

INDIAN JOURNAL OF SOCIO LEGAL STUDIES (IJSLS)

An International Bi-annual Peer Reviewed Research Journal

ISSN 2320 - 8562

IMPACT FACOR : 2.139(IIJIF)

VOLUME VIII

ISSUE-I

2019



**Indexed in
International Innovative Journal Impact Factor(IIJIF)
&
Directory of Research Journals Indexing(DRJI)**

Chief Editor
Dr. Suresh Mani Tripathi
Assistant Professor (Law)
Govind Sarang Govt. Law College
Chhattisgarh

INDIAN JOURNAL OF SOCIO LEGAL STUDIES (IJSLS)

An International Bi-annual Peer Reviewed Research Journal

ISSN 2320 – 8562

Patron

Dr Sanjeev Kumar Tiwari
Head, Department of Law,
University of Burdwan, Burdwan,

Chief Editor

Dr. Suresh Mani Tripathi
Assistant Professor (Law)
Chhattisgarh

Associate Editors

Dr Sudhir Kumar Chaturvedi, Assistant Professor(Law),HNB Garhwal University,UK
Mr. Sharad Chandra Mishra, Law Officer, DDA

Editorial Board(India)

Dr Avkash Jadhav, Associate Professor, Deptt of History ,St. Xavier College ,Mumbai
Dr. V.S. Tripathi ,Sr. Lecturer, B N D College Kanpur University, UP
Dr. Yaswant Singh, Assistant Professor, T.D.College, UP
Dr. Shishir Tiwari, Assistant Professor, Deptt.of Law, North-Eastern Hill University, Shillong.
Dr. Aryendu Dwivedi, Principal , Maa Vaishno Devi Law ,College, Lucknow (U.P.)
Dr. Chandrasen Pratap Singh, Assistant Professor (Law), Lucknow University
Dr. Ganesh ji Tiwari, Associate Professor, Gangtok
Dr. Santosh kr. Singh, Reader, KGK PG College, Muradabad.
Dr R K Singh, Assistant Professor, SLSR, AP Goyal Shimla University, Shimla.
Dr.Vagish Upadhyay, Assistant Professor
Dr. Vikesh Ram Tripathi, Assistant Professor, Delhi University
Dr Santosh Tiwari, Assistant Professor, Gautam Buddha University ,UP
Mr. Pradeep kr.Tiwari ,HR Manager ,Andhra Bank
Dr. Hemant Chand, Advocate, HC
Mr. Ratneshwar Singh ,Advocate ,Deoria
Mr. Sanjeev Ranjan ,Law Manager ,Kenara Bank
Dr. Ajay Kumar Singh, Faculty of Law, KGK College, Moradabad,UP
Dr. Monika Garg, Principal, Saraswati Institute of Law

Editorial Board(International)

Dr.Tek Bahadudur Ghimire, Joint Govt. Attorney, Off. of Attorney General, Nepal
Mr.Bibek Kr. Paudel, Associate Professor, Tribhuvan University, Nepal
Dr. Palollo Michael Lehloenya, Sr. Lecturer, University of South Africa(UNISA)
Mr. Karna Bahadur Thapa Associate Professor, Nepal Law Campus, Tribhuvan University.
Mr. Balram Pd. Raut, Lecturer, Tribhuvan University Nepal
David Tushaus Missouri Western State University, USA
Mr. Laxmi Narayan Dhungel , Lecturer, Faculty of Law, Tribhuvan University, Nepal
Ambalika Biswas, Associate Lecturer Royal Thimphu College, Royal University of Bhutan,
Rhem Rick Corpuz, Faculty , Angeles University Foundation, Philippines
Zelina Sultana, Lecturer, Deptt. of Law, Jagannath University ,Bangladesh
Mr. Gazi Saiful Hasan, Assistant Professor, Metropolitan University, Sylhet, Bangladesh

SUBMISSION GUIDELINES FOR ARTICLES

1. COVERING LETTER-All submissions must be accompanied by a covering letter stating the **title, author's full name, university** and year of study and the **author's contact details**.

All Submissions must be in MS word 2007/2010/2016.

2. MAIN TEXT – Times New Roman, font size 11, double spacing, justified, with a margin of an inch on all sides.

3. FOOT NOTES – Times New Roman, font size 10. Substantive foot notes are accepted.

Both single-authored and co-authored (a maximum of two authors) entries will be accepted.

4. ABSTRACT - All the entries should be accompanied with an abstract which should be of 250 words for both articles and case comments.

Specifically, in context of a BOOK REVIEW, the submission should include relevant information like the title of the book reviewed, names of the author(s)/editor(s), publication information (name, place and year of publication), total no. of pages, etc.

PUBLICATION GUIDELINES

All the submissions should be original, neither previously published nor in consideration for any other publication. The Editorial Board will follow the Anonymous Peer-Review policy for judging the submissions. The Editorial Board reserves the right to reject or edit any article whose content is offensive or defamatory, explicitly unethical or if it supports racism, sexual or religious discrimination, illegal activities ; similarly an article may be refused if the Board deems that it might harm the political or religious sensitivity of interested readers in any manner. Decision for publication will be totally based on recommendation of Editorial Board. Only communicating articles/ papers does not entitle to anyone for publication. The Editorial Board reserves the right to disqualify entries on account of plagiarism. The submissions should not infringe the copyright or any other right of a third party, if so, the journal disclaims any responsibility for copyright violation or any other liability.

By submitting their work, the authors grant to IJSLS, an exclusive right to publish and reproduce their work in all media. Such right is to be given with the view of observing the doctrine of fair use under intellectual property rights subject to attribution of the author.

Conditions apply:

The journal reserves the right to make suitable amendments in the final draft of the articles to suit the journal's standard and other requirements.

The IJSLS follows a rolling submission policy and hence there is no deadline to submit articles. However, to be considered **for the January Issue of a particular year, please submit your paper latest by the 30th of November** and **for the July Issue, latest by the 30th of May**. Papers submitted beyond the deadline shall be automatically considered for the following issue. Since we take decisions on publishing articles on a rolling basis, we encourage authors to submit their papers well in advance of the deadline for an upcoming issue.

Disclaimer:

The views expressed by the scholar in articles of this issue are not the official view of the chief Editor, Members or Editorial Board of IJSLS. They are the independent views of the scholars. So the Scholars are only responsible for their articles. The IJSLS shall not be responsible for the views expressed by the scholars. All right are reserved. No part of this publication can be reproduced or transmitted in any form or any means, without prior permission of the publishers.

GUIDELINES FOR AUTHOR

Preparing your article for submission

Organisation of material

Full papers

Full papers present original high quality primary research that has not been previously published. Extensions on work that has appeared in print in a short form such as a Communication are normally acceptable.

Title

A paper should have a short, straightforward title directed at the general reader. Lengthy systematic names and complicated and numerous chemical formulae should therefore be avoided where possible. The use of nonstandard abbreviations and symbols in a title is not encouraged. Please bear in mind that readers increasingly use search engines to find literature; recognisable, searchable terms should be included in the title where possible. Brevity in a title, though desirable, should be balanced against its accuracy and

usefulness. The use of Series titles and Part numbers in titles of papers is discouraged. Instead these can be included as a footnote to the first page together with a reference (reference 1) to the preceding part.

Author names

Full names for all the authors of an article should be given. To give due acknowledgement to all workers contributing to the work, those who have contributed significantly to the research should be listed as co-authors. On submission of the manuscript, the corresponding author attests to the fact that those named as co-authors have agreed to its submission for publication and accepts the responsibility for having properly included all (and only) co-authors.

Abstract

Every paper must be accompanied by a summary (250 words) setting out briefly and clearly the main objects and results of the work; it should give the reader a clear idea of what has been achieved. The summary should be essentially independent of the main text; however, names, partial names or linear formulae of compounds may be accompanied by the numbers referring to the corresponding displayed formulae in the body of the text. Please bear in mind that readers increasingly use search engines to find literature; recognisable, searchable terms and keywords should be included in the abstract to enable readers to more effectively find your paper.

Introduction

This should give clearly and briefly, with relevant references, both the nature of the problem under investigation and its background.

Conclusion

This is for interpretation and to highlight the novelty and significance of the work. The conclusions should not summarise information already present in the text or abstract.

Acknowledgements

Contributors other than co-authors may be acknowledged in a separate paragraph at the end of the paper; acknowledgements should be as brief as possible. All sources of funding should be declared.

Dedications

Personal dedications of an appropriate nature may be included as a footnote to the title of the paper. Dedications for significant birthdays (from 60 years onwards) and in memoriam dedications would be considered appropriate. Other forms of dedication may require approval of the relevant journal editor.

Bibliographic references and notes

These should be listed at the end of the manuscript in numerical order.

The paper must use footnotes in following style:

1. Articles-

Author's name, "Title of the paper", vol.—Issue--, year name of journal (in italics) page

2. Books:

Author's name, Title of the book (in italics). (Place of publication: Publisher's name year) page

3. Collection of articles/papers in book:

Author's name, Title of the paper in: Editor's name, Title of the book (in italics). (Place of publication: Publisher's name year) page

4. Newspaper :

Author's name, Title, date (day), name of newspaper (in italics), page

5. Website :

Author's name, "Title of the paper", vol.—Issue--, year, name of Journal (in italics) page

CONTACT DETAILS

Submissions should be mailed at ijslsbhu@gmail.com, editorial.ijsls@gmail.com.

For any further queries, please contact:

Dr. Suresh Mani Tripathi,

Assistant Professor(Law)

Chief: Editorial Board,

Mobile no. 8765000688/7000959966

INDIAN JOURNAL OF SOCIO LEGAL STUDIES (IJSLS),

Govind Sarang Government Law College

Bhatapara -Baloda Bajar, Chhattisgarh

The Sexual Harassment of Women at Workplace :A Critical Analysis

Dr. Ajay Kumar Singh*

Abstract

The present article deals with the overview of the Sexual Harassment of women at workplace (Prevention Prohibition & Redressal) Act. 2013 and its obligations and implications for companies and employees. The act is the outcome of the Supreme Courts guidelines in Vishakha Vs. State of Rajasthan and the Delhi gang rape case. But it has some pros and cons which needs further Elucidation.

Introduction

“VIOLENCE against women is a human rights violation, whether it is domestic violence within homes or sexual harassment at the workplace. Sexual harassment is widespread in the Indian workplace, and has a profound impact on women. Sexual harassment ranges from derogatory comments to unwanted sexual advances and threats to sexual assault, and rape. Women constitute 31.6 percent of the workforce in India and 17 percent of working women in India have experienced sexual harassment at their workplace.

Generally, international instruments define sexual harassment broadly as a form of violence against women and as discriminatory treatment, while national laws focus more closely upon the illegal conduct.

At the International level, the United Nations to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), defines sexual harassment as including:

“Such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would

* Faculty of Law, KGK College, Moradabad,UP

disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment."

Guiding Principles For Developing Legislation

The Constitution of India guarantees to all Indian women equality, No -discrimination by the State, equality of opportunity, and equal pay for equal work. In addition, it allows special provisions to be made by the State in favour of women and children. Announces practices, derogatory to the dignity of women, and also allows for provisions to be made by the State for securing just and humane conditions of work and for maternity relief.

Before-1997 the person facing sexual harassment at workplace had to lodge a complaint under Section 354 of the Indian Penal Code 1860. that deals with the 'criminal assault of women to outrage women's modesty', and Section 509 that punishes individual/individuals for using a 'word, gesture or act intended to insult the modesty of a woman.

During the 1990s, Rajasthan state government employee Bhanwari Devi who tried to prevent child-marriage as part of her duties as a worker of the Women Development Programme was raped by the landlords of the community. The feudal patriarchs who were enraged by, her (in their words: "a lowly woman from a poor and potter community") 'guts decided. to teach her a lesson and raped her repeatedly. The rape survivor did not get justice from Rajasthan High Court and the rapists were allowed to go free. This enraged a women's rights group called Vishaka that filed public interest litigation in the Supreme Court of India.

This case brought to the attention of the Supreme Court of India, "the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places."

In 1997, the Supreme Court passed a landmark judgment in the same ***Vishakha case*** laying down guidelines to be followed by. establishments in dealing with complaints about sexual harassment. Vishaka Guidelines were stipulated by the Supreme Court of India, in Vishakha and Others V. State of Rajasthan case in 1997, regarding sexual harassment at workplace. The court stated that these guidelines were to be implemented until legislation is passed to deal with the issue.

The court decided that the consideration of “International Conventions and norms are significant for the purpose of Interpretation of the guarantee, of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.”

On 16th December, 2013 another grave incident of sexual assault took place and prompted the incorporation of separate legislation for the safety of women at workplace.

Interestingly, the Vishakha’s decision did not apply to women lawyers working in the Courts. In the year 2013, two women advocates of Delhi High Court filed a writ petition in the Supreme Court that an employee was peeping into the women’s toilet with his mobile phone. The Supreme Court then constituted a Committee to develop recommendations and guidelines in line with the Act, The Committee made recommendations regarding creation of Gender Sensitization and Internal Complaints Committee.

The CJI had formed GSICC which is headed by the Supreme Court’s woman judge, Justice Ranjana Prakash Desai, and has six other female. V members. There are two members who are outsiders and not connected with the any court in any manner guidelines aid down by apex court in its judgment in the Vishakha case for dealing with complaints of sexual harassment at workplace.

Recently, an advocate has been barred entry into Supreme Court precincts for six months following an inquiry against him in a complaint of sexual Harassment of is the first such order after a committee was formed to look into such complaints in the apex court. The inquiry was conducted against the advocate under the Gender Sensitization & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal), Regulations, 2013. The report had said that GSICC was constituted on 26 November, 2013 with an object to fulfill an important function of sensitizing the public on gender issues and to address complaints made with regard to sexual harassment in the precincts of the Supreme Court.

Sources of International Law related to Sexual Harassment

- General Assembly Resolution 48/104 on the Declaration on the Elimination of Violence Against Women defines violence against women to include sexual harassment, which is prohibited at work, in educational institutions, and elsewhere (Article 2(b)), and encourages

development of penal, civil or other administrative sanctions, as well as preventative approaches to eliminate violence against women (Article 4(d-f)1).

- The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) directs States Parties to take appropriate measures to eliminate discrimination against women in all fields, specifically including equality under law, in governance and politics, the workplace, education, healthcare, and in other areas of public and social life, (Articles 7-16).

- Moreover, the Beijing Platform for Action, Para 78. recognizes sexual harassment as a form of violence against women and as a form of discrimination, and calls on multiple actors including government, employers, unions, and civil society to ensure that governments enact and enforce laws on sexual harassment and that employers develop anti-harassment policies and prevention strategies.

About the Act

The Act applies to all women at all places. This means that any woman who feels that she has been the victim of unwelcome sexual harassment in any workplace may file a complaint. This law provides a civil remedy. If the harassment is of criminal nature, the complaint is to be filed with the Police under Sections 354 /509 of Indian Penal Code, 1860.

Under Section 27 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 bars the Courts from taking suo motto cognizance. No court can take cognizance of an offence punishable under this act, except on a complaint made by the aggrieved or on her behalf. Every offence under this law shall be non-cognizable. It means, no police officer can take suo motto action on it without any direction from a judicial magistrate.

As per the Act, employers are mandated to set up an internal complaints committee (ICC) at each office or branch where there are at least 10 employees. Similarly, the government is also required to set up a local complaints committee (LCC) at the district level. The LCC would investigate complaints from establishments where ICC has not been constituted or if the complaint is against the employer, both the ICC and LCC are required to follow the process and inquire into the complaints in a time bound manner. Both the ICC and LCC, at

the request of the complainant, can recommend interim relief measures like transfer of the aggrieved woman or the respondent to any other workplace; or granting leave to the aggrieved woman upto a period three months in addition. to her regular statutory or contractual leave entitlement.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, provides stringent clauses for the protection of women workers from harassment which are as follows :

1. A written complaint has to be filed by the female employee within three months of the date of the incident.
2. The inquiry has to be completed within 90 days
3. The inquiry report has to be issued within 10 days from the date of completion of inquiry.
4. Employer is required to act on the recommendations of the committee within 60 days of receipt of the inquiry report.
5. Appeal against the decision of the committee is allowed within 90 days of the date of recommendations.

If an employer fails to constitute an Internal Complaints Committee or does not comply with any provisions contained therein, the Act prescribes a monetary penalty of up to 50,000. Sexual harassment at workplace is a criminal offence as per the changes made in the Indian Penal Code, 1860. A new section i.e. Section 354-A added in the Indian Penal Code through the Criminal Law (Amendment) Act, 2013 enlisting the acts which constitute the offence of sexual harassment and further envisages penalty / punishment for such acts. 'A man committing an offence under this section is punishable with imprisonment, the term of which may range between one to three years or with fine or both. Since the amendment criminalizes all acts of sexual harassment, employers are mandated to report any offences of sexual harassment to the appropriate authorities'. So a victim can raise a Criminal complaint case as well as a case with the ICC and both can run parallel.

In order to ensure that the Act does not get misused, certain provisions for action against false or malicious complainants have been made.

Suggestions

It appears from the beginning of the human society the women have been exploited mercilessly and indiscriminately. Endeavor for a violence free environment for women is our constitutional commitment and a new thrust of women's right regime. No doubt that the Act is a welcome change made to the laws for sexual harassment as it finally condemns the acts of the employer who takes advantage of their authority but at the same time it is not a complete safeguard against such heinous acts done to outrage the modesty of a woman.

1. The Act should be gender neutral like in United States, where the complaints of sexual harassment can be filed men, and in the case of same sex, sexual harassment. A harassment of a woman by a woman should be a cognizable cause of action under the Act. There should be a global policy of non-tolerance for sexual harassment which encompasses all employees regardless of gender in line with national law.

2. Section 9 of the Act requires that a complaint must be filed within 3 months of the date of incident. This time limit may be extended if there exist reasonable reasons for such delay but the Act does not specify that what will constitute reasonable circumstances. Moreover there are certain circumstances and societal pressures where it is quite difficult for a woman to file a complaint against her employer. In such cases the time limit would become a barrier in her way to justice.

3. The Internal Complaint Committee (ICC) is required to complete the enquiry within 90 days and the report should be sent to the District officer within 10 days. If a complaint has been proved under Section 13 (3) of the Act, the ICC can recommend action against the respondent in the form of suspension, termination, mediation or other appropriate action as the ICC deems fit. But the provision does not make it clear what will constitute sufficient proof.

4. Moreover in cases of false complaints made by the woman Section 14 provides that a mere inability to substantiate a complaint or provide adequate - proof need not attract action against the complainant. But further the section provides that in case of malicious intent on the part of the complainant the ICC or LCC are free to impose punishment applying proper procedure which is quite contradictory and would be often misused.

5. Every person should be made amenable with the law relating to sexual harassment by way of creation of policy, setting up of internal compliance committee, generating awareness amongst employees and reporting of sexual harassment cases along with the action taken in the Company's annual report.

6. The employer does not appear to be financially liable for the actual misconduct of his or her employees, but only suffer financial consequences if he or she does not comply with the requirements of the Act, which will probably be uncommon.

7. In many companies the Committee to probe allegations of 'sexual harassment at workplace was being constituted on an ad-hoc basis (when the complaint is filed) whereas it should be a standing committee that reports yearly to the Central government, as per the Vishakha Guidelines laid down by the Supreme Court.

Conclusion

The status of women in India has been subject to many great changes over the past few millennia. From equal status with men in ancient times through the low points of the medieval period, in modern India, women have held high offices in India including that of the President, Prime Minister, Speaker of the Lok Sabha and Leader of the Opposition.

Even though the Government of India declared 2001 as the Year of Women's Empowerment (Swashakti), National Policy for the Empowerment of Women was passed in 2001 and on 9th March, 2010, one day after International Women's day, Rajya Sabha passed the Women's Reservation Bill requiring that 33% of seats in India's Parliament and state legislative bodies be reserved for women, still the women in India continue to face atrocities such as rape, acid throwing, dowry killings, and the forced prostitution of young girls. Women in India face myriad cultural challenges that impede social advancement like discriminatory family codes, lack of education, and cultural stigmas etc. Considering such inequities the Government should not only just reform the institutional treatment of women, but also raise the level of dialogue on the larger issue of women's rights in a rapidly modernizing society.

Types of smuggling and fight against it

Md. Ishtiaq Ahmed Talukder*

Abstract

Smuggling, in an informal setting, is trade and in a legal setting illegal transportation of goods. Since smuggling has been introduced with the pace of time, the variation in goods for smuggling has also increased and become diversified. The supply and demand theory actually found to be more appropriate in this case in explaining the diversification of the product. However, this particular study aimed at discussing the types of smuggling, processes of smuggling and available possible measures to fight against it. Starting from the smuggling of human to daily commodities etc. have been smuggled through the border every day to different locations. War has strong correlations with smuggling of human, arms and ammunition and other contrabands. The corruption into the statutory system and the diversified human demand have been fuelling the business of smuggling over a long period of time. Cross border cooperation through conventions for addressing the common smuggling problems, enhancement of the technical capacity as well as understand the problem properly would help diminish the rate of smuggling. Social awareness and government intervention at the right time can solve the problem for good. This is a secondary data-based study where the subject matter has been explained using secondary information collected from journal articles, newspaper, online blogs, public and organisational reports and web sites relevant to the subject area.

Keywords: Smuggling, Classifications of Smuggling, Shuttle Trade, Human Trafficking, Preventive Measures of Smuggling.

Introduction

From the very beginning of human civilization, business remains one of the most important reasons for development. But the nature of human society, as well as the state system, has changed over the period of time. However, trading goods is a basic human activity which has started back in time when people need to exchange their goods and fulfil their demands. Renfrew (1969) thus supporting this view added as such human activity which precedes borders. As the concept of nation-state involves the very notion of state with a fixed geopolitical area, the trade started to have its manyfold faces and other bureaucratic agencies also born to support the system, such as customs, tariffs, levies etc. Therefore, the border, which is by Foucault (1970: 70) “the dead, the fixed, the

*PhD. Student, Police Academy, Ankara(Turkey) & Assistant Professor, Deptt of Criminology & Police Science Mawlana Bhashani Science & Technology University, Bangladesh .

undialectical, the immobile”, started imposing sanctions on the natural human activity, which is the trade.

The development of life and the formation of the state, both have paved the way for a broader business prospect with numerous items for dealing. Among all the development, the institution of the tax system since the medieval period changed the mood of business. Now in the text we have informal and formal way of business and in practice which is termed as illegal and legal forms. Gál Katalin (2015: 58) shared that, “the informal economy sphere covers all illegal economic activities along the formal-informal duality”. The informal trade through the borderland thus become the smuggling of items. As per the condition of the nature of smuggling, international trade at the border area thus is under scrutiny. If the focus is moved towards the informal trade it would provide scope to understand the governance of international trade where its increasing consolidation of rules could have been noticed. Therefore, smuggling (informal trade) has emerged as a new threat to the state system. Cantens et. al. (2015:365) have explained the impact of smuggling on state security where the most important element of its security, the border, comes at stake. They continued by focusing on the role of the state at the border where the business takes place, where the state has to decide its position for economic balance and reveal itself to the society as the economic contribution made by smuggling will tempt the government to avoid the rule.

Since smuggling has introduced with the pace of time the type of items for smuggling has also increased and become diversified. The supply and demand theory actually found to be more appropriate in this case in explaining the diversification of the product. This particular study, however, tried to discuss the types of smuggling and fight against it. Through the article, the author has tried to discuss the basic idea of smuggling and different types of smuggling along with different categories of products which are being smuggled in the world currently.

Study Objective

Smuggling has been highly studied since the inception of the business system. However, after the formation of United Nations based organisations every year numerous reports have been published where different categories of smuggled items were separately discussed. In this study, the major objective is to discuss the basic understanding of smuggling, the categories of smuggling as actions and smuggling products, and to provide with available possible measures to fight against it.

Problem of Smuggling

In the previous section, smuggling has been termed as for informal business which also later defined as illegal as well. According to the Oxford Learners Dictionary smuggling refers to, “the crime of taking, sending or bringing goods secretly and illegally into or out of a country”.

Besides the legality of the trade activity smuggling depends largely on the position of the person who is defining it. Husken (2017:898, 915) for instance defined smuggling from the economic aspect, as he mentioned, “Smuggling is a factor in the economic productivity of the borderland: it generates income and jobs, and its revenues can be transferred to other fields such as politics, status and wealth”

However, in order to classify smuggling or to understand the types of it, the two fundamental aspects must be understood. In the first aspect, the legal view proposes as a crime smuggling hinders the normal economic activity where the state could generate revenue which further threatens its law and order situation and create chaos among the political and social order. The other aspect proposes that trade as a natural activity for a human to survive, to smuggle is nothing but self-help just the way one neighbour help others (Smith, 2006:1). On the other hand in differentiating the concept he said it is the means which is illegal, the way goods are moved from one side to the other of the border.

Thus legality is not the only issue while the legal status is imposed by external actors’ activity while defining the natural action of human, trade (Singelstein and Stolle 2008: 122). Hence the status of trade is defined by a state’s law, therefore smuggling is the outcome of state regulations which termed such thing. However, it should not be confused with the term smuggling with trafficking, as trafficking involves three basic aspects: the limitation of free movement, coercion or force, and exploitation. Whereas, smuggling only involves the transportation of goods which helps to cross international borders and paid a fee to the smuggling benefactors.

According to the United Nations Office on Drugs and Crime (2017) “*Trafficking in Persons and Migrant Smuggling report, there are three crucial differences:*

1. Location

Smuggling crosses international borders. Trafficking can happen across international borders or within one country.

2. Consent

Smuggling is a service a person asks for. It might be dangerous, but that person chooses to take on the journey. Trafficking involves either forcing a person to travel or deceiving a person into taking on a journey under false promises of jobs, payment or safety at the end of that journey

3. Exploitation

Smuggling is limited to one financial transaction in exchange for illegal entry to a country. Trafficking uses threat, force, coercion or deception against a person for the purpose of exploitation. If business was the fundamental condition for state formation in the medieval period, doing smuggling will obviously hamper inter-state relationships. As Dominguez (1975) explain smuggling will create sense insecurity for both industrial protection and population growth. Smuggling has always remained a complex job as it requires a specific market in the specific region for its smuggled goods. Therefore it could be deduced that it is a transnationally organised form of action.

Types of Smuggling

1.1 Smuggling Activities

Customs and Excise Department (C&ED) of Hong Kong in their anti-smuggling strategy classified **smuggling activities** can be broadly classified into the following three categories:

- Organized cases which involve group activities and syndicates;
- Individual cases where people while travelling bring dutiable goods from outside the country (e.g. cigarettes, liquors and hydrocarbon oil); and
- Licensing offences which involves bringing different legal but sensitive items without proper permission from the authority like meat/poultry, animals/plants, endangered species, etc.

Based on the **Middle East** experience the forms of smuggling could be further classified into the following forms:

1. Tigarat al-shanta: trading by bag. In the border of Libya and Egypt, this type of trade takes place so frequently, where there is an official check post in both side namely Salloum in the Egyptian side and Amsaad in Libyan side. This kind of smuggling is a form of petty trade, is largely practised by the gang members who travel to Libya and come back with a bag filled with tea, clothes, harissa, cigarettes, Chinese mobile phones and other such goods when returns after few days travel.

2. The second category of smuggling is tahrīb/tigara bil-leyl which means night smuggling/night trading. A group of young men of 17 to 25 years old carry bags of goods in the night following a footpath in the desert near the checkpoint in Salloum and Amsaad.
3. The third form of smuggling is tahrīb bahri (smuggling by sea). This kind of smuggling takes place in the sea where the fishing boats are used to conduct large scale operation. The boats can carry at best three pickup loads. (Husken, 2017)

1.2 Typology of Smuggling Items

Based on the type of the product, smuggling can be categorised into the following three types:

a) Smuggling of Objects

- i. **Contraband of legal Goods:** this is the most common forms of smuggling available in the report. Transporting legal goods without sufficient permission or authority includes under billing of the prices to avoid customs fees, under billing of the quantity of the goods and also sometimes overbilling to get tax exemption. The goods are re-sold in the local markets with the help of local political or mafia leaders.
- ii. **Shuttle Trade:** Shuttle trade refers to the trade across the border to purchase goods at a lower or cheaper price and selling them in the local market with a comparatively higher price. In order to get high profit, the smugglers import a small amount which is not eligible for the customer. The trade generally takes place in the form of tourists or migrants etc.
- iii. **Trade of Illegal Goods:**

Narco-Trafficking: Smuggling drugs and narcotics are the worst problems in the present world. The United Nations Office on Drugs and Crimes publishes a report every year about the cultivation, production and trafficking of contraband items. Terrorist groups across the world and some non-state agencies are involved in this kind illicit business. The countries with military power like the USA and UK have declared war against those terrorist groups. For example the Taliban, the Afghan-based terrorist group cultivate the major percentage of the world's opium poppy pod. Opiate production has increased thereafter the American invasion since 2001. It has been estimated that more than 90% of the world's heroin comes from the war-torn country.

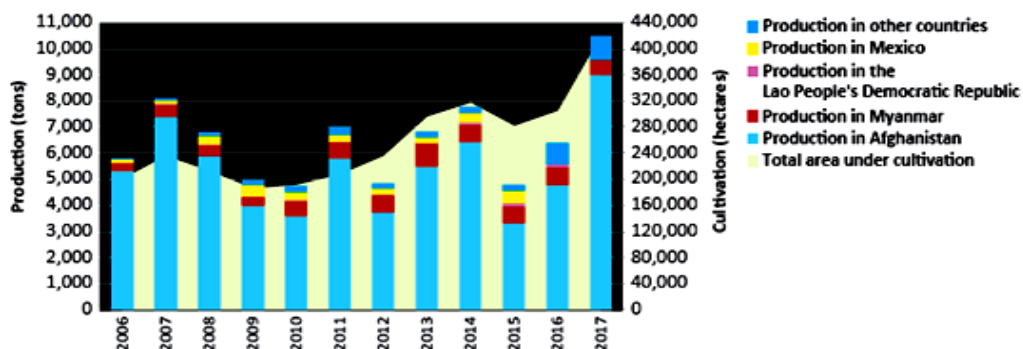


Figure 1 Countries with Illicit Crop Production

Sources: UNODC, calculations are based on UNODC illicit crop monitoring surveys and the responses to the annual report, 2017

Arms Trafficking: With the rise of the number of terrorist organisations in the world it can be easily calculated that the number of arms and explosives trafficking may have increased as well. But the real statistics is not available about the trafficking. Weapons are bartered in return to the supply of drugs in drug producing countries. According to SIPRI Fact Sheet, 2018, the five largest exporters in 2013–17 were the USA, Russia, France, Germany and China. Together, they accounted for 74 per cent of the total volume of arms exports. US exports accounted for 34 per cent of the global total in 2013–17. US arms exports in 2013–17 grew by 25 per cent compared with 2008–12.

Wildlife Smuggling: Wildlife smuggling has also been a popular and ancient kind of activities since aristocrats developed their hobby to store them and use for their pride. According to the World Wildlife Crime Report (2016:11), around 900,000 shipments of protected wildlife have been permitted per year wherein most of the cases the permits were acquired through the fraudulent way. The report also shares the global seizure database, which is called World WISE has a record over 164,000 seizures from 120 countries.

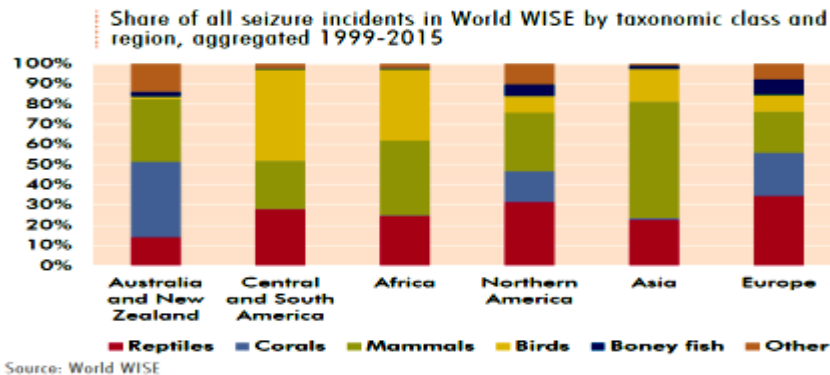


Figure 1 Share of all Seizure Incidents in WorldWise

Cultural Property: Cultural artefacts smuggling through various ways has been predominant since the medieval period. Looting from the museum or from the archaeological sites and selling them in the black market has become an international problem. According to the INTERPOL report of 21 February 2018, more than 41,000 objects have been recovered through a global operation to save the cultural artefacts. The recovered items included: coins, furniture, paintings, musical instruments, archaeological pieces and sculptures.

b) Smuggling of People

People always have looked for opportunities to lead a better life. Political instability, failure state condition, economical disrepair as well as broke out of war have made people migrate from one place to another. The aspirant migrants have also been subject to exploitation through trafficking and other forms. In this 21st century, the smuggling of migrants, especially from the war-torn countries like Syria, Iraq and victim of ethnic cleansing in Myanmar, have crossed previous records of migration. This particular situation has been found pretty profitable for the smugglers all over those areas. According to IOM '2.5 Million Irregular Migrants were smuggled for an economic return of USD 5.5-7 billion in 2016'. Whereas, according to an estimation by IOM in 2016, 25 Million victims of forced labour have been procured for trafficking (about 5 million of them may have crossed an international border) to different countries and sent for modern slavery.

c) Smuggling of Information

Online business has become famous since its inception. On the other hand, the computer program especially the hackers have become another actor in the smuggling world. Reports have been published about the deployment of hackers to support the smugglers in their illicit business.

According to a report of BBC published on 16 October 2013, drug traffickers hired hackers to hack into the IT system which controls the movement of containers location information at the dockyard in order to facilitate drug shipment (Bateman, 2013). Apart from this instance, there are other numerous reports of hacking into state bank's online system and looting millions of dollars and transferring them into another country. For instance, hackers hack into Bangladesh Bank's (state bank of Bangladesh) on 5 February 2016 and robbed about \$80 million (www.aljazeera.com, 2018). So hacking has added another flavour into the smuggling world.

d) Smuggling in General

According to the annual report of the Department of Smuggling and Combating Organized Crime, Turkey (2014) the following items has been generalized as a common form of smuggling in their region. As Turkey has been commonly known for its geographical position which is very conducive for the Middle East and African smugglers to smuggle their items towards Europe and US markets. The items are:

- i. Fuel Smuggling
- ii. Tobacco, Tobacco Products and Alcoholic Beverages Smuggling
- iii. Goods (Commodities) Smuggling
- iv. Cultural and Natural Heritage Smuggling
- v. Migrant Smuggling and Human Trafficking

The report has further discussed the types of commodities under goods smuggling category which are:

- a) Electronic Goods Trafficking (mobile phones, watches, medical devices, etc.)
- b) Smuggling of food products (tea, sugar, red meat, almonds, walnuts, etc.)
- c) Personal Use Products Smuggling (medicines, cosmetics products, glasses, lighters etc.)
- d) Various Commodity Smuggling (textile and household products, gold, hardware, etc.)
- e) Automobile Smuggling (automobiles, auto spare parts etc.)
- f) Livestock Smuggling (Cattle, small cattle etc.)
- g) Export-Import Smuggling
- h) Smuggling Committed via the Internet (Drop shipping)

Centre for the Study of Democracy published a report in 2002 on Corruption, trafficking and institutional reform: Prevention of Trans-Border Crime in Bulgaria (2001 – 2002). In this report

they presented the general classification of smuggling and its connection to corruption, which is presented in the following table:

Table 1 The General Classification of Smuggling and Its Connection to Corruption

Main actors	Type of illegal activity	Consequences
<p>1. Large organized groups, operating on a national level (the personnel involved in the dealing is not known to each other but they are known by the name and position) Bribes: from 10,000 to 50,000 USD per month.</p>	<p>Through the nexus which starts from the importer and revolve around through every person in the process like customs, ministries and even political person holding the authority. The nexus ends at the final recipient and distributor of the bribes. 5% of official</p>	<p>The entire economic system gets vulnerable, causes social tensions and ends with suspicion on the public contract. Losses of the state budget: up to 50% depending on the type of goods.</p>
<p>2. Small organized groups Operate in particular region or in one or two regional customs bureaus. Bribes: up to 5,000 USD per month.</p>	<p>The dealer is either ex or present customs official and works through his old network in the department and get help from the ministry through the local inspector. 10% of officials</p>	<p>A totally corrupted and unethical business environment which discourages foreign investment. Losses of the state budget: five million leva and more (up to 30%)</p>
<p>3. Type "Tandem" (Customs official and another employee at the border crossing). Bribes: 1,500 USD for a ten-ton truck and 5,000 USD for a twenty-ton truck.</p>	<p>So-called "wild smuggling"> goods pass without being registered by the customs >" opened barriers." 10% of officials</p>	<p>Creates conditions for smuggling of banned goods (drugs, weapons).</p>

<p>4.Individual operations: officials from any operative department. In most cases involves customs inspectors.</p> <p>Bribes: depends on the type of the customs department and the position of the official; up to 2,500 USD monthly.</p>	<p>Importer> customs official (in many cases with the passive involvement of the superior).</p> <p>20% of officials</p>	<p>One to ten companies-importers pay 10 to 30% lower taxes. Due to some changes in the tax legislation (VAT, profit tax), the practice is diminishing.</p>
<p>5.Individual operations: customs inspector or superior on the lower level.</p> <p>Bribes: 20 to 200 leva per month.</p>	<p>Too strict observation of non-existing procedures, demands without foundation in the Law, threat of thorough inspection of the goods, blackmailing on a psychological basis.</p> <p>60% of officials.</p>	<p>No fiscal consequences for the budget. Exceptionally negative consequences on the business people. Creates a negative image of the administration.</p>

Source: Corruption, trafficking and institutional reform: Prevention of Trans-Border Crime in Bulgaria (2001 – 2002), Centre for the Study of Democracy 2002. Editors: Boyko Todorov, Ognian Shentov and Alexander Stoyanov, ISBN 954-477-101-8.p.16

Measures to Prevent Smuggling

Fight against smuggling has never been easy since its inception. However, countries suffered from the dark side of smuggling have always been active and tried to prevent it both locally and internationally. With the help of the United Nations and organisations like Interpol and other like agency, countries have been struggling to get rid of this problem. Based on the severity and types of smuggling organisations have been recommending preventing solutions. In this study, the prevention measures will also be discussed problem-wise.

1.3 Addressing Human Smuggling

Human smuggling is one of the crucial problems of all as it gets pretty cloudy to trace as smuggling. To understand the nature and ways of its organizations spend lots of effort. Thus, the European Commission has also come up with some tangible suggestion to stop human smuggling,

for example, they have adopted a comprehensive Action Plan to counter and prevent migrant smuggling (EC, 2015). The action plan has a tentative period from 2015 to 2020 with four major objectives:

- 1) Enhancing police and judicial response;
- 2) Improving the gathering and sharing of information;
- 3) Enhancing prevention of smuggling and assistance to vulnerable migrants
- 4) and, Reinforcing co-operation with third countries.

But in general, the smuggling needs to be addressed in a common framework-based program which can be adopted in every country and prevent human smuggling. Susan F. Martin, an online based freelancer from Georgetown University, tried to provide with a comprehensive solution. According to Martin (no date), there are three principal best practice approaches to combating migrant smuggling:

1.4 Law Enforcement Activities

Law enforcement strategies have to work with its original activities which are creating task harder for the wrongdoer and discourage them from committing it. The work starts with criminalising certain act with sanctioning harsher punishment, maintaining intelligence circle to disrupt the smuggling activities and respond with swift, priority-based action plan to apprehend the offender and process them both at home and abroad.

1.5 Educational Programs

The education program is needed to inform the potential migration seekers about the negative impact of human smuggling. The program can involve free seminars, stage plays to hand out distribution at the public places which should include the dangers of taking the routes used by the service providers, the potentiality of becoming exploited and probably become dead while travelling to the destination.

1.6 Protecting the Rights of the Smuggled Victim

The condition of the smuggled migrants gets complex when they are into new territory. Therefore, saving their basic human rights and get the protection from further harassment or exploitation their rights need to be preserved properly. It can start with the law enforcement officer who can deter the smuggling from happening and by not enforcing the immigration law, and then if get apprehended then get the opportunity for witness protection support in exchange of testifying against the

smuggler and lastly by providing them with a safe return scope to their home country. (Martin, no date)

1.7 Addressing Contraband of Legal Goods

As it is discussed in the earlier section, that trade is the natural human activity which has been performed since time immemorial. The government authority and the politician both have a role to promote this holy human activity. In order to deter legal goods from smuggling the following steps could help fix the issue:

1. Create a business climate and trade facilitation for all level business
2. Border enforcement through proper management and facilities for the business community
3. Exchange rates and convertibility where if the exchange rate changes themselves it should not affect the market directly especially with the prices of importable goods.

1.8 Addressing Smuggling in General

In order to address the smuggling issues in the areas of East Asia and Pacific, the United Nations Office on Drugs and Crime (2013) has conducted threat assessments. Based on their assessment they have come out with four concrete suggestions to address the problem of smuggling for the countries. Those are discussed here:

i. Understand the problem

Understanding the problem includes identification of the trading activity and its impact on the economy and on society. Besides, measuring the potentiality of organized crime in this instance smuggling of objects or people or both is necessary to assess its impact on the statutory organ and society as a whole. In order to address any particular issue with smuggling, the nature and dimension of the threat must be assessed. For example, smuggling legal goods through irregular customs dealing or even undermining the impact of trading any product which is not yet identified as illegal for trade.

ii. Establish the normative framework

To declare any act as illegal or prohibited it needs to be defined as so from both of the concerned countries. Therefore, international norms and conventions are crucial for any kind of response. Mutual understanding paved the way to create convention against any form of smuggling activities which later on help address the issue and to work with a common framework and enjoy a better solution. Every civil nation for the sake of its development should continue to work with consensus against any form of organized crime.

iii. Build technical capacity

Building a new convention creates another door for the concern countries to focus on which is developing technical capacity through the development of law enforcement agencies at a distinct level. The continuous effort will help reduce the problem but to address them the government may need trained law enforcement personnel, prosecutors and even judicial establishment to address the challenge. Along with smuggling, the agency must focus on its national security simultaneously. Therefore, technical capacity enhancement is a must.

iv. Expand regional partnerships

Due to the effect of globalization, the nature of smuggling has turned into a giant one. Often this smuggling activity starts with one continent and ends in a second or maybe a third continent. The flow of a high volume of human, money and commodities opens a wide door for the potential criminal world. Likewise, the opportunists are there to take it and make money. The offenders are expanding their network therefore, the law enforcement agencies should work with the collaboration of the international arena but they have a jurisdictional problem. Which means international level integration and partnership across the border are very much necessary to address the issue. Only trans-border collaboration and understanding can stop this trans-border criminal activity.

Conclusion

Smuggling, from a broad aspect, has only been shown like an unwanted and evil child of the economic system where if it gets proper attention gave its positive feedback by enriching that entity. There are examples of it in northern Africa and also some extent in the Middle East. Dominguez (1975) has also seen smuggling more as beneficial for both economy and politics. He argued that the newborn industry without a proper competition would not be able to provide quality products for the price rather it would end up with low quality. But smuggling would bring foreign competition to all manufacturers. As its nature smuggling cannot bring a bulk amount of goods if it was free and legal. Dominguez continued by advocating for smuggling, he shared that the inflow of the smuggled items would help remain a balance in the market competition with a minimum quality threshold and thereby control inflation.

However, smuggling is still viewed as a double-edged sword, like it, if not controlled, can both the economy and the state system. Ostrov (2002) explains the fact as smuggling is a challenge, a crime against the sovereignty, the state, it may not be a crime against an individual. That's why in the

politics of state-building smuggling will always pose a threat. Besides, for the economic development and for the betterment of human life, smuggling must be studied to locate its root and understand its nature. By only clear understanding it can be controlled. On the other hand, corruption is like a rotten apple which promotes smuggling and corrupt democratic institutions. Estimation of corruption at every level may help undermine smuggling. Therefore, institutional infrastructure and working mechanisms with global cooperation are required to clean up the trade system from its pollution and perform its smooth action to develop human life.

