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IILS LAW REVIEW

INDIAN INSTITUTE OF LEGAL STUDIES

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The Indian Institute of Legal Studies is an institute blossomed under the charismatic vision of Shri Joyjit Choudhury, Chairman, Indian Institute of Legal Studies. It is the only institute within the bounds of North Eastern region which undertook an attempt to meet the demands of the society by offering diverse courses in the field of law. **B.A.LL.B, B.Com.LL.B, BBA.LL.B and 3 years LL.B** as well as certificate/ diploma programs concerning Law and Medicines, Human Rights, Environmental Law, Petroleum Law, Forest Law, Wild Life, Law and Criminology and many more.

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MESSAGE FROM PATRON

It takes great pleasure for me to announce the publication of the second edition of IILS LAW REVIEW, the Journal of our College. The first publication and its wide acceptance by the academics and entire legal fraternity in India and abroad has inspired us and given us the confidence to make this issue more captivating and illustrious. In the mean time the College has striven towards excellence and eminence keeping in minds its paramount duty of providing holistic standardized education to the students. The College has been chosen as an academy of distinction by various national authorities. It would not have been possible without the full scale support of all the pillars of the institution and its stakeholders.

A Journal published by an academic institution and its resonance reflects the inner strength of the institution and the platform occupied by it in the domain of the academic world. I assure you that this publication shall satisfy the quest for perfection and illuminate itself with the thinking and ideas expressed there in.

Joyjit Choudhury,
Chairman,
Indian Institute of Legal Studies.

THE CONTRIBUTION OF JUDICIARY IN INDIA TO SUSTAINABLE DEVELOPMENT

R. Venkata Rao[*]

I. Introduction

The poet Horace in 20th BCE wrote

"Fuscus, *who lives in town and loves it, greetings from one who loves the country …….*

You stay in your nest, I sing my lovely rural
Rivers, and trees and moss—grown rocks. Why drag out
Our differences? I live here, I rule her, as soon as I leave
Those city pleasures celebrated with such noisy gabble:
Like a professional cake – taster I run looking from good plain bread,
Just crusty bread, no honeyed confections, dripping sweet!
If life is harmony with Nature is a primal law,
And we go looking for the land where we'll build our house, is anything
Better than the blissful country? Can you think for anything?
Where can we sleep, safer from biting envy?
Is glass less fragrant, less lovely, than your African tile?
Is your water as clear and sweet, there in its leaden pipes,
As here, trembling, singing, along hilly slopes?
Lord! You try to grow trees, there in your marble courtyards?
And you praise a house for its view of distant fields.
Push out nature with a pitchfork; she'll always come back,
And our stupid contempt somehow falls on its face before her.
Live happy with what you have, Fuscus, and live well,
And never let me be busy gathering in more than I need,
Restlessly, endlessly: rap me on the knuckles, tell me the truth.
Piled-up gold can be master or slave, depending on its owner;
Never let it pull you along, like a goat on a rope".

[*] Vice-Chancellor, NLSIU, Bangalore. A paper presented at the International Seminar On Legal Aspects of BRICS Held In Rome (May 6-8, 2013).

Horace is a nature lover and is warning the people against playing with the nature. He does not want to live a life devoted to "gathering in more than I need," being pulled along like a "goat on a rope" by the pursuit of money and material possession, and he warns fuscus of these dangers. Horace warns the attempt to push out nature with a pitchfork, nature will always come back.

The contempt of nature is very much evident in today's time also. Modernization, technology, development . . . are nothing but pitchforks against nature. Human beings have always been greedy and not self-contended as Horace wish " never let me busy gathering in more than I need." The World Commission on Sustainable Development (Brundtland Commission) in its report *Our Common Future* (1987) reiterated the ongoing pitchforks against nature and suggested Horace wish could be fulfilled by adopting the principle of 'sustainable development'—a development that meet the needs of the present without compromising the ability of future generations to meet their own needs - what Horace calls it 'If *life is harmony with Nature is a primal law'.*

But the question 'what is my need?' is difficult to answer, though certainly not difficult to distinguish between the 'need' and the 'greed'. Perhaps it is judiciary which creeps in each time; one becomes 'restless' and 'raps, knuckles to realize the truth' and protect the 'primal law to live in harmony with nature'. The higher judiciary in India has recognized the principle of sustainable development as a basis for balancing ecological imperatives with development goals. Culling out from the Brundtland report and other international documents, the apex court has repeatedly highlighted that, the salient features of sustainable development are intergeneration equity; use and conservation of natural resources; environment protection; the precautionary principle; the polluter pays principle, and obligation to assist and cooperate in eradication of poverty. Thus, sustainable development does not mean sustainability of economic and social system.

Against the backdrop of the concept of sustainable development perceived by the judiciary in India, let us examine the judicial contribution in developing three pillars of sustainable development.

II. Environmental Justice

The Dehradun Quarrying Case[1] was the first case of its kind in the country involving issues relating to the environment and ecological balance which brought sharp focus into the conflict between development and conservation. The Supreme Court emphasized the need for reconciling the two in the larger interest of the country and ordered closure of the lime stone quarrying industries operating in Mussorie—Dehradun region. The Court observed We are not oblivious of the fact that natural resources have got to be tapped for the purposes of the social development but one cannot forget at the same time that tapping resources have to be done with requisite attention and care so that ecology and environment may not be affected in any serious way. It has always to be remembered that these are permanent assets of mankinkd and not intended to be exhausted in one generation.

The Himachal Pradesh High Court in *Kinkri Devi v. State of Himachal.Pradesh*[1] relying on the Dehradun Quarrying case observed If industrial growth sought to be achieved by reckless mining resulting in loss of property, loss of amenities like water supply and creation of ecological imbalance, there may ultimately be no real economic growth and no real prosperity.

In *Mathew Lukose v. Karnataka*[2] explaining the 'principle of inter-generational equity' the Court held that "The world belongs to us in usufruct, but we owe a duty to the posterity and to the unborn to leave this world at least as beautiful as we found it."Similar view was reiterated by the Supreme Court in *State of Himachal Pradesh v. Ganesh Wood Products*(AIR 1996 SC 149) and held a Government Department's approval to establish a forest-based industry invalid because"it is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and intergenerational equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations."[3]

[1] *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*, (1985) 2 SCC 431.
[1] AIR 1998 H.P. 4.
[2] (1990) 2 KLT 686.
[3] AIR 1996 SC 165

The Calcutta High Court in *People United for Better living in Calcutta v. State of West Bengal*[4]. observed that "while it is true that in a developing country there shall have to be developments, but that developments shall have to be in closest possible harmony with the environment, as otherwise there would be development but no environment, which would result in total devastation --- there has to be a proper balance between the development and environment so that both can co-exist without affecting the other."[5]

In *Union of India v. Kamath Holiday Resorts*[6], the Supreme Court rejected the plea that lease for a snack bar and restaurant was necessary for visiting tourist in the reserved forest. It held that "All current streams of thought lead towards protection of environment and preservation of forest wealth. A balance would have to be struck in a cool and dispassionate manner." Similar situation had come before the Karnataka High Court in the case of *Nagarhole Budakattu Hakka Sthapana Samithi v. State of Karnataka*[7] where the court stopped the hotelier from proceeding renovating cottages and reception centre within the Pench the National Park.

In *Indian Council for Enviro – Legal Action*[8](Bicharri Village Case), the Supreme Court held that 'polluter pays principle' is an essential feature of sustainable development. It observed that the remediation of the damaged environment is part of the process of sustainable development and such polluter is liable to pay cost to the individual sufferers as well as the cost of reversing the damage of the ecology.

Vellore Citizens v. Union of India[9] is a landmark case where the principle of sustainable development has been adopted by the Supreme Court as a balancing concept. Elucidating the 'precautionary principle' the court said:

i. The State Government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation.

[4]AIR 1993 Cal 215.
[5]*Ibid*., at p 223,
[6]AIR 1997 SC 1228.
[7]AIR 1997 Karnt 288.
[8]AIR 1996 SC 1446.
[9](1996) 5 SCC 647.

ii. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

iii. The 'onus of proof' is on the actor or the developer to show that his actions are environmentally benign.[10]

The Court held that Sustainable development is a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the ecosystem. Thought the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues, it has no right to destroy the ecology, degrade the environment and pose a health hazard.'[11]

Reaffirming the precautionary principle and polluter pays principle as two essential feature of sustainable development, relying on the Bhure Lal committee report the Supreme Court directed the Delhi Government to use CNG as fuel for public transport and phase out diesel buses.[12]

In *M.C. Mehta v. Union of India*[13], the Supreme Court ordered the shifting of 168 hazardous industries operating in Delhi as they were causing danger to the ecology and directed that they be reallocated to the National Capital Region. The Court gave necessary directions for the protection of the rights and benefits of the workmen employed in these industries. In the *Taj Trapezium Case*[14], applying the precautionary approach, the Supreme Court ordered a number of industries in the area surrounding the Taj Mahal to relocate or introduce pollution abatement measures in order to protect the Taj from deterioration and damage.

In *Shrimp Culture Case*[15] the apex court opined that sustainable development should be the guiding principle for 'shrimp culture' and following the natural method, though harvest is small [but sustainable over long periods and it has no adverse effect on the environment and ecology.] It held that there must be an environment impact

[10] *Ibid*., at p 648
[11] *Ibid*., at p 649
[12] *M C Mehta v Union of India* 2002 SC 1696,
[13] (1996) 4 SCC 750.
[14] *M C Mehta v Union of India* AIR 1997 SC 734.
[15] *S Jagqannath v Union of India* (1997) 2 SCC 87.

assessment before permission is granted to install commercial shrimp farm. The assessment must take into consideration the intergenerational equity.

