced on 27th January 1980)(Vienna) 1155 U.N.T.S. 331, 8 ILM (1969) 689.

66 *ibid.*

provision would require the country to stop domestic production of the hazardous waste as well which might not be practically feasible.

The Ban on hazardous wastes would be harder to reconcile with the WTO regime due the reasons given above, but mere restrictions won't. If we impose restrictions regulating the trade the WTO regime will be able to adopt it and no country even non-party to the proposed universal Basel convention could take the recourse of WTO regime to nullify the environmental protection measures in the proposed convention.

One possibility is that new convention made for dealing with the matter of hazardous waste should have such a body that can clarify that the trade restriction measures being taken by countries are in compliance with the MEA and not just a disguise for discrimination. Other is that WTO bodies be allowed to decide whether matter comes under WTO exceptions or not, under this WTO dispute settlement procedure should be used as a dispute settlement mechanism under the new proposed universal convention. By this the enforcement mechanism of proposed convention will be strengthened, as most MEAs lack in this aspect. For this changing the composition of WTO panels and appellate bodies should be done in such a manner that in the trade related disputes the panel must have some members with expertise in environmental matters along with international trade.

In the new convention there should be a provision that if any dispute is raised by a party to Basel convention against any other party to Basel convention with respect of non-compliance of Basel mandate, or a non-party to Basel convention but party to WTO raises dispute regarding wrong application of Basel Convention against it, it should be made mandatory for the parties to settle dispute under WTO dispute settlement mechanism. WTO dispute settlement procedure will be better because implementation of decisions made under the mechanisms of any specific MEA is usually weaker. In addition to this, in such matters the composition of WTO panels and appellate bodies should be such that disputes the panel must have some members with expertise in environmental matters along with international trade.

Another possibility is that the restrictions imposed under the proposed convention should be read under new interpretation. Alternative to amendment of WTO provisions will be to have a broad and liberal interpretation of provision we saw earlier were applicable in case of environmental protection like Article XX(b) and XX(g). Such adoption of interpretation requires three-fourths of WTO members approval[67].

Talking about MEAs generally,an exception for international commodity agreements has been provided under Art. XX(h). Hudec[68] proposes a new exception to Art. XX, on the same lines. In such a provision the WTO provsion will lay down pre-specified criteria with respect to *"the substance, structure and negotiating procedure a MEA would need to fulfil to qualify for the exception"*.[69] If this is done it could further clarify what restrictions on hazardous trade could be legal and enforced globally.

6. Conclusion

To protect our environment we'll have to change our approach towards protecting it. The Basel Convention was the first important step towards environmental justice but it failed to achieve environmental protection so we'll have to move further than it. We will have to accept the bitter truth that the world won't stop producing things and which turn wouldn't stop production of hazardous wastes. Only way to ensure that environment isn't harmed by hazardous wastes is to develop a universal convention with characteristics I have mentioned in the paper. If we ensure that all waste is disposed off in a legal manner that harms environment in the least possible manner we would have saved environment more than a regime where everyone is just eloping the laws.

67 Article IX(2)GATT 1947.

68 Robert Hudec and JagdishBhagwati (eds), *Fair Trade and Harmonization* (1st edn, Cambridge, Mass, 1996).

69 *ibid.*