References

- Bateman, Tom, (2013) *Police warning after drug traffickers' cyber-attack*, *BBC News*, 13 October 2013, <https://www.bbc.com/news/world-europe-24539417> [Accessed Date: 17 December 2018]
- Cantens, Thomas; Ireland, Robert & Raballand, Gaël, (2015) *Introduction: Borders, Informality, International Trade and Customs*, *Journal of Borderlands Studies*. P.30:3, 365-380, DOI: 10.1080/08865655.2015.1068207 [Accessed Date: 10 December 2018]
- Corruption, trafficking and institutional reform: Prevention of Trans-Border Crime in Bulgaria (2001 – 2002)*, Centre for the Study of Democracy 2002. Editors: Boyko Todorov, Ognian Shentov and Alexander Stoyanov, ISBN 954-477-101-8.p.16
- Domínguez, Jorge I. (1975) *Smuggling*, *Foreign Policy*, No. 20 pp. 87-96+161-164, Published by: Slate Group, LLC, Stable URL: <https://www.jstor.org/stable/1148128>
- European Commission (2015), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU Action Plan against migrant smuggling (2015-2020)*
- Foucault, M. (1970) *Questions of Geography*. In *Power/knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. C. Gordon, 1980, 63–77. New York: Pantheon Books.
- Global Migration Trends*, IOM UN Migration, Report based on data of 2017. <http://www.iom.int/global-migration-trends> [Accessed Date: 20 December 2018]
- Husken,Thomas, (2017) *The practice and culture of smuggling in the borderland of Egypt and Libya*, *International Affairs*, 93:4, Published by Oxford University Press on behalf of The Royal Institute of International Affairs. P. 898 & 915.
- Hacked: The Bangladesh Bank Heist*, How hackers got away with one of the biggest thefts in history, robbing Bangladesh's central bank of more than \$80m. 24 May 2018, Al-jazeera Tv news, <https://www.aljazeera.com/programmes/101east/2018/05/hacked-bangladesh-bank-heist-180523070038069.html> [Accessed Date: 22 December 2018]
- Katalin, Gál, (2015) *The Informal Economy: conceptual background and theoretical framework*, Arhipelag XXI Press, Tirgu Mures, ISBN: 978-606-8624-21-1.

Legislative Council Panel on Security Anti-Smuggling Work of the Customs and Excise Department (no date) retrieved from: <https://www.legco.gov.hk/yr07-08/english/panels/se/papers/se0708cb2-2481-1-e.pdf> [Accessed Date: 22 December 2018]

Martin, Susan F. (no date), Best Practices to Combat Smuggling and Protect the Victims of Traffickers, Changing Face, <https://migration.ucdavis.edu/cf/more.php?id=100> 6.12.2018 [Accessed Date: 17 December 2018]

Over 41,000 artefacts seized in global operation targeting trafficking of cultural goods, Interpol News, 2018. <https://www.interpol.int/News-and-media/News/2018/N2018-006> [Accessed Date: 17 December 2018]

Ostrov, Benjamin (2002). The Anti-Smuggling Investigation Bureau's War on Smuggling in China, Police Practice and Research, 3:1. P.41-54. DOI: 10.1080/15614260290011327 [Accessed Date: 10 December 2018]

Renfrew, C. (1969). Trade and Culture Process in European Prehistory. Current Anthropology. 10: 151–69.

Singelstein, T. / Stolle, P. (2008): Die Sicherheitsgesellschaft: Soziale Kontrolle im 21. Jahrhundert. Wiesbaden: VS-Verlag.

SIPRI Fact Sheet, March 2018. Trends in International Arms Transfers, (Ed.) 2017. Sweden. P.1

Smith, Joshua M. (2006) Borderland Smuggling, Patriots, Loyalists, and Illicit Trade in the Northeast, 1783–1820, University Press of Florida. P.1

United Nations Office on Drugs and Crime, 2013, A Report on Transnational Organized Crime Threat Assessment, East Asia and the Pacific. Retrieved from http://www.unodc.org/res/cld/bibliography/transnational-organized-crime-in-east-asia-and-the-pacific-a-threat-assessment_html/TOCTA_EAP_web.pdf [Accessed Date: 20 December 2018]

UNODC, World Wildlife Crime Report: Trafficking in protected species, 2016. Retrieved from: https://www.unodc.org/documents/data-and-analysis/wildlife/World_Wildlife_Crime_Report_2016_final.pdf [Accessed Date: 22 December 2018]

UNODC, calculations are based on UNODC illicit crop monitoring surveys and the responses to the annual report, 2017 Retrieved from: https://www.unodc.org/wdr2017/field/Booklet_3_Plantbased.pdf [Accessed Date: 22 December 2018]

United Nations Office on Drugs and Crime (2017) “Trafficking in Persons and Migrant Smuggling Retrieved from <https://www.unodc.org/lpo-brazil/en/trafico-de-pessoas/index.html> [Accessed Date: 22 December 2018]

2014 Turkish Report of Anti-Smuggling and Organized Crime, General Directorate of Security, Department of Anti-Smuggling and Organized Crimes, Ankara, Turkey, July 2015.

भारत में पंचायतीराज . एक संवैधानिक दृष्टिकोण

डॉ राम आशीष श्रीवास्तव*,

सार-संक्षेप :

महात्मा गाँधी के स्वप्न ग्राम स्वराज जिसमें गाँवों के विकास के लिए ग्राम स्तर पर पंचायतों के गठन की व्यवस्था करता है। सर्वप्रथम 2 अक्टूबर 1959 को पंचायती राज की स्थापना का द्वीप प्रज्वलित किया गया था। भारत के संविधान के अनुच्छेद 40 के अंतर्गत राज्य का यह कर्तव्य बना दिया गया कि वह ग्राम पंचायतों का गठन करे जिससे कि वे स्वायत्त शासन की इकाइयों के रूप में कार्य कर सकें। 73 वे संविधान संशोधन अधिनियम 1992 द्वारा अब तो पंचायती राज संस्थाओं के सम्बंध में संपूर्ण देश के लिए एकरूप-व्यवस्था की गई है। यह संशोधन अधिनियम 25 अप्रैल 1993 से संपूर्ण देश में लागू कर दिया गया। इस संशोधन द्वारा संविधान में पंचायत से संबंधित एक नया अध्याय भारत के संविधान के भाग 9 में जोड़ा गया जिसमें अनुच्छेद 243 से 243ण समाहित है, साथ ही ग्यारहवी अनुसूची जोड़ दी गई जिसमें उन विषयों का उल्लेख किया गया है जो पंचायत के कार्यक्षेत्र में आते हैं। संविधान में पंचायती राज को स्थान दिया जाना पंचायती राज के महत्व को परिलक्षित करता है। भारत देश जहाँ की 70 प्रतिशत जनसंख्या गाँवों में निवास करती है, पंचायती राज की उपेक्षा नहीं की जा सकती। पंचायत, चौपाल एवं ग्राम साभाएँ भारत के ग्रामीण अंचल की नैसर्गिक संस्थाएँ रही हैं। इन्हीं के मध्य से ग्रामवासी अपना सामाजिक आर्थिक एवं सांस्कृतिक समाधान करते रहे हैं। ऐसी संस्थाओं को संवैधानिक दर्जा दिया जाना सामयिक कदम है। ग्राम पंचायतों के गठन के संबंध में भारतीय संविधान के अनुच्छेद 40 में उपबंध किया गया है कि, "राज्य ग्राम पंचायतों का गठन करने के लिए कदम उठाएगा और उनको ऐसी शक्तियाँ और प्राधिकार प्रदान करेगा, जो उन्हें स्वायत्त शासन की इकाई के रूप में कार्य करने योग्य बनाने के लिए आवश्यक हो।" चूंकि भारत के संविधान के अंतर्गत अनुच्छेद 40 का उपबंध प्रारंभ से किया गया था किन्तु फिर भी इस दिशा में सही कदम नहीं उठाये गये थे जिस कारण से भारत के संविधान में 73वें संविधान संशोधन की आवश्यकता पड़ी।

मूल-शब्द :पंचायतीराज, ग्रामस्वराज, पंचायत, ग्राम सभा, नियंत्रण, निवारण, अधिनियम, संशोधन।

परिचय :

भारत के संविधान के अंतर्गत जिन उद्देश्यों एवं मानदण्डों को अपनाया गया है क्या वे प्राप्त कर जिये गये है। भारत एक वृहद देश है। राज्य की न्यूनतम इकाई ग्राम है। यदि हम संपूर्ण भारत का विकास करना चाहते हैं तो हमें विकास के केन्द्रबिन्दु ग्राम को बनाना होगा। भारत के संविधान की प्रस्तावना के अंतर्गत जो लक्ष्य निर्धारित किये गये है वे हैं संपूर्णप्रभुत्व संपन्न, समाजवादी, पंथनिरपेक्ष एवं लोकतंत्रात्मक गणराज्य। साथ ही साथ भारत के नागरिकों के लिए न्याय जिसमें सामाजिक, आर्थिक एवं राजनैतिक न्याय की स्थापना तथा स्वतंत्रता जिसमें विचार, अभिव्यक्ति, विश्वास धर्म एवं उपासना की स्वतंत्रता की बात कही गई है। प्रस्तावना के अंतर्गत ही व्यक्ति की गरिमा एवं राष्ट्र की एकता एवं अखंडता सुनिश्चित करने वाली बंधुता के संबंध में बतलाया गया है। यदि भारत में इन उद्देश्य एवं लक्ष्य को पूर्णता प्रदान करनी है

* सहायक प्राध्यापक (विधि) गोविन्द सारंग विधि महाविद्यालय भाटापारा-बलोदाबाजार (छ.ग.)

तो ग्राम स्वराज के माध्यम से इसे गति प्रदान की जा सकती है। **भानुमति बनाम स्टेट ऑफ उत्तर प्रदेश**¹ के मामले में उच्चतम न्यायालय द्वारा पंचायती राज संस्थाओं के संवैधानिकता प्रदान करने के मुख्यतया उद्देश्य बताये गये जिनमें सामाजिक ढाँचे में परिवर्तन लाना, पंचायती राज संस्थाओं के संवैधानिक प्रास्थिति प्रदान कराना तथा, राजनीति में उन्हें तीसरी सरकार के रूप में मान्यता प्रदान कराना प्रमुख हैं। **भीम सिंह बनाम भारत संघ एवं अन्य**² के मामले में माननीय सर्वोच्च न्यायालय द्वारा यह अभिमत व्यक्त किया गया कि एम.पी.एल.ए.डी. योजना संविधान के 73वें और 74वें संशोधनों से विपरीत है।

ग्राम पंचायतों का संगठन :

ग्राम पंचायतों के गठन के संबंध में भारतीय संविधान के अनुच्छेद 40 में उपबंध किया गया है कि, “राज्य ग्राम पंचायतों का गठन करने के लिए कदम उठाएगा और उनको ऐसी शक्तियों और प्राधिकार प्रदान करेगा, जो उन्हें स्वायत्त शासन की इकाई के रूप में कार्य करने योग्य बनाने के लिए आवश्यक हो।” अनुच्छेद 40 के अनुसार राज्य की यह जिम्मेदारी बना दी गई कि ग्राम पंचायतों की स्थापना की जाये। इस प्रावधान के अंतर्गत भारत के विभिन्न राज्यों में ग्राम पंचायतों की स्थापना की गई है। अनुच्छेद 40 का खंड (क) का उपखंड (1) निर्दिष्ट करता है कि प्रत्येक राज्य में ग्राम मध्यवर्ती और जिला स्तर पर इस भाग के उपबंधों के अनुसार पंचायतों का गठन किया जाएगा। साथ ही साथ उपखंड (2) में यह कहा गया है कि खण्ड (1) में किसी बात के होते हुए भी मध्यवर्ती स्तर पर पंचायत का उस राज्य में गठन नहीं किया जाएगा जिसकी जनसंख्या बीस लाख से अनधिक है।

भारतीय संविधान का भाग 9—पंचायत :

भारत के संविधान के अध्याय 9 के अंतर्गत पंचायत से संबंधित प्रावधानों के संबंध में उपबंध किया गया है जिससे संबंधित अनुच्छेद 243—243 ग. तक इस अध्याय में विस्तृत हैं। भाग 9 अंतर्गत प्रथमतः परिभाषाएँ इसके पश्चात् क्रमशः ग्राम सभा³, पंचायतों के गठन⁴, संरचना⁵, स्थानों के आरक्षण⁶, अवधि⁷, सदस्यता के लिए निरर्हताएँ⁸, पंचायतों की शक्तियाँ प्राधिकार और उत्तरदायित्व⁹, कर अधिरोपित करने की शक्तियाँ और उनकी निधियाँ¹⁰, वित्तीय स्थिति के पुनर्विलोकन के लिए वित्त आयोग का गठन¹¹, पंचायतों के लेखाओं की संपरीक्षा¹², पंचायतों के लिए निर्वाचन¹³, संघ राज्यक्षेत्रों को लागू होना¹⁴, इस भाग का कतिपय क्षेत्रों को लागू न होना¹⁵, विद्यमान विधियों और पंचायतों का बना रहना¹⁶ एवं निर्वाचन संबंधी मामलों में न्यायालय के हस्तक्षेप का वर्जन¹⁷ संबंधी उपबंध किये गये हैं।

1 ए.आई.आर 2010 ए.स.सी. 3796

2 SC civil writ petition No.404 of 1999

3 भारत का संविधान अनुच्छेद 243 (क)

4 भारत का संविधान अनुच्छेद 243ख

5 भारत का संविधान अनुच्छेद 243ग

6 भारत का संविधान अनुच्छेद 243घ

7 भारत का संविधान अनुच्छेद 243ड.

8 भारत का संविधान अनुच्छेद 243च

9 भारत का संविधान अनुच्छेद 243छ

10 भारत का संविधान अनुच्छेद 243ज

11 भारत का संविधान अनुच्छेद 243झ

12 भारत का संविधान अनुच्छेद 243ञ

13 भारत का संविधान अनुच्छेद 243ट

14 भारत का संविधान अनुच्छेद 243ठ

पंचायतों का गठन :

भारत का संविधान यह उपबंधित करता है कि (1) प्रत्येक राज्य में ग्राम, मध्यवर्ती और जिला स्तर पर इस भाग के उपबंधों के अनुसार पंचायतों का गठन किया जाएगा। (2) खण्ड (1) में किसी बात के होते हुए भी मध्यवर्ती स्तर पर पंचायत का उस राज्य में गठन नहीं किया जा सकेगा, जिसकी जनसंख्या बीस लाख से अनधिक है।¹⁸

पंचायतों की संरचना :

भारत का संविधान यह उपबंधित करता है कि (1) इस भाग के उपबंधों के अधीन रहते हुए किसी राज्य का विधान मंडल विधि द्वारा पंचायतों की संरचना की बाबत उपबंध कर सकेगा। परंतु किसी भी स्तर पर पंचायत के प्रादेशिक क्षेत्र की जनसंख्या का ऐसी पंचायत में निर्वाचन द्वारा भरे जाने वाले स्थानों की संख्या से अनुपात समस्त राज्य में यथासाध्य एक ही हो। (2) किसी पंचायत के सभी स्थान, पंचायत क्षेत्र में प्रादेशिक निर्वाचन क्षेत्रों से प्रत्यक्ष निर्वाचन द्वारा चुने हुए व्यक्ति से भरे जाएंगे और इस प्रयोजन के लिए प्रत्येक पंचायत क्षेत्र को प्रादेशिक निर्वाचन क्षेत्रों में ऐसी रीति से विभाजित किया जाएगा कि प्रत्येक निर्वाचन क्षेत्र की जनसंख्या का उसको आवंटित स्थानों की संख्या से अनुपात समस्त पंचायत क्षेत्र में यथासाध्य एक ही हो। (3) किसी राज्य का विधान-मंडल विधि द्वारा— (क) ग्राम स्तर पर पंचायतों के अध्यक्षों का मध्यवर्ती स्तर पर पंचायतों में या ऐसे राज्य की दशा में जहां मध्यवर्ती स्तर पर पंचायतें नहीं हैं, जिला स्तर पर पंचायतों में (ख) मध्यवर्ती स्तर पर पंचायतों के अध्यक्षों का जिला स्तर पर पंचायतों में। (ग) लोकसभा के ऐसे सदस्यों का और राज्य की विधानसभा के ऐसे सदस्यों का, जो उन निर्वाचन क्षेत्रों का प्रतिनिधित्व करते हैं, जिनमें ग्राम स्तर से भिन्न स्तर पर कोई पंचायत क्षेत्र पूर्णतः या भागतः समाविष्ट है, ऐसी पंचायत में। (घ) राज्य सभा के सदस्यों का और राज्य की विधान परिषद के सदस्यों का, जहां वे मध्यवर्ती स्तर पर किसी पंचायत क्षेत्र के भीतर निर्वाचकों के रूप में रजिस्ट्रीकृत हैं, मध्यवर्ती स्तर पर पंचायत जिला स्तर पर किसी पंचायत क्षेत्र के भीतर निर्वाचकों के रूप में रजिस्ट्रीकृत हैं, जिला स्तर पर पंचायत में प्रतिनिधित्व करने के लिए उपबंध कर सकेगा। (4) किसी पंचायत के अध्यक्ष और किसी पंचायत के ऐसे अन्य सदस्यों को, चाहे वे पंचायत क्षेत्र में प्रादेशिक निर्वाचन क्षेत्रों से प्रत्यक्ष निर्वाचन द्वारा चुने गए हों या नहीं, पंचायतों के अधिवेशनों में मत देने का अधिकार होगा। (5) (क) ग्राम स्तर पर किसी पंचायत के अध्यक्ष का निर्वाचन ऐसी रीति से, जो राज्य के विधान-मंडल विधि द्वारा उपबंधित करे जाएँ, किया जाएगा, और (ख) मध्यवर्ती स्तर या जिला स्तर पर किसी पंचायत के अध्यक्ष का निर्वाचन, उसके निर्वाचित सदस्यों द्वारा अपने में से किया जाएगा।¹⁹

स्थानों का आरक्षण :

पंचायतों के अंतर्गत आरक्षण दिया जाना बहुत ही महत्वपूर्ण था क्योंकि ग्रामीण जनमानस से ही दे" । का विकास संभव हो सकता है और उनमें से ऐसे वर्ग के लोग जिनका प्रतिनिधित्व न के बराबर था उनको आरक्षण की व्यवस्था का दिया जाना एक महत्वपूर्ण कदम है। यहां पर अनुसूचित जाति, अनुसूचित जनजाति, पिछड़ा वर्ग एवं महिलाओं के लिए आरक्षण की व्यवस्था की गई है जो कि निम्न लिखित है :- (1) प्रत्येक पंचायत में—(क) अनुसूचित जातियों और (ख) अनुसूचित जनजातियों के लिए स्थान आरक्षित रहेंगे और इस प्रकार आरक्षित स्थानों की संख्या का अनुपात, उस पंचायत में प्रत्यक्ष निर्वाचन द्वारा भरे जाने वाले स्थानों की कुल संख्या से यथा" त्वय वही होगा, जो उस पंचायत क्षेत्र में अनुसूचित जातियों

15 भारत का संविधान अनुच्छेद 243ड.

16 भारत का संविधान अनुच्छेद 243ढ

17 भारत का संविधान अनुच्छेद 243ण

18 भारत का संविधान अनुच्छेद 243ख

19 भारत का संविधान अनुच्छेद 243ग

की अथवा उस पंचायत क्षेत्र में अनुसूचित जनजातियों की जनसंख्या का अनुपात उस क्षेत्र की कुल जनसंख्या से है और ऐसे स्थान किसी पंचायत में भिन्न-भिन्न निर्वाचन क्षेत्रों को चक्रानुक्रम से आवंटित किए जा सकेंगे।

(2) खण्ड (1) के अधीन आरक्षित स्थानों की कुल संख्या के कम से कम एक तिहाई स्थान, यथास्थिति अनुसूचित जातियों या अनुसूचित जनजातियों की स्त्रियों के लिए आरक्षित रहेंगे।

(3) प्रत्येक पंचायत में प्रत्यक्ष निर्वाचन द्वारा भरे जाने वाले स्थानों की कुल संख्या के कम से कम एक तिहाई स्थान (जिनके अंतर्गत अनुसूचित जातियों और अनुसूचित जनजातियों की स्त्रियों के लिए आरक्षित स्थानों की संख्या भी है) स्त्रियों के लिए आरक्षित रहेंगे और ऐसे स्थान किसी पंचायत में भिन्न-भिन्न निर्वाचन क्षेत्रों की चक्रानुक्रम से आवंटित किए जा सकेंगे।

(4) ग्राम या किसी अन्य स्तर पर पंचायतों में अध्यक्षों के पद अनुसूचित जातियों, अनुसूचित जनजातियों और स्त्रियों के लिए ऐसी रीति से आरक्षित रहेंगे, जो राज्य का विधान-मंडल विधि द्वारा उपबंधित करें। परंतु किसी राज्य में प्रत्येक स्तर पर पंचायतों में अनुसूचित जातियों और अनुसूचित जनजातियों के लिए आरक्षित अध्यक्षों के पदों की संख्या का अनुपात प्रत्येक स्तर पर उन पंचायतों में से ऐसे पदों की कुल संख्या से यथाशक्य वही होगा, जो उस राज्य में अनुसूचित जातियों की अथवा उस राज्य में अनुसूचित जनजातियों की जनसंख्या का अनुपात उस राज्य की कुल जनसंख्या से है। परंतु यह भी कि इस खंड के अधीन आरक्षित पदों की संख्या प्रत्येक स्तर पर भिन्न-भिन्न पंचायतों को चक्रानुक्रम से आवंटित की जाएगी।

(5) खण्ड (1) और खण्ड (2) के अधीन स्थानों का आरक्षण और खण्ड (4) के अधीन अध्यक्षों के पदों का आरक्षण (जो स्त्रियों के लिए आरक्षण से भिन्न है) अनुच्छेद 334 में विनिर्दिष्ट अवधि की समाप्ति पर प्रभावी नहीं रहेगा।

(6) इस भाग की कोई बात किसी राज्य के विधान मंडल को पिछड़े हुए नागरिकों के किसी वर्ग के पक्ष में किसी स्तर पर किसी पंचायत में स्थानों के या पंचायतों में अध्यक्षों के पदों के आरक्षण के लिए कोई उपबन्ध करने से निवारित नहीं करेगी।

20

पंचायतों की अवधि, आदि :

(1) प्रत्येक पंचायत, यदि तत्समय प्रवृत्त किसी विधि के अधीन पहले ही विघटित नहीं कर दी जाती है तो अपने प्रथम अधिवेशन के लिए नियत तारीख से पाँच वर्ष तक बनी रहेगी, इससे अधिक नहीं। (2) तत्समय प्रवृत्त किसी विधि के किसी संशोधन से किसी स्तर पर ऐसी पंचायत का, जो ऐसे संशोधन के ठीक पूर्व कार्य कर रही है, तब तक विघटन नहीं होगा, जब तक खण्ड (1) में विनिर्दिष्ट उसकी अवधि समाप्त नहीं हो जाती। (3) किसी पंचायत का गठन करने के लिए निर्वाचन- (क) खण्ड (1) में विनिर्दिष्ट उसकी अवधि की समाप्ति के पूर्व: (ख) उसके विघटन की तारीख से छह मास की अवधि की समाप्ति के पूर्व, पूरा किया जाएगा। परंतु जहां वह शेष अवधि, जिसके लिए कोई विघटन पंचायत बनी रहती, छह मास से कम है, वहां ऐसी अवधि के लिए उस पंचायत का गठन करने के लिए इस खण्ड के अधीन कोई निर्वाचन कराना आवश्यक नहीं होगा। (4) किसी पंचायत की अवधि की समाप्ति के पूर्व उस पंचायत के विघटन पर गठित की गई कोई पंचायत उस अवधि के केवल शेष भाग के लिए बनी रहेगी, जिसके लिए विघटित पंचायत खण्ड (1) के अधीन बनी रहती, यदि वह इस प्रकार विघटित नहीं की जाती।²¹

शासन के इस तीसरे सोपान की पंचायती राज इकाइयों का कार्यकाल भी केंद्र व राज्य सरकार की भांति समान करने के लिए यह प्रावधान किया गया है कि प्रत्येक पंचायती राज इकाई का कार्यकाल, यदि वह, राज्य में तत्समय प्रवर्तित किसी

20 भारत का संविधान अनुच्छेद 243घ

21 भारत का संविधान अनुच्छेद 243ड

विधि के अधीन पहले भंग नहीं कर दी जाती है तो, 5 वर्ष होगा और इससे अधिक नहीं। इसी संदर्भ में ध्यान देने योग्य तथ्य यह है कि संविधान में पंचायती राज संस्थाओं के कार्यकाल को 5 वर्ष घोषित किया गया है तथा शब्द “इससे अधिक नहीं” पर विशेष बल दिया गया है। पंचायती राज संस्थाओं के चुनावों के विषय में संविधान में कहा गया है कि इन संस्थाओं के चुनाव उनके निर्धारित कार्यकाल समाप्त होने के पूर्व कराए जाएं और यदि ये संस्थाएं समय से पूर्व भंग की जाती हैं तो भंग किए जाने की तिथि से 6 माह की अवधि में नए चुनाव कराने होंगे।

इस संदर्भ में यह उपबन्ध भी किया गया है, कि यदि भंग की हुई संस्था का निर्धारित कार्यकाल 6 माह से कम रह गया हो तो ऐसे चुनाव कराए जाने आवें” यक नहीं होंगे। भंग किए जाने के पश्चात् नई चुनी हुई पंचायती राज इकाई, उस शेष अवधि के लिए ही कार्य करेगी जितनी अवधि के लिए वह इकाई कार्य करती, यदि वह भंग नहीं की गई होती।

सदस्यता के लिए निरर्हताएँ :

भारत का संविधान यह उपबंधित करता है कि (1) कोई व्यक्ति किसी पंचायत का सदस्य चुने जाने के लिए और सदस्य होने के लिए निरर्हित होगा—(क) यदि वह संबंधित राज्य के विधान—मंडल के निर्वाचनों के प्रयोजनों के लिए तत्समय प्रवृत्त किसी विधि द्वारा या उसके अधीन इस प्रकार निरर्हित कर दिया जाता है। परंतु कोई व्यक्ति इस आधार पर निरर्हित नहीं होगा कि उसकी आयु पच्चीस वर्ष से कम है, यदि उसने इक्कीस वर्ष की आयु प्राप्त कर ली है। (ख) यदि वह राज्य के विधान—मंडल द्वारा बनाई गई किसी विधि द्वारा या उसके अधीन इस प्रकार निरर्हित कर दिया जाता है। (2) यदि यह प्र” न उठता है कि किसी पंचायत का कोई सदस्य खण्ड (1) में वर्णित किसी निरर्हता से ग्रस्त हो गया है या नहीं तो वह प्रश्न ऐसे प्राधिकारी को और ऐसी रीति से, जो राज्य का विधान—मंडल, विधि द्वारा, उपबंधित करें, विनिश्चय के लिए निर्देशित किया जाएगा।²²

शक्तियाँ और प्राधिकार :

भारतीय संविधान के अंतर्गत भाग 9 जोड़ने के पीछे एक महत्वपूर्ण उद्देश्य यह था कि पंचायतीराज संस्थाओं को पूर्ण शक्तियाँ और प्राधिकार प्रदान किये जायें उसी उद्देश्य की प्राप्ति के लिए भारत के संविधान के अनुच्छेद 243 छ के अन्तर्गत पंचायत को शक्तियाँ प्राधिकार और उत्तरदायित्व प्रदान किये गये हैं।

पंचायतों की शक्तियाँ, प्राधिकार और उत्तरदायित्व संविधान के उपबंधों के अधीन रहते हुए किसी राज्य का विधान—मंडल, विधि द्वारा, पंचायतों को ऐसी शक्तियाँ और प्राधिकार प्रदान कर सकेगा, जो उन्हें स्वायत्त शासन की संस्थाओं के रूप में कार्य करने में समर्थ बनाने के लिए आवश्यक हों और ऐसी शर्तों के अधीन रहते हुए, जो उसमें विनिर्दिष्ट की जाएँ, निम्नलिखित के संबंध में शक्तियाँ और उत्तरदायित्व न्याय कराने के लिए उपबंध किए जा सकेंगे, अर्थात्—

- (i) आर्थिक विकास और सामाजिक न्याय के लिए योजनाएं तैयार करना
- (ii) आर्थिक विकास और सामाजिक न्याय की ऐसी स्कीमों को, जो उन्हें सौंपी जाएँ, जिनके अंतर्गत वे स्कीमों में भी हैं, जो ग्यारहवीं अनुसूची में सूचीबद्ध विषयों के संबंध में हैं, कार्यान्वित करना²³

पंचायतों द्वारा कर अधिरोपित करने की शक्तियाँ और उनकी निधियाँ :

किसी राज्य का विधान मंडल विधि द्वारा—(क) ऐसे कर, शुल्क, पथकर और फीस उद्गृहीत, संग्रहित और विनियोजित करने के लिए किसी पंचायत को, ऐसी प्रक्रिया के अनुसार और ऐसे निर्बंधनों के अधीन रहते हुए, प्राधिकृत कर सकेगा। (ख) राज्य सरकार द्वारा उद्गृहीत और संग्रहीत ऐसे कर, शुल्क, पथकर और फीस किसी पंचायत को ऐसे प्रयोजनों के लिए तथा

²² भारत का संविधान अनुच्छेद 243च

²³ भारत का संविधान अनुच्छेद 243 छ

ऐसी शर्तों और निर्बन्धनों के अधीन रहते हुए समनुदिष्ट कर सकेगा। (ग) राज्य की संचित निधि में से पंचायतों के लिए ऐसे सहायता-अनुदान देने के लिए उपबंध कर सकेगा, और (घ) पंचायतों द्वारा या उनकी ओर से क्रमशः प्राप्त किए गए सभी धनों को जमा करने के लिए ऐसी निधियों का गठन करने और उन निधियों में से ऐसे धनों को निकालने के लिए भी उपबंध कर सकेगा, जो विधि में विनिर्दिष्ट किए जाएँ।²⁴

वित्तीय स्थिति के पुनर्विलोकन के लिए वित्त आयोग का गठन :

राज्यों के राज्यपाल, 73वें संविधान संशोधन अधिनियम के प्रवर्तन के एक वर्ष की अवधि में और उसके पश्चात् प्रति 5 वर्ष के अन्तराल पर राज्यों की पंचायती राज संस्थाओं की वित्तीय स्थिति की समीक्षा, और राज्य सरकार द्वारा लगाये गए करों से हुई आय का राज्य द्वारा पंचायती राज संस्थाओं के मध्य वितरण, पंचायती राज संस्थाओं द्वारा लगाए जाने वाले करों को चिन्हित करने, राज्य की संचित निधि से इन संस्थाओं को दिए जाने वाले अनुदान के सिद्धांतों का निर्धारण, और पंचायती राज संस्थाओं की वित्तीय स्थिति में सुधार लाने के लिए किये जाने वाले उपायों तथा वित्तीय स्वरूप के संदर्भ में सौंपे गए किन्हीं भी अन्य कार्यों का निष्पादन करने के लिए राज्य वित्त आयोग का गठन करेंगे। राज्य विधान मंडल विधि के माध्यम से इस वित्त आयोग के संगठन और उसमें नियुक्त किए जाने वाले सदस्यों की योग्यताओं और इन सदस्यों की नियुक्ति की प्रक्रिया का निर्धारण कर सकेगी। भारत के संविधान के अंतर्गत प्रावधान किया गया है कि:- (1) राज्य का राज्यपाल संविधान (तिहत्तरवां संशोधन) अधिनियम, 1992 के प्रारंभ से एक वर्ष के भीतर यथा” शीघ्र और तत्पश्चात् प्रत्येक पांचवें वर्ष की समाप्ति पर वित्त आयोग का गठन करेगा, जो पंचायतों की वित्तीय स्थिति का पुनर्विलोकन करेगा, और जो- (क) राज्य द्वारा उद्गृहीत करों, शुल्कों, पथकरों और फीसों के ऐसे शुद्ध आगमों के राज्य और पंचायतों के बीच, जो इस भाग के अधीन उनमें विभाजित किए जाएँ, वितरण को और सभी स्तरों पर पंचायतों के बीच ऐसे आगमों के तत्संबंधी भाग के आवंटन को। ऐसे करों, शुल्कों, पथकरों और फीसों के अवधारण को, जो पंचायतों को समनुदिष्ट की जा सकेंगी या उनके द्वारा विनियोजित की जा सकेगी। राज्य की संचित निधि में से पंचायतों के लिए सहायता अनुदान को, शासित करने वाले सिद्धांतों के बारे में। (ख) पंचायतों की वित्तीय स्थिति को सुधारने के लिए आवश्यक अध्यापयों के बारे में। (ग) पंचायतों के सुदृढ़ वित्त के हित में राज्यपाल द्वारा वित्त आयोग को निर्दिष्ट किए गए किसी अन्य विषय के बारे में, राज्यपाल को सिफारिश करेगा। (2) राज्य का विधान मंडल, विधि द्वारा, आयोग की संरचना का, उन अर्हताओं का, जो आयोग के सदस्यों के रूप में नियुक्ति के लिए अपेक्षित होंगी और उस रीति का, जिससे उनका चयन किया जाएगा, उपबंध कर सकेगा। (3) आयोग अपनी प्रक्रिया अवधारित करेगा और उसे अपने कृत्यों के पालन में ऐसी शक्तियां होगी, जो राज्य का विधान मंडल विधि द्वारा उसे प्रदान करे। (4) राज्यपाल इस अनुच्छेद के अधीन आयोग द्वारा की गई प्रत्येक सिफारिश को उस पर की गई कार्रवाई के स्पष्टीकारक ज्ञापन सहित राज्य के विधान मंडल के समक्ष रखवाएगा।²⁵

पंचायतों के लेखाओं की संपरीक्षा :

किसी राज्य का विधान-मंडल, विधि द्वारा, पंचायतों द्वारा लेखे रखे जाने और ऐसे लेखाओं की संपरीक्षा करने के बारे में उपबंध कर सकेगा।²⁶ उदाहरण के लिए मध्य प्रदेश विधान मंडल के द्वारा उपबंध किया गया है कि ग्राम सभा समुचित रूप से लेखा पुस्तकें संधारित करवाएगी तथा लेखाओं का वार्षिक विवरण तैयार करेगी। ग्राम सभा के लेखाओं की संपरीक्षा समय-समय पर ऐसी रीति में तथा ऐसे प्राधिकारी द्वारा की जाएगी जा कि विहित किया जाए तथा प्रस्तुत संपरीक्षा रिपोर्ट

24 भारत का संविधान अनुच्छेद 243 ज

25 भारत का संविधान अनुच्छेद 243अ

26 भारत का संविधान अनुच्छेद 243अ

ग्राम सभा के समक्ष आगामी सम्मेलन में रखी जाएगी।²⁷ इसी के अनुरूप ग्राम पंचायत जिला पंचायत एवं जनपद पंचायत के लिए लेखाओं की संपरीक्षा के लिए उपबंध किये गये हैं।

पंचायतों के लिए निर्वाचन :

भारतीय संविधान के अनुच्छेद 243ग के खंड 2 में प्रावधान किया गया है कि पंचायत के सभी स्थानों को पंचायत क्षेत्र के निर्वाचन क्षेत्रों से प्रत्यक्ष निर्वाचन द्वारा चुने हुए व्यक्ति से समीचीन होगा कि 73 वां संविधान सं” गोधन के माध्यम से ग्राम पंचायत, जनपद पंचायत एवं जिला पंचायत के लिए राज्य निर्वाचन आयोग की स्थापना की गई । पंचायतों के निर्वाचन से संबंधित भारतीय संविधान के अनुच्छेद 343ट के अंतर्गत उपबंध किया गया जो कि निम्नांकित है:-

भारतीय संविधान के अनुसार पंचायतों के लिए कराए जाने वाले सभी निर्वाचन के लिए निर्वाचक नामावली तैयार कराने का और उन सभी निर्वाचनों के संचालन का अधीक्षण, निदेशन और नियंत्रण एक राज्य निर्वाचन आयोग में निहित होगा, जिसमें एक राज्य निर्वाचन आयुक्त होगा, जो राज्यपाल द्वारा नियुक्त किया जाएगा।²⁸ किसी राज्य के विधान मंडल द्वारा बनाई गई किसी विधि के उपबंधों के अधीन रहते हुए राज्य निर्वाचन आयुक्त की सेवा की शर्तें और पदावधि ऐसी होंगी, जो राज्यपाल नियम द्वारा अवधारित करें, परंतु राज्य निर्वाचन आयुक्त को उसके पद से उसी रीति से और उन्हीं आधारों पर ही हटाया जाएगा, जिस रीति से और जिन आधारों पर उच्च न्यायालय के न्यायाधीश को हटाया जाता है, अन्यथा नहीं और राज्य निर्वाचन आयुक्त की सेवा की शर्तों में उनकी नियुक्ति के पश्चात उनके लिए अलाभकारी परिवर्तन नहीं किया जाएगा।²⁹ जब राज्य निर्वाचन आयोग ऐसा अनुरोध करें, तब किसी राज्य का राज्यपाल राज्य निर्वाचन आयोग को उतने कर्मचारीवृन्द उपलब्ध कराएगा, जितने खण्ड (1) द्वारा राज्य निर्वाचन आयोग को उसे सौंपे गए कृत्यों के निर्वहन के लिए आवश्यक हों।³⁰ इस संविधान के उपबंधों के अधीन रहते हुए किसी राज्य का विधान मंडल, विधि द्वारा, पंचायतों के निर्वाचनों से संबंधित या संसक्त सभी विषयों के संबंध में उपबंध कर सकेगा।³¹

किसी पंचायत के सभी स्थान, पंचायत क्षेत्र में प्रादेशिक निर्वाचन क्षेत्रों से प्रत्यक्ष निर्वाचन द्वारा चुने हुए व्यक्ति से भरे जाएंगे और इस प्रयोजन के लिए प्रत्येक पंचायत क्षेत्र को प्रादेशिक निर्वाचन क्षेत्रों में ऐसी रीति से विभाजित किया जाएगा कि प्रत्येक निर्वाचन क्षेत्र की जनसंख्या का उसको आवंटित स्थानों की संख्या से अनुपात समस्त पंचायत क्षेत्र में यथासाध्य एक ही हो। अनुच्छेद 243 ग के खंड (3) में उपबंध किया गया है कि किसी राज्य का विधान-मंडल विधि द्वारा-(क) ग्राम स्तर पर पंचायतों के अध्यक्षों का मध्यवर्ती स्तर पर पंचायतों में या ऐसे राज्य की दशा में जहां मध्यवर्ती स्तर पर पंचायतें नहीं हैं, जिला स्तर पर पंचायतों में। (ख) मध्यवर्ती स्तर पर पंचायतों के अध्यक्षों का जिला स्तर पर पंचायतों में। (ग) लोकसभा के ऐसे सदस्यों का और राज्य की विधानसभा के ऐसे सदस्यों का, जो उन निर्वाचन क्षेत्रों का प्रतिनिधित्व करते हैं, जिनमें ग्राम स्तर से भिन्न स्तर पर कोई पंचायत क्षेत्र पूर्णतः या भागतः समाविष्ट है, ऐसी पंचायत में। (घ) राज्य सभा के सदस्यों का और राज्य की विधान परिषद के सदस्यों का, जहां वे-मध्यवर्ती स्तर पर किसी पंचायत क्षेत्र के भीतर निर्वाचकों के रूप में रजिस्ट्रीकृत हैं, मध्यवर्ती स्तर पर पंचायत में एवं जिला स्तर पर किसी पंचायत क्षेत्र के भीतर निर्वाचकों के रूप में रजिस्ट्रीकृत हैं, जिला स्तर पर पंचायत में प्रतिनिधित्व करने के लिए उपबंध कर सकेगा।

संघ राज्यक्षेत्रों को लागू होना :

27 मध्य प्रदेश पंचायत राज एवं ग्राम स्वराज धारा 7-ट

28 भारत का संविधान अनुच्छेद 243 ट(1)

29 भारत का संविधान अनुच्छेद 243 ट(2)

30 भारत का संविधान अनुच्छेद 243 ट(3)

31 भारत का संविधान अनुच्छेद 243 ट(4)

इस भाग के उपबंध संघ राज्यक्षेत्रों को लागू होंगे और किसी संघ राज्यक्षेत्र को उनके लागू होने में इस प्रकार प्रभावी होंगे, मानो किसी राज्य के राज्यपाल के प्रति निर्देश, अनुच्छेद 239 के अधीन नियुक्त संघ राज्यक्षेत्र के प्रशासक के प्रति निर्देश हों और किसी राज्य के विधान-मंडल या विधानसभा के प्रति निर्देश, किसी ऐसे संघ राज्यक्षेत्र के संबंध में, जिसमें विधानसभा है, उस विधानसभा के प्रति निर्देश हों, परंतु राष्ट्रपति, लोक अधिसूचना द्वारा यह निर्देश दे सकेगा कि इस भाग के उपबंध किसी संघ राज्यक्षेत्र या उसके किसी भाग को ऐसे अपवादों और उपांतरणों के अधीन रहते हुए लागू होंगे, जो वह अधिसूचना में विनिर्दिष्ट करें।³²

इस भाग का कतिपय क्षेत्रों को लागू न होना³³ :

भारत का संविधान यहां पर उपबंधित करता है कि (1) इस भाग की कोई बात अनुच्छेद 244 के खण्ड (1) में निर्दिष्ट अनुसूचित क्षेत्रों और उसके खण्ड (2) में निर्दिष्ट जनजाति क्षेत्रों को लागू नहीं होगी। (2) इस भाग की कोई बात निम्नलिखित को लागू नहीं होगी, अर्थात् (क) नागालैंड, मेघालय और मिजोरम राज्य, (ख) मणिपुर राज्य के ऐसे पर्वतीय क्षेत्र, जिनके लिए तत्समय प्रवृत्त किसी विधि के अधीन जिला परिषद विद्यमान है। (3) इस भाग की—(क) कोई बात जिला स्तर पर पंचायतों के संबंध में पश्चिम बंगाल राज्य के दार्जिलिंग जिले के ऐसे पर्वतीय क्षेत्रों को लागू नहीं होगी, जिनके लिए तत्समय प्रवृत्त किसी विधि के अधीन दार्जिलिंग गोरखा पर्वतीय परिषद विद्यमान है। (ख) किसी बात का यह अर्थ नहीं लगाया जाएगा कि वह ऐसी विधि के अधीन दार्जिलिंग गोरखा पर्वतीय परिषद के कृत्यों और शक्तियों पर प्रभाव डालती है। (3 क) अनुसूचित जातियों के लिए स्थानों के आरक्षण से संबंधित अनुच्छेद 243 घ की कोई बात अरुणांचल प्रदेश राज्य को लागू नहीं होगी। (4) इस संविधान में किसी बात के होते हुए भी— (क) खण्ड (2) के उपखण्ड (क) में निर्दिष्ट किसी राज्य का विधान मंडल, विधि द्वारा, इस भाग का विस्तार खण्ड (1) में निर्दिष्ट क्षेत्रों के सिवाय, यदि कोई हों, उस राज्य पर उस दशा में कर सकेगा, जब उस राज्य की विधानसभा इस आशय का एक संकल्प उस सदन की कुल सदस्य संख्या के बहुमत द्वारा तथा उस सदन के उपस्थित और मत देने वाले सदस्यों के कम से कम दो तिहाई बहुमत द्वारा पारित कर देती है।

(ख) संसद, विधि द्वारा, इस भाग के उपबंधों का विस्तार खण्ड (1) में निर्दिष्ट अनुसूचित क्षेत्रों और जनजाति क्षेत्रों पर ऐसे अपवादों और उपांतरणों के अधीन रहते हुए कर सकेगी, जो ऐसी विधि में विनिर्दिष्ट किए जाएं और ऐसी किसी विधि को अनुच्छेद 368 के प्रयोजनों के लिए इस संविधान का संशोधन नहीं समझा जाएगा।³⁴

विद्यमान विधियों और पंचायतों का बना रहना :

इस भाग में किसी बात के होते हुए भी संविधान (तिहत्तरवां संशोधन) अधिनियम, 1992 के प्रारंभ के ठीक पूर्व किसी राज्य में प्रवृत्त पंचायतों से संबंधित किसी विधि का कोई उपबंध, जो इस भाग के उपबंधों से असंगत है, जब तक सक्षम विधान मंडल द्वारा या अन्य सक्षम प्राधिकारी द्वारा उसे संशोधित या निरसित नहीं कर दिया जाता है या जब तक ऐसे प्रारंभ से एक वर्ष समाप्त नहीं हो जाता है, इनमें से जो भी पहले हो, तब तक प्रवृत्त बना सकेगा: परंतु ऐसे प्रारंभ के ठीक पूर्व विद्यमान सभी पंचायतें, यदि उस राज्य की विधानसभा द्वारा या ऐसे राज्य की दशा में, जिसमें विधान परिषद है, उस राज्य

32 भारत का संविधान अनुच्छेद 243ठ

33 भारत का संविधान अनुच्छेद 243द

34 भारत का संविधान अनुच्छेद 243ड.