In *A.P. Pollution Control Board v. Prof. M.V. Nayudu*[16], the apex court held that in order to ensure that there is neither damage to the environment nor to the ecology and, at the same time, ensuring sustainable development, it can refer scientific and technical aspects for investigation and opinion to statutory expert bodies having combination of both judicial and technical expertise in such matters. The court explained in detail, the concept of precautionary principle.

In *M.C. Mehta v. Union of India*[17](Aravalli Hills Range Case) the Supreme Court of India has observed:

--- [T]he development and the protection of environment are not enemies. If without degrading the environment or minimizing adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, projects, etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck. In such matters, many a times, the option to be adopted is not very easy or in a strait – jacket. If an activity is allowed to go head, there may be irreparable damage to economic interest." In this case, a notification was issued under Rule 5, Environmental rules, 1986, which prohibited undertaking expansion/modernization of any mining activity/new project without clearance from the Central Government. However the Ministry of Environment and Forests(MoEF) later issued a circular giving time to defaulting units to obtain *ex-post facto* environmental clearance. The Supreme Court held that, this shows total non-sensitivity of MoEF to the principles of sustainable development and objects of the notification. A statutory notification cannot nullify a circular.

The Supreme Court added a new dimension to the concept of sustainable development by recognizing the 'doctrine of public trust' as a part of the Indian law. The Court in the case of *M.C. Mehta v. Kamal Nath*[18](Span Motel Case), mentioned

[16]AIR 1999 SC 812.
[17]2004 AIR SCW 4033.
[18](1971) 1 SCC 388.

that public trust doctrine implies following restrictions on governmental authority: (i) the property subject to the trust must not only be used for public purpose, but it must be held available for use by the general public;(ii) the property may not be sold, even for a fair cash equivalent,and(iii) the property must be maintained for particular types of use. It also stressed that the aesthetic use and the pristine glory of the natural resources, the environment and ecosystems of our country cannot be permitted to erode for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.[19] In the instant case the lease deed granted in favour of the motel being constructed on the bank of river Beas was quashed and cost was imposed for the restitution of the environment and ecology of the area. Applying the doctrine of public trust in *M.I. Builders v. Radhey Shyam Sahu*[20], Supreme Court directed the demolition of underground shopping complex coming up below a public park and ordered for restoration of park. Emphasizing on the doctrine of public trust the apex court in famous the *2G spectrum case*[21] held that the public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that some resource or property for the long-term and enjoyment by future generations.

III. Economic Justice

It is not that judiciary has always overlooked the development project in its zeal to protect environment. Many a times, pro-development stand has also been taken by it. In *Sachidanand Pandey v. State of WestBengal*[22], the duly authorized construction of a hotel was alleged to interfere with the flight path of migratory birds but the hotel project was eventually permitted to proceed not only because of the hotelier had taken environmental values into account in fashioning the project but also there was obvious public benefits, viz increased revenues for tourism and general 'upgrading and beautification of the area'.

[19] *Ibid*., at p 394
[20] AIR 1999 SC 2468.
[21] (2011) 12 SCC 302
[22] AIR 1987 SC 109.

In *S.N. Rao v. State of Maharahtra*[23] the court taking a pro-development stand permitted the hotel project in a 'green belt' area. In *Calcutta Youth Front v. State of WestBengal*[24], the court permitted the development of an underground market below a neglected park when the developers undertook to rejuvenate the park. In *Goa Foundation v. Konkan Railway Corporation*[25] it was ruled that no development is possible without some adverse effect on the ecology and environment but the projects of public utility (Konkan Rail Project) cannot be abandoned and it is necessary to adjust the interests of the people as well as the necessity to maintain the environment. In *Goa Foundation v. DIksha Holdings*[26], the Supreme Court allowed the construction of hotel and sea beach resort in Goa coastal area on the ground there was no evidence of ecological damage. It observed thatwhile maintaining and preserving environment and ecology, economic development of the State has to be kept in mind and a balance has to struck between the two.[27]

In *M.C. Mehta v. Union of India*[28](Hot Mix Plant Case**)** Hot mix plants were ordered to be closed down by the Supreme Court which were in the vicinity of Indira Gandhi International Airport and populated areas. But later on, looking to the necessity of the hot mix plants for resurfacing the Airport and its national importance, it allowed the plants to operate for a year with certain conditions. It directed that plant must be environmental friendly and the particulate matter must not exceed the permissible limit. The court also reiterated the necessity to balance the environmental concerns with the infrastructure needs.

Courts, many a times, have criticized pro-development stand towards hydroelectric projects. In *Society for Protection of Silent Valley v. Union of India*[29], Kerala High Court allowed the hydroelectric project at Silent Valley- a forest rich area abandoned. In *Tehri Bandh Virodhi Sangarsh Samiti v. State of UttarPradesh*[30]**,** the Supreme Court dismissed the petition opposing the dam construction. The *Narmada case*[31] has stood as epitome in pro-development Governmental activities despite massive

[23]AIR 1988 SC 712.
[24]AIR 1988 SC 436.
[25]AIR 1992 Bom 471.
[26]AIR 2001 SC 184.
[27]*Ibid*., at p 190
[28]AIR 1999 SC 2367.
[29]Petition No. 2949 & 3025 of 1979.
[30] [1990] INSC 342
[31](2000) 10 SCC 64.

opposition. The Court observed that the loss of forest because of any activity is undoubtedly harmful. But these large dams also cause conversion of wasteland into agricultural land and making the area greener. It observed:

> Mere change in the environment does not lead to the presume that there will be ecological disaster. The Court further said that 'in a democratic set up, it is for the elected government to decide what project should be undertaken for the benefit of the people. Once such a project is undertaken and unless it can be proved that there is blatant illegality the court ought not to interfere with executkion of the project.

In *Lafarge Umiam Mining Pvt. Ltd., v. Union of India & Ors*[32]the Supreme Court refused to interfere in mining operations going on in Meghalaya region. It ruled that "the word "development" is a relative term and one cannot assume that the tribals are not aware of principles of conservation of forest. In the present case, limestone mining was going on for centuries in the area and is an activity interwined with the culture and the unique land holding and tenure system of the relevant village. Due to diligence exercise undertaken by the Ministry of Environment and Forests (MoEF) in the matter of forest diversion was satisfactorily done and accordingly no interference in the decision of MoEF granting site clearance required."[33]

IV. Social Justice

The Social justice is the third pillar of sustainable development where the judiciary has been quite pro-active by way of expanding the scope of art 21 of the Constitution of India.

In *Banwasi Sewa Ashram v. State of Uttar Pradesh*[34], the Supreme Court acknowledged that adivasis and other people living within the jungle had been using jungles around for collecting the requirements such as fruits, vegetables, fodder, flowers, small timber, fuel wood etc. for their livelihood. The court gave detailed directions safeguarding and protecting the interest of the adivasis and other backward people who were being ousted from the forest land by NTPC. The court permitted the acquisition of land by NTPC, only after NTPC agreed to provide certain facilities to

[32](2011) 7 SCC 338.
[33]*Ibid*., at p 348
[34]AIR 1987 SC 374.

ousted forest-dwellers. The Supreme Court adopting a midway path highlighted that for industrial growth, as also for provisions of improved living facilities, there is great demand in the country for energy such as electricity.

In *Pradeep Krikshan v. Union of India*[35], a notification of the Government of Madhya Pradesh permitting collection of 'tendu' leaves from the sanctuaries and national parks by the villagers and tribals living around the boundaries thereof with the object of maintenance of their traditional rights were challenged on the ground that it is causing damage to the flora and fauna and wildlife of the area resulting in the shrinkage of the forest cover. The Supreme Court refused to quash or set aside the notification and thus protected the traditional rights of the tribals. But it suggested: "If any one of the reasons for the shrinkage is the entry of villagers and tribal's living in and around the sanctuaries and the national park, there can be no doubt that urgent steps must be taken to prevent any destruction or damage to environment, the flora and fauna and wildlife in these areas".[36]In a similar case of *Animal and Environment Legal Defence Fund v. Union of India*[37], where the action of the Madhya Pradesh Government to permit fishing rights to the tribals in a reservoir within Pench National Park was challenged on environmental grounds. The Supreme Court, while balancing the traditional rights of the native versus development, held that while every attempt must be made to preserve the fragile ecology of the forest area, and to protect the tiger reserve, the rights of tribals living in the area to keep body and soul together must also receive proper consideration.

In these two cases the Supreme Court protected the right to livelihood of the tribals and on the other hand showed its concern for the protection of the ecology and forest.

Taking note of the persistent press reports dealing with the poor arrangements and number of deaths that occurred during the *yatra* in the year 2002 to the holy cave of Amarnathji, the Supreme Court took *suo motu* action and issued notice to the Union of India, State of Jammu and Kashmir and the Chairman / President of the Amarnathji Shrine Board vide its order dated 13th July, 2012 "It is a settled canon of constitutional law that the doctrine of sustainable development also forms part of Article 21 of the Constitution. The precautionary principle and the polluter pays

[35]AIR 1997 SC 2040.
[36]*Ibid*., at p 2044
[37]AIR 1997 SC 1071.

principle flow from the core value in Article 21. The Supreme Court in its judicial dictum in the case of **Glanrock Estate Pvt. Ltd. v. State of Tamil Nadu** (2010 10 SCC 96) has held "forests in India are an important part of the environment. They constitute a national asset and intergenerational equity is also part of the Article 21 of the Constitution and cautioned that if deforestation takes place rampantly, then intergenerational equity would stand violated. Right to life is enshrined under Article 21 of the Constitution which embodies in itself the right to live with dignity. The State is not only expected but is under a constitutional command to treat every citizen with human dignity and ensure equal treatment to all. In our considered view and as demonstrated by these newspaper reports, inhuman, unsafe and undesirable conditions are prevailing at the base camps and en route to the holy cave. The yatris do have a right and the State is under constitutional obligation to provide safe passages, proper medical aid, appropriate arrangement and at least some shelter to the thousands of yatris visiting the holy cave every day. They are also expected to equip the forces deployed with appropriate equipments facilities and the authorities should ensure that no untoward incident occurs at the holy places"[38].