के विधान मंडल के प्रत्येक सदन द्वारा पारित इस आ"य के संकल्प द्वारा पहले ही विघटित नहीं कर दी जाती है तो अपनी अवधि की समाप्ति तक बनी रहेगी।³⁵

निर्वाचन संबंधी मामलों में न्यायालय के हस्तक्षेप का वर्जन :

संविधान के अंतर्गत निर्वाचन संबंधी मामलों में न्यायालय के हस्तक्षेप का वर्जन करते हुए कहा गया है कि संविधान में किसी बात के होते हुए भी—

(क) अनुच्छेद 243 ट के अधीन बनाई गई या बनाई जाने के लिए तात्पर्यित किसी ऐसी विधि की विधिमान्यता, जो निर्वाचन क्षेत्रों के परिसीमा या ऐसे निर्वाचन क्षेत्रों को स्थानों के आवंटन से संबंधित है, किसी न्यायालय में प्रश्नगत नहीं की जाएगी।

(ख) किसी पंचायत के लिए कोई निर्वाचन, ऐसी निर्वाचन अर्जी पर ही प्रश्नगत किया जाएगा, जो ऐसे प्राधिकारी को और ऐसी रीति से प्रस्तुत की गई है, जिसका किसी राज्य के विधान-मंडल द्वारा बनाई गई किसी विधि द्वारा या उसके अधीन उपबंध किया जाए, अन्यथा नहीं।³⁶

भारतीय संविधान की ग्यारहवीं अनुसूची :

भारतीय संविधान की इस अनुसूची के अंतर्गत वे विषय दिये गये हैं जिन पर पंचायते विधि ग्राम सभा के माध्यम से विधि निर्माण कर अपनी कार्यशैली को पंचायत स्वयं निर्वाह कर सकती है। जिससे के ग्रामीण स्वायत्त शासन पद्धति का शुभारंभ होता है। भारतीय संविधान की ग्यारहवीं अनुसूची के प्रावधान निम्नांकित हैं:—

- 1 कृषि, जिसके अंतर्गत कृषि विस्तार,
- 2 भूमि विकास, भूमि सुधार का कार्यान्वयन, चकबन्दी, और भूमि अनुसरक्षण,
- 3 लघु सिंचाई, जल प्रबन्ध और जल विभाजन क्षेत्र का विकास,
- 4 पशुपालन, डेरी उद्योग व कुक्कुट पालन,
- 5 मत्स्य उद्योग,
- 6 सामाजिक वानिकी और फार्म वानिकी,
- 7 लघु वन उपज,
- 8 लघु उद्योग, जिसके अंतर्गत खाद्य प्रसंस्करण उद्योग भी है,
- 9 खादी ग्राम और कुटीर उद्योग,
- 10 ग्रामीण आवासन,
- 11 पेय जल,
- 12 ईंधन और चारा,
- 13 सड़के, पुलिया, पुल, फेरी, जलमार्ग और संचार के अन्य साधन,
- 14 ग्रामीण विद्युतीकरण, जिसके अंतर्गत विद्युत का वितरण है,
- 15 गैर पारम्परिक ऊर्जा स्रोत,
- 16 गरीबी उन्मूलन कार्यक्रम,
- 17 शिक्षा, जिसके अंतर्गत प्राथमिक और माध्यमिक विद्यालय भी है,

35 भारत का संविधान अनुच्छेद 243ड

36 भारत का संविधान अनुच्छेद 243.ण

- 18 तकनीकी प्रशिक्षण और व्यावसायिक शिक्षा,
- 19 प्रौढ़ और आनौपचारिक शिक्षा,
- 20 पुस्तकालय,
- 21 सांस्कृतिक क्रियाकलाप,
- 22 बाजार और मेले,
- 23 स्वास्थ्य और स्वच्छता जिसके अंतर्गत अस्पताल, प्राथमिक स्वास्थ्य केन्द्र और औषधालय भी है,
- 24 परिवार कल्याण,
- 25 महिला और बाल विकास,
- 26 समाज कल्याण, जिसके अंतर्गत विकलांगों और मानसिक रूप से मंद व्यक्तियों का कल्याण है,
- 27 दुर्बल वर्गों का और विशिष्टतया, अनुसूचित जातियों और अनुसूचित जनजातियों का कल्याण,
- 28 सार्वजनिक वितरण प्रणाली,
- 29 सामुदायिक आस्तियों का अनुरक्षण।

भारतीय संविधान की 7वीं अनुसूची :

भारत का संविधान की अनुसूची 7 केन्द्र एवं राज्यों के बीच विधायी शक्तियों के वितरण के संबंध में प्रावधान किया गया है। भारत का संविधान की अनुसूची 7 की सूची 2 राज्य सूची के विषयांतर्गत प्रविष्टी क्रमांक 5 ग्राम प्रशासन अर्थात् ग्राम पंचायत के लिए भी अपने अंतर्गत व्यापक रूप से सम्मिलित करती है और पंचायत के लिए विधि निर्माण संबंधी कार्य राज्य सूची के विषयांतर्गत रखा गया है, जिसके अंतर्गत कहा गया है कि, स्थानीय शासन, अर्थात् नगर निगमों, सुधार न्यासों, जिला बोर्डों, खनन-बस्ती प्राधिकारियों और स्थानीय स्वशासन या ग्राम प्रशासन के प्रयोजनों के लिए अन्य स्थानीय प्राधिकारियों का गठन और शक्तियां।³⁷ उपर्युक्त प्रविष्टि के अंतर्गत मुख्यतः दो बातों पर ध्यान केन्द्रित किया गया जिसमें ' स्थानीय शासन एवं स्थानीय स्वशासन, यहां पर स्थानीय शासन का अर्थ शहरी प्रशासन से एवं स्थानीय स्वशासन से ग्रामीण प्रशासन से है जिसके अंतर्गत ग्राम पंचायत, जनपद पंचायत एवं जिला पंचायत एवं ग्रामीण प्रशासन से संबंधित सभी अन्य उपक्रम भी सम्मिलित किए गए हैं अर्थात् इस संबंध में राज्य विधि निर्माण संबंधी शक्ति धारण करता हैं।

उपसंहार :

भारत में स्थानीय प्रशासन 1993 तक राज्यों के विवेक पर निर्भर था इसलिए उसे अपने अधिकार से अस्तित्व में बने रहने का अधिकार नहीं था। संविधान का तिहत्तरवां संशोधन, जो कि 1993 से लागू हुआ, इन कमियों को दूर कर देता है।³⁸ यहां पर यह स्पष्ट कर देना उपयुक्त होगा कि 73 वां संविधान संशोधन पंचायती राज को शक्तिशाली बनाने के लिए एवं राज्यों के लिए पंचायती राज संबंधी विधिक उपबंध करने के लिए बाध्य करता हैं। इस अधिनियम के पूर्व यह राज्य का नीति निर्देशक तत्व तो बनाया गया था किन्तु राज्यों के लिए इस पर विधि बनाने के लिए बाध्य नहीं किया गया था। किन्तु अब इस संविधान संशोधन के पश्चात् प्रत्येक राज्य पंचायतों के उपबंध करने के लिए बाध्य कर दिया गया हैं। इसका प्रभाव यह हुआ कि राज्यों ने अधिनियम पारित करके अपने अपने राज्यों में पंचायतों की स्थापना कर ली हैं।

37 भारत का संविधान प्रविष्टी क्रमांक 5 सूची 2 अनुसूची 7

38 माहेश्वर एस.आर. (2011) भारत में स्थानीय प्रशासन, प्रकाशक लक्ष्मी नारायण अग्रवाल, आगरा पृष्ठ संख्या 16

संदर्भ ग्रंथ सूची :

1. श्रीवास्तव अरूण (1994), भारत में पंचायती राज, आर. बी. एस. ए. पब्लिशर्स, जयपुर।
2. चौधरी राधाकृष्ण (1982), भारत में स्थानीय शासन, मोतीलाल बनारसीदास, पटना।
3. शर्मा विद्यासागर (1956), पंचायती राज, हिन्दी प्रकाशन मंदिर, इलाहाबाद।
4. गुरुशरण (1962), पंचायती राज को जानिए, अखिल भारत सर्व सेवा संघ प्रकाशन, राजघाट, वाराणसी।
5. एम. लक्ष्मी कान्त (2011), गवर्मेन्स इन इंडिया प्रकाशक, टाटा मेग्राहिल एजुकेशन प्राइवेट लिमिटेड।
6. सान्याल भूपेन्द्रनाथ (1964), भारत में पंचायती राज, नेशनल पब्लिशिंग हाऊस, दिल्ली।
7. बसु नारायण (1965), पंचायती राज की परिकल्पना, इंडियन प्रेस प्रा.लि., इलाहाबाद।
8. डे एस. के. (1961), पंचायती राज एशिया पब्लिकेशन हाउस, मुंबई।
9. एम. के. गाँधी (1949), पंचायतीराज, नवजीवन प्रकाशन मन्दिर, अहमदाबाद।
10. मैथ्यू जॉर्ज (2003), भारत में पंचायती राज, वाणी प्रकाशन, 21-ए, दरियागंज, नई दिल्ली।
11. श्रीवास्तव जवाहर लाल (1976), पंचायती राज की सफलता के सेतु, राष्ट्रीय प्रकाशन मन्दिर, लखनऊ।
12. अल्टेकर डॉ. (1948), प्राचीन भारतीय शासन पद्धति, भारतीय भंडार, इलाहाबाद।
13. फाडिया डॉ. बी. एल. (2002), राजनीति विज्ञान, प्रतियोगिता साहित्य सीरीज, साहित्य भवन, आगरा।
14. वर्मा विश्वनाथ प्रसाद (1975), वैदिक राजनीति भास्त्र-बिहार ग्रन्थ अकादमी, पटना।
15. शर्मा हरिश्चन्द्र (1986), भारत में स्थानीय प्रशासन, कालेज बुक डिपो, जयपुर।
16. भारत शासन (1956), रिपोर्ट आफ दा कांग्रेस विलेज पंचायत कमेटी।
17. भारत प्रशासन (1957), संविधान प्रकाशन विभाग, भारत सरकार।
18. भारत का संविधान, भारत सरकार विधायी विभाग, नई दिल्ली।

लोकतन्त्र में न्यायपालिका की भूमिका

डॉ० भूपेश मणि त्रिपाठी*

भारत में आजादी के बाद लोकतांत्रिक गणराज्य को लागू किया गया और पूरे देश में व्यवस्थापिका, कार्यपालिका एवं न्यायपालिका के रूप में तीन भागों में बांटा गया। इनका अपना अलग-अलग कार्यक्षेत्र भी निर्धारित किया गया और यह भी तय किया गया ये बिना एक दूसरे के हस्तक्षेप के स्वतंत्र रूप से कार्य करेंगे परन्तु कभी-कभी देखने को मिलता है देश में एक संवैधानिक संकट की स्थिति उत्पन्न हो जाती है और देखने में यह भी आता है कि न्यायपालिका की सक्रियता भी लोकतंत्र में नागरिक अधिकारों की रक्षा में महत्वपूर्ण भूमिका निभाती है और कभी-कभी इसके द्वारा हस्तक्षेप पर संवैधानिक संकट भी पैदा हो जाता है। फिर भी शक्ति संतुलन में विधायिका की अधिक शक्ति ने न्यायपालिका की भूमिका सीमित कर दी, क्योंकि इनकी नियुक्ति का अधिकार विधायिका को है। आज इन तमाम परिस्थितियों के बाद भी न्यायपालिका पर सबका विश्वास बना हुआ है और इसे अपनी जिम्मेदारी भी समझना होगा। स्वतंत्र न्यायपालिका ही लोकतंत्र को सफल बना सकती है। प्रस्तुत शोध पत्र में लोकतंत्रीय व्यवस्था में न्यायपालिका की क्या भूमिका हो सकती है। इसी पर अध्ययन किया गया है।

लोकतन्त्र का अर्थ केवल लोकतन्त्रीय शासन से नहीं वरन् ऐसे शासन तथा समाज से है जिसमें सामाजिक, धार्मिक, आर्थिक एवं राजनीतिक समानता तथा बंधुत्व की भावना विद्यमान हो। सत्ता चाहे जिसके हाथ में हो किन्तु यदि वहां के लोगों को स्वतंत्रता तथा समानता के अधिकार प्राप्त हैं, उन्हें स्वयं निर्मित विधियों के अनुसार अपने आध्यात्मिक एवं नैतिक विकास की पूर्ण सुविधाएं हैं, और प्रशासन में भाग लेने का प्रत्यक्ष या अप्रत्यक्ष रूप से अधिकार है तो ऐसी शासन व्यवस्था को लोकतन्त्रीय व्यवस्था कहा जायेगा। **जे०एस० मिल ने कहा कि 'सामाजिक राज्य की सभी आवश्यकताओं को पूरी तरह से पूर्ण करने वाला शासन वही हो सकता है जिसमें सम्पूर्ण जनता भाग लें'।** लोकतंत्र को आधुनिक काल में शासन का सर्वश्रेष्ठ रूप माना जाता है। वर्तमान समय में लोकतंत्र में अपने को एक आदर्श रूप में स्थापित कर लिया है आज प्रत्येक व्यक्ति तथा राज्य अपने आप को लोकतांत्रिक होने का दावा करता है।

लोकतंत्र शब्द का प्रयोग आज जिस राजनीतिक अवधारणा के लिए होता है उस अवधारणा का मूल स्रोत "ग्रीक" है और वहाँ उसके लिए प्रचलित शब्द था "डेमोक्रेसी" जिसका अर्थ होता है "डेमो" (जनता) द्वारा शासन। इसमें सम्पूर्ण जनसंख्या एक तरह से व्यक्तिगत ईकाईयों का एक संस्थागत रूप ग्रहण करती है, अर्थात् लोकतंत्र में हर एक प्रजा एक प्रशासनिक इकाई के रूप में स्वीकृत होता है। यह सर्वविदित तथ्य है कि कोई भी दो व्यक्ति कभी भी प्राकृतिक या भौतिक रूप में एक नहीं हो सकते, क्योंकि शारीरिक बनावट एवं मानसिक भिन्नता के साथ-साथ सबकी जरूरतें

* असि० प्रोफेसर (राजनीति विज्ञान विभाग) संत विनोबा पी०जी० कालेज, देवरिया।

एवं आकांक्षाएं भिन्न-भिन्न होती है। स्वाभाविक रूप में उनके दृष्टिकोण, धारणा, विश्वास एवं व्यवहार समान नहीं है, परन्तु फिर भी जनता का एवं जनता के द्वारा शासन का सिद्धान्त एवं व्यवहार गत दृष्टिगत होता है।

लोकतंत्र में बहुसंख्यक जो निर्णय लेता है सभी जनसंख्या उसी का अनुपालन करती है, परन्तु इसका अर्थ यह कदापि नहीं होता है कि बहुसंख्यक जो चाहे अल्पसंख्यक पर लाद दें। बल्कि इसका मुख्य उद्देश्य अल्पसंख्यकों के लिए संरक्षणात्मक व्यवस्था कर उनके सहयोग से राजनीतिक व्यवस्था को पूर्ण प्रभावोत्पादक बनाना है। वास्तव में यदि देखा जाये, तो **लोकतंत्र प्रतिरोधों के सम्मान की प्रतिध्वनि है।** प्रतिरोध हमेशा संस्थाओं एवं प्रणालियों के बेहतर विकल्प सुझाने में महत्वपूर्ण भूमिका निभाते हैं। यदि असहाय व्यक्तियों के सकारात्मक पहलुओं का दमन कर दिया जाये तो इसका परिणाम असंतोष एवं क्रोध के रूप में सामने आता है तो उसकी सम्भावना बढ़ जाती है। बड़े पैमाने पर खून-खराबा, विध्वंस कुछ भी हो सकता है। इसलिए असहाय व्यक्तियों के प्रति पूर्ण सहानुभूति आवश्यक हो, जो कि प्रजातांत्रिक मूल्यों के व्यापक हित में हो।

वास्तव में निर्विवाद रूप से यह सत्य है कि आज पूरी दुनिया में लोकतंत्र को सराहा जा रहा है तो इसके पीछे जनमत की शक्ति है यह समानता और स्वतंत्रता पर आधारित है। इन सबके बावजूद आज पूरे विश्व में यह स्वीकार किया जाने लगा है कि अधिनायकतंत्र प्रजातंत्र का विकल्प नहीं हो सकता। लेकिन यदि भारतीय लोकतंत्र की चर्चा करे तो आज यह संकट के दौर से गुजर रहा है। राजनीतिक यथार्थ परक मुद्दों, जातिवादी, राजनीति, गरीबी, भूखमरी, असमानता इत्यादि पर केन्द्रित हो गयी है। सरकारों की अस्थिरता, क्षेत्रवाद, जातिवादी राजनीति, राजनीतिक अपराधीकरण, भ्रष्टाचार व आतंकवाद ने भारतीय लोकतंत्र को गहरी दुविधा में डाल दिया है। लोकतंत्र का स्तम्भ कहे जाने वाले प्रेस और मीडिया भी अपनी सही जिम्मेदारी नहीं निभा पा रहा है।

अतः यह कहना कोई आश्चर्य की बात नहीं है कि लोकतंत्र किसी अन्य नैतिक और राजनीतिक सूत्र की अपेक्षा एक घातक बीमारी मानसिक उलझन से अधिक पीड़ित रहा है। लोकतान्त्रिक विचारतंत्र का पोषण करने वाले मूल्य विलुप्त होने के कगार पर है। लोकतंत्र की सफलता के लिए कुछ महत्वपूर्ण परिस्थितियों का होना आवश्यक है जिसमें न्यायपालिका की स्वतंत्रता अनिवार्य शर्त है। स्वतंत्र न्यायपालिका से रहित व्यवस्था के लिए “प्रजातांत्रिक केन्द्रीयता” पद का प्रयोग किया जाता है जो कि व्यवहारिक रूप से निरकुंश शासन व्यवस्था अथवा तानाशाही से भिन्न नहीं है। किसी भी स्वस्थ प्रजातांत्रिक राज्य में न्यायपालिका की स्वतंत्रता की अभिरक्षा अपेक्षित होती है, किन्तु राजनीतिक व्यवस्था में स्वतंत्र न्यायपालिका का अस्तित्व तभी बरकरार रह सकता है जब कार्यपालिका, विधायिका एवं जनता सबकी प्रजातांत्रिक मूल्यों में आस्था हो और स्वाभाविक रूप से न्यायपालिका में स्वयं की अपनी स्वतंत्रता की रक्षा एवं किसी भी तरह के दबाव या भय से मुक्त होकर निष्पक्ष रूप से निर्णय सुनाने की शक्ति और साहस होनी चाहिए। दुर्भाग्यवश भारत में कुछ ऐसा ही होता रहा है जैसा कि डेविड सेलबोर्न ने महसूस किया कि संसद की सम्प्रभुता के नाम पर न्यायपालिका पर प्रहार होता है फिर जनता एवं जनतंत्र के नाम पर संसद की सम्प्रभुता पर प्रहार होता है और राष्ट्रीय अनुशासन एवं अन्य राष्ट्रीय मूल्यों के नाम पर जनतंत्र पर भी प्रहार होता है।

स्वतंत्रता की आकांक्षा मनुष्य में तीव्र होती है परन्तु मानव सभ्यता के इतिहास में शायद ही ऐसा समय कोई बता दे जब शासक वर्ग द्वारा उसकी यह भावना सीमित न की गयी हो। “रूसो ने तभी तो कहा था

“मनुष्य स्वतंत्र पैदा हुआ है पर वह सर्वत्र जंजीरों में जकड़ा हुआ है।”

वैसे तो किसी भी प्रकार की राजनीतिक व्यवस्था में किसी न किसी प्रकार का संविधान अवश्य होता है, परन्तु प्रजातान्त्रिक व्यवस्था में इनकी आवश्यकता और महत्व दोनो बहुत अधिक है। क्योंकि इस राजनीतिक व्यवस्था में संविधान की सर्वोच्चता स्वीकृत होती है। न्यायपालिका द्वारा इस बात का पूरा ध्यान रखा जाता है कि संविधान की उपेक्षा या उल्लंघन तो नहीं हो रहा है। संविधान अपने आप में कुछ भी नहीं कहता, न्यायपालिका संवैधानिक प्रावधानों की जो व्याख्या करती है वही उसका भी अभिप्राय होता है। अर्थात् कुशल एवं निष्पक्ष न्यायपालिका के बिना संविधान का कोई महत्व ही नहीं रह जाता है। ऐसे कई उदाहरण हैं जिनके द्वारा न्यायिक निर्णयों ने राष्ट्राध्यक्षों को अपना पद त्यागने को मजबूर किया है भारत में 1975 में इसी तरह के निर्णय के तहत प्रधानमंत्री इन्दिरा गांधी के निर्वाचन को खारिज कर दिया गया। इलाहाबाद न्यायालय के एक निर्णय के द्वारा जिसके बाद इंदिरा गांधी ने आपताकाल की घोषणा कर दी थी। फिर भी शक्ति संतुलन में विधायिका की अधिक शक्ति ने न्यायपालिका की भूमिका सीमित कर दी क्योंकि इनकी नियुक्ति का अधिकार विधायिका को है अथवा कार्यपालिका के प्रधान को जो राष्ट्राध्यक्ष होता है।

भारत में अत्यन्त दुःखद स्थिति है कि एक ओर तो विधायिका एवं कार्यपालिका न्यायपालिका को नीचा दिखाने का प्रयास करते हैं और दूसरी ओर उसकी स्वतंत्रता के प्रति अपनी वचनबद्धता भी प्रकट करते हैं। निचले स्तर पर न्यायपालिका की सेवा शर्तें बिल्कुल ही असंतोषजनक हैं। इस स्थिति की कल्पना करने पर जिसकी वजह से बिहार एवं दिल्ली के न्यायिक अधिकारी अपने प्रति अन्याय के विरोध में सड़क पर उतर आये। उस न्यायपालिका से जनता क्या अपेक्षा कर सकती है?

गोलकनाथ मुकदमा (1967) बैंको का राष्ट्रीयकरण एवं प्रिवीपर्सज का मामला (1970) केशवानन्द भारती मामला (1973) में जब उच्चतम न्यायालय के निर्णय सरकार के इच्छा के प्रतिकूल गये, तब न्यायपालिका के क्रिया कलापों की कड़ी आलोचना की गयी और संविधान में न्यायपालिका को नियंत्रित करने के लिए कई प्रकार के उल्टे-सीधे संशोधन कर दिये गये। जिससे प्रजातान्त्रिक भावना को गहरा आघात पहुँचा। न्यायाधीश को पश्च दृष्टि से ग्रसित और उनके निर्णय को अप्रासांगिक दर्शन से प्रेरित कहा गया। परन्तु इस तमाम विसंगतियों के बाद भी न्यायपालिका अपने कई महत्वपूर्ण निर्णयों द्वारा भारत में प्रजातान्त्रिक मूल्यों की स्थापना, सुरक्षा एवं उसकी मजबूती बहाल करने में सफल रही है।

उच्चतम न्यायालय के पूर्व मुख्य न्यायाधीश **वैकेंटचेलेया** ने ठीक ही कहा था “ **जब तक हम न्यायपालिका का सम्मान नहीं करते, प्रजातंत्र बहाल नहीं हो सकता।**”

अतः यह कहना कोई आश्चर्य की बात नहीं है कि लोकतंत्र किसी अन्य नैतिक और राजनैतिक सूत्र की अपेक्षा एक घातक बीमारी मानसिक उलझन से अधिक पीड़ित रहा है।

आवश्यकता है आज की आर्थिक – सामाजिक अधोगति से निकलकर ज्ञान, विज्ञान और तकनीकी के प्रकाश में आना तथा अपने अतीत की गौरवशाली उपलब्धियों को सहेजते हुए उनके आलोक में उर्ध्वगामी जीवन प्राप्त करना, सम्पूर्ण देश के सामने खड़ी एक चुनौती है और इसमें लोकतंत्र के माध्यम से सबको अपनी भूमिका निभानी है। आव यकता है समय की वास्तविकताओं को पहचानते हुए पूर्वाग्रहों और दुराग्रहों की त्याग कर दृढ संकल्प करने, कदम बढ़ाने और गतिशील बने रहने की।

संदर्भ

1. वर्मा, सवालिया बिहारी, पंचायत राज स्वयं सेवी संगठन एवम् ग्रामीण विकास, आविष्कार, प्रकाशन, जयपुर 2001/पृ0/33
2. ब्राईस जेम्स, माडर्न डेमोक्रेसीज, वाल्यूम-1 मैकमिलन पब्लिकेशन, न्यूयार्क-1921 पृ0 134 /
3. जौहरी जे0सी0 आधुनिक राजनीति विज्ञान के सिद्धान्त नई दिल्ली, 2002, पृ0-117
4. डायसी 'एन इन्ट्रोडक्सन टू द स्टडी ऑफ द लॉ ऑफ कांस्टीट्यूशन, -1985 पृ0 67
5. गावा, ओमप्रकाश, राजनीति सिद्धान्त की रूप रेखा, मयूर पेपर बैक्स नोएडा 2004 पृ0 307

Human Insecurity in Conflict Zones: A Study of Manipur

Dr. Amitabh Singh¹ & Lojita Khaidem²

Abstract

Manipur, a small state in North-eastern India, has been experiencing conflicts between the state and the non-state armed groups on the one hand and among its ethnic group on the other hand over the issues of issues of exclusivity, governance and integration. Many violent ethnic clashes took place in the state which killed thousands of people also make them displaced from their home. Conflict between the state and non-state actors also resulted destruction of human lives and public poverty. And the government policy to solve the problem of insurgency by imposing Armed Forces Special Power Act, 1958 violate the fundamental right of the people i.e Right to live. Between the year 1992 to 2008, 5121 people have lost their lives in conflict related incidents in the state. All these activities make a threat to human security and people are living with fear in the state from last four five decades.

Introduction

Conflict is a state of opposition, disagreement or incompatibility between two or more peoples or groups which sometime used physical violence. It is one of the greatest threats to the wellbeing of mankind. Conflict rarely produced clear cut events such as victories, triumphs and disasters but they simply linger on a slow torture for the peoples. It can resolve in various ways through violence or by the changing of the issues over time or by the mutual agreement. Anderlini classified conflict as a) Resource based conflicts: Economic power access or control over resources b) Conflicts over governance and authority: political power, participation and control c) Ideological conflicts: Different ideologies and values d) Identity conflicts: Ethnic, religious, communal identity rival over access to resources, territory, political/military power, social justice. Galtung also classified conflicts as a) Micro Conflict -conflict within and between people b) Meso Conflict –conflict between different societies c) Macro Conflict - conflicts among states and Nations d) Mega Conflict - conflict among regions and civilization.

The studies of the structural characteristics of societies in conflict describe the structural features commonly associated with conflict are poverty, ethnic and social divisions, minority grievances, failing government institutions, lack of national identity and level of state legitimacy and so on. The uses of violence in conflict, in the historical contexts, are related to issues involving territorial sovereignty, ideology, self determination and economic power. For instance, conflict can be understood as socio-biological which is derived from the suppression of a basic hierarchy of human needs. The root or causes of protracted conflicts are the repression and deprivation of human needs

¹ Asstt. Professor, Deptt. of Law, Assam University, Silchar

² Research Scholar, Deptt. of Social work, Assam University, Silchar

and also the structural factor such as underdevelopment where the social groups tried to satisfy their needs through conflict. In general sense, conflict is the result of state building both in terms of territorial consolidation and institution building.

In the contemporary world, wars are going on in many places between different nations. Wars have been fought for many reasons such as sanctity of treaties, for preservation of law for achievement of justice, for the promotion of religion and even to end to war and to secure peace. We can also mention that conflict and violence are inter-dependable in the sense that conflict causes violence and at same time violence also causes conflict. Two types of violence can be mentioned here i.e. physical violence and structural violence. And we commonly understood violence as physical and readily apparent through bodily injury or infliction of pain i.e what we termed as physical violence. But there is one kind which is more indirect and insidious than the observable violence i.e. structural violence. Usually structural violence has the effect of denying people important rights such as economic well being; social, political and sexual equality, a sense of personal fulfillment and self worth and so on. Even when people are made starve to death or even go hungry or when people are suffering from diseases that are preventable or denied education or affordable housing or opportunities to work or raise a family or freedom of expression and peaceful assembly, a kind of violence occurred even if no bullets are shot or clubs wielded. A society also commits violence against its members when it forcibly stunts their development and undermines their well- being whether because of religion, ethnicity, gender, age, sexual preference or some other reason. Structural violence is a serious form of social oppression and it is regrettably wide-spread and often unacknowledged. Under conditions of structural violence, many people who behave as good citizens and who think themselves as peace loving people may do enormous harm to others without intending to do so just performing their regular duties as a job defined in the structure. Structural violence also includes political repression and psychological alienation which is often unnoticed and work slowly to erode humanistic values and impoverish human lives. By contrast physical violence generally works much faster and is more visible and dramatic and we likely pay attention to this tangible violence than to the underlying structural factors that may lead to the conflict.

Manipur- A Conflict Zone

Manipur is one of the worst conflict affected state of India. . It has been experiencing conflicts between the state and non state armed groups and also among different ethnic groups in the state over the issues of exclusivity, governance and integration. The types of conflict that are encountered by the state can be analyzed into two- i) Internal conflict – it includes inter-community and intra-community for resource dominance, power and identity reconciliation ii) Conflict between state and

society- it implies conflict between insurgent groups and state between insurgents groups and state for greater autonomy secession or sovereignty of Manipur (Singha, 2013). Between 1991 to 2008, 5121 peoples have lost their lives in conflict related incidents in the state (Singh, 2010).

Ethnic Conflict in Manipur

Manipur is one of the north-eastern states of India with a population of 28.56 lakhs peoples and has more than 33 different recognized tribes (Singh, 2012). It is known for its ethnic and cultural diversity. Some of the larger tribes include Nagas, Kuki, Paites, Thadous, Simtes, Vaipheis, Raltes, Gangtes and Hmars. The major ethnic group of the state is Meiteis who constitute more than 50 per cent of the population. The Meiteis occupy the Imphal Valley and the tribes inhabit the surrounding hill districts. It is one of the most economically backward states in the country due to severe shortfalls in capital, skilled labour and infrastructure including power, transport and communication. Industrialization is almost absence in the state. With hardly any major industrial activity, the government is the major provider of employment. The absence of private investment has resulted a high rate of unemployment, particularly among educated youths. Manipur has poor road connectivity and has no navigable waterways and virtually no railways

As the state is inhabited by many communities, the issue of over economic dominance and political power by the dominant community and revolt against them by the weaker communities are the regular affairs. There were series of violent ethnic conflicts which have caused huge casualties both in terms of human and material loss. The history of using power over the weak and assimilation under the King's administration was also found in Manipur. This process started and assimilated the different clans into Meitei at the valley but the campaign could not reach the hill areas because of the resistance forces such as Hindu religion, British, Christianity etc. Because of the stability and high production of food, the valley area could establish itself into a modern state. During the King's period, there were differentiated level of civilization between the hills and valley. Even though hills people were mostly confined in their villages and they are not participated in trade and commerce with insiders and outsiders of the kingdom. And benefits from the war captives and civilization remark because of outsider contact were not extended to the tribes of hill areas. Religion also play main role for ethnic conflict in the state. When Hindu religion came in Manipur, the valley people easily followed the Hindu religion but the hill people were not agreed to follow the religion. So, the kings gave them punishment and also declared them as outcast. The coming of Christianity had further widened cultural distance between the hill people and plain people and even among the hill people itself. Instead of united identity of tribes, the missionary works were based on the ethnic

groups, language and direction of the state. Thus, all these factors ignites the rivalry feeling among the people of Manipur.

The kingdom of Manipur was not territorial defined entity; the borders of the state expanded or contracted depending upon the strength of the King at that time. They not only fight with the neighboring kings but also used force to subdue and control tribals in the hills around valley. The land has always been precious possession to the tribes and was often the cause of conflict between them. The Meiteis are also displeased against the tribals regarding the privileges enjoy by the tribals such as job reservation, protection of their lands from settlement and ownership by non tribals even if they are Manipuris (Prakash,2008). The conflict between the Nagas of Manipur and the Kukis is also centered round the claim of the land. Sadar Hills issue is the main reason for creating division between Nagas and Kukis. Prior to Kuki rebellion that took place during 1917-1919 against the British government, there was no administration in the hill regions of Manipur. The British had divided the hills into North East and North West subdivision with respective headquarter at Ukhrul and Tamenglong. For administration convenience they created Sadar sub division in 1933 with Kangpokpi as it's Headquarter. In 1949, when State merged with India and the districts were re-organized, the Sadar sub- division was put under the newly created North district later renamed as Senapati district. The kukis have persistently demanded the division of sadar sub division to a district but the Nagas opposed to this demand. The British divide and rule policy also ignite the conflict between Nagas and Kukis. During the Kuki rebellion, the British government recruited Nagas to suppress the rebellion and 174 Nagas were killed. Soon the Kuki rebellion was followed by the Kabui rebellion from 1930 to 1932. It was essentially revivalist of the former rebellion and anti- British in nature but the objective of the rebellion was to make war on the Kuki and secondly on British. The post independence Government of India introduced scheduled lists for certain tribes and castes of the country and all the then tribes under the Kuki ethnic group got separate recognition in the scheduled list under the constitution of India in 1956. After this, political formation in the hill areas of Manipur assumed narrow community interests and led to the formation of tribe-wise political parties such as Hmar National Council, the Vaiphei National Organization, the Zou National Congress etc. Then the Manipur administration felt the necessity of regrouping the different tribes into two groups, namely, Naga group and Kuki group. But the Hmars tribes strongly protested the proposal of grouping the tribes of Manipur into Naga or Kuki on the ground that the Hmars never called themselves Kuki and grouping of various communities as Naga or Kuki against their consent was unconstitutional and against the fundamental rights provided by the Indian

constitution and it was therefore legally objectionable. Thus Manipur experienced her first large inter community clashes during 1959-60 in the form of Hmar- Kuki conflict.

The Kuki-Naga clashes occurred in 1992 and continued till 1998. During this, 950 peoples inclusive of 534 Kukis and 266 Nagas were killed while 480 others i.e. 257 Kukis and 223 Nagas were sustained serious injuries and 5724 houses of which 3110 belonged to the Kukis and 2614 to the Nagas were put on fire. Violent inter community conflict were witnessed between the Meiteis and Meiteis- Pangal (Manipuri Muslims) in 1993. It led to the killing of about 100 innocent persons including men, women and children, within a short span of three to four days. In 1995, there was a sudden eruption of violent conflict between Kukis and Tamils in Moreh. In it, 13 civilians were killed out of which 7 were Tamils and another 4 were Kukis and 25 others were seriously injured. Then in 1997-98, Kuki- Paite conflict occurred which has taken 352 lives, 136 casualties and 4670 houses were burned down (Singh, 2012).

In the state, there is also conflict between the hill and valley communities over the dominance of territory and demand for separate states within the state. In the early part of 1960s, the Naga insurgency with its agenda of dismembering the Naga settled areas of the state as 'sovereign Nagaland' can be felt by the people of Manipur. The 1964 ceasefire between GOI and Naga rebels covered three Manipur hill divisions of Tamenglong, Mao and Ukhrul. It generated a fear among the people of Manipur that the area will soon be the part of Nagaland. The Meiteis were the first to react to this threat asking the people to wake up and fight as their self respect and even their survival was at stake. Thus, UNLF was formed in 1964 as an underground movement devoted to unite the people and fight for the integrity. The Kuki tribesman also strove to strengthen themselves to contain the dominating influence of the Naga rebels in the Naga Hills and Manipur Hills. They reviewed and re-established links with the Kuki insurgents in Burma. The demand for the Greater Nagaland including Naga- dominated hills of Manipur was made public in 1988. The same year, the Burmese kukis demanded Kukiland in Burma and Manipuri Kukis demanded a Kuki district (Sadar Hills) in Manipur to include Kuki areas of Tamenglong, Senapati and Ukhrul district of Manipur. When Chief Minister, Rishang Keishing, endorsed the proposal once made by the Meijingbing Kamson, the Naga MP from Manipur. The proposal stated that five districts of the eight districts of Manipur be brought under a single Autonomous District Council under the Sixth Schedule, which guarantees a high degree of autonomy. The five Hill districts at the Centre of the Controversy- Senapati, Tamenglong, Churachandpur, Chandel and Ukhrul already had six ADS formed under the Manipur Autonomous Districts Councils Act, 1971. The State's Hill Area Committee, which has constitutional sanction and comprises of MLAs elected from the Hills have passed resolutions to

this effect since 1978. But to bring the Hills under the Sixth Schedule, the constitution had to be amended because only Tripura, Meghalaya and Mizoram were listed in the Schedule. The Kukis and Meiteis are opposed to this proposal of making the five hill districts under one ADC. This single ADC would lead to domination of minor tribes by the major tribes i.e. Nagas. Thus, this proposal is seen as a conspiracy to carve Southern Nagaland out of Manipur by the people. On June 14, 2001 Centre made an announcement on the extension of Ceasefire Agreement, till then applicable (limited) to Nagaland, to areas beyond it, by adding three crucial words, 'without territorial's limits'. The long nurtured fears of Manipur came true and the State went up in flames. On June 18, 2001 18 peoples lost their lives fighting for the integrity of Manipur. When Ibobi Singh (then CM of Manipur) declared 18th June as State Integrity and Public holiday, the idea was to honour 18 martyrs who died in 2001 in an uprising against extension of the Centre's cease fire with the NSCN (IM) to Manipur. The integrity Day gesture was seen by the Nagas as a challenge and impeachment to their demand of Greater Nagaland. The declaration of annual commendation day triggered a blockade of Manipur by ANSAM (All Naga Student's Association of Manipur) effective from 20th June, 2005. No transport was allowed for 6 weeks on NH-39 (Dimapur-Kohima-Imphal) and NH-53 (Silchar-Jiribam-Imphal)- two life lines of Manipur. By early August, the situation was so critical that the essential commodities were made transfer through airlifting from the Guwahati. By the end of July, a litre of petrol was sold at Rs. 81 and a gas cylinder at Rs. 750. On 21/7/2005 all educational institutions in Manipur were closed indefinitely as buses and vans transporting students suspended services for the want of fuel supply. The United Council of Manipur blamed the Centre for not developing Nh-53 an alternate route for Imphal and appealed to ANSAM to settle the issue through talks. The Army opened the NH-53 through large scale development of troops on 18th July, 2005. But it has to be closed within 24 hours as the NSCN (I-M) ultras blew up the bridge on Irang some 120 km from Imphal and it was restored on 26th July.

Conflict between State and Non State Armed Personnel

Another more prominent conflict is the state is between the different insurgent groups and the state forces. Manipur tops the list of militias of 35, Nagaland has 4 and Meghalaya with 3. Arunachal Pradesh and Mizoram are not included in the above list but these states are not free from militancy with roots outside the state (Baruah, 2000). About 34 per cent of the region's total fatalities are contributed by Manipur in the last ten years. A large section of people are living in a web of insecurity. Manipur was an independent kingdom until the British lapse in 1947. A constitutional monarchy was established under the Manipur Constitution Act, 1947 after electing a Manipur State Assembly and a council of Ministers, through adult franchise. But the nascent democracy was

dissolved with the annexation of Manipur into India mainland in 1949. No referendum or plebiscite of the people of Manipur was solicited thereby denying the right to self determination of the Nation which was a UN General Assembly resolution adopted on 14th December 1960 (CSCHR, 2013). After the merger of Manipur, the government of India placed Manipur under Part C state, placing under the centre for almost 20 years (Hanjabam, 2008). This forceful merger and exclusion of people for political rights for such long time escalated into an open armed conflict by 1970. In the early 1960s, insurgency germinated in the soil of Manipur. Number of insurgent groups namely United Nation Liberation Front (1964), PREPAK (1977), PLA (1978), KCP (1980) were formed against the government of India demanding a separate Independent state. And to tackle this situation, the whole Manipur was declared a disturbed area and Armed Force Special Act 1958 was imposed in the state from 1980.

The main reason for the imposition of this act in the state is to fight or solve the problem of insurgency. Under the umbrella of AFSPA, 1958 the security personnel were provided excessive power such as – they can use force or fire upon people on mere suspicion, they can arrest any person, they can search any place, can detain any person and they are provided impunity i.e. no legal proceeding or suit can be instituted against any armed personnel except from the central government. Security forces and state forces in the name of counter-insurgency operations violate human rights of the people over the last six decades. The continued armed conflicts and the immediate situation as a result of counter- insurgency measures undertaken by the state has resulted to increasing number of women being targeted – rape, killed and tortured. Torture is used by the police and security personnel as a method of extraction of information. Even women and children are not spared from this method. Arbitrary arrest and detention is the common practice of the state. Women alleged to be member of insurgent groups have been arrested without any women police personnel accompanying and without issuing any arrest memo, thereby violating the direction of the Supreme Court of India. They also experienced sexual abuse at the hands of police commandos and other security personnel but hardly reported. Women activists who try to assert their legitimate human rights through protests and pleas are detained under laws like National Security Act (NSA) and Unlawful Prevention Activities Act (UAPA) framing different charges to justify their suppression (CSCHR, 2013).

On July 11, 2004, Thangjam Manorama (32 years) was arrested from her home at Bamon Kampu, Imphal East district by 17th Assam Rifles after having dinner. On the next morning at around 5.30 a.m. her dead body was found by the villagers in a field near Ngariyan Maring which is four kilometers from her house. Her body bore scratch marks and a gashing wound on her right thigh

probably made by a knife. A report from the Central Forensic Science Laboratory found semen stains on Manorama's clothes suggesting that she may be raped before her death. Her body also bore the signs of torture such as bruising, gunshot wound that had mutilated her genitalia, which lent credence to the theory that she was raped before being shot dead. On July 12, 2004, after the discovery of her body her brother filed a written complaint at the Irilbung police station. Manipur government then ordered a commission of inquiry headed by retired judge C. Upendra Singh to inquire into the facts and circumstances leading to the death, identifying responsibilities on the person/persons responsible and recommend measures for preventing recurrence of such incident in the future. However, the Assam Rifles authority challenged the competence of the Government of Manipur to constitute to examine the conduct of federal armed forces before the Gauhati High Court. The High Court strengthened the competence of the Manipur State Government to inquire the case under the Commission of Inquiry Act. Assam Rifles once again appealed the order of the High Court before the Supreme Court. The Supreme Court is yet to dispose the case.

On the night of July 21-22, 2006, Mithun (23 years) was arrested by 24 Assam Rifles from his home (Moreh, Ward 7). At the time of arrest, an arrest memo was produced in which his was mentioned and the insurgent group UNLF was also mentioned. He was then taken to the 24th Assam Rifle camp in a Gypsy. At the army camp he was blindfolded and taken to a room. His legs and hand were tied. He was told to lie his face up on a wooden cot. His legs were stretched and his underwear was removed. Then a wire was fixed to his testicles and they applied electric shocks and they even hit his head with a rifle butt. They accused him of being a member of UNLF group. The more he answered that he is not connected with any organization the more they hit him and applied electric shocks. When his blindfold was removed for a moment, he saw other people in the same room being tortured like him. The interrogation continued for about a few hours, until 4 a.m. Later he was told to have some tea but when the tea was brought they poured it onto his thigh. Again in the morning he was told to sit in the sun and made him to eat chilies. They also sprayed chili powder in his eyes. At about 4 p.m. he was blindfolded again and when the blindfold removed he was at the police station. He stayed there for a day and the next day was taken to Imphal where he was produced at Chief Judicial Magistrate's court. In the police stations also he was interrogated but they didn't torture him because a friend of him was working at Kangla police station. He was remanded till 27th and again produced before the court and released on bail on the same day. After this incident, he said that he is scared of the army and feel uncomfortable whenever he sees soldiers either on the road or bus. He further said that he still have problems with his testicles and urination. He is undergoing treatment.

On July 23, 2009 at around 10 a.m. Thokchom Rabina (23 years) came to Imphal for medical check-up. She was pregnant. She also brought her young son. Before visiting the hospital, she went to meet her husband who has a small shop at Khwairamband Bazar, Imphal. But suddenly Manipur police commandos without any warning began firing indiscriminately in the busy morning marketing crowd. She was hit by a bullet in her head. The police did not immediately evacuate her to the hospital. According to the eye witnesses, she was made to lie bleeding on the ground for about an hour and the police did not allowed anyone to go near her. There she lost her life and her unborn baby.