V. Some Concerns

Development induced development projects

Displacement and rehabilitation have been a serious concern for all developing countries. People displaced by development projects face a variety of impoverishment risks that include landlessness, joblessness, homelessness, marginalization, increased morbidity, food insecurity, loss of access to common property, and social disarticulation. In *Olga Tellis v. Bombay Municipal Corporation*[39],the pavement dwellers were evicted without resettlement. Since 1985, the principles in this case have been affirmed in many subsequent decisions, frequently leading to large-scale evictions without resettlement. For example, in the Narmada dam cases, adequate re-settlement was ordered but most effected evictees have not been properly resettled and the majority of the Court declined to examine the extent to which their judgment was enforced. Ironically, the case helped the propertied classes; lawyers often cite the

[38]Gautam Navlakha, *Jammu and Kashmir: Communalizing Amarnath Pilgrimage and Demonising a Movement,* SANHATI available athttp://sanhati.com/excerpted/13237/#sthash.rORzuHbA.dpuf(last visited on Aug 9, 2015)

[39] AIR 1986 SC 180.

case to justify eviction of tenants and slum dwellers. But it also helps the slum dwellers; the Government can't evict them summarily (due procedure of law has to be followed). The case also spawned a lot of interest in fighting for housing as a fundamental right. This case is widely quoted as exemplifying the use of civil and political rights to advance social rights but it is also viewed as problematic due to its failure to provide for the right to resettlement. Had the Supreme Court looked the case from the third pillar of sustainable development i.e., social justice perhaps the people affected by displacement could have got better claim for resettlement. Looking the case from the issue of sustainable development perspective would have imposed a duty upon the State to guarantee resettlement for the persons affected due to displacement. Perhaps the concept of sustainable development did not exist in 1986 when Olga Tellis case was decided but in subsequent cases particularly the Narmada Dam case nothing stopped the judiciary from taking an integrated approach to sustainable development declaring that re-settlement and rehabilitation should be taken care in all cases of displacement induced development project.

Though off lately the courts have shown concerns for resettlement and rehabilitation in such projects but not from the perspective of sustainable development but from the perspective of livelihood issues. The Courts have generally focused on development *vis-à-vis* environment negating the social justice from the sustainable development perspective. If sustainable development is to be achieved, the third pillar also needs to be considered ancillary and not subsidiary. Rehabilitation is a slow and continuous process, which requires an organized effort over a period of time. The need is to have an inclusive developmental model for sustainable alternative livelihoods for Project-affected persons (PAPs) creating a people- centric developmental model where people who have given up their land and their livelihoods could be made the immediate beneficiaries from the project.

Waste management

In addition to and not in derogation of the orders passed by it in *Dr. B.L. Wadehra's*case[40] the Supreme Court in *Almitra Patel v. Union of India*[41] issued

[40] AIR 1996 SC 2969.
[41] AIR 2002 SC 2969.

detailed guidelines and responsibilities for the State toward proper disposal of waste and keep the city clean. It also authorized them to frame necessary law in this regard and levy fine for the violation of law. The Court also warned that the violation of the directions issued by this Court shall be viewed seriously.

Though state of affairs with regard to waste has improved since 1996 and much laws has come into existence but still there is hardly any city which can be considered as role model in waste management. The dump of waste keeps on welcoming the people to the city. Is it necessary to remind here that non- compliance will attract contempt of court!Perhaps we are in a habit of living in garbage and have a tolerant attitude. At least this is what we are generating adequately for the future generations.

Pollution cases

It is quite commonly observed that many of the rivers have been converted to drainage due to discharge of polluted waters. The plight of important rivers like Ganga and Yamuna is not indifferent in this regard. The plight of dead fishes in such polluted rivers reminds me of the 'public trust doctrine' evolved in Span Motel case. A question arises whether public trust doctrines apply only to the allocation of natural resources or does it extend to pollution cases as well. What are the implications of this doctrine on pollution control boards charged with issuing consent or permits to water and air polluters??

Bellary Mining

Acting on Central Empowered Committee report, the Supreme Court in July 2011 ordered immediate suspension of mining and transportation of iron ore from Bellary district of the Karnataka State saying "over-exploitation" of the area has caused large-scale environmental degradation. The order came two days after Karnataka Lokayukta Justice Santosh Hedge, a retired apex court judge, brought out a detailed report on rampant illegal mining in the districts of Bellary, Tumkur and Chitradurga and its adverse impact on the environment and the people of these areas.

Speaking at the ninth annual day celebrations of the Centre for Sustainable Development, the former judge of the Supreme Court R.V. Raveendran said that unbridled mining in Bellary that ruined the ecology, simultaneously damaging State's

economy and the interests of the Indian steel industry, is a classical example of 'alleged development' that is completely unsustainable.

Citing another example of unsustainable development, he said that the Union government at one point of time had posted 50 director-level officers to the cluster of islands with a population of around 60,000 people, which had resulted in a boom in the number of cars and vehicles in the islands. These two examples illustrate how spending money or generating money is not necessarily development, he said.

Cases like Bellary are a warning that our own generation is not going to see any more resources, why talk about the future then. In such cases even the judiciary may not be in a position to enforce any polluter pays principle except for the punishing the wrong the doer. But how do we bring the invaluable resources back which have been exhausted either legally or illegally? Perhaps we have forgotten that 'we do not inherit the planet from our ancestors but borrow it from our children'. It's likely if we continue to have such indifferent attitude we will neither be in position to borrow from our children nor be in a position to bear any children and if at all the future generation is to exist, what do we leave behind for them? – Archives of nature scam reports! Glorified judicial pronouncements certifying that their ancestors were plunders of nature! It is high time to realize and act that 'life is harmony with nature is a primal law.' Let us 'not be pulled along like a goat on a rope'.

ARGUING THE LETHAL IMAGINARIES OF TERRORISM AND METHODS OF ITS TACKLING - AN ANALYSIS UNDER POLITICO-LEGAL FRAMEWORK

Narender Nagarwal[*]

I. Introduction

A worse crime against humanity is reflected in the death of innocent civilians. Over lakhs of innocent people are estimated to have been killed in India alone due to different terror strikes.

Terrorism is[1] not a new phenomenon in the world. Though the phenomenon was present for centuries and history has witnessed many assassinations of Kings and their allies by the rebellion groups, the last few decades witnessed the rising graph of terror strikes across the world. Undoubtedly, India is one of those countries worst affected by the curse of terrorism.[2]

Terror activities in different parts of the country forced the Government to take some serious steps. The establishment of specialized and dedicated anti-terror agency i.e. National Investigation Agency (NIA) is one of the landmark steps. Today, the *modus operandi* of the terror outfits has become more sophisticated and conclusive that required scientific and technological approach to tackle them. The NIA's way of

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[Ed. Views expressed in the paper are personal views of the author. None of the persons associated with the IILS Law Review subscribe them]

[1]Webster Dictionary (1990) defines terrorism as "the act or practice or terrorizing, especially by violence for political purposes, as by a government seeking to intimidate a population or by revolutionaries seeking to overthrow a government, compel the release of prisoners etc. The Chambers Dictionary (1990) calls it as "an organized systemof intimidation for political ends".

[2]The intensity of Maoist movement, insurgency in Northeast region and Kashmir, Anti-India activities by the neighboring States like Pakistan and Bangladesh are some of serious threat to India's national security.Pakistan-based terror outfits have been indulged into anti-India terror activities through their countless sleeping cells which are fully financed and protected by Inter Service Intelligence (ISI). In 1993, a series of bomb blasts in Mumbai in which more than 3000 lost their lives. Dropping of arms in Purulia (West Bengal) and reports of logistics support provided to some separatist organizations of North-east region by the Bangladesh and Myanmar are some example to show how terrorist groups are active in India. India has lost its prominent leaders, Mrs. Indira Gandhi and Rajiv Gandhi, in terror attacks.The Indian Airline IC 814 hijacking by the Pakistan based terror organization Jaish-e-Muhammad (thereby releasing some hardened terrorists including Maulana Masood Azahar) still afresh in our mind. The Mumbai terror strikes on November 26, 2008 on famous Taj and Trident Hotel besides, attack on Mumbai CST and a number of other terror attacks in Indian cities have shocked our conscience and our sensibilities. The national security, right to life of citizens and property is under threat due to constant terrorist strikes.

functioning is altogether different from its predecessor i.e. ATS, CBI and Special Cell etc. while tackling terror related cases. The NIA knows well that whenever terrorism strikes its victims are from both the communities i.e. majority and minority. Hence, it would be wrong to give a communal or religious color to any terrorist activity. Terrorism has no religion, caste or creed.