There are more than 44,320 armed personnel of the central security forces stationed in the state and this figure does not include the state forces (Hanjabam, 2008). Such expansion in military and its related activities has created large problems for civil society as government use most of the financial resources in police and armed forces which delay in the development of the state. Manipur suffers from the breakdown of good governance because of more military action programmes instead of fulfillment the state responsibility to development and welfare commitment. The security forces often resort vengeful violence on common people for attacks carried out by the militants (Mishra, 2000). There are innumerable combining operations carried out by the security personnel and state force in the name of counter-insurgency operations. During this operation rape, molestation and sexual violence are common norms. Some of the operations are Operation Rhino, Operation Bazrang, Operation Blue Bird, Operation Tornado etc. These operations were famous for human rights violation in the history of Manipur. During the Operation Blue Bird, all the villagers of Oinam (where operation was carried out) including women and children were not allow to communicate and even a pregnant women was forced to deliver in front of villagers and the security personnel. One woman who is physically handicapped was also raped in front of her child (CSCHR, 2013). During these operations villagers were used as human shield to prevent possible ambushes from the militias. The fear of 'pick up' by the armed forces is very strong in the minds of people because most that are picked up were tortured or killed or made disappearance. If they are killed, they will be tagged as "killed in encounter' (Hanjabam, 2008). Total cases of 1528 extrajudicial executions (fake encounters) were filled in Supreme Court of India out of which 1399 cases for male, 31 cases for female and 98 cases for children. On September 2010, the Indian Supreme Court has passed an order that armed forces, particularly paramilitary forces, are to vacate educational institutions in the North Eastern region. But unfortunately Manipur University is the only university in the country having a security camp within the campus. Even the historic monument such as Kangla Fort was occupied by Indian security forces for decades and recently on November 20, 2004

it was handed over to the people. The people of Manipur understand whatever demands they put in front of the government can be achieved only through non-violent means.

Conclusion

We understand that Manipur is facing crucial problems both from the ethnic and insurgency related activities. We also know that these ethnic and insurgency are interrelated and a vicious cycle of violence prevails in the State from last decades. In course of conflict and violence, thousands of peoples have lost their lives and thousand of them became homeless and are displaced, many women got raped, tortured and even dead. Many people are fighting for justice, for their rights. We can feel and see the physical violence that take place in the state but ignored the structural violence that are facing by the people which is more insidious and indirect but more fatal than the observable physical violence. The forceful merger of Manipur into Indian Union and then placing Manipur under part C for more than 20 years, transfer of Kabaw Valley to Burma without the consent of people of Manipur, the imposition of AFSPA 1958 in the state despite of the several demands of removing by the people, the Greater Nagaland issue, lack of development in the state, feeling of xenophobia among the people of Manipur etc are some events that hurt the sentiment of people of Manipur. This structural violence of political repression and psychological alienation are often unnoticed and work slowly to erode humanistic values and impoverish human lives. Again the government as a mechanism to solve the problem of insurgency in the state enforced AFSPA 1958 but it cannot fulfill its objective. Rather it violates the rights to life and right to live with dignity of people of the State. So the government should take up measures to overcome these conflicts while keeping in mind the structural violence that exist in different forms so as not to hurt the sentiments of the people. Then only a positive outcome can be seen otherwise there will be a never ending conflict and violence in the state.

Bibliography

- Barash, D.P. & Webel, C.P. (2002). Peace and Conflict Studies. USA: Sage Publication.
- Barauh, S. (2000). Durable Disorder: Understanding the Politics of Northeast India. New Delhi: Oxford University Press.
- Boinao, N. Priyokumar. Toigam, Brojen. (2006) . Militarisation and Impunity in Manipur. *International Covenant on Civil and Political Rights*. 5(6). 13-36.
- Civil Society Coalition on Human Rights (CSCHR) in Manipur and UN. (2013). Manipur: Perils Of War and Womanhood. Imphal: CSCHR.
- Keerthana, D.S. Anil, S. & Pola, S. (). Armed Force (Special Powers) Act, 1958: A Legal Analysis. *International Journal For Legal Developments And Allied Issues*. 1(3).

- Hanjabam, S.S. (2008). The Meitei Upsurge in Manipur. *Asia- Europe Journal*. 6(1). 157-169.
- Hanjabam, S.S. (2012). Mapping Nonviolent Movements in Conflict- Ridden Manipur. *Quarterly Journal of Gandhi Peace Foundation*. 34(3 &4). 259-275.
- Huirem, R. (2016). The Development and Human Rights Paradigm in Manipur. New Delhi: Bloomsburry.
- Prakash, C. (2008). Terrorism in India's North-East: A Gathering storm. New Delhi: Kalpaz Publication.
- Sanajaoba, N. (1988). Manipur Past and Present. New Delhi: Mittal Publication.
- Singh, A.K. Hanjanbam, S.S. & Amal, S. (2012). Removing The Viel Issues in Northeast Conflict. New Delhi: Essential Book.
- Singh, J.N. (2005). Revolutionary Movements In Manipur. New Delhi: Akansha Publishing House.
- Singha, K. (2013). Conflict, State and Education in India: A Study of Manipur. *American Journal of Educational Research*. 1(6). 181-193.
- Singh, M.A. (2010). Conflicts in Manipur. Bangalore: National Institute of Advanced Studies.

Litmus Testing of the Constitutional Validity of Tribunalization within the framework of the Companies Act, 2013: Dispute Resolution Mechanism to ensure Good Governance

Ankit Awasthi*

Introduction:

The concept of ‘*Tribunalization*’ is not new in Indian scenario. Its history can be traced back even before independence when on 25th January 1941 by virtue of Section 5A of the Income Tax Act, 1922, Income Tax Appellate Tribunal as a quasi-judicial body came into existence with the motto ‘*Nishpaksh Sulabh Satvar Nyay*’, which means impartial, easy and speedy justice. After that, several tribunals in specialized fields emerged to ensure effective and expeditious remedy like: National Green Tribunal, Competition Appellate Tribunal, Securities Appellate Tribunal etc. The Companies Act, 2013, newly enacted law to deal with incorporate entities in India, also covers the Institution of Tribunals to ensure effective and efficient remedy from the lens of corporate justice and governance point of view.

It is pertinent to mention that law is required to cope up with the changing situations and requirements therefore in the field of corporate legislation (the then Companies Act, 1956) massive overhauling took place in in the name of Companies Act, 2013 (though enough work has already been done by J. J. Irani committee and recommendations of the same had been incorporated in the form of various provisions within the framework of the Companies Bill, 2012). It was much needed as after independence, the Companies Act of 1956 tried to adjust with changing environment for over more than 5 decades but after globalization domestic law was needed to be in line with international best principles, rules and practices. When the Companies Bill, 2012 received the assent of the President of India, Shri Sachin Pilot, the then Minister of Corporate Affairs himself observed it as, “*a historic day for the country as it will usher in a new era in the Corporate Governance.*”

Several new changes took place in the present law which deals with incorporated entities in India. The necessity of a quasi-judicial authority in the field of corporate law has been addressed under the Companies Act, 2013 in the name of National Company Law Tribunal and National Company Law Appellate Tribunal. Framework for the same is provided in the Companies Act, 2013 under Chapter

* Assistant Professor of Law, Hidayatullah National Law University, Atal Nagar, Raipur (C.G.) India.

XXVII which consists of Sections 407 to 434 and National Company Law Tribunal Rules, 2016. After judicial scrutiny Principal and other Benches of the Tribunals started to function and it is not only under the Companies Act, 2013 (appellate jurisdiction with National Company Law Appellate Tribunal in issues entertained by the National Financial Regulatory Authority) but under The Competition Act, 2002 and the Insolvency and Bankruptcy Code, 2016; National Company Law Appellate Tribunal became Appellate Authority to provide expeditious remedy. Importance of the same had been recently traced by the Supreme Court of India on 25th January 2019 in the case of *Swiss Ribbons Private Limited and Another v. Union of India*.¹

In this background the present paper is an attempt to analyze the National Company Law Tribunal and the National Company Law Appellate Tribunal with an object to trace its mechanism and functioning to ensure Contemporary Corporate Governance in Indian scenario. Research Methodology of the present paper titled “*National Company Law Tribunal in India: Tracing the Mechanism to ensure Contemporary Corporate Governance*” is Doctrinal. It is analytical and exploratory in nature.

Litmus testing of the constitutional validity of Tribunal

Seventeen years back, National Company Law Tribunal and National Company Law Appellate Tribunal have been first time introduced with the framework of the Companies Act, 1956 under Section 10FB and Section 10FC, by the Companies (Second Amendment) Act, 2002, consequent to the recommendations mentioned in the report of the high powered Justice Eradi Committee on ‘*Law Relating to Insolvency and Winding up of Companies*’ to replace the existing institutions - Company Law Board and Board for Industrial and Financial Reconstruction (BIFR)² for the ‘*corporate justice*’³ point of view. In this respect Corporate Justice in the field of dispute settlement was done through the inception of National Company Law Tribunal and National Company Law Appellate Tribunal while consolidating the corporate jurisdiction of the followings institutions for expeditious disposal of cases point of view:

- Company Law Board.
- The Board for Industrial and Financial Reconstruction
- The Appellate authority for Industrial and Financial Reconstruction

¹ 2019 Indlaw SC 77

² See, the concept paper, available at <http://www.mca.gov.in/Ministry/pdf/conceptpaper.pdf> (last accessed on January 1, 2019)

³ Divesh Goyal, “*NCLT & NCLAT Under Companies Act, 2013*,” [2017] 77 taxmann.com 236

- Jurisdiction and powers relating to winding up restructuring and such other provisions, vested in the High courts

After the inception of specialized tribunal in the field of company law Madras Bar Association as opposed the inception of Income Tax Tribunal earlier challenged the constitutional validity of National Company Law Tribunal and National Company Law Appellate Tribunal in the High Court of Madras. Finally, in the year 2010 in the case of *Union of India v. R. Gandhi, President, Madras Bar Association*⁴ it was decided by the Supreme Court of India that: ‘*the creation of National Company Law Tribunal and National Company Law Appellate Tribunal under the Companies Act, 1956 was not unconstitutional.*’

However, the Supreme Court of India found certain provisions of the Companies Act, 1956 and rules relating to the selection criteria of technical members of these Tribunals, and the selection committee (to select members of National Company Law Tribunal and National Company Law Appellate Tribunal) were constitutionally invalid, and directed that: “*Unless these defects were cured by legislative amendment, constitution of National Company Law Tribunal and National Company Law Appellate Tribunal could not be proceeded with.*” After the judgment in the case of *Union of India v. R. Gandhi, President, Madras Bar Association*⁵, National Company Law Tribunal and National Company Law Appellate Tribunal could not be set-up and operationalized due to administrative reasons and further litigations on the matter.⁶

After this, the Companies Act 2013 replaced the provisions of earlier Companies Law and under sections 407 to 434 institutionalization of tribunals took place to provide platform for contemporary corporate governance from expeditious remedy point of view. However, again it faced a process of litigation on the ground that: ‘*notwithstanding various directions given in the case of Union of India v. R. Gandhi, President, Madras Bar Association in the year 2010, the new provisions in the Companies Act 2013 were almost on the same lines as were incorporated in the Companies Act, 1956 and, therefore, these provisions suffered from the vice of unconstitutionality as well on the application of the ratio in 2010 judgment and, therefore, warrant to be struck down as unconstitutional.*’

⁴ [2010] 11 SCC 1

⁵ [2010] 11 SCC 1

⁶ Raghav Kumar Bajaj, “*Constitutional Validity of NCLT and NCLAT upheld by Supreme Court*” [2015] 64 taxmann.com 193 (Article)

On this matter the in the case of *Madras Bar Association v. Union of India*⁷ Hon'ble Supreme Court of India on 14th May, 2015 through the five-judges constitution bench headed by the then Chief Justice of India Hon'ble Justice HL Dattu, and Hon'ble Justice AK Sikri, Hon'ble Justice Arun Mishra, Hon'ble Justice Rohinton F Nariman and Hon'ble Justice Amitava Roy decided that: “*The Set-up of both National Company Law Tribunal and National Company Law Appellate Tribunal under the Companies Act 2013 is constitutionally valid.*” In this case it has been observed by the Supreme Court of India that, “*National Company Law Tribunal is the first forum in the hierarchy of quasi-judicial fora set up in the Companies Act, 2013. The National Company Law Tribunal, thus, would not only deal with question of law in a given case coming before it but would be called upon to thrash out the factual disputes/aspects as well. In this scenario, National Company Law Appellate Tribunal which is the first appellate forum provided under the Companies Act, 2013 to examine the validity of the orders passed by National Company Law Tribunal, will have to revisit the factual as well as legal issues.*”

However, with respect to the selection criteria of the Technical members of National Company Law Tribunal and National Company Law Appellate Tribunal directions were issued which were addressed through amendments and after that tribunal came into existence through notification as discussed above on 1st June 2016 under the Companies Act, 2013. Here it is pertinent to mention that on 1st June 2017 Ministry of Finance, Department of Revenue, Government of India in exercise of the powers conferred by section 184 of the Finance Act, 2017 notified the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 to bring uniformity in relation to the appointment process, qualifications, service conditions, removal procedure etc. in tribunals.⁸

Conclusion:

National Company Law Tribunal and National Company Law Appellate Tribunal went through the process of judicial scrutiny as other tribunals in Indian scenario. Nevertheless, in a very short span of time these institutions have emerged as effective independent institutions with an aim to provide ‘*corporate justice*’ in an expeditious manner from the lens of contemporary corporate governance in Indian scenario. In recent years, India emerged as a best destination for foreign investment and it improved its ranking under the “*Ease of Doing Business Framework.*” The Supreme Court of India,

⁷ [2015] 57 taxmann.com 289 (SC)/[2015] 126 CLA 111 (SC)/[2015] 131 SCL 26 (SC)/[2015] 3 COMP. LJ 1 (SC)/[2015] 190 COMP CASE 484 (SC)

⁸ MINISTRY OF FINANCE (Department of Revenue) Notification G.S.R. 514(E) [F. No. A.50050/9/2016-CESTAT Pt-1] dated 1st June, 2017, available at <https://dor.gov.in/sites/default/files/Rules%202017.pdf>

on 27th March 2019 in the case of *Madras Bar Association v. Union of India & Others*⁹ started to check the constitutional validity of the Finance Act, 2017 in which primary issue is related with the streaming of Tribunalization in India. Therefore, more effective mechanism can be expected through the outcome of the judgment in near future. However, as a concluding remark it can noted that National Company Law Tribunal and National Company Law Appellate Tribunal have potential within the framework of the Companies Act, 2013 to ensure corporate governance in Indian scenario.

⁹ Writ Petition (Civil) No. 267/2012

River Pollution in India: Causes, Effects and Rejuvenation Strategy

*Brij Mohann Dutta**

Abstract

A river is a natural channel in which water flows downhill. The Ganga is the most important river of India 60th from the point of view of its basin and cultural significance. The Ganga is India's lifeline. The Ganga basin consists 26% of India's land mass. The Ganga basin covers eleven states. The Ganga is the pride of India. It is 37th largest river in the world. In India Ganga is called 'Gangaji' a source of sustenance and salvation. It has largest river basin in India in terms of catchment area, supports about 43% of its population of catchment area. There was a time when Gangotri glacier extended upto Gangotri town 18 km away. Gangotri glacier has been under a state of continuous recession since 1935, with an average rate of 19 mtr/year. In India river pollution has crossed the mark of crisis. All the three river systems of north India i.e. Ganga, Brahmaputra and Indus are suffering from pollution. This is the most populated area of the world. Likewise in Southern India, river Godavari, Cauvery, Krishna and Mahanadi are highly polluted. Now rivers of India are converted into filthy drains. Water of river Ganga, while is considered as nectar, has become poisonous today. Today it is not even fit for bathing due to a dangerous bacteria found in the Ganga. The quantity of mud is increasing. The cities settled on the banks of river Ganga, dispose of sewage and industrial waste in the Ganga. The purpose of this paper is to analyse the reasons of pollution, contents of pollution the future of the river, how to control the pollution and give the new life to the rivers. What can be the short run and long run ways to review the rivers.

Key Words: River pollution Sewage Pollution River Ganga, River Basin, Pollution Control

INTRODUCTION

A river is a natural channel in which water flows downhill. The flow of water through well defined channels is known as 'Drainage' and network of such channels is called a 'drainage system' A river drains the water collected from a specific area which is called its 'catchment area'. An area drained by a river and its tributaries is called a 'drainage basin'. The boundary line separating one drainage basin from the other is known as the watershed.

Indian drainage system consists of a large number of small and big rivers. There are two major drainage systems. The Himalayan Drainage System. Mainly includes the Ganga, the Indus and the Brahmaputra river basins. The Peninsular Drainage System is older than the Himalayan one, Most of the major peninsular rivers except Narmada and Tapi flow from west to east. The Mahanadi, the Godavari, the Krishna and the Kaveri are major rivers of this system.

*** Asst. Professor, School of Law, Graphic Era Hill University, Dehradun**

The Ganga is the most important river of India both from the point of view of its basin and cultural significance. It rises in the Gangotri glacier near Gaumukh (3,900 m) in the Uttarkashi district of Uttarakhand. Here it is known as the Bhagirathi. At Devprayag, the Bhagirathi meets the Alaknanda; hereafter, it is known as the Ganga. The Alaknanda has its source in the Satopanth glacier above Badrinath. The Ganga enters the plains at Haridwar. It splits into two distributaries, namely the Bhagirathi and the Hugli. The river has a length of 2,525 km. It is shared by Uttarakhand (110 km) and Uttar Pradesh (1,450 km), Bihar (445 km) and West Bengal (520 km). The river finally discharges itself into the Bay of Bengal near the Sagar Island.

The Yamuna, the western most and the longest tributary of the Ganga, has its source in the Yamunotri glacier. It joins the Ganga at Prayag (Allahabad).

The water availability to each Indian in 2011 was 70% less than in 1951, and it will reduce further by 2050.¹ Rising population is one of the reason, but dying rivers and depleted ground water have made the situation worst. Gangotri glacier is retreating largely due to climate change and partially because of excessive human interference with tourists and devotees using the area quite frequently. Out of 800 streams and tributaries of the Ganga, 470 have become seasonal and flow for only four months a year, which has led to a 44 percent reduction of water in the river.² In the Ganga basin – the largest river basin in country – people have removed 94 percent green cover in the last 50 years.³

LAW AND RIVER POLLUTION

- Water Prevention and Control of Pollution Act, 1974: Main objectives of the Act are to provide for prevention, control and abatement of water pollution and maintenance or restoration of the wholesomeness of water. It is designed to assess pollution levels and punish pollutes. The Central Government and State Government have set up Pollution Control Boards to monitor pollution by way of collecting water samples and their analysis, publication of names of offenders, water laboratories and analysis.

Mechanism is through a permit or ‘consent administration’ procedure. Discharge of effluents is permitted by obtaining the consent of the State Water Board, subject to any condition they specify.

- Article 21 of the Constitution of India: which assures the citizens of India the right to a healthy environment.

- The National Green Tribunal Act, 2010: is an Act of Parliament of India which enables creation of a special tribunal to handle the expeditious disposal of the cases pertaining to environmental issues.

This Tribunal is also competent to hear cases for several Acts such as Forest Conservation Act, Biological Diversity Act, Environment (Protection) Act, Water & Air (Prevention & Control of Pollution) Acts.

FACTORS RESPONSIBLE FOR RIVER'S POLLUTION

1)Industrial Factors:

a)Waste from pharmaceutical industry: is big factor under industrial waste. Environment Ministry of India classifies Pharmaceutical manufacturing as a “red Category” activity owing to the hazardous waste it produces. Due to toxic chemicals and heavy metals such as copper, lead, mercury and arsenic. The effluent treatment plants are inadequate for the task in hand. They are unable to handle the large volumes of waste being generated by the bulk drug manufacturing industry.

A further problem is the way in which monitoring of pollution from pharmaceutical manufacturing is undertaken. Private, so-called independent laboratories are paid by the industry to carry out Environmental Impact Assessment of the pharmaceutical plant and give them a clean chit, providing certificates that say plants are well within the standards despite potential issues.

Organisations charged with monitoring pollution have absolutely no teeth and in some cases are in league with the industry they are supposed to be monitoring.

b)Waste from Tanneries – The waste water is made of high concentration of salts, chromium, ammonia, dye and solvent chemicals.

c)Waste water from Paper & Pulp, Chemical, distilleries etc. – The paper mill wastewater contains colour, very high level of Biochemical Oxygen Demand (BOD), Chemical Oxygen Demand (COD), change in PH of water etc. The wastewater discharge from distilleries contains carbon and organic pollutants as well as suspended and dissolved solids.

d)Waste Water from Slaughter houses – The main component from slaughter houses waste water is the feces, urine, blood, lint, fat, carcasses and non digested food in the intestine. The production left overs and cleaning of the facilities. The waste is detrimental due to it's complex composition of fats, proteins, organic nutrients, fibers, pathogenic and non pathogenic micro organisms, detergents and disinfectants.

2)Cultural Factors: In Uttar Pradesh, they call ‘Gangaji’ in place of ‘Ganga’ a source of their sustenance and salvation. It's with this belief that scores through the ghats in Varanasi to perform rituals and immense ashes in the river. It is a matter of faith for generations. It is believed that body

is made of ‘panch tatva’. This burden of faith has been borne by Ganga for centuries. Ages ago, the rationale was that the ashes – a collection of calcium, phosphates and other minerals from the human body – made the water mineral rich and that was a boon for farmlands.

Today the ritual is misunderstood, and we see half-burnt bodies thrown into the river. Even our scriptures prohibit immersion of bodies in rivers. Nearly 33,000 bodies are cremated by the riverbanks in Varanasi alone every year. Thus requires 16,000 tonnes of wood and generates 800 tonnes of ashes.⁴

For the poor, banks of river turn burial ground. In Kaushambi district, the sandy stretch is dotted with mounds covered with saffron sheets. A close look reveals they are not shrines, but graves.

Earlier, when there was adequate water, people who couldn’t afford a proper cremation would dump the body in the holy river for salvation. This social change is not due to any new beliefs and practices. But solely necessitated by the decrease in the water levels of the holy river.⁵

Allahabad’s daily struggle is also similar to Varanasi, 300 pilgrims visit Sangam to immense ashes everyday, 60 kg of puja waste thrown into Sangam everyday. This includes polythene also, 30 bodies cremated daily at Daraganj Ghat using 120 quintals of wood.⁶

Mass-bathing in Ganga during pilgrimages may be contributing to anti-microbial resistance (AMR). It is said to be the reason for certain key antibiotics becoming ineffective against diseases, including tuberculosis.⁷ The levels of resistance genes that leads to ‘superbugs’ were found to be about 60 times greater during the pilgrimage months of May and June than at other times of the year.⁸

‘Jal Samadhis’ of Seers is immersion of bodies of dead seers. Even the saints are aware of the facts and have been demanding allocation of land for ‘bhu-samadhi’ (burial in earth)’ for deceased saints.

3) Domestic Waste from Households: Only about 7% of waste water generated in cities and towns is treated while the rest 93% is discharged into the open or water bodies. Similarly, about 56% of individual household toilets have no sewerage connection.⁹ 34.8% of waste water is conveyed to treatment plants or proper disposal sites, of which only 6.7% is treated.¹⁰ An off-cited reason for households not using their toilets in lack of water supply and shallow pits, which means that these will get filled soon. About 20% of the households in urban areas lack toilets and depend on shared toilets. Approximately 17.4% of the urban population lives in slums.¹¹

Urban local bodies are inconsistent in de-sludging septic tanks and soak-pits. Only 2%-4% of septic tanks and pits are cleaned annually. In most urban areas and a major proportion of the emptied

sludge is discharged into open fields and water bodies, more so when private contractors undertake the task.¹²

Other components of pollution in rivers are disposal of plastic, disposal of sewage, open defecation near water bodies, washing of clothes and animals washing.

4) Use of Drugs for Healthcare: Pharmaceutical drugs and their metabolites, which reach the water bodies through, waste water. It is a worldwide problem now due to outmoded infrastructure sewage overflows. Most such pollution comes simply from the drugs having been cleared and excreted in the urine. The portion that comes from expired or unneeded drugs that are flushed unused down the toilet, this practice is prominent in hospitals as compared to domestic sector. This include drug molecules that are too small to be paltered out by existing water treatment plants. Drugs such as antidepressants, contraceptive drugs, antihistamines. World's highest drug pollution levels found in Indian streams.

Use of contraceptive ethinylestradiol (EE) was developed in the 1930s and was introduced for medical use in 1943, and in birth control pills in the 1960s. Today EE is found in almost all combined forms of birth control pills and is nearly the exclusive estrogen used for this purpose. The hormones available in contraceptive reaching to rivers through domestic sewage. European Union has taken up the measures to control these hormones in the rivers. As use of contraceptive in European countries is very much in use so the rivers there are under a great danger. Slowly the trend of use of contraceptive in India is also rising so we have to timely adopt the measures to protect our rivers from this pollution.

The process of upgrading existing plants to use advanced oxidation processes that are able to remove their molecules are very expensive. Fish behavior on antidepressants has been noted to have similar impacts and reducing risk-averse behavior and thereby reducing survival through predation.

5) Agricultural Sector & River Pollution

a) Fertilizer: 35% of fertilization takes place in the Ganga Basin, improper application as applying before a rainstorm can lead to fertilizer runoff. Due to this runoff over production of algae takes place which deoxygenates the water. Leaving less oxygen for the inhabitants of the water system, crippling the environmental system.

b) Pesticides & Herbicides: These are applied to agricultural land to control pest that disrupt crop production. Pesticide leaching occurs when pesticide mix with water and move through the soil to

ground water. Pesticides and herbicides are used in a very irregular manner by our farmers due to negligence or for the greed of higher crop production can create an alarming situation.

c)Agricultural Pollution: It is biotic and abiotic byproducts of farming practices that result in contamination of ecosystems. The pollution may come from variety of sources from agricultural practices. Manure and biosolids contain many nutrients consumed by animals and humans in the form of food. They also contain contaminants including pharmaceuticals and personal care products.

6)Oil Spill: Oil spills can travel great distances depending on the direction of wind and waves. Recently Bangla Oil Spill. The slick spread along a 60-70 km stretch on the Sela river and entered the network of channels. St. Martin Island, a coral reef area where the ecology is extremely sensitive and disasters like the oil spill can wreak havoc. "Turtles turning to St. Martin Island for nesting were most vulnerable as well as the huge fish stock, including Hilsa.

The oil spill always affects the oxygen content in water and hamper fish stock. This hurts the livelihood of fishermen. Mangrove their will also get effected. As oil settles on forest topsoil, seeds that germinate on ground will die. Mangroves unable to regenerate, seeds staple food of Pungash fish that's also food for crocodiles. Crabs that make up largest single group in the forest face biggest threat. If crabs hit, dolphins and tigers affected. This Sunderban delta is home to rare and endangered species, has three sanctuaries for Irawaddy and Ganga dolphins, hundreds of Royal Bengal Tigers, Indian Otter, spotted deer.

7)Population Density: Due to increase in population efforts in the direction of managing the river pollution become insufficient in all aspects. As a country we have to think on this seriously and adopt some measures as early as possible.

8)Eutrophication/Hypertrophication: When a body of water becomes overly enriched with minerals and nutrients that induce excessive growth of plants and algae. This process may result in oxygen depletion of the water body. This may be due to sewage water mixing with rivers, dairy industries waste etc.

River Pollution and Efforts Made in Recent Time:

Measure rivers in country need urgent medical attention. Recently 'RALLY FOR RIVERS' was started by Sadhguru Jaggi Vasudev. He said during campaign "You and I will come and go but the rivers which have been flowing for a million years will remain." A time has come when we don't

have to approach this problem emotionally or politically but scientifically and strategically and it is for this purpose that the rally was started.

It is important to “Plant trees on river banks and protect them”. For a permanent solution, country needs to have a policy under which people treat rivers as a national treasures.

The Gyaspur forestry experiment of the Ahmedabad Municipal Corporation. A 29-acre green zone, packed with 47,000 trees, now brings a fresh air to the Sabarmati river named the third most polluted river in the country by Central Pollution Control Board four years ago.

The green zone was also an attempt to compensate for the trees cut to pave the way for development in the city and complement the steles efforts to develop the environs of the river in city. The thick plantation has started attracting birds, animals and insects driven away by rapid industrialization and pollution. It is now home to 110 species of birds, including migratory varieties.

Gyaspur is an example of how trees and plants beside a polluted river become ecosystem engineers. You allow trees and plants to colonize a bare river sediment path and they will do everything – from trapping of sediments to retention of seeds.¹³

Narmada has helped Madhya Pradesh become an agricultural power house. Epic initiatives were taken by state of Madhya Pradesh. First, the Madhya Pradesh assembly passed a resolution in May 2017, to declare the river a living entity. Second, On July 2, 2017 six crore saplings were planted along it across the breadth of Madhya Pradesh in a span of 12 hours.¹⁴

Most plantations have 20% survival rate but the state hopes for 70% from this one by making village – level committees responsible for their protection. Plantation sites will be divided into grids and volunteers assigned to each grid. Further the state thinks to use GPS to track survival rates.

Trees can revive our rivers; trees help rainwater seep into soil several hundred times faster because living and draying roots make soil porous by creating a network of well connected minuscule channels. Water absorbed by soil can percolate both downward and sideways. This kind of underground water flow, called base flow can feed streams and rivers wherever the water table intersects the streambed.¹⁵

The High Court of Uttarakhand at Nainital has granted the Ganga the ‘living entity’ or a ‘legal person’ and ordered the shut down of many industrial units creating pollution in the river. Recently the High Court of Nainital had suo-motu taken cognizance of pollution of the Ganga through U-tube video.

CONCLUSION AND SUGGESTIONS

- There should be River Valley Authority for each river for River Water Management in the form of legislation.
- Simultaneous analysis of schemes of elimination of pollution from rivers.
- All State Governments and Local Bodies must ensure that no sewer and other domestic waste is let-off in the rivers by industrial and commercial establishments and for this all sub- divisional magistrates to ensure due compliance of the objective.
- Total ban on use of plastic for which alternates are there. Plastic was the invention of the 20th century it has revolutionized so many sectors and created havoc due to its ill management throughout the world.
- Farmers of the country must be educated on reasonable use of fertilizers, herbicides and pesticides – they should be motivated towards organic pharming in a phased manner. By the process of ‘leaching’ agricultural chemicals can wash into rivers and poisoning them.
- There must be strict norms for industries for industrial processes’ not to release water without treatment of industrial waste.
- Only 7% of the wastewater generated in cities and towns is treated. The sewerage treatment must be increased on mission mode by all states, all Municipal Corporations and Panchayats etc.
- There should be an established mechanism process of sludge throughout the country.
- Maintenance of the natural minimum flow of the river till the seacoast.
- On public land, plant native and local trees for at least 1 km on both sides of rivers.
- Prohibition of use of chemical fertilisers and pesticides in flood plains.
- Declaration of land along rivers on ecologically sensitive area.
- Make micro irrigation compulsory as 75% freshwater is used for irrigation.
- Setting of strict rules for sand mining along rivers.
- Fossil fuels used in the shipping industry is also an important cause of water pollution. So there should be alternatives to this also.
- Heated water from power plants: this reduces the oxygen content in water so a reason for the pollution.
- Promotion of love for rivers by performing Aartis at different new places on bank of rivers.
- Need to involve the NGOs for all types of river pollution for spreading information, implementing policies, search for non-compliance of laws by stakeholders in water pollution.

- Involvement of workforce of MANREGA in plantation and caring plants by watering and protection along the riverside with geo-tagging of all trees.
- Association of faith with clearing or protecting the river. On occasions like birth or marriage, people should be persuaded to plant a tree next to the river or clean it.
- A shift from immersing ashes in the river completely to immersion of a pinch and scatter the rest in field.
- Civic bodies must help change mindsets and promote ecofriendly methods of cremation.
- India has 20,0000 km of riverine land. Nearly 25% of this is government land. This should be forested.
- There are people who are in favour of river linking and those against it. There should be a joint effort from science and politics to take a decision.
- All the states having major rivers, their Assemblies should pass a unanimous resolution to declare the river a living entity.
- After plantation guardians of the saplings must be appointed right down to the village level.
- For a permanent solution, the country needs to have a policy under which people treat rivers as a national treasure and direction for the nation on how we handle our soil and water

Reference.

- 1 Vishwa Mohan, *Eight Key Steps to Cleaner Rivers and Higher Green Cover*, Nov. 06, 2017, *Times of India* at pg. 11
- 2 Vishwa Mohan, *Major Rivers in Country Need Urgent Medical Attention*, Oct. 02, 2017, *Times of India* at pg. 4
- 3 *Ibid/Supra*
- 4 Rashi Lal, *Ganga Continues to Carry Burden of Faith*, Sep. 29, 201, *Times of India*, at pg. 11
- 5 *ibid*
- 6 *Ibid*
- 7 Jacob Koshy, *Mass Bathing in Ganga Aggravates Antimicrobial Resistance Woes*, November 2, 2017, *Times of India* at pg.14
- 8 *Ibid*
- 9 Dipak Dash, *Only 7% of Waste Water Treated: Study*, Oct. 30, 2017, *Times of India*, at pg. 11
- 10 *Ibid*
- 11 *Ibid*
- 13 Paul Joh, *Plant by Plant, Gujrat Forest Experiment bears fruit for Sabarmati Waterfront*, Sep. 22, 2017, *Times Of India*, at pg. 8
- 14 *Epic Greening to Save the River of Myths*, Sep. 26, 2017, *Times News Network*, at pg.11
- 15 *Ibid*

Study of Buddhist Economic System in Present Context

Dr. Avinash Kumar Jha*

Abstract.

The Buddhist State is advised to provide all people with a minimum income. Radiation theory sees the economy prospering through the virtuous actions of individuals following the moral law. Early Buddhist writings generally accept existing political and economic institutions, even while providing a democratic social ethos revolutionary for its time. King Asoka, greatest of all Indian emperors, pursued a fiscal policy even though he believed only meditation could help people to advance in moral living. But canonical beliefs about economic activity are much more ambiguous than economic literature often indicates. Hence today there are rightist and leftist Buddhists, differing in interpretation.

Key Words: Buddhist- Economic, Theravadin literature, prosperity, peasant, modern economies, moral, capitalism and communism, Ideas.

Early Buddhist writings generally accept existing political and economic institutions, even while providing a democratic social ethos revolutionary for its time. Theravada Buddhism has "nothing comparable" to Western analyses of "distributive justice." Theravadin literature on distributive justice, nor is it the poor as such who are for the Theravadas the primary object of beneficence This does not mean indifference to the poor, for one's economic status is not only dependent on the laws of kamma, but is also complemented by the moral virtues of compassion and generosity. It should be added that the revered Buddhist kings are also known for the financial aid which they provided for the poor; indeed, the " Cakkavatti -Sihanada Suttanta" advises kings to give their gifts to all who are poor. Moreover, gifts to the monks and to the monasteries do not prevent them from providing a refuge for the destitute or from redistributing such beneficence to the indigent.

Thus although there is little discussion of distributive justice, redistribution of income, either through the public, private, or monastery sectors, is certainly regarded in a favorable light. In order to favor the spiritual improvement of the population, the State is justified in taking steps to provide all people with a minimum income. Whether the motive for redistribution is to spread the dhamma (in a Buddhist economy) or to increase distributive justice (in a Western economy) seems a bit irrelevant; in both cases, it should be added, the limits of redistribution are difficult to determine.

* Associate Professor, Deptt. of History , J.N.L.College, Khagaul, Patna.

The Buddhist theory of radiation sees the economy prospering through the collective impact of the virtuous actions of individuals following the dhamma. In many respects it parallels Leibenstein's conception of efficiency as determined by an "atmosphere." This, of course, provides a considerable contrast to the views of Adam Smith who saw an economy prospering through the self-interested, not consciously virtuous, actions of individuals. Buddhists argue that since the economy can ultimately prosper only through virtuous action, ultimately the only hope for prosperity lies in a regeneration of human kind. Buddhists hold that any appropriate dhammic action inevitably leads to an increase of the material wealth of the community. A stark contrast to this theory of economic radiation is exemplified by the writings of such Western theologians as Reinhold Niebuhr, who have argued that individual and social progress, in both material and spiritual senses, may be quite different in certain situations; further, personal virtue does not always carry directly over into social virtue.

The major part of the Buddhist canon does not appear to discuss any alternative means of distributing goods and services beyond the market. Thus their analysis of trade is quite straightforward. The Buddhist discussion on right livelihood prohibits trade in certain goods and services, which means that all other types of trade are apparently allowed. In an interesting comparison between trading and agriculture as means of livelihood, the Buddha also notes that both can bring high or low returns, depending on the circumstances; however, trading is an occupation with little to do, few duties, a small administration, and small problems, while agriculture is the reverse. One of the most favored of Buddha's disciples was Anathapidika, a merchant who was generous to the cause and who was highly praised for his piety. Some scholars (Reynolds, 1988) claim that early Buddhism was particularly attractive to merchants, a marginal group adopting a marginal religion which had a strongly democratic nature. All of this raises a difficult point concerning Buddhist beliefs about the functioning of the market.

How relevant is this to the economy? If we adopt the reasonable "Austrian" view that the competitive market can not properly function without rivalry, then it can be argued that innovation or "vigorous" market activities can not take place in a Buddhist economy. As Schumpeter pointed out, innovations bring the winds of creative destruction, which can cause economic distress to the non-innovators. Similarly, rivalry in a market where the available demand at an equilibrium price would drive a number of firms out of business would also lead to similar distress. We can lack attachment to our wealth and yet still experience considerable pain in the process of being deprived of our customary livelihood. In both cases, it must be added, the exact incidence and extent of the pain are unanticipated by the participants who are the cause of this distress.

One receives the strong impression that early Buddhist writings generally accept existing political and economic institutions, even while providing a democratic social ethos which was revolutionary for its time. For instance, the Buddha did not appear to challenge the general framework of the kingship; and in so far as he did not strongly urge the freeing of slaves he appeared to accept the institution of slavery (Gard, 1960, p. 225). The Buddha did represent a break from older social traditions in that he did not condemn urban institutions and seemed aligned with such groups as merchants.

Additional insight into State economic activities can be gained by examining the records of some of the "righteous rulers" who are revered by the Buddhists. Unfortunately, the economic parts of this literature are not extensive because the monks writing such manuscripts were more concerned with their spiritual lives, rather than their statecraft, an orientation most apparent in the well-known discussion of King Malinda. It should also be noted that because of the participation of the State in the operations of the irrigation systems in many of these countries, the crown had a fairly active role in the economy.

The prototypical important righteous founder of the Mauryan dynasty in India and one of the greatest of the Indian emperors.² From Asoka's edicts it appears that he generally accepted the economic and political institutions of his time. For instance, he did not condemn either torture (although he spoke of the necessity to avoid "unjust torture" or the killing of criminals, (Nikam and McKeon, 1966, p. 61), which seems peculiar with regard to his reverence for life, especially of animals. The various writings on economic policy are both unsystematic and diffuse; they certainly do not define very exactly what type of economic policies should be followed or, in any very specific sense, the economic principles underlying such action. However, one important assumption behind such policy advice is simple a king following the dhamma and listening to the advice of the monks will know what are the correct policies to follow. These moral policies will bring prosperity according to the doctrine of radiation.

It should be clear that canonical Buddhist beliefs and attitudes toward economic activity and capital formation are much more ambiguous than often stated in the economic literature (Ayal, 1963). The purpose of this section is to delve into three economic problems posed within the framework of canonical impact of canonical Buddhism on actual economic practices and beliefs in Buddhist countries is a much more complicated subject, especially since these vary considerably from country to country, and they must be left for another occasion.) In common with all religions which emerged in peasant economies, Buddhism has a number of doctrines which point toward the relationships within a small community as a behavioral ideal. The emphasis on simple living

discussed above reinforces this idea. Further, according to Gard (1964, p. 112), Buddhism has a strong personalistic ethic, e.g., a preference for settling questions of equity and justice on a person-to-person basis, rather than by a legalistic technique or stated principles. Their belief that work should enable a person to overcome ego-centredness by joining with others in a common purpose is another sign pointing to the benevolent nature of the small scale community, in contrast to the large, urban community. Modern Buddhists, e.g., Buddhadasa BhikLu (1986, p. 86) argue that social problems seem to grow as people begin living in larger and larger groups and that such complexity and development leads to an overvaluation of "quantity" and an undervaluation of "quality. "

The canonical scriptures appear to provide few direct guideposts for living in highly complicated and impersonal urban complexes. Two approaches are possible to imagine: (a) Traditional doctrines would be extrapolated to meet the new situation, e.g, right mindedness could be reinterpreted for the needs of such a setting; (b) Attempts would be made to avoid the creation of such conditions. The latter alternate would require the deliberate maintenance of small, face-to-face communities; small factories; considerable self-sufficiency; dampening of the class struggle of workers and property owners by social forces, and maintenance of high direct and indirect barriers to trade with the outside world. all of this would be accompanied by a considerable loss of productivity and lower living standards. This, however, would be quite consistent with the beliefs about production for needs, rather than wants, and for simplicity of life style. Such self-contained communities would also reduce external trade and thus reduce the temptation of merchants to deviate from the dhamma by becoming too attached to their profits of trade. In a small community, it may be easier to enforce social controls to prevent trade profits from being too high. Finally, the fall in income from the loss of economies of scale which occurs in small-scale economic communities is, as noted above, one way of reducing the possible corruption of attachment arising from consumption of luxury goods.

Although I have not seen proposals for such small-scale, autarkic communities in the Buddhist literature available to me, some--such as Mahatma Gandhi and E. F. Schumacher have viewed this idea with favor. Certain of Gandhi's disciples (Das, 1979) have explored at considerable length how the modern society and economy could be arranged under such a principle while minimizing the loss of production. Some Buddhist social commentators took a very passive view toward economic policy, arguing that it is even useless to try to correct some obvious shortcomings of the economy. In more recent times this appears to be changing and a considerable number of Buddhist intellectuals start their analysis of economic systems with a critique of the obvious defects of both capitalism and communism, then to argue that since Buddhism is a doctrine of the Middle Path Way, it is possible to draw upon the positive aspects of both types of systems while, at the same

time, arranging matters so as to avoid the general materialism and spiritual sickness which is found in both systems. The real question, of course, is what must the economy look like and what must the State do to avoid the various specified evils, while increasing virtue.

The Buddhist canon provides arguments for all sides of the political spectrum for reconstructing the economy. For purposes of illustration it is useful to compare the ideas advanced by the far left (Buddhist socialists or communists) and right (Buddhist traditionalists). Representing the left I draw upon the doctrines of the Buddhist socialists as summarized by Sarkisyanz (1965, 1978); representing the right I draw upon the writings of a Thai monk, Buddhadasa Bhikkhu (1986).⁴ I have not been able to locate any intellectual in recent years justifying some type of laissez-faire capitalism by recourse to the Buddhist canon, although it is not hard to imagine updated versions of the arguments advanced by Shway Yoe (noted above) combined with some notion that it is primarily individual actions, rather than governmental moral prescriptions and policies, which lead to a virtuous society.

Buddhadasa has little discussion of public ownership of the means of production, apparently taking a pragmatic stand in favor of current arrangements based on the necessity of private property arising from human frailties. The Buddhist socialists have favored considerable nationalization of the means of production. For instance, land nationalization by arguing that by eliminating private ownership of land, the class struggle based on the illusion about the importance of property could be eliminated as well (Sarkisyanz, 1978). Both the right and the left Buddhists favor a certain minimal redistribution of income so that the basic consumption needs of all are covered. However, based on traditional arguments, Bhikkhu can still support the maintenance of class distinctions, albeit based on function and duty rather than inherited wealth. Others of the left argued for redistribution, drawing upon arguments about the rough economic equality found in the monastery. On the right, Buddhadasa Bhikkhu has drawn those limits rather widely: He called his ideal system "dictatorial dhammic socialism" which, among other things, means that moral governmental policies should be carried out "expeditiously"; this differs from tyranny, he argues, since in the latter the policies carried out do not serve the general interest. In any case he is not shy in urging governmental coercion to force people to contribute their labor to public works construction.

In short, the vagueness of the Buddhist canon on economic matters combined with its complexity and length allows room for quite different interpretations of an ideal economic system in modern times. But the really difficult problem is to determine what part of the canon will be taken seriously under what circumstances. The Buddhists' moral critiques of modern economies have cogency, as do their investigation of possible alternative economic policies.

References

- 1) E. M Hare, (trans). *Anguttara-Nikaya, Volumes III and IV, Gradual Sayings for Pali Text Society* London: Luzac, 1961,1965
- 2) F L. Woodward . by trans *Anguttara-Nikaya, Volumes I and II, , The Book of Gradual Sayings for Pali Text Society.* London Luzac, 1962, 1970.
- 3) Donald K.Swearer(translated and edited). *Buddhadasa, Bhikkhu, Dhammic Socialism, Bangkok: Thai Inter Religious Commission for Development, 1986.*
- 4) T. W Rhys Davids, by trans , *Digha-Nikaya,. Part 15th edition,Pali Text Society.* London: Luzac, 1965.
- 5) Das, Amritandanda, *Foundations of Gandhian Economics* New York st. Martin's, 1979.
- 6) Gard, Richard A., *Buddhism.* New York: George Braziller, 1962.
- 7) King, Winston L., *In the Hope of Nibhana* LaSalle, Illinois: Open Court, 1964.
- 8) Little, David, "Ethical Analysis and Wealth in Theravaa Buddhism: A Response to Frank Reynolds," in Sizemore and Swearer (1988).
- 9) B Homer translated *Majjhima- Nikaya, Volumes I,II, and III, for Pali Text Society.* London: Luzac, 1957,1967.
- 10) Nikam, N A and Richard McKeon, eds. *The Edicts of Asoka.* Chicago: University of Chicago Press, 1966.
- 11) Reynolds, Frank E., "Ethics and Wealth in Theravada Buddhism: A Study in Comparative Religious Ethics," in Sizemore and Swearer (1988).
- 12) "Four Modes of Theravada Action," *Journal of Religious Ethics*, 7, No. 1 (Spring 1979), pp. 12-26.
- 13) Reynolds, Frank E. and Regina T. Clifford, "Sangha, Society, and the Struggle for National Identity: Burma and Thailand," in Frank Reynolds and Ludwig, Theodore, eds. *Transition and Transformations in the History of Religions.* Leiden: Brill, 1980, pp. 56-91.
- 14) Schumacher, E. F., "Buddhist Economics," in his *Small is Beautiful:Economics as if People Mattered.* New York: Harper and Row, 1973, pp. 53-63
- 15) Weber, Max, *Economy and Society*, edited by Guenther Roth and Claus Wittich, Volume II. New York: Bedminster Press, 1968.
- 16) Weber, Max, *The Religion of India: The Sociology of Hinduism and Buddhism*, transl. by Hans H. Gerth and Don Manindale. Glencoe: Free Press, 1958.