II. Identifying Terrorism

There are many definitions and explanations of terrorism. Terrorism is 'a coercive intimidation'.[3] It is systematized use of destruction, and the threat of murder and destruction in order to terrorize individual, groups, communities or governments into conceding to the terrorists' political demands. It is one of the oldest techniques of the psychological warfare.[4] Terrorism involves violent criminal activities for provoking terror or fear, and thereby achieving certain political goals.[5]

In *Hitendra Vishnu Thakur v. State of Maharashtra*,[6] the Supreme Court opined:

> It is possible to give a precise definition of terrorism by laying down what constitute terrorism. It may be possible to describe terrorism as use of violence when it's most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objectives is to overawe the Government or disturb the harmony of the society or 'terrorize' people and the society and not only those directly assaulted, with a view to disturb even tempo peace and tranquility of the society and create a sense of fear and insecurity.[7]

In the judicial exposition of terrorism, fear and intimidation becomes inherent contours of the terrorism. While Paul Wilkinson outlines the terrorism in three broad categories, namely, (i) revolutionary terrorism (aims at political revolution); (ii) sub-

[3] For detailed study, See H.O. Aggarwal's "*Combating International Terrorism: State' Approach"* in "*International Law and Human Rights*" (Central Law Pub. Allahabad, 2010) chap 9, pp. 656-665.
[4] Paul Wilkinson, "*Terrorism Theory and Practice*', London-Allen & Unwin, 114 (1985).
[5] Available at Interpol website http://www.interpol.int
[6] (1994) 4 SCC 618.
[52] *Ibid*., at p 620

revolutionary terrorism (it has political motives but not the revolution), and (iii) repressive terrorism (it aims at restraining certain groups, individuals or forms of behavior deemed to be undesirable).[8]

Thus, any attempt at defining 'terrorism' is bound to raise questions and disclose different contours thereof. Nevertheless, some of the lowest common denominations which are agreed upon world over about terrorism are:[9]

(i) Terrorism always involves a criminal act.
(ii) It involves the use of violence and element of spreading fear.
(iii) It focuses on choice of targets both animate and inanimate.
(iv) It declares reliance on the publicity rather than the events.
(v) Fight for an ostensible political/communal cause.
(vi) It does not follow the convention of war.
(vii) Maximum use of planned surprise.
(viii) It demands immediate action from the establishment.

The purpose of terrorism, obviously, is to wreak revenge and to draw attention to the demands of some aggrieved section.[10]

III. Growth of Terrorism: What Went Wrong?

Primarily the growth of the terrorism in India has been gifted to us due to ill-governance and bad politics of the political class. Some historical blunders had also been responsible for the rise of terrorism in India e.g. Kashmir issue brought by India in the UN forum despite the fact that it was a direct infiltration by the Pakistan army under the guise of tribal forces in 1948. It was also evident that former Prime Minister of India Jawaharlal Nehru hugely relied on Lord Mountbatten's advises and it was his advise that Kashmir issue should be resolved through UN, its mean we consider

[8] Paul Wilkinson, *Political Terrorism*, pp. 36-40 (1974) quoted in S C Arora's, *Combating Terrorism: The Punjab Case*, Journal of Constitutional and Parliamentary Studies (230) 1995.
[9] Yonah Alexandor, *International Terrorism-National, Regional and Global Perspectives*, Praeger Pub. New York, 3-17 (1995).
[10] Dr. Gilbert Sebastian,*Getting to the Global Terror*, 47(2) MAINSTREAM NEWSWEEKLY (January 24, 2009)

Kashmir was a disputed subject. India has been still paying the price of that historical blunder in the form of cross border terrorism.[11]

The earliest terrorist organization in pre-independence era seems to have been Chapekar Association of Maharashtra, founded by the Chapekar brothers sometime prior to 1897. Its existence came to light as a result of the murder of the plague commissioner of Bombay. *Mitra Mela* was started around 1899 by the Savarkar brothers and in 1900 developed into the *Abhinav Bharat of Young India Society*. The Society aimed at an organization modeled on the revolutionary societies of Russia. It had members in various parts of western India and a secret branch in Satara in Maharashtra. The investigation in connection with Nasik conspiracy exposed this Society. The Gwalior conspiracy led to the discovery of the *Nav Bharat Society of Gwalior*. Similarly, in Bengal there had been many secret organizations and *Samitis* and their important centers are Calcutta, Dhaca, Faridpur, Mymensingh, Chittagaong, Cooch Behar and Dinajpur. The umbrella organization of northern India, and also the most influential, was the Hindustan Republican Association, formed with the combination of *Anushilan* Party in north India. The objective of these organizations was to establish a federal India through the armed revolution.[12]

The growth of terrorism to a great extent has also been owing to communal politics of certain political class and organizations of the country. Different ideological sects, organizations, like RSS, Young India Society, Hindu Mahasabha etc, and different secret societies have been active since long and spreading communal venom in the community.[13] M.S. Golwalkar, the RSS ideologue and popularly known as 'Guruji' (master) of Rashtriya Swayamsevak Sangh (RSS), in his book, *We and Our Nationhood Defined*, had written about the approach the *Hindu Rashtra* should adopt towards its religious minorities: There are only two courses open to the foreign elements, either to merge themselves in the national race and adopt its culture, or to live at its mercy so long as the national race may allow them to do so and to quit the country at the sweet will of the national race. "There is," he says, "at least should be, no other course for them to adopt." Even if Golwalkar's proposal is accepted, it is well-nigh impossible to crush a huge minority of 12.4 per cent Muslims in India as of

[11] See K Natwar Singh's interview about "*One Life is Not Enough*", Rupa Pub. New Delhi, 2014-An autobiography of the veteran Congress leader, visited http://www.ndtv.com dt. 30.07.2014, some texts of interview also appeared in 'India Today' newsmagazine dt. 13.08.2014

[12] Yonah Alexander, *International Terrorism-National, Regional and Global Perspectives*, 170-171 (Praeger,New York, 1976).

[13] Bipan Chandra, *India's Struggle for Independence* PENGUIN PUBLICATIONS 429 (2002).

2001. In Hitler's Germany, Jews were only around one per cent; so it was much easier to subjugate them. Even the Christian minority in India today is 2.3 per cent as per the 2001 Census. Attempts to forcibly subjugate these communities can only lead to the tearing apart of the social fabric which would be detrimental to the interests of even the dominant social forces because in such a situation, a regime of unhindered accumulation cannot be sustained.[14]

These communal ideologies movement have been working in both the communities i.e. majority and minority. But some of the historical events can't be rejected altogether which are wholly responsible for the rise of communalism in India that led to the problem of terrorism. Some of these incidents are appended below:-

1. Who is responsible for the partition of India-Jinnah had adopted the two nation theory and the theory had been propounded by Sawarkar but the RSS held Muslims responsible for partition.
2. Post-independence communal riots of 1947 that claimed lives of thousands of innocent people, but blame given to only Muslims.
3. Rise of the Hindu extremists' organizations, the RSS propagated its communal ideology and started its hate campaign against Muslims throughout India. Slogan likes Hindu-Hindi-Hindustan given by the RSS targeting the minorities.
4. Anti-Muslim riots happened in different parts of the country i.e. Ahmedabad, Meerut, Maliana, Hashimpura, Delhi, Mumbai, Bhiwandi, Bhagalpur, Neeli (Assam)-hardly anyone punished so far. Anti-Sikhs riots had taken place in Delhi 1984, no one is punished.
5. Ram temple movement and demolition of Babri Maszid in 1992.
6. Post Babri Maszid demolition riots in UP, Mumbai and other parts of the country in 1992-93.
7. Justice Srikrishna Commission appointed by the Govt. and the Commission indicted in its finding that some political leaders were involved in the mass murderers of innocent Muslims. The Report was not accepted and even, no efforts were made by the Union Government or State Government for its implementation.

[14] Ibid at 430.

8. Gujarat riots of 2002 and killing of more than 2000 Muslims, no one is punished.
9. Government had given free hands to all state police forces which encouraged fake encounters of Muslim youths.
10. Implication of Muslim youth in a false terror charges e.g. Samjhauta Express blast, Mecca Maszid blast, Malegaon blasts by the ATS and Special Cell.
11. There have been reports of various attempts of grabbing *Waqf* properties (Muslim Kabristan and Mosque) by the other community; riots had taken place due to land dispute between the two communities. No efforts were made to resolve the disputes through constituting special courts for *Waqf* properties disputes. The riots that had taken place recently at Forbesgunj, Mujjaffarnagar, Saharanpur and Gopalgarh are some instances of land dispute riots between the two communities.
12. In addition to above, different commissions, committees and recommendations had suggested some concrete and immediate action plan for the Muslims (considering them least developed minority community) as a step to ensuring social justice to them and bringing them into the mainstream development of the nation but nothing was done. For e.g. Justice Madan Commission Report, Gopal Singh Panel Committee Report, Justice Srikrishna Commission Report, Justice Rangnath Mishra Commission Report and Justice Sachhar Commission Report etc., are never implemented.

Had there been no incidents of miscarriage of justice against minority community, there would not have any incidents of terrorist activities in India. Would government or political class care to explain why no action has been taken against the perpetrators of atrocities against minorities? Not a single politician has been punished so far for the demolition of Babri Maszid. Perpetrators of Mumbai and Gujarat riots are still at large. Not a single politician has been punished for anti-Sikh riots of 1984. It is pertinent to mention that the police had even not filed any charge- sheet in the 1984 anti-Sikh riots.[15] The communal organizations have been working on the sole agenda to portraying the image of Muslims community as anti-nationalist. Moreover, instead

[15] H S Phoolka, Sr. Advocate who represented the riots victim's case of 1984 anti-Sikh riots, the detailed interview given to Srinivasan Jain in Truth versus Hype programme, (last visited on visited http://www.ndtv.com 06.06.2014 10.30 PM)

of ascertaining the root causes of terrorism, the electronic media has been indulging in anti-Pak jingoism and politician-bashing for security lapses and started to play blame game with each other. The police and armed forces have been painted in larger-than-life images. The stereotyping and stigmatizing of the Muslims has also proceeded apace. The paranoia about security and intolerant attitudes has reached unprecedented heights. One would well wonder if we are going to have a paranoid society in the near future.

In a talk on terrorism, formerly Professor of Punjab University, S S Bindra, was insistent that one must look into the demands of the terrorist/militant organizations and their desire to sacrifice their lives for the community. One must need to understand that well before the assassination of Mrs. Indira Gandhi; she had ordered the Operation Blue Star at Golden Temple in the first week of June, 1984. In consequences, various Sikhs militants' organizations mobilized and they also got logistics support from the Pakistan. These organizations like Babbar Khalsa International, Khalistan Jindabad Force etc formed in reaction to what happened in June 1984 at Golden Temple and their only agenda is, to make a separate state i.e. Khalistan (*Holy Place for Sikhs*).[16] Likewise, some misguided youths from the Muslim community too joined radical organization after the demolition of Babri Maszid and Gujarat riots episode. The demands of all terrorist organization are that they did not get justice and are still being victimized by the state agencies.[17]

India has one of the poorest records in punishing those guilty for killing people in the name of religion. There is no closure for families as cases have lingered on for more than 20 years that causes anguish and hatred against the establishment. Dr Riaz Ahmed of the Delhi University rightly says that terrorism is the 'desperate reaction of a desperate people'. Terrorists are crying for attention towards issues like the gross

[16] Lt. Gen. K S Brar, *Operation Bluestar-The True Story*, UBS PUBLISHERS PVT. LTD, 9 (1993) (Lt. Gen. K S Brar was the operational head of the surgical army action named "Operation Bluestar" conducted by the Indian Army in June 1984 at Golden Temple Holy Shrine of Harminder Sahib Ji, Amritsar, Punjab)

[17] Author is thankful to Prof. S S Bindra, Department of Political Science, Amity Institute of Social Science, Amity University, Noida for his valuable comments on causes of Sikh militancy in India.

violations of collective human rights in Kashmir and justice to the victims of the carnage in Gujarat.[18]

IV. "Their Terrorism-Our Terrorism"- The Lethal Imaginaries

Is there any link between religion and terrorism? First of all, there is no link between the duos. The terrorism is a faceless menace and has no religion. However it is a worrying phenomenon that desperate attempt was given to Islam after the 9/11 episode thereby creating Islamophobia throughout the globe.The war on terrorism was targeted towards Muslim aiming to put the community in a bad light and portraying them as cruel and *jehadis* (fanatics). A section of Indian political class and a small chunk of media too have tried to associate Islam with the terrorism. There had been some slogan after every terror attack like *"Not every Muslim is a terrorist, but every terrorist is a Muslim".* So long there was no problem when terrorism associated with the Islam but as soon as Hindu terrorism is used, it has become difficult to digest.[19] If every Muslim is a terrorist, has Swami Aseemanand and Sadhvi Pragya Singh Thakur converted to Islam? Why there is an ambiguous silence in the media and political class on the arrest of Sadhvi Pragya Singh Thakur, Swami Aseemanand, Lt. Col. Srikant Purohit, self-styled Godman Sankaracharya Dayanand Pandey for their involvement in bomb blasts in different parts of the country.

Unfortunately, instead of facing the real challenges to the national security implications, the reactions of the political class to the latest terror revelations have oscillated between denial and demonization.[20] It is to be noted that Himani Savarkar[21] had justified certain activities of the Abhinav Bharat leaders stating that *"if we can have a bullet for a bullet why not a blast for a blast".* She gave a clean chit to

[18] Gilbert Sebastian , *Getting to the Global Terror*, MAINSTREAM NEWSWEEKLY, (January 24, 2009).
[19] D N Rath, *Terrorism and Human Rights* available at http://www.boloji.com<last visited on dt. 23.08.2008>
[20] Rajdeep Sardesai-IBN Live available at http://www.ibnlive.com(last visited on 14.01.2011-09.46 PM IST).
[21] Himani Savarkar is a niece of Nathu Ram Godse who assassinated Mahatma Gandhi and member of Abhinav Bharat (a Militant Hindu Outfit financed and controlled by the RSS). Nathu Ram Godse is dead but his legacy of hatred still thrives on, he is a martyr not terrorist, claimed Abhinav Bharat.

all the members of Abhinav Bharat.[22] There have been demands of re-investigate every recent blast case and to release the accused from the minority community. While in some instances there has been a genuine miscarriage of justice, to suggest that Muslims have been victimized in every case is to reveal a complete lack of faith in the judicial process, one that can only wide the communal chasm. There has been a legitimate suspicious of the claim advanced by various police forces (ATS of different States and Special Cell of Delhi Police) about their successes in the fight against terror. One simple fact should illustrate why suspicious is well founded: take the example of Samjhauta Express bombing; the police declared with great authority that bombers were Jihadis acting under the instructions from Pakistan. Now we come to know that real perpetrators were Hindus who the NIA has in custody.[23] The new avatar of radical Hindus outfits in the name of Abhinav Bharat and others put India into an embarrassing situation. Not surprisingly, Pakistan has chosen to exploit our embarrassment for its own propaganda purposes.

Similarly we came to know that the real perpetrators of Hyderabad's Mecca Maszid blast were members of the Abhinav Bharat. Since, we had officially described the attack as handiwork of the Lashkar. But now after NIA's finding, it has been done by the Hindutva hardliners. More amazingly, some political leaders openly supported the acts done by Abhinav Bharat. The truth is that partisanship of any kind must have no place in the war against terror. When BJP president Rajnath Singh visits Malegaon blast accused Sadhvi Pragya Singh Thakur and claims that she is innocent and is being harassed by the state government, he is taking a political stance incompatible with the rule of law. But the BJP cannot take the same line that when cops arrest so-called Muslim terrorist, they are never to be challenged. Its only when cops arrest Hindus that we can accuse them of framing the suspects! We can now see what the BJP's message to the police really is: arrest all the Muslims as you want, we will back you unthinkingly. But if you dare to arrest Hindus for terrorist attack, we will attack you from the highest platform. That shameful double standard exposes the hypocrisy and prejudices at the root of the party's approach towards terrorism.

[22] D N Rath, *Terrorism and Human Rights* avalaible at http://www.boloji.com (last visited on dt. 23.08.2008).
[23] Rajinder Puri in "*Samjhauta farce still on track*", The Statesman (Kolkata, 31st July,2014).

It is needs to be understood that the terrorism cannot be associated with any one religion. Terrorism is a crime against the humanity that needs to be erased. But this cannot be done by targeting any one specific community as this, apart from being patently unjust, can only be counter-productive by creating the atmosphere that breeds terrorism's recruits. In India's case, the victim of terrorist attack have been of such a diverse range that the terrorist cannot be straight jacketed into any single religious group. We have experienced the agonies of attacks on Muslims, Sikhs, Christians, Tribals, Dalits and Hindus, we lost two Prime Ministers through the terrorist assassinations, and Mahatma Gandhi himself was a victim of terrorist bullets.[24]

V. Strategy to Deal with Terrorism: The Ground Realities

It is true that India has been facing countless constraints in combating terrorism. In the absence of any specialized or dedicated investigative agency, the task of investigation had been carried out by the CBI and State Police forces. Apart from CBI, the state police forces have shameless record of misuse of the draconian acts and violation of the human rights of minorities. Nobody would dispute on the issue that police should do their duty and work impartially but in the name of terrorism we can't let the police to killing and frame innocent citizens.[25] Take the series of bombing case in Delhi, when it take place we are assured with great authority that bombers were *Jehadis* (Muslims-the followers of Osama Bin laden) acting under the instruction from Pakistan terror outfits. So far four different states police had been claimed that masterminds of bombing are in custody with us. Now, we are being told that they were Hindus who the ATS of Maharasthtra Police has in custody. We can easily predict that what has been going on in the name of so called "investigation" by the police, special cell or ATS. If you go through the controversial area of encounters, the police come off even worse. Nobody seriously disputes that many of the people killed in so called encounters have actually been killed in the police custody.[26] The Gujarat Police and the role of state administration is the finest example of state sponsored

[24] Sitaram Yechuri "*Terror has no religion*" in '*Left Hand Drive'*, Prajasakti Book House Hyderabad, 167 (2012).

[25] See "Crime in India" NCRB Report-"Delhi Police has been on top in all India level percentage of crime committed by the police personnel and human rights violation cases e.g. custodial violence, extortion, frame-up in false cases, outraging the modesty of woman and other serious category of crime according to the latest report on crime released by the National Crime Records Bureau", Ministry of Home Affairs. 161-166 (2013).

[26] Vir Sanghavi in *Counterpoint*, The Hindustan Times 11(Delhi, 23August 2008).

atrocities against the Muslim community. The former DGP of the state is absconding, many police officials are in jails-the charges are same i.e. extra- judicial killing of innocent people, unfortunately most the victims are happened to be Muslims.