Treasury Stock: Topsy-Turvy Track

Dr. Ashish Kumar Srivastava*

Abstract

“The Corporate Governance in India is shaken by repetitive scams which is denting the image of regulatory framework. Corporate Governance stands for ‘accountability’ and ‘transparency’. Companies being legal person and having corporate personality can buy shares. Inter-corporate investments give better controlling over the affairs of company. At times company are also allowed to hold securities of their company which is known as ‘treasury stocks’. However voting rights of such shares are suspended, and such situations emerge in cases of ‘Merger and Acquisitions’ and ‘Buy-back of securities.’ Under these situations a company is allowed to hold securities of own company. Section 232 provides for prohibition of treasury shares and this came in to effect in 2016. These shares are to be extinguished or cancelled. Treasury stocks can be oppressive to minority shareholders and these provisions only are strengthening the corporate governance. The cases of abuse of treasury stocks by Reliance, M& M and Escorts are some illustrations. Recently Uday Kotak Committee Report and MCA, Committee of Experts also raised its concerns about abuse of treasury stocks. Through this paper the author tries to find out the cases in India wherein the treasury stocks have been abused and loopholes still existing and solutions thereto.”

Introduction

Corporate personality is created for wealth management and profit maximization. The principle of corporate personality of a company was recognized in the case of *Saloman v. Saloman & Co*¹. Corporations initially and gradually fulfilled the aspirations of human beings by supplying the goods and services. Corporations rose to mammoth size in modern era. Shares of company are wonderful legal instrument to include general people in corporate governance process. Shareholders can buy shares and participate in corporate governance. Companies are legal person so it can hold shares of another company. Inter-corporate investment is a phenomenon in corporate world. People buy shares to sell it in secondary market and make profits and at the same time they also get dividends. IPO and FPO are the mode wherein share of public listed entities are purchased. Generally, a company cannot buy its own shares and it is like transferring property to self.

There are some times when company buys its own shares which is known as treasury stock. Treasury shares are purchased by Company in itself. A company is a legal person therefore it can buy and dispose of properties. Companies can also purchase shares of other company, but a company is prohibited to buy shares of own. In situations of merger and acquisitions (M&A) companies have cross holdings may hold shares of own and in case of buy back also companies

* Assistant Professor, Faculty of Law, University of Lucknow

¹ [1895 – 99] All ER Rep 33

may have treasury shares. In case of a merger and acquisition of two companies if share swap is to be done in the whole 'deal' and in the process companies may result in own shares of self. If there are two companies A and B and company A holds shares in B Company. B company is to merge in company A and all shareholders of company B are to be issued shares in Company A then A shall be allotted shares in itself after merger. Treasury stock is also created in merger of subsidiary and holding.²

Treasury Stock: Evolution

As a rule, a company must not purchase its own shares. This was established in the old English case of *Trevor v. Whitworth*³ This rule was enunciated for two basic reasons: first, to avoid a reduction of capital to the prejudice of the creditors and second, to stop companies trafficking in their own shares.

As a general rule, a company limited by shares or by guarantee and having a share capital may not acquire its own shares by purchase, subscription or otherwise⁴. This prohibition does not apply in cases of redemption of preference shares or reduction of share capital.

Over the decade, Britain has reformed and re-cast the two most prominent rules area: the rule against corporate share repurchases, and the rule against assistance. These reforms, which were long overdue are commendable.⁵

Until recently, a corporation's purchases of its own securities in many instances have been considered entirely proper. The board of directors, for example, may decide to purchase shares for a variety of reasons, namely, to fund stock option or retirement plans, to acquire treasury shares with a view towards future acquisitions, or the board may simply feel that the company's shares are a good buy since they are thought to be worth more than is reflected by their then current market price⁶.

The use of treasury stock rather than newly-issued shares is a fairly common practice in the funding of employee benefit plans. It has the obvious advantage of not diluting the equity of existing shareholders.⁷

² Henry W. Ballantine, "The Curious Fiction of Treasury Shares", 34 *CALIF. L. Rev.* 536(1946)

³ 1887 12 App Cas 409.

⁴ Companies Act 1985, sec. 143(1).

⁵ John Kiggundu, "The regulation of corporate dealings in own shares: the position in Botswana and Britain" *The Comparative and International Law Journal of Southern Africa*, Vol. 26, No. 1(March 1993), pp. 17-48at 47

⁶ W. McNeil Kennedy, Transactions By A Corporation In Its Own Shares, *The Business Lawyer*, Vol. 19, No. 2 (January 1964), pp. 319-337 at 323

⁷ Richard L. Baker, "Purchases By A Corporation Of Its Own Shares For Employee Benefit Plans" *The Business Lawyer*, Vol. 22, No. 2 (January 1967), pp. 439-448 at 439

In case of buy-back of shares governed by Buy-Back Regulations a company may buy back its shares from its shareholders. Generally, after buy-back company has to destroy the shares. According to SEBI regulations it has to be extinguished within seven days. In case of M &A or buy-back treasury stocks are held and most prominently in cross holding of shares and post-merger treasury stock are held by companies. Companies Act, 2013 prohibits holding treasury stock under section 232⁸. Treasury stock is often abused by promoters and people having controlling shares against minority of the company or dissenting shareholders.

Indian Perspective

Section 77 of Companies Act, 1956 provided for prohibition of a company of holding its own shares⁹. Companies started holding treasury stock by creating trust which holds shares for company and its shareholders. Section 77A suspended voting rights of such shares and declaration of dividend also.

Some illustrations are worth quoting in 2002 Reliance Industries Limited (RIL) merged with Reliance Petroleum and then RIL held stake in RP as it was holding company of it. After the merger the RP shareholders were allotted shares in share swap. In 2007 same happened in the merger of RIL with Indian Petrochemicals. There is a prohibition under section 77 so a trust was created to hold shares of RIL in lieu of RP shares. The Petroleum Trust held 7.2% stake in RIL after merger. In the merger of Japypee Hotels, Japypee Cement, Jayprakash Enterprises and Gujarat Anjan Cement a trust was created to hold securities post-merger in its own. In 2006 due to merger of United Spirits with Shaw Wallace the USL Benefit Trust held 2.75% stake as treasury stock. In 2010 it was reported that Mahindra & Mahindra, BPCL and Indian Oil Corporation also held treasury stocks in their own companies.

The truth is that 'treasury stock' is merely authorized stock which may be reissued as fully paid without some of the restrictions upon an original issue of shares as to consideration and as to preemptive rights, if any.¹⁰

If shares in corporation A are purchased or held by corporation B, the shares of which are wholly owned or controlled by A, it would seem that such shares are not to be regarded as in legal contemplation treasury shares of the parent¹¹.

⁸ Proviso of Section 232(3)(b) of the Act.

⁹ <http://www.mca.gov.in/MinistryV2/access+to+capital.html>.

¹⁰ Henry W. Ballantine, "The Curious Fiction of Treasury Shares", 34 *Calif. L. Rev.* 536 (1946) at 538

¹¹ *Golden State Theatre & Realty Corp. v. Comm'r* (C. C. A. 9th, 1942) 125 F. (2d) 641; *Vanderlip v. Los Molinos Land Co.* (1943) 56 Cal. App. (2d) 747, 755, 133 P. (2d) 467, 472; *Lawrence v. I. N. Parlier Estate*

Treasury shares are indeed a masterpiece of legal magic, the creation of something out of nothing. They are no longer outstanding shares in the hands of a holder. They are not outstanding because the obligor has become the owner of the 'obligation' as in the case of reacquired bonds.¹²

Treasury shares do not have voting rights, dividend rights or distribution rights on liquidation, so what rights, if any, remain? Perhaps the 'right' of the corporation to reissue its treasury shares for a valuable consideration if its charter law permits-but that is a mere incident of incorporation which is applicable to unissued as well as issued shares. Treasury shares are not a corporate 'asset' and cannot be considered as an asset in computing net assets or surplus available for dividends or share purchases.¹³

Many of these corporations desire to reduce their equity base and select repurchase as the most effective way of accomplishing the reduction. Other companies, however, engage in re-purchase to prevent the expansion of their equity as the need to issue additional shares arises. Other major motivations include share repurchase (1) as a good investment, (2) to support the market, (3) to eliminate small stockholders, and (4) to gain or improve control.¹⁴

'Treasury Shares' Are Not Assets. It follows that "treasury" shares, like other unissued shares, can never properly be construed as a corporate asset. Such treatment, it is true, has often been accorded to acquired shares in practice, but it cannot be soundly supported, under any circumstances.¹⁵

Treasury Stocks: Merits and Demerits

Treasury Stock has its own merits and demerits. Companies holding treasury stocks continue to hold the shares in stead of cancelling or extinguishing it. Treasury stocks give the companies an opportunity of selling the shares subsequently to raise money without bringing IPO or right issue. In 2009 Reliance sold its treasury stock and raised Rs. 3188 Crores. Treasury stock are also used to dilute the stocks and repel the hostile takeover.¹⁶

Treasury stock often goes against the spirit of shareholders' democracy as it may abused against the minority shareholders. The treasury stock holders are abused by promoter and allied group against the minority and dissenting shareholders as they carry voting rights. The trustees exercise the voting

Co. (1940) 15 Cal. (2d) 220, 229, 100 P. (2d) 765, 770; *Italo Petroleum Corp. v. Producers Oil Corp.* (1934) 20 Del. Ch. 283, 174 Atl. 276.

¹² Henry W. Ballantine, "The Curious Fiction of Treasury Shares", 34 *Calif. L. Rev.* 536 (1946) at 537.

¹³ *Hills, Federal Taxation v. Corporation Law* (1937) 12 *Wis. L. Rev.* 280, 299.

¹⁴ Leo A. Guthart, "Why Companies Are Buying Back Their Own Stock" *Financial Analysts Journal*, Vol. 23, No. 2 (Mar. - Apr., 1967), pp. 105-110 at 110

¹⁵ W. A. Paton, "Postscript on Treasury Shares" *The Accounting Review*, Vol. 44, No. 2 (Apr., 1969), pp. 276-283 at 278

¹⁶ http://www.business-standard.com/article/companies/ril-raises-rs-3-188-crore-from-treasury-stock-sale-109091800045_1.html .

power on the stance of promoters against minority. In the case of Petroleum Trust it is controlled by RIL management. The treasury stock gives additional voting rights to promoters and managers and gives better control to the promoters.

In 2012 the merger of Escorts with its three companies was opposed as the treasury stock created by such would have increased the shareholding from 12.43 to 41%. The treasury stock was to be held by Escorts Benefit and Welfare Trust which would have a shareholding of 30.4% which would have given the promoter family 41.1% voting rights. On cancellation of treasury stock merger was approved. The treasury stock has been duly criticized as it against the corporate governance norms and recently the Uday Kotak Committee recommended that treasury stocks must be duly extinguished.

Companies Act, 2013 & Judicial Response

Companies Act, 2013 does not provide for treasury stock and prohibits it and under a merger scheme it cannot be held. The provisions¹⁷ regarding buy-back by a company of its own shares have been subjected to a significant change with the incorporation of section 67, 68 and 77 A of the Companies Act. In many cases, the court also clarified that these provisions apply only in respect of buying by a company of its own shares. In *EDC Ltd. v. GKB Ophthalmic Ltd.*¹⁸ the issue was whether section 77 and 77 A can be attracted when a promoter is going to buy the company's shares from the equity investor as per an agreement with a company. Deciding favorably the court held that section 77 A can be applied in case of buy-back of shares by promoters of company from equity investor.

In *Smart link Network Systems Ltd. v. State of Maharashtra*¹⁹ the issue was the interpretation of section 77A of the Companies Act, 1956. For a question whether an offer made by the company for buy back of its shares can be withdrawn after the public announcement about the offer. In the present case, the company has proposed to buy back of its shares but withdrew it before the public announcement was made. The high court held that in this case one of the main ingredients for applying regulation 19 of Securities and Exchange Board of India (SEBI)²⁰ was the public announcement about the offer was not made by the company and hence the company had not committed any offence.

¹⁷ These provisions provide that "no company limited by shares or by guarantee and having a share capital shall have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of the Act".

¹⁸ [2015] 191 Comp Case 262 (Bom).

¹⁹ [2015] 190 Comp Case 177 (Bom).

²⁰ SEBI, Reg. 19: provides that the company which has proposed a buy-back of its shares prohibits withdrawal of the offer after public announcement about the offer is made.

In *Vodafone International Holdings BV v. Union of India*²¹ with regards to the nature of the relationship of shareholder with property or assets of company it was held that holding of shares in a company usually entitles shareholder automatically to a concomitant congeries of rights and liabilities, such as voting rights, controlling rights, meeting rights, management rights, right to share in profits, share in surplus upon liquidation etc. which are creatures of Companies Acts and memorandum and articles of association of company. All these rights are personal rights/contractual rights flowing from ownership of the share, are not property rights, and cannot by themselves and apart from the share be acquired or disposed of or taken possession of shares and said concomitant rights which emanate from them, flow together and cannot be dissected. Thus, transfer of such concomitant rights upon transfer of shares cannot be construed as separate and independent transfers.

Conclusion

In Companies Act, 2013 the treasury stock holding via trust has been duly prohibited and a company cannot hold its own shares in the name of a trust under a merger scheme and such shares if any held in M&A must be extinguished. The Act is silent about existing treasury stocks held before the commencement of Companies Act, 2013. The provision is a welcome step to improve the corporate governance norms and it protects minority shareholders against oppressive management. But the biggest demerit of banning the treasury stock would be that company shall fail to raise money by sale of shares without bringing an IPO. The Companies Act must be further amended to provide for existing structure of treasury stock.

²¹ (2012) 6 SCC 613

Nuclear Energy and the Law: National and International Perspectives

Dr. Dhiraj Kumar Mishra*

Abstract

Presence of environmental concerns, insufficient confidence regarding fossil fuels and the need for variety of resources are among important issues, which make consideration of modern technology such as nuclear energy inevitable. Considering the ever-growing capabilities of nuclear energy, and legal and environmental problems in developing this technology, the need for this study seems obvious. Findings showed that the current situation of international laws and regulations in peaceful usage of nuclear energy is unsuitable, therefore preventive, deterrent, and controlling laws and regulations must be considered. In fact, creating obligatory legal procedures, and supporting a system of international cooperation regarding execution and planning, and accurate supervision on functions related to environmental and nuclear energy laws with sufficient supportive facilities seem essential.

I. INTRODUCTION

Atomic/Nuclear energy is one of the most efficient energies in the world, which with little effect on the environment, produces the largest amount of electricity.¹ In present days, most of the world countries have realized the role and importance of different energy sources in supplying needs of the present and the future, and have engaged in investments and extensive research on policy making and devising strategies and infrastructural plans in this regard. Among different energy carriers, nuclear energy has a special position, and today, many nuclear power plants are active in different parts of the world.² Nuclear power constitutes approximately 16% of the world's electricity. In the year 2009 alone more than 15% of the world's electricity came from nuclear power. Apart from this, more than 150 naval vessels have been built using nuclear propulsion around the world. India, as on 2010, has 19 nuclear power plants in operation generating 4,560 MW with 4 others are under construction and are expected to generate an additional 2,720 MW of energy. India is also envisaging an increase of contribution of nuclear power to overall electricity generation capacity from 4.2% to 9% within 25 years.³ According a latest Report from the Government, India has an ambitious plan to reach a nuclear power capacity of 63,000 MW by

* Professor, T.N.B.College, Bhagalpur

¹ J Loiseaux, International Journal of Energy Technology and Policy, 2002, 1, 27- 36.

² J Blomgren, F Moons, J Safieh, International Journal of Nuclear Knowledge Management, 2005, 1, 270 – 282.

³ *Nuclear Energy in India and Foreign Investment*, India Juris, <http://www.indiajuris.com/nuclear.pdf>.

2032.⁴ Nuclear energy is one of the largest sources of energy without pollutant emissions, and nuclear plants do not produce any of the air pollutants including sulfur and dust or greenhouse gases that break the ozone layer and therefore act as a hazard for our atmosphere. They require a relatively small space and reduce other negative effects of the environment. Utilizing this energy instead of other sources will preserve clean air, maintain continental conditions, and prevent acid rain.⁵

II. Nuclear law: Concept

The term nuclear law is defined as “the body of *special* legal norms created to regulate the conduct of legal or natural persons engaged in activities related to fissionable materials, ionizing radiation and exposure to natural sources of radiation.”⁶ But such a special legal regime needs to be interwoven with the normal legal hierarchy of every legal system. The purpose of such a special legal regime must be to “provide a legal framework for conducting activities related to nuclear energy and ionizing radiation in a manner which adequately protects individuals, property and the environment.” The International Atomic Energy Agency (IAEA) envisages that the nuclear law should be present at four different levels namely (a) the constitutional level, that establishes the basic institutional and legal structure governing all relationships in the State. (b) Immediately below the constitutional level is the statutory level, at which specific laws are enacted by a parliament in order to establish other necessary bodies and to adopt measures relating to the broad range of activities affecting national interests. (c) The third level comprises regulations; that are, detailed and often highly technical rules to control or regulate activities specified by statutory instruments. Owing to their special character, such rules are typically developed by expert bodies (including bodies designated as regulatory authorities) empowered to oversee specific areas of national interest, and promulgated in accordance with the national legal framework. (d) A fourth level consists of non-mandatory guidance instruments, which contain recommendations designed to assist persons and organizations in meeting the legal requirements.

III. Nuclear law and Environmental law

The problem of using nuclear energy for peaceful purposes, following scientific and applied activities in this field and its effects on the environment is a topic that has been discussed in public

⁴The Economic Times, http://articles.economictimes.indiatimes.com/2010-10-11/news/27616582_1_pressurised-heavy-water-reactors-fuel-cycle-indian-nuclear-society

⁵ Kueny, International Journal of Nuclear Law, 2011, 3, 198 – 215. Also P Qiang, International Journal of Risk Assessment and Management, 2002, 3, 16-22.

⁶ Carlton Stoiber, Alec Baer et al., Hand Book on Nuclear Law 4 (2003).

international laws and national regulations in the past few years⁷. Considering that continuous operation of nuclear sites and protection of existing natural resources requires a series of global principles and standards, and this importance will be assured by conclusion and execution of international laws and regulation. The nuclear law has traditionally emphasized on protecting individuals and assets; however, the Chernobyl disaster and the increase in public knowledge of the hazardous effects of nuclear activities, resulted in the tendency of environmental law to cover nuclear issues. In this course, environmental and nuclear laws, were directly – by defining activities – and indirectly – by introducing protection concepts – related to each other.⁸ In fact, the general goal of nuclear safety is to protect people, the society, and the environment by devising supportive and supervisory measures against nuclear hazards, or in a simpler sense, all actions must be in the course of preventing nuclear accident⁹. Berger (2008) in a research titled “Environmental law developments in nuclear energy”, stated that from the one hand, climate change, oil price fluctuations, and increase in energy dependency, has fueled interest in nuclear energy; however, on the other hand, by mentioning disasters such as Three Mile Island and Chernobyl, introduced environmental protection and safety assurance as requirements for developing this technology..¹⁰ Ferro (2008) in a research titled “The future of the regulation of nuclear safety in the EU” considers prevention of harm to workers, people, and the environment among the fundamental issues discussed in nuclear safety laws and regulations. Although, he stresses that regulations must not limit themselves to nuclear power plants, but should cover all effective factors within the nuclear fuel cycle including radioactive waste management¹¹. However, Bhattacharjee (2012) in his study showed that by expanding diverse applications of nuclear technology in various fields including industrial, medical, and agricultural fields, governments have realized the fact that in order to respond to technical and managerial requirements of environmental protection, and safety and human health, creating a well-organized legal framework, especially in the fields of government liabilities towards nuclear damages in lieu of nuclear harm, is essential.¹²

IV. Fundamental Principles of Nuclear Law

⁷ H Borzouei, *Annals of Biological Research*, 2011, 2, 6.

⁸ S Emmerechts, *OECD-Nuclear Law journal*, 2008, 2, 91-110.

⁹ C Stoiber, A Baer, N Pelzer, W Tonhauser, *Handbook on Nuclear Law*, IAEA, 2003, 63-65.

¹⁰ DBerger, *Environmental Law Developments in Nuclear Energy*, *Nuclear Law Bulletin*, 2008, 81, 55.

¹¹ M SFerro, *International Journal of Nuclear Law*, 2008, 2, 149 – 171.

¹² SBhattacharjee, *International Journal of Nuclear Law*, 2012, 3, 276 – 291.

The International Atomic Energy Agency also identifies eleven principles that are fundamental and are to be incorporated in every national legal system on nuclear law.¹³ They are as follows:

(a) **The Safety Principle:** The safety principle emphasizes that the legal regime in a country should give utmost importance to safety of life and property of persons. This principle has two subsidiary principles. They are

i.Prevention and Protection Principle: It holds that, the primary objective of nuclear law should be to promote the exercise of caution and foresight so as to prevent damage that might be caused by the use of the technology and to minimize any adverse effects resulting from misuse or from accidents.

(ii)Precautionary Principle: It says that the fundamental purpose of any regulatory regime is to balance social risks and benefits. Where the risks associated with an activity are found to outweigh the benefits, priority must be given to protecting public health, safety, security and the environment. Of course, in the event that a balance cannot be achieved, the rules of nuclear law should require action-favouring protection.

(b) **Security Principle:** The Security Principle suggests that any nuclear law system should include provisions against, accidental or intentional, losing or abandoning radiation sources so as to pose threat to the life and property of the people. The same principle also cautions against acquisition of nuclear materials by criminal or terrorist groups.

(c) **Responsibility Principle:** Generally the entity that is usually considered as primarily responsible for safety is the operator or licensee. The fundamental principle is ‘that the operator or licensee should bear the burden of ensuring that its activities meet the applicable safety, security and environmental protection requirements.’”

(d)Permission Principle: Prior permission is required to do those things, which may pose serious threat or injury to persons or environment. As nuclear use of nuclear technology inherently involves some risk, prior permission is always required. The law also clearly needs to identify those activities that require prior permission.

(e) **Continuous Control Principle:** A continuous monitoring of the activities to make sure that they are being conducted safely and securely and in accordance with the terms of the authorization. It also includes ‘free access’ by the regulatory officers to all premises where nuclear material is being used and stored.

¹³Supra note 6 at 5.

(f) **Compensation Principle:** As preventive measures cannot completely exclude, but only minimize the possibility of damage, this principle re-quires that States adopt measures to provide adequate compensation in the event of a nuclear accident.

(g) **Sustainable Development Principle:** The principle of sustainable development has special relevance in nuclear energy production. It is “because some fissile material and sources of ionizing radiation can pose health, safety and environmental risks for very long periods of time.”

(h) **Compliance principle:** Nuclear energy production has been deemed to involve particular risks of radiological contamination transcending national boundaries. There are many bilateral and multilateral instruments that aim at determining an international law of nuclear energy. The fundamental question is to what extent a particular state has adhered to these international legal regimes. It is also important that the national legal regime incorporates the provisions of customary international law also.

(i)**Independence principle:** It is very important that the powers, functions and decisions of the Regulatory Authority that is constituted under the nuclear law are not interfered by the executive or other branches of the State and also from entities involved in the development or promotion of nuclear energy.

(j) **Transparency principle:** Erstwhile, information of nuclear materials was guarded, categorizing it as ‘sensitive’ and ‘confidential’. In the recent past, however, the emphasis is “with the development of the peaceful uses of nuclear energy, however, public understanding of and confidence in the technology have required that the public, the media, legislatures and other interested bodies be provided with the fullest possible information concerning the risks and benefits of using various nuclear related techniques for economic and social development. The transparency principle requires that bodies involved in the development, use and regulation of nuclear energy make available all relevant information concern-ing how nuclear energy is being used, particularly concerning incidents and abnormal occurrences that could have an impact on public health, safety and the environment.”

(k)**International Co-Operation Principle:** The level of international co-operation required is based on several factors. “First, in the area of safety and the environment, the potential for trans-boundary impacts requires governments to harmonize policies and develop co-operative programmes so as to reduce the risks of damage to their citizens and territories, the global population and indeed to the planet as a whole. Also, lessons learned in one State about how to enhance safety can be highly relevant to improving the situation in other States. Second, the use of nuclear material involves security risks that do not respect national borders. Threats of terrorist acts

and the threats associated with illicit trafficking in nuclear material and the proliferation of nuclear explosives have long been recognized as matters requiring a high level of international co-operation. Third, a large number of international legal instruments have been promulgated to codify the obligations of States in the nuclear field. Not only must governments comply in good faith with those obligations, but the terms of those instruments may limit the discretion of legislators in framing national legislation concerning some matters covered by them. Fourth, the increasingly multinational character of the nuclear industry, with frequent movements of nuclear material and equipment across national borders, makes effective control dependent on parallel and joint approaches by both public and private entities. For all these reasons, national nuclear energy legislation should make adequate provision for encouraging public bodies and private users of nuclear energy to participate in relevant international activities in the nuclear field.”

V. Nuclear Liability: International Framework

Currently there is three major international agreements, which form the international framework of nuclear liability. They are:

- (a) The (IAEA) Paris Convention of 1960.
- (b) The (OECD) Vienna Convention of 1963 along with the Protocol to amend the Vienna Convention, 1997.
- (c) The Convention on Supplementary Compensation for Nuclear Damage of 1997.

Among these conventions, India is a signatory to only the Convention on Supplementary Compensation for Nuclear Damage, but she has signed few bilateral agreements with other countries, including USA, UK, Russia, France, and Canada, for co-operation in using of nuclear energy for civilian purposes.¹⁴

VI. Atomic Law: National Framework

In consonance with the prescribed IAEA hierarchy the provisions of law in the Indian legal system regarding atomic energy are found at four different levels namely the (a) constitutional level (b) the statutory level (c) Regulations or Delegated Legislation and (d) Non-Mandatory Guidance instruments.

¹⁴ For details see International Atomic Energy Agency, <http://www.iaea.org/newscenter/news/2010/indiaconvention.html>

Atomic Energy Law at the Constitutional Level: In the Constitution of India the exclusive power to make laws with respect to any of the matter connected with atomic energy and mineral resources necessary for its production is upon the Parliament of India.¹⁵ The States do not have any power or role in making laws in the area of atomic energy. In pursuance of the powers conferred on it through this provision the Parliament of India has enacted legislations that are analysed in the next section.

Atomic Energy Law at the Statutory Level: At the Statutory Level, India has two specific legislations that deal with atomic energy. They are namely,

(i) The Atomic Energy Act, 1962 and (ii) the Civil Liability for Nuclear Damage Act, 2010.

Atomic Energy Law at the Delegated Legislations Level: (i) Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987 (ii) The Atomic Energy (Working on the Mines, Minerals and Handling of Prescribed Substances) Rules, 1984, (iii) the Atomic Energy Radiation Protection Rules, 2004, (iv) the Atomic Energy (Arbitration Procedure) Rules, 1983, (v) the Atomic Energy (Factories) Rules, 1996, and (vi) The Atomic Energy (Control of Irradiation of Food) Rules, 1996.

Atomic Energy Law and the Non -Mandatory Guidance Instruments: The Government of India, Department of Atomic Energy also have come up with few guidance instruments such as (i) Guidelines for Nuclear Transfers (Exports) in the year 2006, and (ii) Guidelines for the Implementation of Arrangements for Co-Operation concerning Peaceful Uses of Atomic Energy with Other Countries in the year 2010.

VII. Conclusion and Suggestions

Using nuclear energy for peaceful purposes is considered as one of the most important and fundamental topics in the field of international environmental law. Non-adherence of governments to nuclear law principles, lack of a comprehensive nuclear convention, weak international warranties, and non-proportional international responsibilities of governments for peaceful use of nuclear energy are considered amongst the most important issues which are to be addressed by the world community.. On the international level, while allowing usage and expansion of nuclear energy sources for peaceful purposes (fulfilling human needs and fighting against existing environmental problems), world powers must commit and be obliged to general and comprehensive nuclear disarmament, and start to close-down all military nuclear sites. In addition, governments must solve their international conflicts through agreements and conventions. The International Court of Justice, International Court of Arbitration and regional mechanisms must work to

¹⁵ The Constitution of India, Article 246 read with Entry 6, List 1, the Seventh Schedule.

peacefully facilitate resolution of nuclear conflicts. From environmental perspective, the major problems are inability to calculate environmental damages, non-adherence to environmental assessment results, and lack of environmental standards for application of nuclear technologies. Existing facts regarding fossil fuel limitations, and worries about increase in greenhouse gas emissions and global warming, shows that in the current century, using the nuclear energy is inevitable. In this course, considering recent developments in nuclear plant technologies, utilization of this approach for countries who have obtained this technology provides many environmental advantages compared to other energy options. While sustainable development of nuclear energy necessitates that activities do not pollute and harm the environment, therefore promoting environmental knowledge of nuclear authorities, and devising comprehensive trans boundary environmental programs are amongst the most important requirements. With regards to safety, lack of preventive criteria and standards, lack of continuous control of nuclear sites, and insufficiency of technical training resources and facilities are amongst the most important problems to be addressed.. Although, one of the most important necessities in development of sciences and technologies is existence of an international responsibility system, which covers explaining important issues such as proportion of damage and liability, insurance coverage, and complementary indemnifications, however, in the field of international law, in order to ensure nuclear safety, instead of indemnifications and other such actions, the course of direction must move towards devising preventive solutions, laws, and regulations.

Despite the investment opportunities and the new global access to technology and fuel that the NSG waiver creates, there are a number of challenges that nuclear energy development in India faces. There are also some concerns that cause the opinion within India on nuclear energy to remain fractured. In this regard, further research and knowledge on a number of issues, including safety, environment, and health concerns of an expanded civil nuclear programme; increased risks of proliferation and terrorism; treatment and disposal of high-level and low-level radioactive waste, true costs of nuclear power plants; and land and water requirements for large-scale deployment of the programme and associated concerns are required. The development of responsible nuclear energy system will need a revised regime that will ensure greater transparency of the industry, while enabling a shared view of risks and precautions that will help create a more engaged public opinion.

A Study on disability of the armed forces personnel's and its impact in their life.

Disability of personnel's of the Armed Forces and its effect in their lives.

Sunil Kumar Mishra*

Abstract

A strong and rock hard military force act as back bone for any country in its development. No force is strong without its men in uniform. These men are always ready to defend their nation, carrying out their duties 24X7. The nation looks for them whenever there is war or some natural calamities. They stand and fight whatever the role is assigned to them. But it unfortunate that these brave heart soldiers are denied from the compensations and the rewards when they are declared disabled and medically unfit and are discharged from the force. They have to fight long legal battles to get their dues and respect in the society. There is no strong legislation which promises social rehabilitation of these disabled soldiers. The Persons with Disabilities Act 1995, The Persons with Disabilities Act 2016 and The Army rules are the few Act which assures some relief to the PWD's. But not there is requirement of strong legislation to ensure equal Opportunities, and Protection of Rights embedded by the Constitution of India to its all citizen.

Introduction

The disabled have been oppressed marginalised and stigmatized in almost all societies. They constitute a section of the population, which is most backward least served and grossly neglected. Person with disability are the poorest of the poor and weakest of the weak, who have been socially, educationally and economically disadvantaged; thus having customarily denied their right to self-assertion, identity and development.

Indian armed forces are the military forces of the Republic of India, It consist of three professional uniformed services: The Indian Army, Indian Navy and Indian Air Force. India is fourth most powerful military power in the world. According to the Global Fire Power index 2017, India/s military strength is second only to that of US, Russia and China. The Indian Armed Forces are under the management of the Ministry of Defence of the Government of India with strength over 1.4 million active personnel. This professional soldiers discharge their duties with utmost dedication and devotion to the peril of their life. These three uniform forces play different and crucial role during peace time and war time. It is well known that during war these competent forces take on the enemy and threat against our nation with courage and valour. During peacetime they carry out vital operations along the boundaries, training and fighting the natural calamities. These brave soldiers gets injured, severely wounded, while carrying out operation they loses their vital

* Research Scholar, Pacific Academy of Higher Education and Research University, Udaipur

body part, that they are declared disabled and discharged from service. Despite of putting up such an exemplary service they never get the respect, which they deserve in society. They have to fight long and delayed battle for justice for their own awarded entitlement after being declared disabled. They suffer mental stress and feel humiliated.

Though the Indian Army has established rehabilitation programmes and beneficiary schemes for the disabled soldiers, the programmes and schemes require reinforcement throughout centuries, The Union Government is considering the proposal of a major grant to establish a separate fund that can be further enhanced by contributions from individuals, establishments and corporate sector thus facilitating meaningful initiatives for disabled soldiers. The Indian Army plans to create awareness on organisational support available to soldiers and their dependents with respect to medical, rehabilitation, various beneficiary schemes of the central and state governments, vocational opportunities and assistance for their placement. They also plans to showcase the talent of the disabled soldiers by organising sports and physical activities, cultural events and their art exhibitions. The army is also planning to felicitate the disabled soldiers along with selected organisations that are dedicated in their rehabilitation. The Indian army also plans to gather due support for the unemployable disabled soldier and his family with an initial financial support to ensure a life of dignity through partially-funded entrepreneurship venture. The main aim of the observance is to alleviate the sufferings of the soldiers, who have done their duty with utmost dedication to the nation and have been disabled for life. For the same, the observance aims to provide one-time financial assistance to disabled soldiers, who have been put out service on medical grounds and are rendered non-employable due to their medical or physical conditions.

Constitutional and Legislation Framework in India

The Constitution of India applies uniformly to every legal citizen of India, whether they are healthy or disabled in any way (physically or mentally) and guarantees a right of justice, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and for the promotion of fraternity. It assures to safeguard the credibility and dignity of its citizen, it assures that no discrimination will be made or tolerated on basis of caste, gender, creed, racialism or even on the basis of disability.

The Persons with Disabilities Act 1995

Employment –This act provides 4% reservations for disabled people (blind or low vision, hearing impairment and locomotor disability or cerebral palsy in poverty alleviation programs, government posts, and in state educational facilities, as well as other rights and entitlement). If the 4% reservations for the disable vacancies are not filled up to then it is carried forward for next three

years and after that the vacancy will be filled by a non-disabled person. The specific objectives of the Act are: Prevention and Early Detection of Disabilities. In pursuance of the provisions of Section 32 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 {1 of 1996}, had constituted an Expert Committee on the 30th December, 2010 under the Chairmanship of Additional Secretary, Ministry of Social Justice and Empowerment.

Criticism of Person with Disabilities Act 1995

The Persons with Disabilities Act (PWD), 1995 has been landmark legislation for the disabled in India. But this act focuses only on the mental illness (MI) and provides recommendations aimed at making it an official instrument for equal opportunities, participation and protection of rights. There are some serious flaws in the Act that have to be set right to ensure equitable distribution of benefits to all. The Act defines a disabled person as one who is “suffering from 40% or more disability”. However, as far as MI is concerned, this quantification is a mystification because such a tool is unavailable. The PWD Act unfortunately, turns out to be an instrument of injustice and discrimination albeit unwittingly. According to the chairperson of the Amendments Committee, MI missed this opportunity for employment rights because of the absence of a well-informed advocacy platform that coalesced into a lobby.

The Disabilities Act, 2016

Some of the key features of the Disability Law inter alia include: ‘Disabled persons’ have been categorized as: (i) persons with disability; (ii) persons with benchmark disability and (iii) persons with disability having high support needs. The definition of ‘person with disability’ under the Disabilities Act, 2016 is an inclusive definition as opposed to the exhaustive definition provided under the Disabilities Act, 1995 and includes 21 types of disabilities as ‘specified disabilities’. The Disabilities Act, 1995 covered only 7 types of disabilities. While majority of the obligations under the Disability Law are cast upon the appropriate government and/or local authorities; certain obligations/duties are also cast upon establishments including in the private sector. All establishments (including in the private sector) are required to frame and publish an Equal Opportunity Policy. It prohibits discrimination of persons with disabilities, unless it can be shown that the act of discrimination was a proportionate means of achieving a legitimate aim. Onus has been placed on the government to facilitate the rights of disabled persons. The government is required to inter alia, ensure/protect a disabled person’s right to equality, dignity and respect for his/her integrity equally with others; right to personal liberty, right not to be discriminated against; right to live in a community; right to equal protection and safety in situations of risk, armed

conflicts, humanitarian emergencies, natural disasters etc.; accessibility to polling stations and material relating to electoral processes; right to access any court, tribunal, authority, commission or body having judicial or quasi-judicial or investigative powers without discrimination; right to own or inherit property (movable or immovable); right to manage one's own financial affairs and access to bank loans, mortgages and other forms of financial credit; right to barrier-free access to healthcare institutions and centres; right to have cultural life and to participate in recreational activities and sporting activities etc. Additional benefits such as right to free education (between the age group of 6 and 18 years), reservation in education, government jobs, allocation of land, poverty alleviation schemes etc. have been provided for persons with benchmark disabilities. For ensuring speedy trial, special courts are to be constituted in each district to handle cases concerning violation of rights of persons with disabilities. Enhanced penalties with a monetary penalty extending up to Rs. 500,000 and imprisonment extending up to 5 years.

New Set Of Compliances for Private Employers

With the enactment of the Disability Law, private employers shall be required to:

- (a) **Frame an Equal Opportunity Policy:** Every establishment shall notify an Equal Opportunity Policy. Such policy shall be displayed on the employer's website, failing which, the same shall be displayed at conspicuous places of the establishment premises. A copy of the said policy shall also be registered with the Chief Commissioner or the State Commissioner, as applicable. The Equal Opportunity Policy shall contain details of the facilities and amenities that the employer will be providing to the disabled employees in order to enable them to effectively discharge their duties in the establishment.
- (b) **Appoint a Liaison Officer:** Private establishments having more than 20 employees are required to appoint a liaison officer who shall oversee the recruitment of disabled persons and make the necessary provisions and facilities for such employees in the establishment
- (c) **Prohibit Discrimination:** The head of the establishment shall ensure that no disabled person is discriminated because of his/her disability, except in cases where such act/omission is a proportionate means of achieving a legitimate aim.
- (d) **Provide Additional Facilities/Benefits:** Private establishments shall take efforts to provide additional facilities to the disabled such as training facilities, assistive devices, barrier free accessibility and formulate additional benefits for the disabled such as preference in transfer, special leave etc.
- (e) **Revamp Existing Hiring Practices and Policies:** Given the above requirements, employers will now need to revamp their existing hiring practices and modify their HR policies.

- (f) Conform with Accessibility Norms: All establishments will need to ensure that the building plan/ building structure of the establishment and the physical environment, transport and information and communication technology adheres to the accessibility norms formulated by the government. No establishment shall be issued a certificate of completion or allowed to take occupation of a building unless it has adhered to the accessibility norms formulated by the Central Government.
- (g) Maintenance of Records: Every private establishment having 20 or more employees shall maintain records containing details of the disabled persons who are employed at the establishment.

The Hits and the Misses of compliance for private sector.

Hits - With the increase of industries in India, the role of the corporate sector in generating job opportunities had increased tremendously. There was an immediate need to create awareness amidst the corporate sector to take active responsibility in recognizing the abilities of disabled persons and give them equal opportunities in the job market. By enacting the Disability Law, the Indian Government has succeeded in promoting equal employment opportunity for the disabled in the private sector as well, by casting mandatory obligations on private employers. The Disability Law is a sign that the government is making a move towards a more inclusive and progressive society, where persons would not be limited by their disabilities. This would ensure that employment standards in India are brought in line with international standards.

Misses - There is inadequate clarity on various aspects under the Disability Law, which the government may need to clarify in due course. For example, disability Law does not clarify the quantum of special leaves that need to be provided nor does it mention the purpose for which such leaves may be availed and the standards for accommodation facility etc. The Disability Law does not provide a transition framework or a timeline for ensuring compliance under the Disabilities Act, 2016. Although there is no reservation quota in the private sector, the Disability Law states that ‘The appropriate Government and the local authorities shall, within the limit of their economic capacity and development, provide incentives to employers in the private sector to ensure that at least five per cent of their work force is composed of persons with benchmark disability’. The way the law has been crafted, it is unclear whether it would be mandatory for private sector employers receiving incentives from the government to ensure that 5% of their workforce is comprised of persons having benchmark disabilities.

Wars and Disability

War has been the single largest factor responsible for causing permanent disablement not only to combatants in the battlefield but also to civilians who are forced to bear the hazards of lethal, chemical and nuclear weapons. Based on figures from a study carried out in 206 communities, including Afghanistan and Cambodia, landmine triggered disability rate among survivors is about 0.9%. About 6% of households in Afghanistan are affected by landmine. 44,000 people lost their limbs in industrial accidents during the period of Vietnam War in which 17,000 American soldiers became disabled. Surveys of four countries in 1995 found that between 12% & 60% landmine victims sold their assets to meet their medical bills.

The Army Rules, 1954 – Medical Board and legal proceedings:

Release on medical grounds.

- (a) An officer who is found by a Medical Board to be permanently unfit for any form of military service, may be released from the service in accordance with the procedure laid down in this rule.
- (b) The President of the Medical Board shall, immediately after the Medical Board has come to the conclusion that the officer is permanently unfit for any form of military service, issue, a notice specifying the nature of the disease or disability he is suffering from and the finding of the Medical Board and also intimating him that in view of the finding he may be released from the service; every such notice shall also specify that the officer may, within fifteen days of the date of receipt of the notice, prefer a petition against the finding of the Medical Board to the Chief of the Army Staff through the President of the Medical Board: Provided that where in the opinion of the Medical Board the officer is suffering from a mental disease and it is either unsafe to communicate the nature of the disease or disability to the officer or the officer is unfit to look after his interests, the nature of the disease or disability shall be communicated to the officer's next-of-kin who shall have the like right to petition.
- (c) If no petition is preferred within the time specified in sub-rule (ii), the officer may be released from the service by an order to that effect by the Chief of the Army Staff 2 or the Adjutant General.
- (d) If a petition is preferred within the time specified in sub-rule (ii), it shall be forwarded to the Central Government together with the records thereof and the recommendation of the Chief of the Army Staff 2[or the adjutant General. The Central Government may, after considering the petition and the

recommendation of the Chief of the Army Staff 2 or the Adjutant General pass such order as it deems fit.

Processing of appeal

A Defence Forces Personnel, who is boarded out on medical grounds or is discharged / released / retires in low medical categories has the right to appeal against the denial of disability pension within a period of six months from the date of rejection of his initial claim. He will submit his claim to his Record Office, which, in turn, will forward the same to Service HQ, as the case may be, to place it before the Appellate Committee. Similarly, right of appeal is available to next of kin to Defence Forces Personnel, whose initial claim for Special Family Pension has been rejected. This Committee comprises of:- Chairman: DDG (PS)/equivalent rank in Air Force and Navy. Members: (a) DDG (Pens), Office of DGAFMS :(b) DFA (Pension) :(c) Dir PS-4 / equivalent rank in Air Force and Navy. In case the individual is not satisfied with the decision of the Appellate Committee for First Appeal, he has right to make another appeal through his Record Office, which, in turn, will forward the same AG/PS, Army HQ or equivalent in Navy/Air Force along-with all the records to place it before the Second Appellate Committee on Pension. This committee comprises of: - Chairman: Vice Chief of Army Staff or equivalent in Navy & Air Force. Members: a. Addl. DGPS or equivalent in Navy & Air Force. b. DGHS (Rep of DGAFMS) c. Joint Secretary & Addl. FA, MoD (Fin) d. Judge Advocate General of the Service other than to which the appellant belongs. After consideration of all relevant issues involved in the case, the Appellate Committee will give its decision by upholding or rejecting the appeal.

Disability and Discrimination in Armed Forces.