In the words of Mr. Wajahat Habibullah the former chairman of National Commission for Minorities, "all encounters are fake and illegal and the police are creating a kind of paranoia in the multi-cultural and multi-religious Indian society and there is strong apprehension that, these developments will certainly rise the communal atmosphere of the Indian society. The police have been completely failed to build confidence amongst members of minorities. The whole community has been under frightened and force to live under the shadow of police terror. The minority community have legitimate rights to not to cooperate with police as there had been a history of police atrocities against them. How they can trust police who framed innocent youths from their community in the false terror charges, subjected them to acute form of torture and barbaric cruelties."[27]

In India the violation of human rights through state agencies in the name of combating terrorism has been a major concern for all democratic loving citizens. The TADA Act 1987 was most draconian Acts in India and the same was heavily misused by the police. Due to countrywide protest it was dropped in 1995. On POTA, the chairperson of NHRC Justice A S Anand had said that "it did not have provisions to safeguards against its misuse though those provisions may not be enough".[28] Justice Anand further added that "undoubtedly, national security is of paramount importance but the individual human rights must be uphold by the state, without protecting the safety and security individuals rights, the nation can't be protected." Referring to terrorism the NHRC chairperson said:

> Government should adopt the strategies which balance the dignity of the individuals with national security. The human dignity must be placed alongside the unity and integrity of the nation. Any law enacted to tackle terrorism must be very closely scrutinized and must muster the strict approval of constitutional

[27] Wazahat Habibullah, Chairman, National Commission for Minorities, in a interview given to NDTV's Barkha Dutt for details available at http://www.ndtv.com/wethepeople (last visited on 23.02.2014 at 10.30 PM IST)

[28] "Text of NHRC opinion on Terrorism Ordinance 2001, issued in November 2001" 8th Human Rights News Letter, NHRC, New Delhi (December 2001).

validity, necessity and proportionality, the legislature must scrutinize whether there is at all any need for such law and whether it infringes civil liberties or not.[29]

However, all the liberal states have enacted certain special laws dealing with terrorists. Recently, investigation and prosecution of the terrorist offences at central level is streamlined. The establishment of National Investigation Agency under the NIA Act 2008 is the first step towards effective handling of terrorism related offences. The second piece of legislation, the Unlawful Activities (Prevention) Amendment Act 2008, makes a number of substantive and procedural changes to empower the NIA to act effectively and decisively on terrorism related activities. The powers of the NIA to arrest and search have been tightened. Sections 43A to 43F have been substituted with provisions that enlarge the power to search any premises or arrest any person who, in the opinion of the officer, is about to or has a design to commit an offence covered under the UAPA Act.[30] The provision of anticipatory bail under s. 438 of the Cr.P.C does not apply to the offences under the Act. If the accused is a foreigner, who entered the country illegally, bail is not to be granted at all. Finally the Act empowers the Central Government to freeze, seize or attach the financial assets of those engaged in the terrorism. These strong provisions, if responsibly executed in combating terrorism, would undoubtedly protect the security and liberty of the citizens,which form the foundation of the Rule of Law in a constitutional system.

VI. Concluding Remarks

In the final analysis, terrorism is an extreme form of violence; it's a product of social dissatisfaction and frustration, denial of certain basic human rights i.e. economic and political deprivation and administrative malaise. It cannot be cured only through the military action or by use of force. Terrorism, like corruption needs to be tackled in a proactive manner. "Reactive" action is inadequate; it can have fatal consequences in terms of public peace and the national cause. The measures that need to tackle terrorism include political, social and administrative measures along with military

[29] Ibid
[30] See Unlawful Activities (Prevention) Amendment Act, 2008.

actions. Further by politicizing the terror and giving any religious color to the terrorism, our political classes are guilty of doing grave disservice to our anti-terror investigative agencies. The existing agencies i.e. NIA, ATS etc must function independently and without any influence of the political class. The immediate task is to rise above the religious prejudices when confronting terror. There must be an acute realization that there are some individuals in both the community who are seeking to settle scores through mindless violence. We must treat all terrorist equally irrespective of their religion, creed or colour.

The media is too responsible for creating panic in the society through their reporting on terrorist attacks. The visual media must shun its class and religious bias while reporting such incidents. The media gives importance to "newsworthy" incidents that capture the interest of viewers and maximize their profit. Terrorism is pervasive flavor of the era and undoubtedly, any profit grabbing sector will try selling the product to maximize its consumers regardless of the apprehensive effect of the act. Visual Media exploits nature of the people by filling of more tragic scenes which in turn generates more viewership and profit. The electronic media should play constructive and vital role in reporting the terrorist incidents.

The strength of republic is measured in its capacity to treat all its citizens equally without any discrimination. The Preamble of the Indian Constitution promises to do so. The incapacity to deliver this promise can only undermine the foundations of the Republic. The secular democratic foundation of the Indian Republic must be strengthened by strengthening the equality of all before the law.

TRANSFORMING LEGAL EDUCATION IN INDIA- NEED OF THE DAY

*Stuti Deka**

I. Introduction

Law is the cement of society and also an essential medium of change. Knowledge of law increases understanding of public affairs. Study of law promotes accuracy of expression, facility in argument and skill in interpreting the written words, as well as some understanding of social values.[1] Thus, the study of law enables a person to understand the public affairs and social values and respond accordingly. It is equally important to stimulate the society through legal awareness and a noble duty is cast upon those versed in law. Persons in the legal profession, namely the practitioners, judges and law educators have an avowed obligation. If we look back and reflect by taking a glance into our movement of independence, this is easily discernable. The tremendous contribution of legal luminaries in effectively shaping the freedom struggle and their seminal involvement in drafting the Constitution providing for a democratic republic based on humanism and welfarism has stimulated the society into proper track.

A welfare state based upon the values of rule of law and a democratic order can effectively be promoted and protected and sustained through an enlightened citizenry, education being the prime and enabling prerequisite. At the cost of emphasis the cardinal role of legal education has to be stressed[2]. In present day society the urgent need is to provide meaningful importance on legal education so that the society would get human resource of legal knowledge. With the advancement of science and technology, the study of law on different aspects such as cyber law, intellectual property law, environmental law etc has been increased unlimitedly. Practically every sphere of life has come to be impacted upon by law; be it the extraction of mineral deposits, marine and aquatic life, outer space, genomics and the law or chemical warfare, climate change,

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[1] WILLIAMS GLANVILLE, *LEARNING THE LAW* (11th ed.,Universal Book Traders,1980)

issues involving the development agenda, social issues to sports and medicines, health, if one may say so, from the cradle to the grave everything is being determined by law. Law has been changing with the passage of time and it has to adapt with the changing conditions of the society. 'Law is the mirror of the society', thus, the method of study of law has to be altered or changed to meet the needs of time. From the domestic to international and transnational issues, legal educators are required to explore, analyse and inculcate through jurisprudence, facilitate legisprudence. Hence, the fundamental tenets of law educators has been to explore the dynamics in the present social and legal *mileau* besides inculcating skills, imbibing values and bringing about an attitudinal change in the advocates and legal professionals for the morrow.

II. Law in Primitive Stages

The vast changing scenario in the field of legal education can only be appreciated if one delves into the past. History bears testimony to the almost evolutionary changes that has revolutionised the teaching of law in current parlance from what it was during yester years. But a brief mention of the evolving years of legal education would perhaps help in conceptualisation and transfigure the process of transformation. During the primitive stages people used to live in a disorderly way[3]. Gradually they became civilized and started living in an organised society. When the people acquired the rights of possession and ownership of properties, the concept of law emerged to maintain harmony in the society. During the Vedic age the concept of 'Law' was based on the concept of 'Dharma' and the king delivered justice according to the principles of righteousness and justness but he ought to be a man of fair and impartial renderings to the governed. At that time there was no formal legal education as prevailing today, yet justice had been delivered by the king following the principle of '*nyaya*', that is, equity. In the medieval period, particularly during Mughal reign, one came to be familiar heard the term vakil as representative of litigant. The modern day legal system has been

[3] It being primarily the domain of anthropologists and sociologist, detailed analysis is being deliberately refrained from.

transplanted in India during the British Raj from the common law system, though in some isolated pockets, evidence of the continental system was to be found.

III. Legal Education in England in early stage

The purpose of the present paper is to focus on legal education in India. Yet, before venturing upon the same, a perfunctory glance into the aspect of legal education in England has been considered worthwhile, the primary reason being that the country during the colonial years, in the last phase, had been impacted by the British Raj commanded from Downing Street, Nottingham Palace, the Law Lords and the Privy Council and the British Parliament.

The process of legal education in India during the Raj and soon thereafter, centred round the efforts to depict the then prevailing system of legal education in England at a time when India was under subjugation of the British rule. In 1857, the Cambridge University introduced the degree of Bachelor of Law in legal education. On the other hand, the Oxford University initiated the degree of Bachelor of Civil Laws in 1873. But surprisingly these degrees were not recognised as qualifying degree for entering into legal profession as barrister or solicitor.[4]These degrees never acquired due prestige with the legal profession. For entering the legal profession as solicitor the essential required qualification was to pass a professional examination conducted by the Law Society. This Law Society happened to be a professional body and it had no arrangement for teaching law. In 1903, it established its own School of Law in London. The twin objects of this Law School were to prepare the students for the professional examination and for the degree in Bachelor of Laws of the London University. There was a Council for Legal Education to control admission process in law school and training for the Bar. Until 1872, the students were required either to attend lectures or to pass the prescribed

[4] For a forceful plea that a university degree in law should be so required; Grover, L.C.B,English Legal Training". 13 *Mod. L. Rev.*137 159 (1950). Quoted from Tripathi, P.K.: *Spotlights on ConstitutionalInterpretation*, 342

examination. Thereafter passing of examination had become obligatory.[5] The national universities of London, Oxford and Cambridge and also some other provincial universities introduced curricula for law degree courses. The degree holders were not entitled to enter the legal profession and had to appear professional examination. This wasteful duplication of studies in University and professional schools had prompted public dissatisfaction. To examine these anomalies a Legal Education Committee was appointed by Lord Chancellor, Lord Sankey. The committee headed by Lord Atkin, recommended for closer cooperation between the work done by the Universities and the professional bodies and for creation of further provision for advanced research in legal studies.[6]

"The university law schools in England have indeed made great contribution in the field of legal education by salvaging English legal education from the status of mere craft training where the professional bodies tended to relegate it."[7] They have emphasized the theoretical, scientific and philosophical aspects of law which alone can explain and facilitate its role as an instrument of social policy capable of adapting itself to the ever shifting needs of society and without an understanding of which no legal practitioner can discharge his functions adequately and meaningfully.

IV. Legal Studies in India- Pre-Independence Era

The legacy of modern day legal system in India can be traced to England. Tradition of the common law system is traced to the British Empire, India being one of its colonies naturally came to be governed by it. Studies on legal representation or a glance into legal and judicial history offers a rich account of the existence of the dual system of the company's courts and the Crown's courts. The system of trial by the muffosil courts and later on in the Sadar Dewani and Sadar Nizamat Adalats offer an account of the administration of justice. Prior to the taking over of the company by the British Crown, the existence of other forums is in evidence wherein much

[5] ibid
[6] Francis Vallant, "Legal Education in England." 15 *Can. B. Rev.*151 (1937),
[7] ibid 16.

lacunae were said to exist. Under the Crown, administration of justice came to take shape, but apart from the Barristers, the vakils and Muktars without much formal legal learning or scholarship sans any formal training came to be engaged by the clients. The jury too came in handy, but formal legal training or inculcation in the laws or legal skills or for that matter legal education could virtually be regarded to be nonexistent. It was much later that the need for legal education came to be realised.

The present legal education system that exists in India therefore happens to be a British phenomenon, the nascent bearings being attributed to the establishment of the three premier universities of Calcutta, Bombay and Madras. In the year 1857, the British established three universities in Calcutta, Madras and Bombay, located in present day Kolkata, Chennai and Mumbai, in the process initiating the progression of legal education in India. Formal legal education was started in India with the establishment of the Government Law School in the year 1855 and it was affiliated with the Bombay University in the year 1860. Later on, it was renamed as the Government Law College in the year 1925. Law classes commenced in Presidency College in 1857 and it was in the year 1909 that a law college under Calcutta University was established for the first time as a separate College[8]. After independence, India has become a democratic republic and as such the importance of legal education has been increasingly felt to subserve the need of the changing society. Thus, the legal education came to be introduced as a separate course of study.

V. Legal Education in India-- Post-Independence Era

After independence, India came to be regarded as one of the largest democratic republics. Such a large republic in size and population also witnessed diversity in different spheres like language, religion, cultures, customs etc. Therefore a fraternal feeling has to be promoted along with other uniting bonds and it was quite natural to have a legal system in place. Along with it, the need to develop a legal culture was also realised. Having realised that law is the important thrust to run a democratic

[8]available at www.wikipedia.com(last visited on 6th Oct. 2014)

republic and as such the significance of legal study came to be increasingly felt for the effective administration of the state. Thus, the legal education was introduced as a separate course of studies. The English dual system of University degree and professional examination prevailing in England, however, were not incorporated in India.

Almost in the last phase of the seventh decade of independence, one may observe that the country has effected some changes to cope with the demands of emerging challenges, but the moot point as to the extent of accommodation remains debatable. This is exactly the issue at hand. In hindsight critiquing may be severe, but the process of accommodating and acceding to the requirements of legal education under the euphoria of freedom has to be appreciated. To study the inception of legal education in India after more than six decades of independence, though not the focal point of the present endeavour, nonetheless appear very much pertinent. In this respect, one has to start from the report of the University Education Commission (1949). This report went on to admit that despite the absence of any internationally acclaimed ' expounders of jurisprudence and legal studies', the lack of any centre of legal education of 'high esteem either at home or abroad or the lacking of profound scholarship and enlighten research, the country could take pride in having 'so many able practitioners and well qualified judges.' It however lamented the paucity of 'gifted legal scholars and researchers.[9]'

Part of the said report titled Introduction to chapter on 'Law', it very vividly observed on the situation in the legal domain about the scarcity of profound scholars and legal researchers in India as well as in abroad. It stated that "[w]e have efficient judges, able practitioners but lack of scholars to fill the vacuum in legal education as faculty of Law. This observation still holds good, prevailing in the legal horizon of India.

For determination of standards of Universities in the country, the University Grant Commission Act was enacted in the year 1956. The

[9] Pillai Chandrasekharan, K.N. Article on Legal Education—In Search of New Vistas, (Quoted from *Journal Of theILI*, 50(3) (2008)

University Grant Commission (UGC) at that point in time was regarded as the competent authority dealing with the grant of affiliation to the Law Colleges. It has undertaken some measures towards improvement relating to the standard of teaching in Universities and Colleges. After a decade of independence, the chaotic state of affairs in legal education came to be portrayed in the 14th Law Commission Report, published in 1958. In the Report it was stated that as, "[t]he portals of our teaching institutions manned by part-time teachers open even wider and are accessible to any graduate of mediocre ability and indifferent merits.[10]" Though the part-time teachers still prevail in managing legal institutes with low remuneration, in some institutes it is very difficult to get admission for students of mediocre ability. Lots of improvements have been effected in them resulting in the shaping of efficient legal practitioners, judges, Policy–makers etc., yet lots of work have to be done for further improvements. The report of the 14th Law Commission under the chairmanship of M C Setalvad, revealed the deteriorating condition of legal studies. After publication of this report, the Parliament enacted the Advocates Act, 1961. The Act enables Rules to be framed by the Bar Council of India in regard to the standard of professional legal education to be observed by the Universities in India and the inspection of Universities for the purposes.

The Bar Council of India enacted rules in 1965[11], to deal with the standards of legal education, and subsequently effected amendments to the same, while effecting recognition of degrees in law for enrolment as

[10] 14th Law Commission Report on *Reform of Judicial Administration* (Government of India, 1958).

[11] Rule 21, of the Bar Council Rules, provides that Bar Council of India may issue directions from time to time for maintenance of standards of legal education and the University/ College is required to follow the same.

Schedule – 1 to the Rules enumerates as many as 21 directions which the Bar Council of India is authorised to give to the Universities / Colleges.

Rule 8 of the Chapter III of the Bar Council Rules dealing with the Legal Education Committee enables the Committee:

(a) To make its recommendation to the council for laying down the standard of legal education for the Universities,

(b) To visit and inspect Universities and report to the Council, and

(c) To recommend to the Council for recognition of any degree in law of any university under Section 24(1) (c) (iii) of the Act. The Committee is also authorised to recommend the discontinuance of any recognition already granted by the Council.

Rule 17 of the Bar Council Rules states that no College shall impart legal education unless its affiliation to any university has been approved by the Bar Council of India.

advocate. Thus, the Bar Council of India has a continuing role to monitor and maintain the standards of legal education, particularly through its Committee on Legal Education presently functioning with an eminent Director under the supervision of a retired Supreme Court judge, having several prominent academicians in it.

The urgent need to tailor and shape legal education to face emerging challenges in equipping future legal professionals came to be emphasised upon by the Knowledge Commission. Regarding vision of Legal Education, the Knowledge Commission in 2008, opined for multifaceted approach to be adopted. It observed:

> "The vision of legal education is to provide justice-oriented education essential to the realization of the values enshrined in the Constitution of India. In keeping with this vision, the legal education must aim at preparing legal professionals who will play decisive leadership roles, not only as advocates practicing in courts but also as academicians, legislators, judges, policy makers, public officials, civil society activists as well as legal counsel in the private sectors maintaining the highest standards of professional ethics and spirit of public service. Legal education should also prepare professionals equipped to meet the new challenges and dimensions of internationalization where the nature and organization of law and legal practice are undergoing a paradigm shift."[12]

The objective of legal studies has to be multifaceted as rightly pointed out by the commission. Its prime endeavour has to be equip the pupils to acquire the skill to serve as an advocate, judge, a law teacher or a legal researcher. From the above report it is explicit that legal educators have to reorient and attune themselves to perform a leadership role that finds reflection not only in the law court but in the working of their students and researchers in varied spheres of public life. If a person is conversant in the application of law he would be a good judge, lawyer, policy maker, executives etc. and contribute effectively in the service of the society and

[12]Report of Knowledge Commission (2008).

the nation at large. The confidence will automatically build up if a person acquires the requisite skills for application of law.

VI. Significance of Legal education

The roles of lawyer, whether professional or academic, are multifaceted. The admitted position is that the general people are not conversant with the application of law, hence the social orientation is all the more incumbent upon them. In this sense, the pertinence of academic discourse of justice education came to be appreciated and its relevance came to be in India with added vigour as in other parts of the world. Law graduates, if enabled to appreciate the finer instincts and attributes between law and justice can better serve the society, apart from their constituents. The country can take pride in the fact that the globally recognised entity, Global Alliance for Justice Education (GAJE) made its nascent beginning from Thiruvananthapuram , Kerala.

In the present day of globalisation the role of legal practitioners have changed tremendously, they have to acquire the specialized knowledge and skill to solve various problems faced beyond or prior to litigation. Problem solving has emerged as one of the virgin area of focus. As a result the globalized legal trend has evolved calling for multidisciplinary and interdisciplinary strategies. Besides, legal educators are called upon to be equipped to impart knowledge and skills in transnational lawyering involving different legal systems involving different countries and clientele. Facilitating all these and more are the emerging mandated areas. But the moot issue is, whether Law Schools in India, with a few exceptions, are moving in this direction or we are bent upon focussing the traditional clientele base.

In India we have three different types of legal schools, namely Global Law School[13], National Law Schools and other State law Schools. It is pertinent to mention here that the Global law Schools are for the very rich people as they collect high fees. They provide legal education at

[13] Provide for international faculty, pressing research oriented scholarship and overseas internships.

international standards in collaboration with leading law schools of U.K. and USA. The National Law Schools[14] are for the rich and the fees are comparatively high. The admission process is sound and preference has been given to the merit of the students. The other category is for the general students of middle and lower level. These three different Law Schools produce three different categories of law graduates. The first one is for international level; second one is fit for semi-international or national level and the third one is fit for local levels. It is high time to stimulate a uniform standard of education and to raise the standards of the local level to the national level rather than continuing with the existing ones or implementing the contemplated urban/ rural divide.