Nearly 200 [armed forces](#) personnel become disabled every year, a senior doctor for the forces has said, citing road accidents and snow avalanche, especially in hilly terrains, and battle injuries as the prime reasons. Lt Gen Bipin Puri, Director General of the [Armed Forces Medical Service](#), said the [disability](#) armed forces personnel suffer are not only related to spinal cord and limbs - one of the most commonly noticed. Many a time there are cases of crippling of intestine and lungs due to injury to abdomen and chest. The life of military personnel or even paramilitary troopers who are on duty almost 24 hours a day and who require permission to use even a washroom or visit a market after signing multiple registers, cannot be compared with civilians who live with their families and have fixed and reasonable working hours in a week. Disability rules in India and other democracies are balanced and work on the presumption of a military service-disability connection. But the army of accountants and financial wizards often rejects such disability claims leading to numerous instances of judicial intervention. When disability benefits are awarded by courts and tribunals,

there is more shock in store. The Ministry of Defence appeals against the claims of disabled, at times over amounts as little as a few hundred rupees. According to an RTI in 2017, that MoD had spent Rs 47 cr in fighting cases against pension of widows and disability pensions, the issue of fighting against pension of disabled and widows is unethical, and painful. The expense of a lawyer is around Rs. 2 lakh from defence funds, that too without a single case won by the government to-date? Between 2012-2013, 90 per cent of all appeals filed in the Supreme Court by the Ministry of Defence were against disabled soldiers. The efforts of the Defence Minister to control the litigation malaise are being met with strong resistance from the official-legal ecosystem which thrives on the miseries of disabled soldiers. A recent example was the recommendation made in the Seventh Central Pay Commission to slash disability pension rates. The observation was that, the benefits needed to be slashed from the “percentage of pay system” to a “slab system” which would be more equitable for ranks other than officers. The recommendation was that from the current formula of “30% of pay for 100% disability”, the disability element should now be granted at the fixed rate of Rs. 27,000, Rs.17,000 and Rs.12,000 for Commissioned Officers, Junior Commissioned Officers and Other Ranks respectively for 100 per cent disability, and proportionately reduced for lesser disability. There is no such corresponding “equitable” change was recommended for civilian disability pensioners, including those from the Central Armed Police Forces, who continue to receive benefits on the basis of “percentage of pay”. It shocks one that those who are maimed and infirm have to bear insults when instead there should be concern about the rise in stress and strain and a deteriorating health profile among defence personnel. According to the recommendation of 7th Pay Commission A Lieutenant General who is 100 per cent disabled and drawing a disability element of Rs.52,560 as of December 31, 2015, would now get Rs.27,000 on January 1, 2016. His civilian counterpart, on a par earlier, would now get Rs.67,500. While the pay commission has handsomely increased all pensions, which includes civil disability, it has slashed those for military disability; in some instances by more than half. These soldiers are denied their disability pension as compared to their civil counterpart. They have to fight long legal battles to get their rights. Several time the MoD and the courts had even suggested the Centre must change its bureaucratic psyche. There are many examples to mention the grievance of disabled soldiers and their pain in getting justice, to name few are:

Sepoy Mohinder Singh who was buried under an avalanche when serving at Siachen. Rescued after 72 hours, he lost a leg to debilitating frost bite. While the military medical board gave him 40 per cent disability adding ₹ 140 per month to his meagre pension, the CDA (Controller of Defence Accounts, Pensions) arbitrarily reduced it to 20 per cent; cutting his disability pension by half.

Mohinder Singh had to fight his case all the way to the Supreme Court, with the Union of India opposing him tooth and nail at every stage to deny him the princely sum of ₹ 70 per month.

Naib Subedar Rajesh, who suffered a permanent spine injury while capturing a crucial post during Kargil, says that the excessive chest-thumping that takes place for men in uniform in India is all superficial.

It is shocking to mention that nobody is bothered about how disabled soldiers manage after we are discharged from service. It is very disappointing that the Army's insurance still covers only martyrs and not those who have been disabled in the battlefield.

Organisations working for welfare of Disabled Soldiers

There are few organisation who are working for the welfare and rehabilitation of the disabled soldiers and their families. They generate fund through donation and sometime grants from government and spend it on developing the skills through training.

War Wounded Foundation – It was set up in 2002 it is an autonomous, registered charitable society. Its intention is to create long term avenues for the financial independence of all war wounded personnel of the Army, Navy and Air Force. It helps the disabled soldiers to live a productive and financially independent life by helping them become soldier-entrepreneur. A registered charitable society, the organization gets no funds from any government source and carries out its activities with the help of donation from individuals, associations, institutions and organisations. It provides legal assistance to the veterans to resolve their issues with the official organisations. It works to generate self-employment for the disabled soldiers in their home town as most of the soldiers prefer to their roots after being discharged from the service. The organisation has assisted disabled soldiers to set up retail outlets in villages. It has also imparted skill training to veterans as well as their children.

Another initiative, "Hrann : Ab Hamari Jimmedari" has been recently started by Queen Mary's Technical Institute (QMTI) for disabled soldiers. The initiative's objective is to make their life more equipped and empowered by providing them vocational-cum-professional training courses and making them eligible to work in different sectors and fields post retirement to live a respectable life.

The welfare associations of the three forces namely AWWA (Army Wives Welfare Association), NWWA (Naval Wives Welfare Association), AFWWA (Air Force Wives Welfare Association) organise several charitable camps and workshops for the disabled soldiers and their children.

New disability pension rules for armed forces

In order to rehabilitate and to improve the living standard of the disabled soldiers the government has notified a new set of rules for disability pensions for the armed forces, This Division

administers (i) Pension Regulations for the Army (PRA), 1961, revised as PRA, 2008 (ii) Pension Regulations for the Air Force, 1961, and (iii) Navy (Pension) Regulation, 1964. It also deals with Entitlement Rules for Casualty Pensioner Awards, 2008.

Kinds of Pension

Pension Division deals with policy matters relating to pensioner matters of Defence Forces Personnel which includes:-

1. Service Pension is granted @ 50% of emoluments last drawn or average of reckonable emoluments during the last 10 months, whichever is more beneficial subject to minimum of Rs. 9000 /p.m. The minimum qualifying service to earn pension is 20 years in case of Commissioned Officer and 15 years in the case Personnel below Officer Rank.
2. Ordinary Family Pension is granted @ 30% of reckonable emoluments last drawn subject to a minimum of Rs.9000/- p.m. (in case of natural death of the individual).
3. Special Family Pension is granted at a uniform rate of 60% of reckonable emoluments last drawn by the deceased in case of death of an individual attributable to military service.
4. Liberalized Family Pension is granted equal to the reckonable emoluments last drawn by the deceased to the families of personnel killed in war or war like operations, counter-insurgency operations, encounter with terrorists etc)
5. Disability Pension matter has been referred to anomaly committee-Ministry of Finance, Department of Expenditure.
6. War Injury Pension - The rates of War Injury Element for 100% disability for various rank shall be equal to the reckonable emoluments last drawn in case of invalided out and 60% of reckonable emoluments last drawn in case of discharge, which would be proportionately reduced where disability is less than 100%.

Suggestions & Recommendations.

1. A Database of the soldiers with disability to be compiled at different District Soldier Boards so that the Department of Ex-Servicemen Welfare (DESW) of each force can access the database and then send their serving personnel to these people and enquire about their problems and try to provide solutions for them."
2. Judicial review system to be improved to evaluate orders of the Armed Forces Tribunal and making justice reachable for defence personnel and their families.
3. NGOs to be promoted and registered organisation to be established to work for the welfare and development of disabled soldiers.

4. Allocation of gas and petroleum outlet should not be limited to the war disabled soldiers only but also those soldiers who were discharged from the service due to their medical condition.
5. Skill development programme launched by the government should also cater for the development of disabled soldiers so that they can also able sustain in the civil world.
6. Private organisation and companies to consider welfare and development of disabled soldiers as important agenda in their CSR activities.
7. The regional ECHS poly clinic should have the database of the soldiers in their zone so as to provide medical aides and when required.
8. More numbers of Artificial Limb Centre to be developed across the country to facilitate the soldier who lost their limbs while carrying out military operations.
9. Other Schemes: initiative to schemes for ensuring employment of soldiers with disabilities such as : Training and welfare, Relaxation of upper age limit, Regulation the employment, Health and safety measures, Preferential allotment of land for self-employment purpose, allocation of shops for setting up business, establishment of special school, establishment of research centres.

Conclusion

There is excessive chest-thumping for our men and women in uniform on one hand and pride in laying constant siege to the benefits and legal rights of those very personnel whom we superficially cheer while on parades on the other. And bearing the brunt of this all are our disabled soldiers. Soldiers live in a strictly regimented lifestyle, away from their families and at times, under the shadow of the gun for most of the year. They are trained and developed to face any situation at any time. They have crucial role assigned both during peace and war. When everyone fails, then these men in uniform are deployed to tackle the tasks. Many of these men suffers severe injuries, disabilities and even death. Generally it perceived that soldiers are injured in wars only but it is important to note that not just in wars, many soldiers are also gets wounded in the military operations that take place at the borders every day, during training, during different exercises, also while carrying out their day to day duties. Some are so severely wounded that they are declared “Disabled” and are discharged from service. These wounds can go far beyond what meets the eye. They undergo severe mental stress, various health issues, illness and injuries that persist long after they’ve left the battlefield, they face a multitude of health troubles. These soldiers live away from family most of the year, the inability to cope with domestic commitments, and a lack of community living, sexual fulfilment and physical proximity, curtailed freedoms and rights, can all lead to an

aggravation of common medical conditions. The deleterious effect the stress and strain of military service has on a soldier's health is a universally recognised phenomenon. In fact, most nations go out of the way to make the lives of their troops more comfortable — as seen in rising pay-outs for their loss of health. India does too. But only in theory, not in practice. When a soldier fights long legal battles for their dues, the official establishment is quick to file appeals all the way up to the Supreme Court. The officials are comfortable wasting money and resources on expensive lawyers and litigation but not with releasing a few thousand, at times a few hundred, rupees to those who have protected the nation. So when Indian soldiers return home from war with disabilities, they often suffer twice — first from their combat injuries, next from the humiliation of government dependency. The fact that vested interests have twisted the issue on social media citing 'government sources' makes this even more unfortunate. What is the use of all the pomp and show at military displays or basking in the glory of our military achievements if we cannot take care of our disabled soldiers?

References

- Mohan I, Tandon R, Kalra H, Trivedi JK. Disability assessment in mental illnesses using Indian Disability Evaluation Assessment Scale (IDEAS). Indian J Med Res 2005; 121 : 759- 63.*
- Allen KC, Robert AK. Cognitive disabilities measuring the social consequences of Mental Disorder. J Clin Psychiatry 1987; 48(5) : 185-90.*
- Wiersma D, Wanderling J, Dragomirecka E, et al. Social disability in schizophrenia:its development and prediction over 15 years in incidence cohorts in six European countries. Psychol Med 2000; 30 : 1155–67.*
- Thornicroft G, Tansella M, Becker T, et al. The personal impact of schizophrenia in Europe. Schizophr Res 2004; 69 : 125–32.*
- Thornicroft G. Shunned: Discrimination Against People with Mental Illness. Oxford: Oxford University Press 2006.*
- Delisio G, Maremmani J, Perugi G. Impairment*

Change of Tribal Community through Digital Education at Jhabua.

Nivriti Dubey*

Abstract

Huge amount has been dispersed by the Governments to improve education system in India but the provision of education for all is still a distant dream. The main objective of this study is to explore an alternate learning model that can make optimum utilization of e-revolution that has proliferated every aspect of our life. Implementation of Digital Education in rural area is best available option for utilization of e-Revolution. Although there have been attempts to incorporate DE in classroom but the significant result hasn't been achieved. Our aim is not only to make e-learning effective but also to replace underqualified teacher in rural area and allow free infusion of education to bridge the digital divide amongst students of various socio economic background.

INTRODUCTION

The Ministry of Tribal Affairs, Government of India has taken a decision to continue the scheme "Support to TRIs" with revised financial norms and identified interventions. Scheduled Tribe people comprise about 8.6% of the population (census, 2011) of the country and the policy adopted in independent India reaffirms the commitment of the state to preserve and protect the distinctiveness of their culture, habit and language. However, in spite of political, social and economic commitments, the development gaps exist between tribal and non-tribal people. Preservation of the uniqueness of the tribal culture becomes all the more important given the fast changing economic pattern and life style coupled with technological advancements across the country. There is lack of awareness about the various development programmes available to the ST population. Identifying challenges in the field of Socio-economic development of tribal is critical while formulating various developmental programmes for the tribal. It is equally needed for knowledge advocacy, which in return, would help formulate evidence based policy and planning. 1.2 It is envisaged that TRIs should focus on their core responsibilities as body of knowledge & research more or less as a think tank for tribal development, preservation of tribal cultural heritage, providing inputs to States for evidence based planning and appropriate legislations, capacity building of tribal and persons / institutions associated with tribal affairs, dissemination of information and creation of awareness. Efforts may be made to avoid involving TRIs in the activities like verification of Caste Certificates etc. 1.3 The basic objective of the scheme is to strengthen the Tribal Research Institutes (TRIs) in

* Research Scholar, Pacific Academy of Higher Education and Research University, Udaipur

their infrastructural needs, Research & documentation activities and Training & Capacity Building programmes etc.

Special Central Assistance to Tribal Sub-Scheme (SCA to TSS)

Special Central Assistance to Tribal Sub-Scheme (SCA to TSS) is 100% grant from Government of India (since 1977-78). It is charged to Consolidated Fund of India (except grants for North Eastern States, a voted item) and is an additive to State Plan funds and efforts for Tribal Development. This grant is utilized for economic development of Integrated Tribal Development Project (ITDP), Integrated Tribal Development Agency (ITDA), Modified Area Development Approach (MADA), Clusters, Particularly Vulnerable Tribal Groups (PVTGs) and dispersed tribal population. SCA to TSS covers 23 States: At present, TRIs function in the States of Andhra Pradesh, Assam, Chhattisgarh, Jharkhand, Gujarat, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Rajasthan, Sikkim, Tamil Nadu, West Bengal, Uttar Pradesh, Manipur and Tripura. New TRIs will be set up in the States where no TRI exists.

Institutional Mechanism:

The Ministry of Tribal Affairs (MoTA), Government of India shall be the nodal Ministry for operationalizing the scheme. The scheme shall be a Central Sector Scheme with 100% funding by the Central Government to the TRIs directly or through State Government. A National Level Institute under MoTA could probably be set up to coordinate the activities of TRIs across the country, and to undertake National Level Activities.

Research & Documentation (including Audio/ Video/ Virtual Reality (VRy Augmented Reality (AR) & new technologies): (a) Tribal welfare measure (b) Success stories. (c) Tribal Profile. (d) Tribal language, culture, traditions, customs, art & artefacts, traditional medicinal practices, tribal myth & stories, tribal cuisines and other special characteristics and (e) Monitoring and evaluation of various government interventions. (f) Development and printing of primers in local tribal languages. (g) Any other aspects relating to tribal art, tradition and culture.

Training and Capacity building:

- (a) Laws/constitutional provisions in respect of Scheduled areas / tribal rights. (Including FRA, PESA, Prevention of Atrocity Act, L&RR, and Acquisition etc.)
 - (b) Capacity building of functionaries and tribal representatives on socioeconomic programs.
 - (c) Capacity building of Artisans- Art & craft Metal craft, painting, dance/drama, textiles, handicrafts as well as value addition to art, craft and designs etc. This can include kits and tools etc.
 - (d) Conducting of Seminars, Conferences, Workshops on various tribal related issues.
 - (e) Think tank related activities.
- 4.4 Many tribal festivals/ yatras etc. are celebrated in States which can be publicized

at National Level to attract more tourists, TRIs may propose such festivals/ yatras etc. for supplementary support under the scheme.

- (b) Organizing "exchange of visits by tribal": TRI shall arrange visit to other parts of the State/Country. The visiting groups may comprise of people for various tribes, have adequate representation from women and officials. The objectives should include to get a wider perspective of culture and traditions, to learn about socio- economic development/ best practices of other areas and to see how TRIs can be managed more efficiently and to see how socio-economic development can happen without losing core culture etc. 4.6 Innovative projects /initiatives / activities which can help the tribals or tribal majority area.

Manpower Requirement:

A dedicated core staff structure with an independent Director is essential in order for smooth management of the institutions and the same will be taken care of by the State Government. The salary of the entire staff will be borne by the State Government / UT.

Funding:

There is no uniformity of requirements among TRIs. Some of the TRIs have their own building, some others are running in rented building. Similarly, some TRIs have libraries, museums etc. on the other hand some others do not have. It is thus not feasible to lay down a strict criteria for allocation of funds to States. Funding under this Scheme would, however, be 100% grant-in-aid by the Ministry of Tribal Affairs to the TRIs on need basis with the approval of APEX Committee. TRIs would be responsible to prepare proposal and detailed action plan for the year along with budgetary requirement and submit it to the Ministry through State Tribal Welfare Department.

The proposals shall be accompanied by utilization certificates as per provisions of GFR. 6.3 item-wise proposed budgetary expenditure shall be clearly spelt out.

Role of NGOs in Tribal Development in Jhabua District of Madhya Pradesh

NGO initiatives aimed at development have a long history in India. The individual efforts of social workers are expressed in micro-terms but it deals with conditions that are caused by large macro-structures. There are number of NGOs working for the tribal development in India. The researcher has studied 7 major NGOs from the research area engaged in the tribal development. These NGOs tackle development related issues and their ideological orientation differs widely. There are some NGOs who's nature is agitational and there are some who are engaged in both construction and agitational work. In the present study, the aims & objectives, project area, target group, views of NGOs on problems of tribal communities, their suggestions have been studied. The work of NGO has been evaluated on the basis of nature of work, their priorities, financial conditions of NGOs,

staff position, their views on self-sufficiency, need for continuity of work. In order to have openness, their membership patterns, confidentiality of their accounts etc. are discussed. Their views on tribal liberation and need to work all NGOs under one banner also have been sought. Finally the problems of NGOs have been discussed at length. This paper thus evaluates the role of NGOs working with tribal communities, their strengths and weaknesses, future thrust, **ROLE OF NGOs IN INDIA** the growing disillusionment and the resultant discontent among the masses gave birth to a number of NGOs in 1960s in India.

These grassroots movements are concerned with the plight of the exploited sections of society. They are part of the democratic struggle at various levels. The role of NGOs is neither antagonistic nor complementary with the existing sectors. It is a role at once more limited and more radical, taking up issues that the political parties are unwilling to take up, coping with a large diversity of situation that governments and parties are unable to cope, encompassing issues that arise from not merely local and national but also international forces at work. The individual efforts are expressed in micro terms but it deals with conditions that are caused by large macro-structures. The NGOs are thus a part of a large movement for global transformations in which non-State actors on the one hand and non-territorial crystallisations on the other are emerging and playing new roles. Most important role Indian NGOs play in of a 'watch dog'.

ACTIVITIES OF NGOs

All activities of NGOs are aimed at social, economic, political & educational Development of Mop pressed people in the area. The activities stated by the respondent NGOs are listed below:

1. Comprehensive village development.
2. Activities related with education: Balwadi, supplementary classes for school-going children, school at the brick kilns, education to katkari women, hostel for children, motivate children to go to school.
3. Activities related with Women's development: Formation of Women's groups, Saving group of women, training of self-employment, Women's Co-operative Society, Income generation for women, Women's employment, etc.
4. Youth development activities: Formation of Youth groups.
5. Health activities: Primary health care, health education, health project of family planning, traditional medicines.
5. Provision of food: Nutrition programmes, Grain bank.
6. Political activities: Awareness and training on Panchayatiraj , electoral systems , human rights,

7. Counselling activities: Women's counselling centre, Family counselling centre, Legal counselling.
8. Dissemination of information of Government scheme, helping people to secure benefits of Government scheme.
10. Self-employment: Guidance on self-occupation, Handicraft development etc.

FUTURE THRUST OF NGO WORK

1. Work with Youth,
2. Information dissemination, Strengths of Panchayati Raj
3. Advocacy & Organisational Work especially for Women.
4. Availability of employment.
5. Anti- Liquor movement.
6. Health awareness.
7. To start the sale counter of Minor Forest Product (MFP) of Women.
8. Educational complex only for Katkari
9. Implement ideal project of Land Development.
10. With co-operation of industries, implement developmental projects.
11. To develop land of 100 tribal families and make them stable.
12. Continue working on the present issues.
13. Develop volunteers. Strengthening NGO.
14. Create Women's federation.
15. Education – put tribal children to school.
16. Propaganda and implementation of our experiments.
17. Networking with NGOs in Maharashtra.
18. Women and Panchayati Raj will be the priority.

Government Policies and Programmes for Tribal Education

Starting from the First Five Year Plan Period¹ (1951-1956) the government is steadily allocating financial resources for the purpose of tribal development. Towards, the end of the plan (1954), 43 Special Multipurpose Tribal Development Projects (MTDPs) were created. During the Third Five Year Plan Period (1961-1966), the government of India adopted the strategy of converting areas with more than 66 per cent tribal concentration into Tribal Development Blocks (TBDs). By the end of Fourth Five Year Plan (1969-1974), the number of TBDs in the country rose to 504. Additionally, in 1972 the Tribal Sub-Plan Strategy (TSP) was implemented by the Ministry of Education and Social Welfare. TSP was based on twin objectives of socio-economic development

and protection against exploitation. It was generally implemented in the areas where the Scheduled Tribe population was more than 50 per cent of the total population.

The PESA (The Panchayats Extension to Scheduled Areas) Act, 1996 in fact, has made it mandatory for the States having scheduled areas to make specific provisions for giving wide-ranging powers to the tribes on the matters relating to decision-making and development of their community. A centrally-sponsored government scheme of ashram schools exclusively for ST children from elementary to higher secondary levels was initiated in the 1970s. But the poor quality of education in ashram schools, however, has undermined confidence in education as a vehicle for social mobility.

The Janshala Programme is a collaborative effort of the Government of India (GOI) and five UN Agencies – UNDP, UNICEF, UNESCO, ILO and UNFPA – a community based primary education programme, aims to make primary education more accessible and effective, especially for girls and children in deprived communities, marginalised groups, Scheduled Caste/Scheduled Tribes/minorities, children with specific needs Accepting the challenge.

Educational Status of Tribals in India.

India advocates inclusive growth, but owing to lack of education and skill development, the marginalised sections are not becoming part of the inclusive growth. To ensure inclusive growth, the Constitution has empowered the backward classes with reservations in education and jobs. For this purpose, the Constitution of India has earmarked certain special provisions to enable the SCs and STs to access education. These special provisions were adopted through the amendment to the Constitution in 1951, and a special clause was added to article 15(4). This clause empowers the state to make special provisions for the educational development of the SCs and STs (Sahoo 2009). These special provisions too have failed to bring impressive impact on their literacy level as many tribals have their own peculiar and vernacular language different from the common language spoken in the state where they reside. It's found that as many as 22 per cent of tribal habitations have less than 100 population, and more than 40 per cent have between 100 to less than 300 people, while others have less than 500 people (Panda 2011; Sujatha 2008). Their literacy rate did not go beyond 8.5 per cent in 1961. In the same period, the female literacy rate was much more depressing than that of male literacy, just 3.2 per cent. Recognizing their deprivation and marginalization in Indian society, the Government of India has started an innovative scheme for the promotion of education among Scheduled Tribes, i.e., the establishment of Ashram schools. The Ashram school concept started in the Third Plan in all scheduled areas across India. It aims to promote education to the marginalised in a customised way. In addition to Ashram schools, there was construction of

hostels for boarding and lodging to tribal students in the schedule areas. These special measures were introduced to achieve targeted results in elementary education among the tribals. In spite of this, the literacy rate has not crossed beyond 11.39 percent in 1971 because of the complex nature of issues like absenteeism, stagnation, drop-out, and seasonal migration by the tribal children.

Development of Particularly Vulnerable Tribal Groups (PVTGs):

The scheme of Development of PVTGs covers 75 identified PVTGs in 18 States and UT of Andaman & Nicobar Islands for the activities like housing, land distribution, land development, agricultural development, animal husbandry, construction of link roads, installation of non-conventional sources of energy for lighting purpose, social security including JanashreeBimaYojana or any other innovative activity meant for the comprehensive socio-economic development of PVTGs. The scheme is flexible as it enables the States to focus on areas that they consider is relevant to PVTGs and their socio-cultural environment.

Scheme of Strengthening Education among Scheduled Tribe Girls in Low Literacy districts.

The primary objective of this Central Sector Scheme is promotion of education among tribal girls in the identified low literacy districts of the country. The scheme aims to improve the socio-economic status of the poor and illiterate tribal population through the education of women. The Scheme has been revised with effect from 1.4.2008. Now it is-being implemented in 54 identified low literacy districts where ST Population is 25% or more and ST female literacy rate is below 35% as per 2001 census. The Scheme aims to bridge the gap in literacy levels between the general female population and tribal women and is meant exclusively for ST Girls. The educational complexes are established in rural areas of identified districts and have classes I to V with a provision for up gradation up to class XII, provided there is sufficient accommodation for classrooms, hostel, a kitchen, gardening and for sports facilities. The educational complexes impart not only formal education to tribal girls but also train the students in agriculture, animal husbandry, other vocations and crafts to make them economically strong. The scheme was introduced by the Ministry of Tribal Affairs. The objective of this scheme is to bridge the gap in literacy levels between the general female population and tribal women, through facilitating 100% enrolment of tribal girls in the identified Districts or Blocks and reducing drop-outs at the elementary level.

Mobile libraries

The library component of the intervention, which was initially planned to play a smaller role, was adapted to respond to this. The organisation got support from the Tata Trusts and their resource partner Muskaan to train their library coordinators and select contextually appropriate books. To serve the widely spread out villages, the project adopted the model of mobile libraries where

traveling library coordinators visit the Jhabua during the morning hours. They carry a carefully selected box of 20 children's books. Most of them are graded as per reading levels, meant for early readers, and a large number of them have children from villages and rural contexts. The library coordinators conduct a variety of activities in schools besides issuing books from the zip-lock bags. These include read aloud sessions of big-sized books meant especially for young readers, shared reading, paired reading among students and storytelling. Children enjoy these sessions a lot, and look forward to the librarian's visits. Other than school visit, library coordinators also take their cycles to villages and set up a library in a particular place where children and youths come and issue books. A key reason behind the enthusiasm of library coordinators for trying innovative ideas is the learning brought home by four of the organization's team members from the Library Educator Course by Parag, an initiative of the Tata Trusts. By encouraging activities like role-play with stories, they have made children confident in expressing and talking in their own language in the classroom.

Creating books in tribal languages

Research shows that learning in their mother tongue helps in children's engagement in schools and motivation to learn improving their learning scores, and also that multilingual children develop better thinking skills compared to their monolingual peers. The project team engages in a variety of such activities to allow children to speak and learn in their own language while also learning the school language. These low-cost, scalable, micro-innovations are practices that tackle real-time challenges and organically become steps towards a larger change.

Organising open library sessions for the community is another activity to gain their interest. Once a week, all library coordinators converge in one village where story telling by the coordinator, singing folk songs, folk stories and puzzles are encouraged. Parents and grandparents are invited to discuss the need for education in the school, the importance of supporting children at home, and to ensure that every child attends school to learn how to write and read these songs and much more. This activity thus becomes a complement to community mobilization for improving children's attendance that is undertaken by Jhabua volunteers. Many women who see the beautifully illustrated children's books then encourage children to read books. "I read books and encourage my children also to read because books give us lot of new knowledge which we have not seen and broaden our imagination," Debu Bai, living in jhabua told VillageSquare.in.

Digital Based Computer-Learning

The wide use of Internet has affected the methods of education, giving us the concept of global classroom where any number of students can interact with each other at any time. Digital E learning

is currently widespread in schools and colleges of developed countries (DG Communications Networks Report, 2013). In the developing countries, it is being primarily used to support education in the form of “E-Learning” applications. There is still some amount of scepticism among the schools in adopting DE because it is still a relatively new feature and its impact on student achievement is not known. Also such technological solutions are thought to be not very cost effective (Rajesh, 2003). Although there are several studies that indicate how DE can benefit various stakeholders, what is certain is that DE is not the ultimate solution rather an aid to achieve the maximum that can be derived out of educational experiences at school. While the debate on the impact of DE learning outcomes still goes on, there seems to be a consensus that DEs in education can increase access to information inside a classroom as well as increase motivation and efficiency throughout the system. (Haddad, Jurich, 2002) (InfoDev Report, 2010) Government of India, as part of its 11th Five Year Plan, continues to support federally sponsored scheme, known as “SarvaShikshaAbhiyan, (SSA)” with the objectives of providing school education to every child between the age of 6 and 14 years and improving the quality of school education in the country. Under this policy GOI aims at fostering DE based Education in India. Under the Sarva Shiksha Abhiyan, several Computer Aided Learning (CAL) programmes have been created by developing multimedia content.¹ SSA has introduced many CAL projects across states in India. 27,289 schools with about 5.3 million students were beneficiaries of this program.² The two major DE related projects in schools are Multimedia in K-12 (for affluent private schools) and DE in public schools. The leading players are Educomp Solutions, Everonn and NIIT. Educomp which is the pioneer in this field has a product called “Smart Class”. Smart class is a product offered under Multimedia in K-12. The objectives of this are as follows:

1. To use multimedia modules to effectively teach Students across Playschool to 12th grades.
2. Content delivery through multimedia i.e. digital Content and LCD TVs/Projector assisted Whiteboards. It has been universally accepted that this content delivery scheme improves teaching and learning experience. However, the focus of these efforts was more towards computer-aided learning than Distance e- Learning. Distance E-Learning is the combination of Distance Education and e-Learning which is characterized by the extensive use of Internet enabled web technology in the delivery of education and instruction and the use of synchronous and asynchronous online communication in an interactive learning environment or virtual communities, in lieu of a physical classroom, to bridge the gap in temporal or spatial constraints (Garrison, 2011). A recent development in distance e-learning is Massive open online courses (MOOCs), aimed at large-scale interactive participation and open access via the web or other network technologies.

PRE-MATRIC SCHOLARSHIPS TO ST STUDENTS (Class IX and X)

Applicable to students who are studying in Classes IX–X. Parental income from all sources should be less than Rs.2.00 lakhs per annum, which is proposed to be revised to Rs.2.50 lakhs per annum. Scholarships are paid @ Rs.150/- per month for Day Scholars and @Rs.350/- per month for Hostellers, for a period of 10 months in a year. This is proposed to be revised from existing Rs.150/- to Rs.225/- p.m. for Day Scholars, and from Rs.350/- to Rs.525/- p.m. for Hostellers. Central assistance in the share of 75:25 (90:10 for NER and Hilly States) to State Governments/UT Administrations is available from the Government of India. Scholarship is distributed through the State Government/UT Administration.

Scholarship For Higher Education (earlier known as Top Class Education) For ST students.

Scholarship is given to ST students for pursuing studies in prescribed courses in any of the 246 institutes of excellence across the country like IITs, AIIMS, IIMs, NIITs, etc. identified by the Ministry. Total number of scholarships is 1000 per year. Family income from all sources does not exceed Rs.6.00 lakhs per annum. Scholarship amount includes tuition fees, living expenses and allowances for books and computer.

Scheme of Grant-in-aid to voluntary organizations working for the welfare of Scheduled Tribes.

The Scheme was launched in 1953-54 and was last revised w.e.f. 1st April 2008. The prime objective of the scheme is to enhance the reach of welfare schemes of Government and fill the gaps in service deficient tribal areas, in the sectors such as education, health, drinking water, agro-horticultural productivity, social security net etc. through the efforts of voluntary organizations, and to provide favourable environment for socio-economic upliftment and overall development of the Scheduled Tribes (STs). Any other innovative activity having direct positive impact on the socio-economic development or livelihood generation of STs may also be considered through voluntary efforts. The scheme is Central Sector Scheme. The grants are provided to the non-governmental organizations on application, in a prescribed format, duly recommended by the multi-disciplinary State Level Committee of the concerned State Government / UT Administration. Funds are generally provided to the extent of 90% by the Government. The voluntary organization is expected to bear the remaining 10% balance from its own resources.

Calculation

It can be seen that those who had been near the bottom of the class benefit the most from this intervention (fig.2). A majority of the others perform at the same level as their class performance. Among the five students of class V who have a normalized score of 1 in their school exams, three

(i.e. 60%) achieve a normalized score of 3 in the evaluation conducted post-DE intervention. Although the sample size is small, this is a significant finding. Fig 3. shows the examination performance of 28 Class-I students in (i) the regular school examination before remote teaching, and (ii) an examination taken after a month-long remote teaching intervention in English (20 hours total). The students have been indexed on the basis of their rank in the school exam. The chart shows marked improvements in student performances. Specially, the students who received very poor marks in school examination (student number 24 to 28) have shown significant improvement in their English language skills. The classes were conducted using Google Lastly the expectancy created in the children, increased interest for both instructor and the children in the classroom. To summarize, one can make the following hypotheses about this intervention and, based on the data obtained, examine whether the nature of results for each has been positive or negative:

Methodology.

The research is Quasi-experimental in nature and has undertaken before after studies to evaluate the plus and the teaching learning materials were video based and PowerPoints. The method of teaching was interactive and it was made sure that the children interacted with the instructor. Fig. 3 Performance Improvement of Class-I Students after DE-enabled Remote English Teaching The intervention has generated positive results both in nature of change in attitude towards technology and learning outcomes. The children were aged between 6 to 11 years and it was earlier assumed that it would be difficult for them to cope with remote teaching due to their lack of attention span. However during the intervention it was observed that the children on the contrary did not lose their attention. The social difference that is often created between teacher and student due to several disparities was not observed in this context, the children were quite aware of the instructor's presence online but they did not have any hesitation in interaction. There was no fear of punishment although the instructor observed discipline in the class, but the children did not shy away from the instructor. Interactive sessions created a positive Learning environment for them, leading to increased interest in the topics taught. It can be deduced that technological aids, along to low/no teacher absenteeism and low social difference has led to creation of a better learning environment. The teacher student ratio being comparatively low, and the regular interactions with the teacher also lead to faster learning of concepts. Video based teaching created better cognitive understanding of the topics taught. Children were able to freely interact amongst themselves, and this also created a positive interest in the topics taught Acceptance of it, and 81% interviewed have stated that they are open to change and would like to be taught in a different way.. The children would offer some resistance in opening up to outsiders: We have received negative response from most of the students

on this. Being a close-knit tribal community at a remote village, with little interaction with the outer world, it was assumed that the children would not be open to the idea of complete strangers instructing or interacting with them. However, not only did the children show incredible openness to the idea, they also engaged very freely in all interactions and showed extreme enthusiasm.

CONCLUSION

In India teachers are known as Gurus and considered as compered as incarnation of God. “gurur brahma, guru rvishnu, gurur devo maheswarai, gurur sakshat param brahama, tasmaye shree guruve namaha”.

Teachers are expected to enhance a child’s knowledge, develop his learning and schooling experience. But unfortunately, this doesn’t goes as we think in rural India. Studies have shown the teacher scares students, terrify them, beat them and humiliate them, which leaves student horrified and traumatized. The students are beaten and discriminated in the classroom. A recent survey of rural school in West Bengal revealed shocking result, where a teacher was found discriminating with the students belonging to Schedule Caste. As the teacher is designated to be very respectful post, few teachers tend to consider themselves belonging to superior class in the society. They castigate, admonish the students for not being tidy, punctual, not able to get study material because of low income of their parents, they humiliate the students as they belong to certain community. Children are teased and ridiculed for their eating habits. They are made to sit separately because they belong to lower community. 70 years after Independence the education system in rural India has not changed much. Discrimination based on caste, gender and cultural still prevails in rural areas. As the majority of section in rural India are farmers and labourers, most of them belongs to backward SC & ST castes, they have very low income. They cannot afford to send their children to a private school for better education. It forces them to send their children to Government school, the lax education system and incompetent teachers are serious treat for overall development of student. Whereas, better-off sections belonging to higher caste are capable enough to send their children to private school.

Suggestions

Despite the good work by various NGOs in rural areas with the tribal communities, they still lack co-ordination among themselves and with the Government. NGOs are much interested in funding themselves. They are working as agents of Government, focusing on implementation of their project.

Education is the only primary agent that can help individuals overcome the obstacles of income, and can help to expand the horizons of the community for career development, personal development,

trust building and sustainable development in welfare. This is the highest and most important parameter for the better tomorrow of the tribal population.

Recommendations

- For the progress of the tribal community, there is a dire need of educational bodies that blend well with the tribal background and lifestyle
- In the initial stages, the medium of instruction should be one that is familiar to them, and then gradually, they can be encouraged to take up regional languages
- Tribal education should not be restricted to only learning but should evoke the responsibilities of the concerned individual towards his entire community
- Students should be taught to safeguard their own rights as well as the rights of their community and resolve to combat exploitation against their people

REFERENCES

- *DG Communications Networks & Technology (2013). Survey of Schools: DE in Education- Benchmarking Access, Use and Attitudes to Technology in Europe's schools (A study prepared for the European Commission)*
- *Dreze, J. (2003). Patterns of Literacy and their Social Context, in Das V. et al (ed). The Oxford India Companion of Sociology and Social Anthropology, 2, Oxford University Press, New Delhi.*
- *References [1] Abdulraheem, A. (2011) Education for the Economically and Socially Disadvantaged Groups in India:*
- *Basu, Salil.2000. 'Dimensions of Tribal Health in India', Health and Population Perspectives and Issues, 23(2): 61-70.*
- *Behera, Amulya Kumar. 2015. 'Primary Education among Tribal People of Mayurbhanj District of Odisha: An Evaluative Study', International Journal of Humanities and Social Science Invention, 4(2): 43-54.*
- *Chandra Guru, Dr.B.P.Mahesh, H.S.Shivaram, M.Dileep Kumar, & K.Rajagopala.2015. 'Tribal Development in India: An Overview', International Contemp*

Case study

- *(Aggarwal 2000; Kumaret al 2005; Mehta 2005; PROBE 1999). DE is a significant step in this direction, which eliminates barriers of regional and gender-based.*
- *Gnanasambandam, Chandra, AnuMadgavkar, Noshir Kaka, James Manyika, Michael Chui, Jacques Bughin, Malcolm Gomes (2012). Online and upcoming: The Internet's impact on India, McKinsey.*
- *Garg Manisha, Mandal, Kalyan Shankar, (2013). Mid-Day Meal for the Poor, Privatised Education for the Non-Poor, Economic & Political Weekly, Vol XLVIII no 30.*
- *Kumar, Anant, (2008). Education of Tribal Children in Jharkhand: A Situational Analysis, Jharkhand Journal of Development and Management Studies, XISS, Ranchi, Vol. 6, No.4 (XXV).*

Web-links

- *Board of Open Learning School: www.bolsd.in/*
- *Computer Aided Learning under SSA:*
- *www.ssa.tn.nic.in/Docu/CAL%202011-ss.pdf*
- *DE in schools: http://mhrd.gov.in/DE_school*

E- Waste Protection Through National Green Tribunal in India: An Analysis

Apeksha Chaudhary* & Prof. Vaibhav Goel Bhartiya •

Abstract

India is becoming the big market of E- waste. It is becoming a serious issue in our country, driven by the rapidly increasing quantities, as well as its toxic nature and the economic value of the recycled substance. E-waste has an adverse effect on the human rights of the individuals and environment too, which is the essential part of the right to life. Lack of awareness among the public and stakeholders about the proper disposal policies of e- waste causing problems to their day to day life style. This is alarming time to take some strict action to control the e- waste pollution in India. As per the Supreme court judgments and Law Commission Report (2003), National green tribunal was constituted for the preservation and protection of the environment and prove a mile stone in improving the environmental condition of the country. The main objective of this research paper is to analysis the role of national green tribunal for controlling the problem of E- waste management and for the protection and preservation of environment in India

Key words: E-waste, National green tribunal, environment, human rights, Central Pollution Control Board.

INTRODUCTION:

E-Waste stands for Electronic-Waste. It is the term used to describe old, end-of-life or discarded electronic appliance. It includes This may include items such as computers, servers, mainframes, monitors, CDs, printers, scanners, copiers, calculators, fax machines, battery cells, cellular phones, transceivers, TVs, medical apparatus and electronic components besides white goods such as refrigerators and air-conditioners.

'E-waste' means electrical and electronic equipment, completely or in part discarded as waste by the consumer or bulk consumer as well as rejects from manufacturing, refurbishment and repair processes. Electrical and electronic equipment means equipment which is dependent on electrical currents or electro-magnetic fields to be fully functional.

E- Waste:

Section 3(r) of e-waste (Management) Rules, 2016: 'E-waste' means electrical and electronic equipment, whole or in part discarded as waste by the consumer or bulk consumer as well as rejects from manufacturing, refurbishment and repair processes.

* Research Scholar, Sardar Patel Subharti Institute of Law , Swami Vivekanand Subharti University Meerut (Uttar Pradesh)

• Dean, SPSIL, Swami Vivekanand Subharti University, Meerut (Uttar Pradesh)

Basel Action Network¹- "E-waste encompasses a broad and growing range of electronic devices ranging from large household devices such as refrigerators, air conditioners, cell phones, personal stereos, and consumer electronics to computers which have been discarded by their users. "

In European Union, E-waste is divided into ten categories².

1. *Large household appliances*
2. *Small household appliances*
3. *IT and telecommunications equipment*
4. *Consumer equipment and photovoltaic panels*
5. *Lighting equipment*
6. *Electrical and electric tools*
7. *Toys, leisure and sports equipment*
8. *Medical devices*
9. *Monitoring and control instruments*
10. *Automatic dispensers*

E-waste has been categorized into three main categories, i.e.

1. Production of Necessity
 2. Production of Technology advancement
 3. Production of luxury
- **Production of Necessity**-Refrigerator and washing machine, mixer represent production of necessity.
 - **Production of Technology advancement**- personal computer (PC), monitor laptop, fax machine, mobile phones represent production of technology advancement.
 - **Production of luxury**- TV, air- conditioner etc. represents the production of luxury.

Sources of E-Waste –

The sources of e-waste can be divided into two parts such as Formal Sector, and Informal Sector.

1	Formal Sector	Importers, Producers/ Manufactures, Retailers(business, government and others), Consumer (individuals households, businesses, government) and traders, scrap dealers
2	Informal Sector	Dissemblers/dismantlers, Smelters, Recyclers

¹ <http://www.ban.org/>

² EU Directive 2012/19

GENSIS OF NATIONAL GREEN TRIBUNAL

Earlier, UN conference³ held in 1972, the UN make recommendation for the to the states for taking the appropriate steps for the protection and improvement of human environment. After this again in UN conference⁴, 1992 recommended the all the states parties for providing compensation to the victims of environment pollution. As India is party of both the conference, hence its necessary to follow the all the directions .

Other than this,Indian judiciary also pronounced in so many judgment for establishing the permanent environment court. In M.C Mehta v. Union of India⁵ Supreme Court observed that environmental cases involve assessment of scientific data. Setting up of environmental courts on regional basis would require professional judge and experts, keeping in view the expertise required for such adjudication.

In an another judgement Indian Council for Enviro-Legal Action vs. Union of India⁶ the Supreme Court observed that Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner. Charan Lal Sahu v. Union of India⁷, the court opined that “under the existing civil law, damages are determined after a long litigation, which ultimately destroys the very purpose of awarding damages.”

Supreme Court of India in A.P. Pollution Control Board v. M.V. Nayudu⁸ referred to the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists/technically qualified persons, as a part of the judicial process, after an elaborate discussion of the views of jurists of various countries.

LAW COMMISSION REPORT

Law commission of India in his 186th report,2003 recommended for the establishment of environment courts in India for the effective and speedy disposal of cases relating to environment protection and conservation of forest and other natural resources including enforcement of legal rights. Tribunal was authorized to provide compensation for the environment damages caused to individuals⁹.

³ United Nation Conference on human environment,1972.

⁴ United Nation Conference on environment and Development,1992.

⁵ 1987 SCR (1) 819

⁶ 1996 SCC (3) 212

⁷ AIR 1990 SC 1480

⁸ 2000(3)SCALE354

⁹ One Hundred Eighty Sixth Report On Proposal To Constitute Environment Courts, September, 2003 visit-
<http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>

NATIONAL GREEN TRIBUNAL

NGT is a statutory body established by a Government by using the powers of Section 3 of the NGT Act, 2010 on 18th October, 2010. It is a special fast-track court track court to handle the expeditious disposal of the cases pertaining to environmental issues. It has been established to assure the right to a healthy environment to the citizens of India as enshrined in Article 21 of Constitution.

The NGT has been established for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for kdamage to persons and property and for matters connected therewith or incidental thereto.

The Tribunal has five places of sitting with Principal Bench in Delhi. The other four zonal benches are at Pune, Kolkata, Bhopal and Chennai. In addition, there are three circuit Benches at Shimla, Shillong and Jodhpur. Judicial Members of the Tribunal are drawn from Judiciary while Expert Members are experts in physical and life sciences, engineering and law including persons having practical knowledge and administrative experience in the field of environmental policy and regulation. In addition to the Chairperson, 7 Judicial and 8 Expert Members are presently working in the Tribunal.

CONSTITUTION AND FUNCTION

NGT consist a full time chairperson¹⁰ and at least 10 and maximum 20 Full time Judicial members¹¹ as central government time to time notify and 10 and maximum 20 Full time Expert Members¹² as central government time to time notify.

The tribunal has jurisdiction over all the civil cases where a substantial question relating environment arises.¹³

PRINCIPLES OF JUSTICE ADOPTED BY NGT

The NGT is not bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice. Further, NGT is also not bound by the rules of evidence as enshrined in the Indian Evidence Act, 1872. Thus, it will be relatively easier (as opposed to approaching a court) for conservation groups to present facts and issues before the NGT,

¹⁰ Section 4 (1) (a) of National Green Tribunal Act, 2010.

¹¹ Section 4 (1)(b) of National Green Tribunal Act, 2010

¹² Section 4 (1)(c) of National Green Tribunal Act, 2010

¹³ Section 14 (a) of National Green Tribunal Act, 2010

including pointing out technical flaws in a project, or proposing alternatives that could minimize environmental damage but which have not been considered.

While passing Orders/decisions/awards, the NGT will apply the principles of sustainable development, the precautionary principle and the polluter pays principles.

However, it must be noted that if the NGT holds that a claim is false, it can impose costs including lost benefits due to any interim injunction.

NGT RESPONSE TO THE E- WASTE PROBLEM

After coming into existence NGT pass so many orders and direction for saving the environment from the e- waste time to time. India comes under the top five country in producing the e- waste at globe level. Therefore NGT directed the Central and state government for the effective implementation of the E- waste (Management and Handling) rules, 2016.

In *Research Foundation for science Technology and Natural resources Policy v. Union of India and another*¹⁴ dumping of hazardous waste, whether directions shall be issued for destruction of consignments with a view to protect environment and, if not, in what other manner consignments may be dealt with it was held, precautionary principles are fully applicable to facts and circumstances of the case and only appropriate course to protect environments is to direct destruction of consignments by incineration as recommended by Monitoring Committee.

“The right to life is much more than the right to animal existence and its attributes are manifold as life itself. The right to sweet water and right to free air are attributes of the right to life for to these are the basic elements which sustain life itself.”

In *Almitra H. Patel & Ors. v. Union of India and Ors*¹⁵ Mrs. Almitra Patel and another had filed a PIL under Article 32 of the Constitution of India before the Apex Court whereby the Petitioner sought the immediate and urgent improvement in the practices that are presently adopted for the way Municipal Solid Waste or garbage is treated in India. Then the Tribunal directed every state and UT to implement the Solid Waste Management Rules, 2016 immediately and prepare an action plan in terms of the Rules within 4 weeks. Moreover, the Tribunal directed the Central Government, state governments, local bodies and all citizens to perform their respective obligations under the Rules without any delay, direction was issued to ensure proper segregation before processing of waste in energy plants. It mandated the provision of buffer zones around plants and landfills as required. Tribunal said that absolute segregation has been made mandatory in waste to energy

¹⁴ *Research Foundation for science Technology and Natural resources Policy v. Union of India and Another* (2005) 13 SCC 186

¹⁵ MANU/GT/0150/2016

plants and landfills should be used for depositing inert waste only and are subject to bio-stabilization within 6 months but the most important direction of the Tribunal in this case was a complete prohibition on open burning of waste on lands, including at landfills.

In *Srinagar Bandh Aapda Sangharsh Samiti & Anr. v. Alaknanda hydro Power Co. Ltd. & Ors*¹⁶ the NGT has directly relied on the principle of 'polluter pays' and made a private entity liable to pay a compensation, making them subject to a code of environmental jurisprudence.

In *Samit Mehta vs. Union of India and Ors*¹⁷ an environmentalist filed applications in relation to the damage caused to the sinking of a ship named M. V. Rak which was carrying huge amounts of coal, fuel oil and diesel. As a result of the ship's sinking close to the coast of south Mumbai, a thick film of oil was formed on the surface of the sea and large-scale damage was caused to mangroves and marine ecosystem. The tribunal found that negligence could be attributed to Respondents 5, 6, 7 and 11 and elements of *mens rea* were to be found. Further The sinking of the ship was the result of the negligence of the Respondents and upholding the principle of Polluter Pays, the Tribunal directed Respondents 5, 7 and 11 to pay environmental compensation to the tune of Rs. 100 crores to the Ministry of Shipping, GOI, which is one of the biggest compensation amounts ever paid by a private entity against environmental damage done and Respondent 6 was asked to pay a compensation of Rs. 5 crores.

One of the most important case of NGT is *Ms. Betty C. Alvares vs. the State of Goa and Ors*¹⁸ NGT held that even a foreign national can approach the NGT.

In *Toxic Link v. Union of India & Ors*¹⁹ the NGT issued the directions to check nation wide menace of E- waste and said state pollution control boards are under obligation to enforce the e-waste rules and its grievance of applicant the implementation of rules envisaged in the rules is not taking place all over the country. Further tribunal issue bailable warrants in the sum of Rs.10,000/- to the satisfaction of the Arresting Officer against the Member Secretaries of the respective States Pollution Control Board i.e. Respondent Nos. 5, 6, 9 ,16, 17, 18, 22, 25, 28 in exercise of our powers and in terms of the provision of Section 19 (4) (a) of the National Green Tribunal Act, 2010 read with Order XVI Rule 10(3) and Section 151 of Code of Civil Procedure, 1908.

In *Nagrik Upphogta Marg darshak Manch & Anr. v. State of Madhya Pradesh & Ors*²⁰ petitioner raised the issue of ill effects of Electrical and Electronic in the State of MP. It is the contention of

¹⁶ MANU/GT/0101/2016

¹⁷ MANU/GT/0150/2016

¹⁸ Misc Application No. 32/2014(WZ)

¹⁹ Original Application No. 183/2014

²⁰ Original Application No. 143/2013(THC) (CZ)

the Applicant that after the notification of the E-waste (Management & Handling) Rules, 2011 under the Environment Protection Act, 1986 no concrete steps had been taken by the authorities concerned in the state of MP to implement the Rules of 2011 leading to environmental degradation. To solve this issue, NGT has issued the eleven directions for the proper disposal of the e- waste.

In Mahendra Pandey v. UOI and others²¹ the NGT announced that anyone found dumping electronic waste on the banks of river Ramganagan Moradabad in UP would have to pay Rs. One lakh as environment compensation. NGT Further direct the concerned Municipal Corporation to deal with pollution and take appropriate action against the persons illegally carrying and transporting the electronic wastes so that such e-waste should not be transported from NCT Delhi in contravention of the Hazardous and other Waste (Management and Transboundary Movement) Rules, 2016.

In Satish Kumar v. Union of India & Ors²² the NGT ordered that all the plastic waste/scrap dealers and/or recyclers including the member of the PWD Association Respondent herein shall be restrained from carrying on their business of segregation of plastic waste and its eventual transfer to recyclers or disposal contrary to and without registration under the provisions of Plastic Waste(Management and Handling) Rules, 2011 and there shall be no unregulated open burning of plastic/rubber or such other articles anywhere in India.

Naveen kumar and others v. UOI and others²³ ordered that to restrain setting up of Solid Waste Processing Plant without obtaining consent to operate under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 and removal of waste dumped on the land along Kaali River in Ganwri village in Meerut district. The applicant alleges that unscientific dumping of solid waste is taking place in village Ganwri on the banks of river Kaali which is creating health issues. 22 deaths have taken place and 200 people have been taken ill and NGT directed the district magistrate, Meerut and Uttar Pradesh Pollution Control Board to take an action and submit a report to the NGT through the e- mail within one month on the receipt of the order.

CONCLUSION:

Waste can only be disposed of properly through the appropriate method. The national green tribunal prove as a mile stone for the protection and preservation of the environment. Pollution free environment is the very essential for the right to life. Therefore time to time NGT pass the

²¹ Original Application No. 58/2017 (M.A. No. 210/2018)

²² Application No. 56(THC) of 2013

²³ Original Application No. 77/2019

guidelines for the *proper disposal of e-waste is undoubtedly an important issue. NGT consider it necessary to direct the MoEF, state Pollution Control Boards and the Central Pollution Control Board to look into the matter and prepare an action plan for enforcement of the e- waste rules as well as taking appropriate action against those violating the said rules.*

REFERENCES:

1. *Indrajit Dube, Environmental Jurisprudence(Polluter's Liability),Lexis Nexis Butterworth, 2007*
2. *Dr. Devendra S Verma and Shekhar Aggarwal, "E-waste management in India: Problems and Legislations" international Journal of Science, Engineering and Technology Research (IJSETR), Volume 3, Issue 7, July 2014*
3. *Vijaya Chandra Tennat, E- waste Hazards and Law, Souvenir, Icfai foundation for the higher education.*
4. *Pooja Kandukuri and Prajeet Daniel, Electronic Waste: A new Generation Challenge, Souvenir, Icfai foundation for the higher education*
5. *Nairobi Conference on Basel Convention to Address the Growing Challenge of Electronic Wastes ,Nairobi, 27 November 2006,available on*
6. *National Green Tribunal Act, 2010*
7. *186th Report of Law Commission of India, 2003*
8. *United Nation Conference on human environment,1972.*
9. *United Nation Conference on environment and Development,1992.*
10. *<http://www.ban.org/>*

Justiciability and Jurisdiction – Study of Conflicting Areas in Indian

Dharmendra Kumar Gupta¹

“Constitutional provisions about individual rights are far from being homogeneous. They may be manifestly non-justiciable, ostensibly justiciable but in reality non-justiciable, or truly justiciable. They may be statements of the objectives that ought to be pursued under the constitution; such statements may well appear in a preamble (as in India and Tanganyika) in so far as they reflect general aspirations, or in a set of directive principles of state policy or principle of law making in so far as they purport to import on the state a positive but unenforceable duty to act in conformity with them in the interest of the people.² ” --- Prof. de Smith

Introduction:

Judicial review matures into judicial activism and this maturity and consequential activism often bring a conflicting scene before us. In this scene there is conflict between justiciability and jurisdiction. This conflict is not a conflict of only two words i.e. justiciability and jurisdiction, it includes various other issues such as issue of separation of powers, issue of constitutionalism, issue of parliamentary supremacy, issue of judicial restraint, issue of independence of judiciary and many other connected issues. But, whatever may be the debate, the paramount consideration is to secure justice for all and in every sphere.

The sense of justice has adopted in India in grand way and on a big canvas. The Preamble of Indian Constitution, which is called the spirit of the constitution, states that its primary object is to secure its citizens the social, economical and political justice. This spirit of justice enshrined in the Preamble has been articulated in whole Indian Constitution.

For the establishment of the justice there are three prerequisites, that is, policy, means and institutions. Without a proper policy, containing the provisions for establishment of justice, it become very difficult task (though not impossible) to secure justice. Likewise, means like economic resources are also necessary for a State making policy for establishment of justice. Thirdly, institutions securing justice are the most important requirement as without these institutions where will people go for the remedy for their grievances. There is diversity in the nature of problems and therefore there is plurality of institutions to deal such different type of problems. In fact, there is no legal wrong without legal remedy, but this justiciability of legal wrongs does not presuppose that

¹ Assistant Professor (Law) Harishchandra PG College Varanasi

² Cited in Seervai H.M., Constitutional Law of India, (New Delhi, Universal Law Publishing co.pvt. Ltd. 2010) vol. 2 pg. 1925

single institution has jurisdiction for all legal wrongs. Justiciability of any issue is different from the jurisdiction on any issue. In present article I will examine the difference between the two with reference to Indian position.

Meaning of Justiciability and Jurisdiction:

Justiciability:

Justice is the first virtue of social institution³ and as such it should be available to every entity of the society. Since there is diversity in the nature, justice becomes a relative concept. Justice has a protean face, capable of change, readily assuming different shapes, and endowed with highly variable features.⁴ The concept of justiciability is so connected with the concept of justice that we can't understand it with any particular reference like justice. This is the reason that Frankfurter, J. observed that Justiciability is, of course, not a legal concept with fixed content or susceptible of scientific verification.⁵

Justiciability focuses on two fundamental aspects: the first aspect may be termed "law-ability," as opposed to the second aspect, which may be termed "litigability."⁶ First aspect bears a plainly jurisprudential character. This is the consideration of whether there exists a legal answer for every legal question i.e., for every question as to the existence or non-existence of a person's rights or obligations, as these are understood under Hohfeld's classic categorization.⁷ This aspect of justiciability has been termed by the Chief Justice of the Israeli Supreme Court, Aharon Barak, as "normative justiciability." According to his definition, "normative justiciability comes to answer the question whether there exist legal criteria sufficient to determine a dispute presented before the Court."⁸ Normative justiciability deals with the question of whether for every legal question there exists any (i.e., at *least* one) legal answer.

Second aspect has been termed by Justice Barak as "institutional justiciability." According to his definition, "institutional justiciability comes to answer the question of whether the court is the appropriate authority to determine a particular dispute, or whether it is more appropriate that the

³ Rawls, John, *A Theory of Justice*, (Oxford : Oxford University Press, 1972) pp. 3

⁴ Bodenheimer, Edgar, *Jurisprudence*, (Delhi : Universal Book Traders, 1974 Revised Edn., Second Indian Reprint 1997) p. 196.

⁵ *Poe v. Ullman*, 367 U.S. 497, 508 (1961)

⁶ Ariel L. Bendor, Are There Any Limits to Justiciability?, *Indiana International and Comparative Law Review* (vol. 7 , 1997) p.315

⁷ Hohfeld categorizes the various rights into four categories: (1) right (in the sense of claim or demand) and duty; (2) privilege (in the more modern term-liberty) and no-right; (3) power and liability; and (4) immunity and disability.

⁸ H.C. 910/86, *Ressler v. Minister of Defense*, 42(2) P.D. 441, 474. Referred by Ariel L. Bendor, Are There Any Limits to Justiciability?, *Indiana International and Comparative Law Review* (vol. 7 , 1997) p.315

dispute be determined by another institution, such as the legislative or the executive authority."⁹ Institutional justiciability itself bears two aspects: a material aspect and an organic aspect.¹⁰ The material aspect is concerned with the question of whether it is appropriate for the court to adjudicate the subject matter of the dispute before it. The organic aspect, which is particularly relevant with respect to petitions brought against the legislative branch or executive branch, is concerned with whether it is appropriate for the court to adjudicate the legality of the actions of the organ of the state against whom the legal petition has been brought.

Jurisdiction:

As per Oxford English Dictionary 'Jurisdiction' means the official power to make legal decisions and judgments or the area or sphere of activity over which the legal authority of a court or other institution extends. Jurisdiction is a dignity which a man hath by a power to do justice in causes of complaint made before him.¹¹ According to Black's Law Dictionary, the word is a term of large and comprehensive import, and embraces every kind of judicial action. It is the authority by which courts and judicial officers take cognizance of and decide cases and the legal right by which judges exercise their authority. It exists when court has cognizance of class of cases involved, proper parties are present, and point to be decided is within issues. It is the authority, capacity, power or right to act. It is the power of him who has the right of judging conferred by the Constitution or by law. It is of three kinds, of the subject-matter, of the person, and to render particular judgment which was given.¹²

Justiciability versus Jurisdiction: A Study in Indian Perspective

Justiciability and jurisdiction over a subject matter is not the same thing. A distinction must be drawn between the jurisdiction over a certain matter that is conferred upon a court by law, and justiciability, that is, whether it is appropriate that the matter should be determined judicially. Justiciability prescribes the boundaries of law and adjudication. Every legal question has normative justiciability but it is not necessary that that question may have institutional justiciability. Part IV of the Constitution talks about the Directive Principles of State Policy. These directives are part of socio-economic justice enshrined in the Preamble of the Constitution. The rights given under this Part like right to food, right to equal pay, protection of children from exploitation, free and compulsory education, free legal aid, right to work, right to public assistance, right to just and

⁹ *Ressler*, 42(2) P.D. at 474.

¹⁰ Ariel Bendor, *Justiciability in the High Court of Justice*, 17 MISHPATIM 592, 594 (1987-1988)

¹¹ Judicial dictionary, Sweet and Maxwell, Limited, 3, Chancery Lane, Stevens and Sons, Limited, 119 & 120, Chancery Lane London,

¹² Black's Law Dictionary 4th Ed., 1968, pg. 990-1

human conditions of the work, protection of environment and ecology have normative justiciability as these are *fundamental in the governance of the country*¹³. But at the same time Article 37 says that ‘the provisions contained in this Part shall not be enforceable by any court’, and in this way courts have no institutional justiciability in respect of these rights. This non-justiciability or non-enforceability is a kind of limitation on the jurisdiction of the court.

This thing can also be cleared from the example of Parliamentary Privileges. Article 105 (2) and Article 194(2) no member of Parliament or Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings. Thus matters connected with privileges are justiciable but Parliament and state legislature are the sole administrator and adjudicating body of the matters related to parliamentary privileges and as per the black letters of the Constitution, courts have no jurisdiction

There are two further ways to see the distinction, that is, material aspect and an organic aspect of institutional justiciability. In material aspect of the institutional justiciability there is a question that whether it is appropriate for the court to adjudicate the subject matter of the dispute before it. For example, Article 71 of the Indian Constitution says that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final. Thus, any question in respect of election of President of India is justiciable only by the Supreme Court of India and no other court in India has jurisdiction in respect of that question as the decision given by the Supreme Court shall be final. In this way the questions about election of the President justiciable but no other court except the Supreme Court of India has jurisdiction to deal such questions.

In organic aspect of the institutional justiciability there is a question that whether it is appropriate for the court to adjudicate the legality of the actions of the organ of the state against whom the legal petition has been brought. For example, Article 122 says that (1) the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure. (2) No officer or Member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers. Article 212 also states in the same direction in respect of business of the state legislature. In this way these

¹³ Article 37

provisions have barred the jurisdiction of courts in India to interfere in the business of Parliament and state legislature.

Further, Article 121 says that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided. Likewise, Article 211 says No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties. These two provisions say about the non-justiciability of the matters connected with the courts (SC/HC).

The provisions discussed above reveals not only the parliamentary supremacy and independence of judiciary but also the separation of powers. Whenever we talk about non-justiciability about any particular issue, indirectly we accept the doctrine of separation of powers in which one organ of the state cannot interfere in the activities of the other organ. In modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers.

In fact, the difference between justiciability and jurisdiction has been created by the institutions of government in exercise of their discretionary powers. For example, Article 142 of the Constitution of India provides that, ‘the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it...’ This paragraph extends the jurisdiction of the Supreme Court and authorizes it to use large discretionary power for the sake of justice. Because of this power court has tried to extend its jurisdiction in spite of lack of jurisdiction and it has decided many cases on the ground of justiciability. Many decisions of the Supreme Court have created ambiguity about the jurisdiction and justiciability. For example, in *Kesavananda Bharti* case¹⁴ court has established the basic structure doctrine. Court has reserved jurisdiction to decide that whether any Amendment of the Parliament is in violation or not of the basic structure of the Constitution. This doctrine has introduced an element of uncertainty for both, the parliament and the judiciary.

Areas of conflict:

1. Justiciability of PILs- The new human right jurisprudence has considerably relaxed the requirement of traditional rule of *locus standi*. Now, the court permits PIL for the enforcement of Constitutional and other legal rights of any person or group of persons who because of their poverty

¹⁴ *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461

or socially or economically disadvantaged position are unable to approach the court for relief. Underlining its limitation, in *S P Gupta case*¹⁵, court observed, “It is also necessary for the Court to bear in mind that there is a vital distinction between *locus standi* and justiciability and it is not every default on the part of the State or a public authority that is justiciable. The Court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution.” In recent case, *Rajiv Ranjan Singh 'Lalan' & Anr. Vs. Union of India & Ors*¹⁶, court observed that court cannot be the venue of political battle by filing a writ petition under Article 32 of the Constitution of India.

2. Justiciability of Directive Principles- Though directive principles are expressly made non-justiciable, in a number of decisions the Supreme Court has given many of them the status of fundamental right. Instead of becoming a stumbling block the judiciary has now taken itself the responsibility of implementing the Directive Principle. This new trend and the decisions show that it is being increasingly difficult to draw a line between fundamental rights and directive principles when courts are exercising the power of judicial review. In *Unnikrishnan v. State of A P*¹⁷, the directive principles contained in Art. 45 has been raised to the status of a fundamental right. It has been held that children from the age of 6 to 14 years have fundamental right to free and compulsory education. Likewise, in *Randheer Singh v. Union of India*¹⁸, equal pay for equal work has been held to be a fundamental right. In *H. M. Hoskot v. State of Maharashtra*¹⁹, court held that legal aid and speedy remedy are the fundamental rights available to all prisoners.

3. Justiciability of pardoning power of President and Governors- The power of the executive to grant pardon under Article 72/161 is a Constitutional power and court on numerous occasions, has declined to frame guidelines for the exercise of power under the said Articles.²⁰ Further in *Shatrughan Chauhan v. Union of India*²¹, court was of the view that this Court has been of the consistent view that the executive orders under Article 72/161 should be subject to limited judicial review based on the rationale that the power under Article 72/161 is *per se* above judicial review but the manner of exercise of power is certainly subject to judicial review. Apart from above ruling, in *Shatrughan Chauhan case* court has observed in important thing, - “It is well established that

¹⁵ AIR 1982 SC 149

¹⁶ Writ Petition (crl.) 197-198 of 2004

¹⁷ 1993 1 SCC 645

¹⁸ AIR 1982 SC 879

¹⁹ AIR 1978 SC 1548

²⁰ *Kechar Singh vs. Union of India & Anr.*, (1989) 1 SCC 204, *Bikas Chatterjee vs. Union of India* (2004) 7 SCC 634, *Epuru Sudhakar & Anr. vs. Govt. of A.P. & Ors.*, (2006) 8 SCC 161

²¹ WRIT PETITION (CRIMINAL) NO. 55 OF 2013

exercising of power under Article 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. *Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values.*”

4. Justiciability of 9th Schedule- The insertion of the Article 31-B read with 9th Schedule was an attempt to make property right reform by the Parliament in 1951. These provisions empower Parliament to provide immunity of Fundamental Rights to the laws included in the Ninth Schedule, once the laws passed by the legislature are placed in the Ninth Schedule of the Constitution, they instantly become immune from any judicial challenge on the ground that they violate any of Fundamental Rights enumerated in Part III of the Constitution. Unfortunately, this Ninth Schedule has been misused for the political gain and to show the supremacy of Parliament by incorporating controversial laws and this is the starting point of tussle between legislature and judiciary. Legislative enactments are incorporated into the 9th Schedule and immunized against all attacks on the grounds of breach of any of the Fundamental Rights. Since 1951, the Ninth Schedule has been expanded so much that today 284 Acts are included therein. Till the *Shankari Prasad*²² and *Sajjan Singh*²³ case, the Court's view was in conformity and similar with that of the Legislature. The Supreme Court was of the view that there was no threat from the enhanced power of the legislature and that the agrarian reform was necessary to curb down the menace of poverty and change the system unequal distribution of land holdings in the countryside. In case of *Golaknath V State of Punjab*²⁴ the Apex Court held that if an amendment abridged or took away a Fundamental Rights guaranteed by Part III of the Constitution, the amending act itself was void and *ultra vires*, in other words, Parliament has no power to amend or take away the fundamental rights enshrined under Part III of the Constitution. Subsequently in *Keshvanand Bharti V State of Kerala*²⁵ the Supreme Court held that all the provisions of the Constitution can be

²² *Shankari Prasad v. Union of India*, AIR 1951 - SC 458.

²³ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

²⁴ *I.C Golaknath v. State of Punjab*, AIR 1967 SC, 1643

²⁵ AIR 1973, SC 1461

amended, but the provision affecting the basic structure of the Constitution could not be amended. Again in case of *Waman Rao V Union of India*²⁶, the Supreme Court held that the amendment to the Constitution which was made before April 24 1973, and by which the Ninth Schedule to the Constitution was amended from time to time by addition of various Acts and Regulations are valid and constitutional. The Amendments of Ninth Schedule after April 24, 1973 are open to challenge on the ground that they are beyond the constituent power of the Parliament since they damage the basic structure of the Constitution. *I.R.Coelho v. State of Tamil Nadu*²⁷, the Apex Court held that even though an Act is put in the Ninth Schedule by a Constitutional amendment, it would be open to challenge on the ground that it destroys the basic structure or the fundamental right or rights taken away or abrogated pertains to the basic structure.

5. Whether the terms and conditions of admission of a new State are justiciable?- In *R.C. Poudyal and Anr. etc. Vs. Union of India and Ors. Etc.*²⁸ court held that the power to admit new States into the Union under Article 2 is, no doubt, in the very nature of the power, very wide and its exercise necessarily guided by political issues of considerable complexity many of which may not be judicially manageable. But for that reason, it cannot be predicated that Article 2 confers on the Parliament an unreviewable and unfettered power immune from judicial scrutiny.

6. Justiciability of political covenant- In *Kanwar Shri Veer Rajendra Singh v. Union of India*,²⁹ a Bench of five learned Judges has pronounced on the non-enforceability of the provision for payment of Privy Purse under Article 291 by resort to legal proceedings. Further in *Raghunathrao Ganpatrao Etc. Etc. V. Union Of India*³⁰ court held that the treaties/covenants/etc. entered into between the Union of India and the Rulers were as a result of political action. No justiciable rights were intended to be created. Rights arising out of covenants which were non-justiciable cannot be regarded as basic features.

7. Justiciability of the recommendations of the Chief Justice of High Court- In *N. Kannadasan V. Ajoy Khose and others*³¹, court held that the Chief Justice of a High Court, while making recommendations, exercises statutory functions. While it is incumbent upon the State Government to consult the Chief Justice, indisputably the Chief Justice of the High Court would have a heavy burden on his shoulder to recommend the name of a person who would be suitable

²⁶ (1981) 1 SCC 166

²⁷ AIR 2007 SC 861; (2007) 2 SCC 1

²⁸ 1993 AIR 1804

²⁹ (1970) 2 SCR 631

³⁰ (1993) 1 S.C.R. 480

³¹ CIVIL APPEAL NO. 7360 OF 2008

therefor. We are not oblivious of the fact that no court howsoever high would have any power of judicial review in relation thereto. Power of judicial review, although is very restricted, cannot be denied to be exercised when relevant fact is not considered. What is not the subject matter of judicial review is the opinion of the Chief Justice touching upon the merit of the decision but the decision making process is subject to judicial review. In this case the justiciability of the recommendation of the Chief Justice of Madras High Court, for appointment of Shri N. Kannadasan as the President of the State Consumer Disputes Redressal Commission, under Section 16 of the Consumers Protection Act, 1986, was involved.

8. Justiciability of appointments under Article 217(1)- In *M. Manohar Reddy & Anr. V. Union of India & Ors.*³², the Court held that the appointment under 217 is justiciable, if “eligibility for appointment” is put in question. Eligibility is based on objective facts and it is, therefore, liable to judicial review. But, suitability pertained to the realm of opinion and is, therefore, not amenable to any judicial review. There is a basic difference between “eligibility” and “suitability”. The process of judging the fitness of a person to be appointed as a High Court Judge falls in the realm of suitability.

9. Justiciability of cases relating to transfer of judges- In *K Shoka Reddy Etc. V. The Govt. Of India And Others*³³ court held that in these cases the area of justiciability is very limited and the tool of judicial review can be used only on the petition of transferred judge alone because he has only the *locus standi* to challenge the transfer. In these cases the judicial review is not available on the ground of arbitrariness or bias.

10. Justiciability of the satisfaction of the President, under article 356- In *Rameshwar Prasad And Ors. V. Union Of India And Anr*³⁴, court accepted the majority view of *S. R. Bommai*³⁵ case and held that the satisfaction of the President while making a Proclamation under Article 356 (1) is justiciable and it would be open to challenge on the ground of mala fides or being based wholly on extraneous and or irrelevant grounds. And the principles evolved in *Barium Chemicals*³⁶ for adjudging the validity of an action based on the subjective satisfaction of the authority created by statute do not, in their entirety, apply to the exercise of a constitutional power under Article 356.

³² (WRIT PETITION (CIVIL) NO.174 OF 2012) February 4, 2013

³³ **7 FEB 1994, SCR 1994 1 Pg.662**

³⁴ Writ Petition (civil) 257 of 2005

³⁵ (1994 (3) SCC 1)

³⁶ *Barium Chemicals Ltd. and Anr. v. Company Law Board and Ors.* (AIR 1967 SC 295)

11. Justiciability of the Speaker's order- In *D. Sudhakar & Ors. V. D. N. Jeevaraju & Ors*³⁷. Court held that Speaker's order on account of the expression of finality in paragraph 2 of the Tenth Schedule to the Constitution, did not bar the jurisdiction of the superior Courts under Articles 32, 226 and 136 of the Constitution to judicially review the order of the Speaker.³⁸

Conclusion:

Law prescribes the jurisdiction and the need of justice makes the way for justiciability. When the provisions of the constitution are clear and there is no ambiguity about the intention of the legislature, the judiciary has very small role, that is, only to give effect the intention of the legislature. The three organs of the government i.e. legislative, executive and judiciary have their own sphere of action. The essential work of the legislative body is to make laws; essential work of the executive is to execute those laws; and, the essential work of the judiciary is to adjudicate the rights and duties between the entities in the state. In spite of this there no strict separation of power. Weakness of one organ empowers the other organ to be active for the sake of justice.

Though, the judicial activism is the mature face of the judicial review, this maturity is not self generated. It is the cry for justice and ignorance of other branches of the government that make our judiciary active, and judiciary has gone one step further from mere judicial review. Because of demand of justice many cases in which though there is express provision of non-justiciability becomes justiciable. In this way judiciary has to go beyond its jurisdiction and when this overstepping and activism become over-activism, the consequential tussle among the organs of the government becomes apparent.

Every person has his own philosophy of life and judges are not exception of this fact. Here we may say that the philosophy of the judges is the living source of the law. They decide cases for the community as whole and when they decide for community their decision become precedent. They make the black latter law according to the situation and social needs. In doing so one may say that they are going beyond their jurisdiction and breaking the law but in fact it is not the breaking of law, it is molding of law according to time, place and situation.

³⁷ CIVIL APPEAL NOS.4510-4514 OF 2011

³⁸ See further *KIHOTO HOLLOHAN Vs. ZACHILLHU AND OTHERS*, 1992 SCR (1) 686/ *Raja Ram Pal vs The Hon'ble Speaker, Lok Sabha & Ors*, Writ Petition (civil) 1 of 2006/ *SUB-COMMITTEE ON JUDICIAL ACCOUNTABILITY ETC. ETC. Vs. UNION OF INDIA AND ORS., ETC.*, 1992 AIR 320

Can the judicial guidelines be enough? A case study on sexual harassment in Bangladesh

Ferdous Rahman*

ABSTRACT

The sexual harassment cases in Bangladesh are judged at institutional capacity under the Guidelines of the High Court Division (HCD) of the Supreme Court of Bangladesh. Despite the verdicts in 2009 and 2011 and the governmental commitment in its report 2015 on CEDAW to pass statutory law, it is yet to come. The empirical evidence shows lack of proper administration to combat this vice and lower rate of disposal of cases. Nevertheless, the jurisprudential analysis of judicial activism infers restrictive views on declaring as act as offence by judges instead of legislation which is interpreted as an encroachment to the democracy of the legislators. Bangladesh constitution also holds the same spirit. The continuous judicial activism in woman rights and safety related issues critically questions the seriousness of the government in this regard. From a more pragmatic view, the experiences of the others countries including India, Canada, Japan, USA also emphasized on statutory law followed by judicial directions in the same context. Being imbibed by the activism of these countries, the government of Bangladesh should focus on fulfilling its commitment to bring laws for preventing sexual harassment to maximize safety, security and personal liberty of the female in the country.

KEY WORDS:Sexual harassment, Bangladesh, Statutory law, Judicial activism, Governmental role.

PART A. Introduction

The Bengali culture receives acknowledgement for its secular celebration of its festivals but such celebration got disrupted with the heinous incident of sexual harassment to women in Bangladesh on the occasion of celebrating the first day of Bengali New Year of 2015 (“Outrage over sex assault,” 2015). It is yet to achieve its prestige back as the victims have been denied justice till date. Police submitted final report on the ground of non-identification of the perpetrators even though the men doing the harassment were reportedly seen in CCTV footage (“Pohela Boishak Sexual Harassment,” 2016). Moreover the media questioned the silent presence of the police at the time of occurrence which was unheard by the government (“Boishak celebration,” 2015). Even some ministers were also reported stating these incidents as insignificant (“Shipping Minister describes,” 2016). The broader scenario of sexual harassment in Bangladesh is more alarming. The survey conducted by international NGO result shows that 76% of women in Bangladesh under the age of 18 and 44% of women above this age faced sexual harassment at some point of their lives (“Women get sexually harassed,” 2014) and 91% of women in Bangladesh are sexually harassed at some point of their lives (Action Aid, 2014; Bakkar, 2013). The data of UN infers that sexual harassment cases increased by 76% at tertiary level of education (Bhagani, 2015). The situation gets worse when the victims are blamed for these cases (Haspels, Kasim, Thomas and McCann, 2001). In the survey, it was found that 65% women who went to the police to complain were blamed by the police for the harassment (Haspels, et al., 2001). One of the reasons behind the sexual harassment complaints remaining unheard is inadequacy of statutory law (“Cities are mostly unsafe for woman,” 2014). In current legal regime of Bangladesh, the single

* Assistant Professor, Department of Law & Justice Jahangirnagar University

provision relevant to sexual harassment in the Penal Code 1860 i.e. 509, declares verbal action or gesture derogating a woman's modesty as an offence. However so far there has been only one case upholding the perpetrator liable under this section (*Mohammad Sharif v. State*, (1957)). Pursuant to three different public interest litigations, the High Court Division of the Supreme Court of Bangladesh gave directions in the form of guidelines to combat the sexual harassment in the society (*BNWLA v. Bangladesh*, (2009); *BNWLA v. the Government of Bangladesh and Others*, (2011)). Gradually through these guidelines, the scope of directions became wider. The first and second writ petitions passed the guidelines for the sexual harassment occurred in educational institution and the work places whereas the third one (*BNWLA v. Bangladesh Government and Others*, (2011)) covers the sexual harassment incidents occurred in any places. Moreover, the third writ petition defined stalking as an extended form of previously defined sexual harassment. Foundation of sexual harassment law through judicial activism is not new. Similar examples can also be found in the United States (*Meritor Sav. Bank, FSB v Vinson* (1986); *Harris v Forklift Systems Inc.*, (1993)), India (*Vishaka and Others v State of Rajasthan*, (1997)), and Japan (*Hanrei Taimuzu* 238, 580 *RodoHanrei* 17 (1991)) etc.

Since Bangladesh follows the doctrine of *stare decisis* (The Constitution of People's Republic of Bangladesh, Article 111), the guidelines hold the status as binding precedent pending the enactment of statutory law. Here this research questions the effectiveness of judicial activism in the mind of the people in absence of statutory law. It also aims to critically analyze the role of the government in presence of such judicial guidelines. This paper is focused on exploring the answer on sufficiency of judicial guidelines instead of a statutory law for combating the vice of sexual harassment in Bangladesh and giving justice to the victims. The paper would contain six parts apart from the introduction and the conclusion. The second part starts with the jurisprudential analysis of judicial activism followed by third and fourth part explaining the background and the provisions of the guidelines given by the Supreme Court. The fifth one critically analyze the government's role whereas the sixth part digs into the precedents from the other states with particular focus on the US, India, Japan and Canada. The seventh part finally argues the sufficiency of judicial activism on sexual harassment cases and the necessity of statutory law in this regard followed by the concluding remark.

Part B: Jurisprudential analysis of judicial activism

Practice of judicial activism has increased all over the world (Condeixa, 2012). Particularly in Bangladesh, whenever the statutory laws are found to be inconvenient, the pro-bono lawyers knock the door of the court for its guidelines. The victory of such litigation occurred in Bangladesh when the access to court is ensured to all including for environmental justice through public interest litigation (*Dr. M. Farooque v. Bangladesh* (1997)). Having the root of legal system of Bangladesh in common law countries (David & Brieley, 1978; Jain, 1990), the presence of strong judicial activism is not a surprise. The common law judges play their role as law maker to fill up a gap in case of "the real, big, theoretical (and practical) issues at stake" (Chiassoni, 2006). Its emergence was termed as a supposition by Hans Kelsen. He observed the application of judicial activism when there is a "lack (of legal order), based on a subjective, moral-political value judgment, of a certain legal norms within a legal order" (Kelsen, 1967). Justice Dyson Heydon of the High Court of Australia

defined judicial activism as action of the court beyond determining rights and liabilities between the parties in dispute (Heydon, 2003).

Judicial activism can be against the government to establish the separation of powers named as executory judicial activism or fill up an existing legal vacuum called legislating judicial activism, (Voegelin, 1987). Both can be seen in judicial practice of Bangladesh. The former can be illustrated with the verdict of the Supreme Court of Bangladesh against the government to pay compensation to the deceased family on negligent death of the victim (“The Appellate Division upheld,” 2018) whereas the judicial activism of the High Court Division in defining sexual harassment as an offence is an example of the latter one.

In legislating judicial activism, the challenge is not what vice, the judge targets to remedy but who is responsible to implement the changes given by the verdict (*Dred Scott v. Sandford*, (1856)). Thus the acceptance of the judgment in the eye of the authority determines the effectiveness of activism. Because of the practical obstacles of the legislative process, both the sources of law (the statutory law and the judicial precedent) do not stand in the same footing (Condeixa, 2012). Notwithstanding the verities in legal priorities, because of the complexities in acting in timely manner and the procedural stages, judicial activism acts as a necessary tool to provide quick justice where the statutory law is silent. Still the longer reliance on judicial activism takes away the democratic opportunity from the parliamentarian to promulgate laws. It can run to the extent of the ‘consensual changes’ albeit perfect consensus is not possible, where no other instances exist to ensure justice (Condeixa, 2012). The American philosopher John Rawls termed it as overlapping consensus where the presumption lies in favor of existence of majority consensus to determine the dispute by judicial activism (Rawls, 1971).

Now the question arises whether such consensus exists for declaring any action as criminal offence by way of judicial activism. The role of judicial activism in criminal matters is different from the other cannon of law. With the elapse of time, the statutory offences replace the common law ones (Condeixa, 2012). The sexual harassment is not only violation of privacy of any woman but also a gender based discrimination irrespective of its place of occurrence (Kapur, 2008). Claypoole (1987) observed “*Sexual harassment is an important issue that must be addressed by Congress because it is demeaning conduct that deserves censure.*” The judicial activism in absence of domestic law is welcomed to meet the comprehensive need of the society but statutory law is always preferable (Claypoole, 1987; *Southern Pac. Co. v. Jensen*, (1917)).

PART C: Historical background of guidelines of the Supreme Court of Bangladesh

Previous to the filing of the writ petitions before the High Court Division, section 10,ⁱ the Nari O Shishu Nirjatan Daman Ain (Woman and Child Repression Prevention Act) 2000 and section 294,ⁱⁱ 354ⁱⁱⁱ and 509^{iv} of the Penal Code 1860 deal with the offences attributing as sexual harassment. Due to vagueness and insufficiently defined actions as sexual harassment, some right based organizations brought forward the issues before the court (*BNWLA v. Bangladesh*, (2009)).

The writ petition was filed by a national level NGO, named Bangladesh National Women Lawyers’ Association in 2008. The preparation to this writ petition can further be traced to a press conference organized

by 47 NGOs on 7th July 2008. In this press-conference, 333 unreported cases of sexual harassment were presented for the period of January to June of 2008. This press conference mentioned the incident of sexual harassment occurred Jahangirnagar University which made its faculty members raise their voice against the heinous act (“Sexual Harassment in Jahangirnagar University,” 2008). The initiation of this Social Resistance Committee got their root in a report of 2001 of International Labor Organization where the garments sector workers of Bangladesh identified as the most vulnerable to sexual harassment (Haspels, et al., 2001). This legal regime of sexual harassment began with the seven resolutions adopted by the Social Resistance Committee in its press conference held on 7 July 2008 (*BNWLA v. Bangladesh*, (2009)). Another attempt to provide a legal framework for sexual harassment cases was the guideline drafted the University Grant Commission in 2008. Afterwards, the Law Commission also formulated a draft guideline for sexual harassment complaints (8th Periodic Report to CEDAW, 2015). These actions helped to form this committee and subsequently filing the writ petition to the High Court Division (HCD) for guidelines on sexual harassment in workplace and educational institutions.

However, the scope of the guideline given in judgment of Writ Petition no. 5916 of 2008 was limited to sexual harassment incident in educational institutions and workplace. A year later in 2009, the women safety again came into question. Several incidents of ‘eve teasing’ resulting suicide of victims and murder of people protesting this social menace were reported in different print and electronic media (*BNWLA v. Government of Bangladesh*, (2011)). The same NGO filed another Writ Petition before the HCD in 2010 seeking the guidelines from the court about the eve teasing issues. Earlier to the guideline pursuant to the writ petition, situation was being dealt by executive rules.

In reply of issued *rule nisi* of the HCD pursuant to the Writ Petition no 8769 of 2010, the Ministry of Law, Justice and Parliamentary Affairs of the government mentioned about the proposed amendment to the Nari O Shishu Nirjatan Daman Ain (Woman and Child Repression Prevention Act) 2000 incorporating section 10A of penalty for sexual harassment which has not come into force yet. It further emphasized on inclusion of section 509 of the Penal Code in Schedule of the Mobile Court Act 2009 empowering the executive magistrate to punish the offenders at spot (*BNWLA v. the Government of Bangladesh and Others*, (2011)). However, till date one case was proved under section 509 of the Penal Code due to its vagueness and high level of proof required for conviction under this section (*Mohammad Sharif v. State*, (1957)).

PART D: Legal regime of sexual harassment before and after the issuance of guidelines

The aim of the judgment of the HCD in the Writ petition no 5916 of 2008 was to fill up the vacuum in statutory legislation as to sexual harassment cases. In particular, three fold objectives of the guideline were to create awareness about sexual harassment and its consequences and to make it a punishable offence (*BNWLA v. Bangladesh*, (2009)). It imposed the responsibility upon the employer of the work place and the concerned authorities of the educational institutions to take disciplinary actions to deter these offences. This guideline defined sexual harassment offence as any unwelcome sexually determined verbal, physical gesture or contact through SMS, phone calls, writing on wall, notice board, bench etc. to the victim by abuse of administrative,

professional or authoritative power over the victim. Such actions also include stalking, joking with sexual implication, showing pornography etc. Such action may be aimed at having sexual relation, demand or request for sexual favor, blackmailing or character assassination of the victim.

In order to achieve the first objective, the guidelines required the employers and the relevant authorities of the educational institutions to take orientation class to the new recruits as well as the fresh students before beginning of formal employment or classes. It also required arranging monthly and half yearly programs on sexual harassment for the employees and the students to create awareness about this guideline. These guidelines were to be printed in booklet form for dissemination purpose. Secondly, with a view to making the sexual harassment as punishable, the guideline obliged the employer and the concerned authority of the educational institution to make the working environment safe for women and in no way disadvantageous to them in comparison to the male colleague or fellow students. In case of commission of any action falling in the definition of sexual harassment, disciplinary action is to be taken against the offender.

A complaint committee is to be formed in every public and private educational institutions as well as workplace, consisting of minimum five members, headed by a female. Two members of this committee need to be from outside the organization and working on gender issue and abuse. This committee reports annually to the concerned authority of the government. This guideline states the detail procedure of the investigation of any complaint filed before the committee. Upon proving the complaint, the committee may suspend the guilty and take necessary actions in accordance with the disciplinary rules of the institutions. If such action falls in any offence under any statutory criminal law, it may further refer the matter to the court.

Subsequently in 2011, the HCD passed another judgment giving guidelines for sexual harassment in public places. It first signified the grievance of so call 'eve teasing' and defined such action as sexual harassment. It extended the scope of sexual harassment defined in the previous guideline and included stalking by way of any conduct intending to harass the victim sexually or causing apprehension of sexual harassment in the mind of the victim. Subject to certain exceptions, such conduct could be following the victim, contacting through letter, SMS, telephone or any medium, keeping her in surveillance, any actions causing fear in the mind of the victim as to safety of herself and her family (*BNWLA v. the Government of Bangladesh and Others*, (2011)).

In order to combat this social menace, the HCD requires every police station to have separate cell reporting to existing District Law and Order Committee of each district. This committee is to hold a "meet the people session" to inform the ordinary people regarding the sexual harassment incident of the district and the actions taken against them. Moreover, with a view to reducing the cyber harassment, this guideline requires the government to adopt necessary measures to regulate internet users in cyber cafes. In addition, the HCD directed the government to enact the amendment immediately and also emphasized on passing new laws as to protection of victim and witnesses to remove the fear from going to the court and to recognizing the audio and video recording as admissible evidence to increase the conviction of offenders which is currently significantly relied on the eye witnesses and they are scared of giving statement to the court.

Pending the compliance with these requirements, the HCD made its interim orders to the concerned ministries to direct its officers to combat sexual harassment cases, until the new laws come into force. The Inspector General of Police, the deputy commissioners and the Upazila Nirbari Officers (Sub-district Executive Officer) are directed to take immediate actions for the already occurred incidents and to issue high alert in their territorial jurisdictions respectively. Besides, the officers-in charge of the police stations are ordered to ensure protection to the victim and her family.

Part E: Role of the Government after the pronouncement of the guidelines

In the guidelines, the government was directed to enact law concerning sexual harassment immediately. However, there is no further initiative taken by the government. Even in the third writ petition, the government informed court by way of their affidavit pursuant to the *rule nisi* issued by the court that an amendment to the Women and Children Repression Restraint Act 2000 was proposed incorporating sexual harassment as an offence punishable with imprisonment not exceeding seven years. However till today, the proposed amendment has not been passed. The amendment to Nari O Shishu Nirjatan Daman Ain, 2000 (unofficially translated as the Woman and Child Repression Prevention Act, 2000) mentioned in the affidavit in compliance of the Ministry of Law, Justice and Parliamentary Affairs during the hearing of Writ Petition no 8967 of 2010 never came into force. The present section 10 of the said Act, does not cover the definition of sexual harassment given by the HCD in its judgment rather has a limited scope of actions falling in the category of sexual harassment. Section 10 of the Act 2000 needs to prove physical contact for sexual harassment whereas the definition given in the guidelines covered any verbal or physical gesture and even attempt to communicate through SMS or telephone calls.

The government is yet to enact the Sexual Harassment (Prevention) Act 2010 in light of the guidelines of the HCD. As a result, many educational institutions as well as workplaces have no complain committee for sexual harassment and left the female students and employees who are victims of sexual harassment without any remedy (Citizens' Initiative on CEDAW, 2016). According to a study, sexual harassment is increasing at an alarming rate as for instance 76% at tertiary level (Bhagani, 2015). Moreover no law is formulated based on the guideline of the HCD passed in 2010. The witness protection act which the HCD recommended in 2010 is yet to be enforced.

As a member of the United Nations, Bangladesh is under obligation to adopt a national work plan to eliminate violence against women under the Declaration of Elimination of Violence against Women (UNGA Resolution no A/RES/48/104 dated 20 December 1993). Even though the United Nation Resolution was adopted in 1993, the national work plan of Bangladesh adopted by the Ministry of Women and Children Affairs in 2013 set the target of enacting law on sexual harassment as per the guidelines of the court to be achieved by 2020-2021 whereas the guideline was passed on 2010 (Ministry of Woman and Child Affairs, 2013).

Despite the commitment of the government made by way of ratifying the Convention on Elimination of Discrimination against Women (CEDAW) and adopting the National Women Policy to enact laws to ensure woman rights, statutory laws on sexual harassment are yet to be formulated (the National Women policy,

2008; the CEDAW, 1993). Moreover, non-appearance of Ministry of Children and Women Affairs and Ministry of Home Affairs implied their lack of interest in these issues of women safety (BNWLA v. Bangladesh, 2011). Here it is noteworthy that strong judicial activism can be observed in the similar kind of cases as the sexual harassment, the so called ‘eve teasing’, banning of ‘two finger test’ of the rape victims (BLAST v. Bangladesh, 2013). Such consecutive public interest litigations are not mere con-incidents but imply the lack of seriousness of the government in protecting woman rights and safety.

PART F: Judicial activism in sexual harassment cases: Experience of US, Canada, India & Japan

Enactment of explicit legislation on sexual harassment has not been new. Many states either passed new law or amended the existing ones to prevent sexual harassment. Such as Sri Lanka amended its penal code and Costa Rica enacted new Act against sexual harassment in educational institution and workplace in 1998. However, development of laws on sexual harassment through judicial activism in is also not uncommon. The USA, Canada, India and Japan can be exemplified here. Nevertheless, all of them passed statutory laws subsequent to judicial direction. Thus these illustrations infer the pragmatic approach of the other states in combating sexual harassment cases:

a. India

Sharing the same legal historical background, the legal provisions before the guidelines of the court were same in both Bangladesh and India. A case which started with non-cooperation of the law enforcing agency while the victim complained the harassment and afterward such non-cooperation let the rape occurred, turned the Indian judiciary up-side down and opened the door of the court for comprehensive laws on sexual harassment and discrimination in workplace based on gender (*Vishakha and Others v. State of Rajasthan*, (1997)). In this case, the petitioner argued for equality entitled under their human rights in workplace based on CEDAW. The judges not only recognized sexual harassment as breach of equality but also violation of human rights. The court interpreted the international convention and commitment of the government to meet the contemporary need of the society and accommodate the sexual harassment cases in the existing legal regime in absence of the domestic law.

India formulated the draft rules of conduct in 2000, 2003, 2004, 2006 and 2010 since this landmark case (“Sexual harassment in work,” 2017). The Indian Law Commission first formulated their code of conduct on workplace incorporating the provisions on sexual harassment following the guideline passed by the Supreme Court (The Law Commission, 2000). Subsequently in 2013, the parliament passed Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act. The enactment of legislation in light of the court’s direction and the international instruments of CEDAW, Universal Declaration of Human Rights (UDHR) encompasses the safe society for women. (Kapur, 2008)

b. USA

As the sexual harassment cases did not fall in any particular category of offence. The US courts applied their interpretive power to define this kind of acts as an actionable cause of action (*Barnes v Costle*, (1977); *Tompkins v. Public Service of Electrics and Gas Co.* (1977)). The first case in USA on sexual harassment was

filed in 1986 (*Meritor Savings Bank v. Vinson*, (1986)). This case opened several questions on legal regimes of sexual harassment instead of any guideline and let the lower courts confused with the similar cases (Claypoole, 1987). The counsel of the Equal Employment Opportunity Committee (EEOC) recognized sexual attraction as a part of day to day life in their amicus curiae to the Supreme Court in this case and required the government (by way of enacting law) to regulate this situation with a “broad sweep”.

In November 1980 even before the case been filed, the EEOC published its first guidelines on sexual harassment upon receiving more than one thousand complains a year which increased more than 3453 after publishing the guidelines (EEOC Guidelines, 1986). In addition to this, twelve states had their own regulation on sexual harassment which were also held as insufficient to fill up the gap of federal laws on the ground of un-uniformity and lack of comprehensiveness (Claypoole, 1987). In order to remove the ambiguities, and bring uniformity in law, the USA Congress enacted laws on sexual harassment namely the Violence against Women Act in 1994 after the first judgment in 1986 (Fenton, 2018).

c. Canada

A comprehensive case on sexual harassment in Canada was filed in 1989 (*Janzen v. Platy Enterprises Ltd.*, (1989)). Before the enactment of law, the constitutional root of sexual harassment cases lied in section 15 of the Canadian Charter of Rights and Freedom which guarantees equal protection of law in workplace. The laws on sexual harassment at workplace came into force in 1981 by way of amending its human rights code after the pronouncement of judicial decision in 1980 and despite the legislations at the state levels (Campbell, 1992; *Bell v Ladas* (1980); *Coutroubis v Sklavos Printing* (1981)). In addition to the human rights code, the labor code of Canada also supplement the legal regimes governing sexual harassment cases “to employment free of sexual harassment” (the Labor Code (Canada), 1985).

d. Japan

Having no specific legislation defining sexual harassment as offence, the judges of the Japanese court declared sexual harassment as discrimination based on sex was thus violation of Japanese laws (*Hanrei Taimuzu* 238, 580 *RodoHanrei* 17 (1991)). The lack of awareness among the Japanese people about the sexual harassment put this types of cases beyond the reach of the court for very long time (Wolff, 1996). Having no explicit law on preventing sexual harassment, the academics and the judges concentrated on defining sexual harassment from the perspective of international instruments and attempted to remedy the action as tort case under section 709 of the Civil Code of Japan^v. Such lack of statutory law resulted the non-progress of sexual harassment cases after the district level court (Wolff, 1996). The positive development in Japan is the submission of draft amendment to the existing labor laws defining and banning ‘power harassment’ in workplace (Human Rights Watch, 2018).

PART G: Questioning the sufficiency of judicial guidelines instead of statutory law

Sexual harassment laws act as regulating human behavior at public places including workplace and educational institution. Censorship of any conduct can only be done through parliamentary enactments because the legislators represent the mass people whose behaviors are being regulated. Any action can be

declared as crime only through the laws passed by parliament which is a democratic practice (Claypoole, 1987) and also holds upper position in the hierarchy of sources of laws. Even there is increasing demand for parliamentary intervention in addition to judicial activism. At the same time, creating law is not the job of the judiciary. It can be an interim measure for the time being to meet the urgent demand of the society where the enactment of new law through parliamentary process takes time and may cause extra-ordinary delay to combat the situation (Wright, 1968). It was also clear from the wording of the judgment of the HCD that this guideline remains in action only until the formulation of laws by the Parliament. In accordance with the principles of the *stare decisis*, judiciary plays a vital role in fulfilling the vacuum of legal provisions (the Constitution of People's Republic of Bangladesh, article 111). However, from a constitutional standpoint, the Parliament should make the affirmative provision which the judiciary did by way of activism in the issue of sexual harassment (the Constitution of People's Republic of Bangladesh, article 111; Wright, 1968). Article 31 of the Constitution permits detriment to any person's life, body, property or reputation only in accordance with statutory laws. Furthermore the term law has been defined as any Act, ordinance, order, rule, regulation, bye law, notification, or other legal instrument and any custom or usage having the force of law in Bangladesh (the Constitution of People's Republic of Bangladesh, article 152). Here decision of judges has not been recognized as source of law. On the contrary, Art 111 of the Constitution gives the binding force of judgment of the Supreme Court of Bangladesh over the subordinate courts only.

The present guidelines imposed liability upon the employers to regulate the conduct of their employees which might fall on the definition of the sexual harassment. Such regulation is nothing but the disciplinary rules of the institution itself and the institutional agency has no power to make laws in declaring an action as offence (*Ansonia Bd. of Educ. v. Philbrook*, (1987)). The so called disciplinary rules of the educational institution or workplace leave the punishment at the discretion of the complaint committee and such action is uncertain and subjective also. It might create confusion among the employers as to control the behavior of their employees. In order to prevent sexual harassment action, certainty and coherence is must for which the legislator should come forward (Claypoole, 1987). The vulnerability of the victim in terms of her education, financial strength and social position also increases her probability of being harassed (Tangri, Burt, & Johnson, 1982). Thus leaving such vulnerability at the hand of institutional committee makes the situation as slippery slope as the mass people still do not take sexual harassment as serious issue (or an offence as no statutory law defines this kind of action as offence) but a mere 'joke' (Kapur, 2008).

Again in view of the given guidelines, no specific provisions except the definition of sexual harassment action is given rather left the action to be regulated in accordance with the provisions of existing laws. It states as follows, "*if the accused is found guilty of sexual harassment, the concerned authority shall treat it as misconduct and take proper action according to the disciplinary rules of all workplaces and the educational institutions in both public and private sectors...and/or shall refer the matter to the appropriate court or tribunal if the act complained of, constitutes an offence under any penal law*" (*BNWLA v. Bangladesh*, (2009)). It implies that the guideline has not declared any punishment for the acts of sexual harassment

instead left for existing laws. As a result, the legislative vacuum remained as it was. As noted earlier, action of molestation of women at public places, popularly called as “eve teasing” was defined as offence under section 509 of the Penal Code having insignificant implementation. Thus the shortcomings of the present legal provisions demand no further explanation. In terms of examining effectiveness of this guidelines, it shows that though initially the rate of filed complaint was higher but the rate of due disposal cases is very low in comparison to the cases filed under a statutory law (the 8th Periodic Report on CEDAW, 2015). Because many cases were settled locally. One of the reasons behind the local settlement of cases is the absence of statutory law.

Besides, administrative measures through ministries by virtue of judicial guidelines are not enough. As reluctance among the concerned ministries in participating the hearing of the writ petition was observed, question may also be raised on their seriousness about the guidelines of the HCD and compliance therewith. The Sexual Harassment Prevention Committee of the University Grant Commission found the existence of compliant committee in 30 public universities out of 39 and 49 private universities out of 95 (Jahan, 2018). Apart from this, the disposal of complaint rate is also not satisfactory (Ruhani, 2018). As the Such lower number of committees raises doubt as to the effectiveness of the guideline in absence of a statute. In view of such disinclination, judicial activism may not be a proper remedy here. Nevertheless, the piecemeal guidelines from the judiciary can never bring a fruitful result in the battle against sexual harassment (*Southern Pac. Co. v. Jensen*, (1917)). Hence, legislative measures are required for comprehensive solution to the issue. A statutory law will make the employers and the mass people to take the sexual harassment cases more seriously (Claypoole, 1987).

Following the similar trend, Bangladesh government was also supposed to enact a comprehensive law in this regard. However, no law including the proposed amendment mentioned in the affidavit is yet to be formulated. Despite having the guidelines in place, parliamentary laws have no better alternative. Such delay by Bangladeshi government raises doubt on their intention and understanding about the seriousness of the sexual harassment situation in Bangladesh. Then the question arises why the government is so inactive in taking stringent actions against sexual harassment whereas it is playing more active and vital role for other aspects of women rights and their protections such as enactment of National Women Development Policy 2011 despite massive opposition and physical protest from the so called Islamic fundamentalist (“Hefajat e Islam,” 2013), gradual revocation of reservations from CEDAW (UN Treaty Collection).^{vi}

PART H: Concluding remark

In recent years as illustrated in the introduction of this paper, the nation witnessed several heinous case of sexual harassment which left unaddressed in judicial procedures. Many other cases are reported in the newspaper and also recorded by the NGOs in their reports and publications. However, the government has still not taken any action in this regard. The legal regime of sexual harassment cases are solely based on two guidelines of the High Court Division. This guidelines first opened the institutional framework for the workplaces and the educational institutions to deal with the sexual harassment complaints and also provided

some directions on procedural matters to be followed while inquiring these complaints. One of the significant contribution of this guideline was the definition of sexual harassment which is a quite broad one and lacked in previous legislations.

In 2009, the nation faced similar social menace which was popularly called as 'eve teasing'. As per the newspaper report, people got murdered because of protesting such acts and many victims committed suicide consequent to this molestation. Another writ petition was filed by the NGO, named Bangladesh National Woman Lawyers Association (BNWLA) and pursuant to this, High Court Division pronounced another extensive judgment covering the issues of eve teasing. The significant feature of this judgment was the realization of seriousness of such action and the court declared this as a form of sexual harassment. Moreover, the previous judgment gave protection to women in workplace and educational institutions whereas this judgment provided provisions for protection from sexual harassment occurred in public places such as roads or transports. The court also ordered the concerned law enforcing agencies to take necessary actions for the proper implementation of these guidelines. However, at the same time, it also made this guideline as an interim measure till the enactment of statutory law. The government also showed its interest and plan to make amendment in the existing laws to incorporate the provisions of this guidelines in national laws. However, till date, no such amendment is made. Draft was submitted to the government in 2010 which has not seen any light yet.

In judgment, the committee is directed to hand over the offender to the law enforcing agency to prosecute him in accordance with national laws after taking disciplinary actions against him. Here lies the vacuum of national laws because no statutory laws have been enacted after these guidelines. Though the guideline defined sexual harassment as an offence but declared for punishment for the same. The philosophy behind such abstinence from the court was to show respect for the democratic nature of the Parliament and any action should be declared as offence and punishment should be decided by the parliament which is consisted of people's representative.

According to the definition of law given in the constitution of Bangladesh (article 152), judicial decision has not been included rather it is binding upon the subordinate courts only while deciding any similar cases. Moreover, the fundamental rights guaranteed in the Constitution of Bangladesh allow detriment to the body, property, reputation only in accordance with the law (article 111). In comparison to the other countries such as India, USA, Japan, Canada, it can be seen that though their sexual harassment law was originated from the judicial precedent, the government enacted the law as early as possible. Therefore, the government of Bangladesh should also focus on the gravity of the situation and makes laws in this regard.

ⁱ The Nari O Shishu Nirjatan Daman Ain 2000, s 10 defined any physical contact to a female or child and/or any indecent gesture or assaulting any woman with the intent of sexual pleasure as an offence of sexual harassment and is to be punished by way of imprisonment of 7 years but not less than 2 years.

ii The Penal Code 1860, s 295 defined any obscene act in any public place including singing, reciting and uttering any obscene songs, ballads or words, in or near any public space to the annoyance of others as an offence punishable with imprisonment of either description for a term that may extend to three months, or with fine, or with both.

iii The Penal Code 1860, s 354 stated that whoever assaults or uses criminal force on any woman, intending to outrage her modesty or knowing it likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

iv The Penal Code 1860, s 509 holds that whoever, intending to insult the modesty of a woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture is seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

v The Civil Code, Chapter 5 (Japan), Article 709. A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

vi For details, Art 2 of CEDAW states for Obligations of the state parties to eliminate discriminations against women. The other articles require the state parties to eliminate discrimination against women in their rights to family benefits (Art 13 (a)), same rights to enter into marriage (Art 16 (1) (c)) and same rights as to guardianship, ward ship, adoption of children etc. (Art 16 (1) (f)) (see the United Nations Treaty Collections)

References

Legislations:

The Charter of Rights and Freedom, section 15 (Canada)

The Convention on Elimination of Discrimination against Woman 1993, art 11 & 24 (International)

The Constitution of People's Republic of Bangladesh, Art 31, 32, 111 & 152 (Bangladesh)

The Declaration on the Elimination of Violence against Women [1993] UN General Assembly Resolution no A/RES/48/104 dated 20 December 1993 (International)

The Labor Code 1985, chapter 9, section 17 (Canada)

The Nari O Shishu Nirjatan Daman Ain 2000 (Bangladesh)

The National Women policy 2008, chapter 3.3 & 3.7 (Bangladesh)

The Penal Code 1860 (Bangladesh)

The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act 2013 (India)

Cases:

Ansonia Bd. of Educ. v. Philbrook, (1987) 107 S. Ct. 367, 372 n.6 (the United States)

Bell v Ladas [1980] 27 LAC, 2d, 227 (Canada)

Barnes v Costle, (1977) 561 F.2d 983 (D. C. Cir.) (the United States)

BLAST and Others v. Bangladesh and Others [2013] (Bangladesh)

BNWLA vs. Bangladesh, [2009] 89 BLC 694 (Bangladesh)

BNWLA v Government of Bangladesh & Others [2011] 31 BLD (HCD) 324 (Bangladesh)

Coutroubis v Sklavos Printing [1981] 2 CHRR D/457 (Canada)

Dred Scott v. Sandford, 90 US (19 Howard) 393 (1856) (the United States)

Dr. M. Farooque v. Bangladesh 49 DLR (AD) (1997) (Bangladesh)

Harris v Forklift Systems Inc., [1993] 510 U.S. 17 (the United States)

Janzen v. Platy Enterprises Ltd., (1989) 59 DLR. 4th 352 (Canada)

-
- Meritor Sav. Bank, FSB v Vinson*, [1986] 477 U.S. 57, (the United States)
- Muhammad Sharif v. State*, [1957] 9 D.L.R SC 27 (Bangladesh)
- Southern Pac. Co. v. Jensen*, [1917] 244 U.S. 205, 221 (Holmes, J., dissenting) (Holmes comments on the limitations of judicial action) (the United States)
- Tompkins v. Public Service of Electrics and Gas Co.* (1977) 568 F.2d 1084 (3rd Cir.) (the United States).
- Vishaka and Others v State of Rajasthan*, [1997] AIR SC 3011 (India)
- 745 Hanrei Taimuzu 238, 580 Rodo Hanrei 17 (1991) (Japan)
- Secondary sources:
- Action Aid (2014). *Women and the city III: a summary of baseline data on women's experience on violence in seven countries*. Dhaka, Bangladesh.
- Ain O Shalish Kendra (2008) *Sexual Harassment in Jahangirnagar University Campus*. Retrieved from <http://www.askbd.org/ask/2008/09/14/sexual-harassment-jahangirnagar-university-campus/>
- Bakker, K. J. (2013). *Eliminating Sexual harassment of adolescent girls in Bangladesh: a comparative analysis of multilevel strategies*. Capstone Collection. 2592.
- Bhagani, H. (2015). *Addressing Sexual Harassment in Universities. Bangladesh: the UN Women*. Retrieved from <http://asiapacific.unwomen.org/en/news-and-events/stories/2015/09/addressing-sexual-harassment-in-universities>
- Boishakh Celebration: *Women Harassed Near TSC*. (19 April 2015) *The Dhaka Tribune*. Retrieved from <http://www.dhakatribune.com/bangladesh/2015/apr/15/women-sexually-harassed-du-campus>
- Citizen's Initiative on CEDAW, Bangladesh (CIC-BD) (2016), Status Implementation of UN CEDAW Concluding Observation 2011*.
- Condeixa, F. (2012). *Parallels between judicial activism in Brazil and Australia: A critical appraisal*. *The Western Australian Jurist*, 3, 103-125.
- Campbell, D. A. (1992). *The Evolution of Sexual Harassment Case Law in Canada*. Queen's University Industrial Relations Center (IRC).
- Chiassoni, P. (September, 2006). *A Tale from Two Traditions: Civil-law, Common-law, and Legal Gaps*. Paper presented at the American-Italian Seminar on Relations between the Ius Commune and English Law, Facoltà di giurisprudenza, Geneva.
- Claypoole, T. F. (1987). *Inadequacies in Civil Rights Law: the need for sexual harassment legislation*. *Ohio State Law Journal*, 48(4).
- Cities are mostly unsafe for women*. (2014, October 29). *The Daily Star*. Retrieved from <http://www.thedailystar.net/cities-mostly-unsafe-for-women-47878>.
- David, R. & Brierley, J. E. C. (1978). *Major legal systems in the world today: An introduction to the comparative study of law*. New York: The Free Press.
- Equal Employment Opportunity Committee (1986). *EEOC Guidelines on Discrimination Because of Sex*. The United States.
- Fenton, M. K. (2018). *A History of Sexual Harassment Laws in the United States*. Retrieved from <https://www.wenzelfenton.com/blog/2018/01/01/history-sexual-harassment-laws-united-states/>.
- Haspels, N., Kasim, Z. M., Thomas, C. and McCann, D. (2001) *An Action against the Sexual Harassment at the Work in Asia and Pacific*. International Labor Office.
- Hefajat e Islam: Islami Coalition*. (2013, May 06). *BBC News*. Retrieved from <http://www.bbc.com/news/world-asia-22424708>.
- Heydon, D. (2003). *Judicial Activism and the Death of the Rule of Law*. *Quadrant*, 47(9).

-
- Huda, T. (2018, August 07). *The Appellate Division upheld the verdict of the High Court Division to pay compensation to Zihad's family on his death due to negligence of the Water Supply Body of Bangladesh government. Judicial Activism in Constitutional Tort. The Daily Star. Law & Our Rights.*
- Human Rights Watch (2018, December 02). *Japan: end workplace harassment, violence: Labor ministry's draft proposal fails to prohibit abuse. Retrieved from <https://www.hrw.org/news/2018/12/02/japan-end-workplace-harassment-violence>.*
- Jain, M. P. (1990). *Outlines of Indian Legal History. Bombay: N. M. Tripathy (P) Ltd.*
- Jahan, N. (2018, April 06). *A deafening culture of silence. The Daily Star. Retrieved from <https://www.thedailystar.net/star-weekend/spotlight/deafening-culture-silence-1558549>.*
- Kapur, N. (2008, May). *Sexual Harassment and Law Reform in India. United Nations. Presented in Expert Group Meeting on Good practices in legislation on violence against woman. Vienna, Austria.*
- Kelsen, H. (1967). *The Pure Theory of Law. California: University of California Press.*
- Outrage over Sex Assault. (2015, April 16). *The Daily Star. Retrieved from <http://www.thedailystar.net/frontpage/outrage-over-sex-assault-77496>*
- Pohela Boishakh Sexual Harassment an inconsequential incident. (09 March 2016) *The Dhaka Tribune. Retrieved from <http://www.dhakatribune.com/bangladesh/2016/mar/09/pohela-boishakh-sexual-harassment-inconsequential-incident>.*
- Rawls, J. (1971). *A Theory of Justice. Harvard: Harvard University Press.*
- Ruhani, R. A. (2018, April 16). *Universities reluctant to share sexual harassment info with UGC. The Daily Star. Retrieved from <https://www.dhakatribune.com/law-and-rights/2018/04/16/universities-reluctant-give-ugc-sexual-harassment-info>.*
- Sexual Harassment in Work: the Limits of Law. (2017, April 02) The Hindu. India.*
- Shipping Minister Describes Pohela Boishakh Sexual Harassment as Insignificant. (03 March 2016) BD News24. Retrieved from <http://bdnews24.com/bangladesh/2016/03/08/shipping-minister-describes-pahela-baishakh-sexual-harassment-as-insignificant-incident>.*
- The Law Commission of India (2000) 172nd Report on Sexual Assault Law Reform. India.*
- The Ministry of Women and Children Affairs (May 2015) The Eighth Periodic Report on CEDAW. The Government of Bangladesh.*
- The Ministry of Women and Children Affairs (2013) National Work plan to prevent Violence against Women. Bangladesh. Retrieved from <http://www.mowca.gov.bd/site/page/a21d8ca7-c186-4f7f-b376-978d6e4d11d2/National-Action-Plan-to-prevent-violence-against-women-and-children-2013-2025>.*
- Tangri, S. S, Burt, M. R. & Johnson, L. B. (1982). *Sexual Harassment at Work: Three Explanatory Models. Journal of Social Issues. 38, 55-74.*
- United Nations Treaty Collections, Retrieved from <https://treaties.un.org>.*
- Voegelin, E. (1987). *The New Science of Politics: An Introduction. US: University of Chicago Press.*
- Women get sexually harassed more at public places in Bangladesh: Study. (2014, October 28). BD News24 <http://bdnews24.com/bangladesh/2014/10/28/women-get-sexually-harassed-more-at-public-places-in-bangladesh-study>.*
- Women Policy Detractors: Do not use religion for party politics. (2011, April 04). the Daily Stars*
- Wolff, L. (1996). *Eastern Twists on Western Concepts: Equality Jurisprudence and Sexual Harassment in Japan. Pacific Rim Law and Policy Journal, 5(3).*
- Wright (1968). *The Role of Supreme Court in a Democratic Society- Judicial Activism or Restrain?. Cornell Law Review, 54(1)*

Sustainable Development: Environmental Perspective

Manoj Kumar¹

Abstract

Development is the need of the hour for human progress. But in the rush for progress and economic development man should not compromise the ability of the present and future generations to fulfill their needs from natural resources. This does not mean shutting the door to all the developmental activities. There is often a perception that environmental management runs counter to development. But it is increasingly clear that sound conservation and use of the environment is better viewed as a foundation for development.

It was issues surrounding the environment and ecology that brought modern concepts of sustainability to the fore. One of these ideas is the recognition of the connectedness of all of nature. In many cultures, this concept has been the basis of life experience and philosophy since time immemorial. In others, there has been a tendency to set human experience apart from its natural surroundings, or at least to see humans as having the ability and obligation to control nature for their own benefit.

In this paper the author will try to explore and discuss the concept of development and sustainable development and their interface with environment.

Key Words: *Environment, Development, Sustainable Development*

Introduction

Development is a continuous process; even the most developed countries of the world strive to develop further. Therefore, distinction between developed, developing and underdeveloped is in a true sense an illusion. In the advanced countries, however, economic developments have caused unprecedented crises for the environment resulting in pollution of air-space, waters and land areas. In the under- developed countries, the deterioration in environment is due to poverty and inadequate development. Economic development without sustainable impact on environment has been the central cause of deterioration of global environment.²

Sustainable development is a concept of good and sound economic growth, a growth that can be maintained indefinitely with no or minimal damage to the environment. Good environment will ultimately beget good economics. However, exploding population, accelerated resource exploitation and development based on careless application of technology are the chief causes of environmental crisis. Sustainable development is the very answer to these problems. It should not be environment or development; but environment and sustainable development. Science and technology, compatible

¹ Assistant Professor of Law and Ph.D. Research Scholar at Hidayatullah National Law University, Atal Nagar, Raipur, Chhattisgarh, India.

² Prof. S. Bhatt, Environment Protection and Sustainable Development, A. P. H. Publishing Corporation, New Delhi, (2013), p. 12- 13.

with environment, is the remedy to the malady.³ The challenge before mankind is to make use of knowledge without adverse impact on the environment

Meaning of development

Development is known as a dynamic process of improvement, as implementing a change, or evolution, as growth and advancement of an urban area. It is also known as a phenomenon that suggests that the people are able to control the future of their city. It is known as the phenomenon in which people can improve the living conditions in the world. In the modern world development can also stand for scientific developments or biological developments. It can also be used in Engineering and Technology, in Business, Marketing and Commerce. Development can also be in the life of an individual, personal or professional development.

Development is a process that involves use of both natural and man made resources. Economic development comprises a highly resource consuming activity. The adequate availability of resources like land, water, forests, etc. are required not only for a healthy ecosystem, but also for a sustainable long- term economic growth. The attempt to large scale production of consumer's goods requires large scale exploitation of these resources, thereby causing environmental problems like deforestation, desertification, soil erosion, global warming, ozone depletion, salinity, water pollution, air pollution etc. The growth process causes continuous depletion and degradation of the natural resources. As long as economic activities are at a level below the regenerative capacity, there is no secular decline in the quality and quantity of these natural resources. The problem emerges⁴ when these limits are transcended and when secular decline in the quality and quantity of natural resources takes place.

Right to development

By 1982, the United Nations General Assembly declared that the right to development is an 'inalienable human right' and emphasized that UN should give attention not only to human rights aspect of development but also the developmental aspect of human rights. This position was adopted on 4th December 1986 by the UN Declaration on the Right to Development. It recognizes that "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of well- being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of

³ M. G. Chitkara, *Environmental Impact Assessment*, APH Publishing Corporation, New Delhi (2015), p 51.

⁴ The problem crops up in two respects, firstly when natural resources are over exhausted and secondly when the discharges from economic activities are more than abating capacity of the nature. In both cases natural resources are depleted, which puts limit to the sustainability of the growth process.

benefits resulting therefrom.”⁵ It also recognizes that “international peace and security are essential elements for the realization of the right to development.”⁶ It proclaims that “The right to development is an inalienable human right by virtue of which every human being and all the people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁷ It underscores that “The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”⁸ It highlights the duty of the states “to cooperate with each other in ensuring development and eliminating obstacles to development”.⁹ “States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.”¹⁰ The hallmark of this declaration is three- fold: *One*, it conceives development as a fundamental human right. *Two*, it holds individual states primarily responsible for striving to achieve it. *Three*, it also holds them collectively responsible to pursue the goal through international cooperation.¹¹ Indeed, as the above declaration conceives it, development is a multifaceted process and it encompasses all essential conditions of human life. Equitable access to basic resources is an ingredient of the right to development.¹² Development does not mean development of the elite and urban rich alone, but also of the masses- people living in the villages, mountains, hills, forests, slums, and also in coastal regions.

Meaning of sustainable development

The earlier concept of development was only economic development. It was a narrower concept of development. The concept of sustainable development is a recently developed concept of development which has a broader perspective with additional and important perspectives of social and environmental. This concept emerged in 1970s. Sustainable development has been practiced by many cultures but the industrialized world first became interested in the concept in the 1960s. Many

⁵ A/Res/41/128 of 4 December 1986, 2nd preambular para.

⁶ *Ibid.*, 11th preambular para.

⁷ *Ibid.*, Article 1(1).

⁸ *Ibid.*, Article 2(1).

⁹ *Ibid.*, Article 3(3).

¹⁰ *Ibid.* Article 4(1).

¹¹ Professor (Dr.) V. S. Mani, “Globalisation, Development and Human Rights” in Shatish C. Shastri, *Human Rights, Development and Environmental Law- An Anthology*, Bharat Law Publication, Jaipur, (First Edition-2006), p 106.

¹² The United Nations Declaration on the Right to Development 1986, Art. 8(1) imposes on the member states an obligation to undertake all necessary measures for the realization of the right to development, and to ensure inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing and employment.

credit Rachel Carson and her book “The Silent Spring”¹³ as the catalyst for worldwide acknowledgement of environmental problems. The term sustainable development was brought into common use by the World Commission on Environment and Development in its report “Our Common Future”. According to Brundtland Report (World Commission on Environment and Development), 1987 sustainable development is that development which meets the needs of the present without compromising the ability of the future generations to meet their own needs.”¹⁴ Thus, sustainable development is a pattern of resource use that aims to meet human needs while preserving the environment so that these needs can be met not only by the present, but also by the future generations. Two common features of these definitions of sustainable development are fairness across generations and fairness within generations. Thus, it enshrines in it the principle of intra-generational equity and intergenerational equity.

The concept of sustainability is the exploitation of resources for indefinite period without damaging their structure and function. Sustainability does not mean that resources must remain untouched rather it means that their rate of use should be chosen so as not to jeopardize resources. This implies using the extracted resources in such a way that it contributes to the long- run economic growth. Sustainability is an important criterion for an eco- friendly and just society. The transformation to such a socio- ecological society requires creating sustainable organization that can serve as models for a sustainable society. The quality of sustainability does not mean indefinite persistence and ability of selected few to sustain themselves by ensuring their own continued existence but continued human development in a healthy environment. The kind of development that we are trying at present is largely based on a socio- economic model.¹⁵

There is common understanding that sustainable development implies a better balance between economic, social and environmental goals in policy formation as well as long term perspective about the consequences of today’s activities such as industrialization and urbanization etc. Sustainable development is capturing the attention of planners, politicians and business leaders.

¹³ Rachel Carson, *The Silent Spring*, Penguin Books (1962).

¹⁴ Unfortunately this definition remained vague and little guidance was offered on how countries could develop coherent sustainable development policies. At first sight, the definition does not assume an immediate connection between economic development and the environment; however, a careful analysis permits the observation that, essentially, it is based on the concept of ‘necessity’, which leads one towards the understanding of economic development as a means for improving the quality of life. The quality of the environment is the essential characteristic of the quality of life in a certain society, therefore, becoming the essential characteristic of the quality of economic development. According to this view, the interdependence between the objective of economic development and that of the conservation of the environment becomes explicit.

¹⁵ Md. Reyazuddin and Ram Pravesh Singh (eds.), *Challenges to Sustainable Development in India*, Deep & Deep Publications Pvt. Ltd., New Delhi (2010), p. 4.

Within the academic sphere its study is increasingly breaching disciplinary boundaries to become a focus of attention for natural and social scientists alike in studying such a key concept, it is vital that there is a clear definition of what it means, how it is applied on the ground and the influence it exerts upon people's perceptions of change in the physical environment, economic activity and society. Ignoring the issues of sustainable development has many possible consequences, such as rising sea levels, extreme droughts, erosion, and loss of forests, increase in slum populations, species extinctions and collapsing fisheries.

The field of sustainable development can be conceptually broken into three constituent parts: environmental sustainability,¹⁶ economic sustainability¹⁷ and sociopolitical sustainability¹⁸. These three constituents are interdependent. These three are referred to as the triple bottom line and used to gauge the success of a particular development project. Each component is given equal attention in order to ensure a sustainable outcome. This balance becomes obvious when each component is examined individually.¹⁹

The achievement of sustainable and equitable development remains the greatest challenges facing the human race. Environment is one of the most important elements which are directly connected with economic development. So, economic development and environment are the two sides of the same coin. But the environmental constraints limit development and in turn development causes serious environmental damage impairing the quality of life for the future generations. A number of environmental problems are already very serious and require urgent attention. The main aim of economic development is to provide comforts and decencies of life to the human race and make

¹⁶ The environment component requires sustainable resource use, efficient sink function and maintenance of stock of natural capital, i.e. the environment should be able to perform its three functions efficiently and uninterrupted so that ecological stability and resilience are not affected.¹⁶ Natural environment provides aesthetic and recreational values apart from more fundamental services without which human life cannot survive. Environmental sustainability requires that the fundamental services provided by the environment be sustained at or above some minimum levels over time. A major issue for environmental sustainability is how far ecosystems can be depleted and pollutants allowed to accumulate in the atmosphere without threatening global life- support systems.

¹⁷ The economic aspect of sustainable development requires that societies pursue growth path that generate optimal flow of income while maintaining their basic stock of manmade capital, human capital and natural capital, internalizing all costs including the environmental costs associated with production and consumption.¹⁷ In the economic dimension of sustainable development only the sustainability of consumption and the contribution of natural resources to production is dealt with.

¹⁸ The social dimension of sustainable development is built on the twin principles of justice and equity. For a development path to be sustainable, health, resources and opportunity should be equitably shared. All citizens should have access to minimum standards of security, human rights, and social benefits such as food, health, education, shelter and opportunities of self- development. Social equity implies equal opportunities to all for education and for making productive contribution to society.

¹⁹ Md. Reyazuddin and Ram Pravesh Singh (eds.), *Challenges to Sustainable Development in India*, Deep & Deep Publications Pvt. Ltd., New Delhi (2010), p. 41.

human living happier. Environment plays a protective and promotional role in the survival of humanity. Environment alone cannot make human life decent and livable, nor economic development can provide solutions to all our economic ills. There is a close relationship between economic development and environment. Both are absolutely vital for humanity. Thus, development without environmental considerations ruins the human life support system. Sustainable development aims at reconciling man, nature, and development for a better future.²⁰

Poverty and Sustainable development

Poverty contributes equally to both- population growth and environmental pollution. “Poverty” has been defined as “the inability of an individual or household to attain a minimal standard of living.”²¹ The poor usually have low life expectancy, high mortality, higher incidence of disablement and higher consumption of natural resources in the form of food, fodder and fuel. Unhygienic and insanitary conditions are another by- product of poverty affecting human health. Poverty reduces people’s capacity to use resources in a sustainable manner, it intensifies pressure on the environment.

The link between poverty and environmental degradation are well known. The World Bank Report, 1998 says that the poor people are both the victim and agents of environmental degradation. Poverty often promotes environmental destruction as poorer people rely heavily upon extraction of natural resources. At the same time environmental degradation worsens poverty, resulting in a vicious cycle of environmental degradation and human suffering. Combating poverty is an important step in the struggle to protect the environment and for sustainable development. It is said that sustainability will take care of itself as economic growth proceeds. This is sort of a cornucopian view and it is attributed to the economist Simon Kuznets who contended that as per capita income rises, people tend to take care of the environment; when you are very poor, you are concerned about surviving and getting along at any cost. A variety of strategies are currently being used to balance population growth, economic development and environmental health in order to attain sustainable development.

In sustainable development a considerable concern is on ecology. “Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfill their aspirations for a better life. A world in which poverty is endemic will

²⁰ Md. Reyazuddin and Ram Pravesh Singh (eds.), *Challenges to Sustainable Development in India*, Deep & Deep Publications Pvt. Ltd., New Delhi (2010), p. 68.

²¹ *Our Planet, Our Health*, Report of the World Commission on Health and Environment (1992), p. 38.

always be prone to ecological and other catastrophes.”²² Poverty is an important reason for the overuse or misuse of nature. Thus, the struggle against poverty is in fact an indirect method of environmental protection. Therefore, the need of the time is some strategy including legal strategy to contain the problem of poverty and to have sustainable development and healthy environment.

Judicial Approach towards Sustainable Development and Environment Protection

It is now universally recognized and rightly so that all development must always take full account of its ecological implications. As such a balance is to be maintained between the necessity to preserve the environment and the need of the society for socio- economic development. The judiciary in India has been trying its best to maintain balance between development and preservation of environment. Indeed, in striking a balance between the environment and development the courts have to play a very crucial role. There is also a very significant provision that in passing any order, decision or award, tribunal shall apply the principle of sustainable development, the precautionary principle and the polluter pays principle.²³

In *Rural Litigation and Entitlement Kendra v. State of U.P.*,²⁴ the Supreme Court wanted information on whether indiscriminate mining continued under a legally valid license, had any adverse impact on the ecology. Several committees consisting of experts were appointed to go into the question. On the basis of their reports, certain mining operations were ordered to be closed immediately in Doon Valley in a phased manner.²⁵

The Supreme Court in *N. D. Jayal v. Union of India*,²⁶ gave wider interpretation to right to life. It declared that right to environment is a fundamental right. On the other hand right to development is also one. Here the right to “sustainable development” cannot be singled out. Therefore, the concept of sustainable development is an integral part of right to “life” under Article 21. The court declared that “the adherence to sustainable development principle is a *sine qua non* for the maintenance of the symbiotic balance between the rights to environment and development. It was also clear that this right to development encompasses much more than economic well- being and includes within its definition the guarantee of fundamental human rights.

²² Md. Reyazuddin and Ram Pravesh Singh (eds.), *Challenges to Sustainable Development in India*, Deep & Deep Publications Pvt. Ltd., New Delhi (2010), p. 63.

²³ Section 20, the National Green Tribunal Act, 2011.

²⁴ AIR 1988 SC 2187.

²⁵ *Ibid.*, P. 2209.

²⁶ (2004) 9 SCC 362.

In *T. N. Godaverman Thirumulpad (87) v. Union of India*,²⁷ the court held, “the damage to the environment is damage to the country’s assets as a whole. Ecology knows no boundaries. It can have impact on the climate. The principles and parameters for valuation of the damage have to be evolved also keeping in view the likely impact of activities on future generations.”²⁸ The preservation of ecosystem, biodiversity and environment is a national issue to be dealt with at national level. The problem is not area- specific or state specific.²⁹ Public trust doctrine has to be used to protect rights of the present and future generations. Ecology belongs to all, being a gift of nature for the entire nation.³⁰

In *Sierra Club v. Morton*,³¹ Justice Douglas stated, “inanimate objects may also be considered as invisible parties in environmental litigation.” Literally, the verdict in *Sludge case*³² speaks on behalf of a village, its soil, irrigation canals, wells, cattles and trees. It speaks about the injury to those biotic and non- biotic objects or victims of the accumulated poisonous wastes remaining not treated or disposed in the village, long after the industry stopped production.

It is primarily for the Government concerned to consider the importance of public projects for the betterment of the conditions of living of the people on the one hand and the necessity for the preservation of social and ecological balance, in the light of various factual, technical and other aspects that may be brought to the notice by various bodies of laymen, experts and public workers and strike a just balance between these two conflicting objectives.

However, change in the environment does not per se violate right under Article 21, especially when ameliorating steps are taken not only to preserve but also to improve ecology and environment. Holding that care for environment was an ongoing process, the Supreme Court in *Narmada Bachao Andolan v. Union of India*,³³ issued directions in respect of the continuance of the construction of dam on Narmada River (Sardar Sarovar Project), for taking relief and rehabilitation measures, *pari passu* with construction of dam for displaced persons.³⁴

Probably, more than any other jurisdiction, India has fostered an extensive and innovative jurisprudence on environmental rights.³⁵

²⁷ (2006) 1 SCC 1.

²⁸ *Ibid.* p. 39.

²⁹ *Ibid.* p. 41- 42.

³⁰ *Ibid.* p. 42- 43.

³¹ 405 US 727

³² *Indian Council for Enviro- legal Action v. Union of India*, AIR 1996 SC 1446.

³³ AIR 2000 SC 3751.

³⁴ *Ibid.* p. 3804.

³⁵ M. R. Anderson, *Human Rights, Approaches to Environmental Protection: An Overview* 19-20 (1996).

Conclusion

Sustainable development is often an overused word but involves a number of inter-related global issues such as poverty, inequality, hunger and environmental degradation etc. people tend to think that we have to make a choice between environment protection and development. Development that is sustainable and not damaging to the natural resources is very much possible. To achieve sustainable development the three pillars- economic, social and environmental- must be integrated in a balanced way. Conserving land and water resources, protecting bio-diversity and managing agricultural heritage systems are very important for sustainable development. There is no inherent contradiction between environment and development, and that these two concerns should be mutually supportive. Protection of the environment should not be seen as a sectorial interest but as an integrated component in all economic and social development.

Sustainability links present to the future. Sustainable development is defined as a pattern of social and structured economic transformations which optimize the economic and social benefits available in the present, without jeopardizing the likely potential for similar benefits in the future. Thus, the concept of sustainable development can be broken into three inter-related components- (1) A healthy growing economy, (2) A commitment to social equity, and (3) Protection of the environment.

For the permanence of growth there is a need for a balanced and harmonious growth so that no section of the society, no sector of the economy and no region of the country is left out of the growth process. This permanency of growth can be achieved only through sustainable development. It has been found that environmental depletion is the direct result of the excessive growth. Therefore, the sustainable development requires that there should be economic, social and environmental protection from the long-term perspective. The sustainable development requires that resources should be used at a rate at which it can be replaced by the nature.