VII. Challenges in Legal education in India

As briefly alluded to above, there are two organizations to look after the legal education in India. They are Bar Council of India and the University Grants Commission. The needs for effective co-ordination between the two organizations have been reported in the 184th Report of the Law Commission of India[15], which will be highlighted some time later so that the state can cope up with the emerging challenges in the milieu of globalization and liberalization. Thus, the need for present day law schools is to equip the law graduates with necessary skills and traits to cope with the present situations. It is acknowledged that at the national level, legal education has not been able to keep pace with the time, nor in the North-East India we have not been able to equip our lawyers in the right manner to serve with the process of law being confined to litigation. The need of the day is to equip lawyers of the twenty first century to face transnational challenges[16]. The doubtful point is where do our law graduates stand in this demanding situation, can they make space for themselves. The resolve has to be there. It has to be facilitated by effecting changes in the pedagogical system with more emphasis on practical training, clinical education, stimulation exercises and the like

[14] They also provide for reservation of seats for students of SAARC Countries.
[15] 184th Report on The Legal Education and professional Training and Proposal for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956.
[16] Presented by Subhram Rajkhowa, Equipping Lawyers face transnational Challenges.

and facilitating the opportunity of exposure through revised curriculum inputs. For this an environment has to be created with trained minds tasked with the process. The Look East Policy and now the link West Policy promises immense potential for our law graduates, demanding a clubbing of the existing three tier system of law schools, namely the Global, National and Traditional Law Schools, so that our law graduates while catering to the needs of the domestic sector can serve with proficiency the globalised demands. Some work has begun through the legal Process Outsourcing Companies but proliferation of legal services through in-house engagement equipped with skills identified will serve the country and its people. Added emphasis on negotiation skills, arbitration and counselling along with other forms of alternate disputes resolution will certainly better equip the law graduates. To achieve these objectives teaching methodologies with technologies will have to be modified with focus on effective practical training, moot Courts, debates, internships, increase in frequency of exposure to real life situations through other practical inputs including law clinics, both institutional and mobile. India cannot lag behind other countries and regimes, as issues like communication, cyber space, internet, Intellectual Property Rights (IPR), human rights, displacement and rights issues in outer space besides territorial waters, climate issues will be required to be dealt with through adequate interdisciplinary interplay, both domestic and transnational.

Objectives of Legal Education in India

The main objectives of legal education are to produce good lawyers, competent judges, efficient law teachers and law researchers, policy –makers, public servant and above all good citizen. To achieve these objectives, person trained in law can acquire the skills and traits to perform his duties as a lawyer, judge or law teacher, law researcher and writers. The lawyers are the finders of the law. They have to interpret the law and find out the law from the statute book; case laws etc and assist the court to find out the law and thus solve the problems of the litigants. Much are expected from the legal profession as they are regarded as sentinels, in certain cases the only vestiges of hope. The legal

professionals should imbibe some positive habits and traits demanded of the profession in such a competitive globalised world. Lacking the same may leave them, so to say, on the wayside. While they should lend themselves to much needed exposure provided by legal educators through capsule courses, like cyber informatics, geonomics, intangible rights issues and the like. Hence legal educators, their professional governing bodies and collaborative agencies should move ahead through planning and effective programme implementation, including collaborative need based research.

Ethical lawering should be focussed throughout curriculum inputs and practical exposure. The lawyer should follow the professional ethics. Though Professional Ethics is a subject in the undergraduate course of legal education, practical orientation is found to be wanting. Importance should be given to this aspect. The lawyers should be honest, sincere and dedicated to the interest of their clients and the society

Law schools in India have started clinical legal education. The clinical legal education in law school can produce committed law graduates reflecting their concerns for the society through action oriented activities. Even while being in schools they can render yeomen service to the society, act as a bridge between the lawyers and the affected individuals, if required through legal aid services now being facilitated by the Legal Services Authorities Act, 1987 as well further the constitutional mandate of legal aid and pro bono services. On this count legal educators have much to offer. Law schools should place primacy in producing committed qualitative lawyers, judges and the jurists in the long run. Memoirs and autobiographies by eminent jurists reveal that their careers get shaped largely by the training, value based legal education that they have had as law students. Transforming the legal system for welfare of the society has been one of the objectives but how best to realise it or activate it remains largely on those manning the temples of learning. This need to be extended uniformly to all law schools in India and it should be

introduced in a planned and systematic manner. In this context the suggestions of the Iyer Committee[17] in brevity merits consideration:

> Either law faculties must run legal aid clinics or the law students must be attached to a 'parent' scheme under the general programme of legal aid. Interviewing applicants for legal aid, meeting and accused in the prison, preparing detailed pre-trial reports, drafting pleadings and researching into the legal issues raised are a social exposure and sobering experience of lasting benefit. This work will also impart practical skill in addition to substantive and procedural rules of the law. Having seen slums and rural squalor in their draining impact, the law students when he becomes a full lawyer will no longer see clients as mere facts of the case, but living neighbours and friends in trouble. For him litigation will cease to be cerebral cricket match but a human drama in the law. He will be a trained hand in legal aid service who will give a necessary social ideology to the profession.

Though this Legal Aid Clinic has been initiated in some law schools but the proper implementation of the suggestions of the Justice Krishna Iyer Committee has not been followed effectively. Most of the Law colleges provide only oral training by providing at best, a small corner and one to two counsel, instead of monitoring through effective follow up action. Having largely remained only in paper, it has resulted in an exercise for acquiring credit minus the prime object of inculcation of justicing value. Neither the students nor those who approach Street law clinics, health law clinics, service delivery mechanisms and the like can work wonders and cast a lasting impact on the legal professionals. Hence, it deserves the required emphasis leading to action oriented clinical activities.

Another quality that has to be acquired by a lawyer is the leadership and team spirit. He should work constructively as team member with broader

[17] Processual Justice to the people -Report of the Expert Committee on Legal Aid, Government of India (1973).

vision. He should be able to comprehend the problem and render a decision using multidisciplinary skills. Therefore, the legal education in India must be geared to produce a new crop of lawyers who not only help in disseminating and implementing them[18] but connect as a bridge for action oriented work promoting social oriented activity. Thus, the admitted fact is that for a lawyer there is no limitation regarding study of subject matters. Whenever a legal issue arises the legal practitioner has to enter the area and solve the problem by applying multidisciplinary skill, though he may not be a conversant in that field. The third President of USA, Thomas Jefferson, once said to the students of Yale University that if one happens to be a law student, there is no area of study which could be excluded from his curriculum.[19]

Value based legal education is the need of the day. Value based education fosters good interpersonal relationship, self esteem and confidence. Dr Eknath Gawande defines value education in the following words: When human values are inculcated through curriculum to transcend to cognitive, affective and psychomotor level for conducive development of individual, society, national and international understanding, it is called value education[20]. In the Indian context, education is an effective tool for inculcating values, legal education is no exception. We should not forget our own spiritual, ethical and constitutional values which have been time tested. Thus, we can safely infer, rather profess that the Indian ethos is based on values which enable proper use of knowledge for the cause of humanity. In the same vein, legal education must impart lessons for realisation of the values enshrined in the Constitution of India and to provide justice –oriented education in India.

Young lawyers are the assets of the nation. For proper development of mind and body the students must maintain a good health. Body is the mirror of the soul and thoughts. Thus, in the law curriculum '*Yuga&pranayam'* should be incorporated so that the future legal

[18] Gajendragadkar's forword to G.S. Sharma Ed. *Essays in Indian Jurisprudence* ,vi (1964).
[19] Report of University Education Commission 1990.
[20] Concept of human values, value education towards personal development. (1994).

luminaries would bear a healthy mind in a healthy body. So, one should always lead his life being physically fit and happy by observing *Yoga*, which releases stress. Exposure to such activity should be provided through law schools. The significance can be gauged from the fact that the international community through the comity of nations has acknowledged the same having recently recognised 21st June as international Yoga day. To start with, mindful advocacy, meditation and the like should be provided as optional activities in law schools, as emerging and essential approach to justice education and to sustaining work for social justice and practice generally. It helps bring out the connection/correlation between "acting nonjudgmentally" and "acting for social justice". It leads to improved confidence, assist in legal skills and effectiveness as a lawyer, which in turn leads to better outcomes for clients. Mindful and meditative practices including qigong, have blossomed within the field of lawyering and have been considered a part of the curriculum content in western countries.

Shortcomings in Legal Education

As discussed above, we have three categories of Law Schools imparting legal education. The first two categories, namely Global and National Law schools are well equipped legal educational institute with proportionately low intake capacity. They function with patronage from the state and have focussed research activities. However, the quality of legal education as a whole has been considered to be rather dismal. Despondency should not set in but positive endeavour needs to be undertaken to promote the standards. Some marked initiatives have been witnessed on the part of the regulatory authorities, but much more is required of them if at all they mean it a business. This finds reflection in the quality of legal profession and education provided in institutions like National Law Schools of India University established in the late eighties under the initiative of the Bar Council of India. Following its success story and track record, the Judiciary has taken initiative to have National Law Schools in every State. The Schools produce quality products imparting legal knowledge and professional skills. But most of the law

graduates from National Law Schools prefer the corporate sector, as a result the position pertaining to the Bar remain more or less same as before. The cherished aim of setting such law schools continue to remain elusive if not defeated. This fact highlights the need for reform in legal education to produce law graduate imbibed with the modern traits that the legal profession is expected to handle. On the other hand, the third category referred to above, with certain exceptions continue to remain a subject of great concern. Since, the intake capacity of these institutes are high[21] and lack in minimal infrastructure, they have to surmount enormous difficulties in imparting legal education to the mediocre students of the upper middle class and poor students of the country as a whole.

The reasons for deterioration of standards of the present legal education system may be attributed primarily to a defective admission system, defective examination system, lack of well-trained teaching faculty, non existence of uniform legal education policy all over India though curriculum content is being regulated by the Bar Council of India in respect of the Bachelors programme. We have two types of legal education of three year and five year duration. Both follow the semester system, as a result there would be number of anomalies in the admission system[22], examination system etc in the traditional law colleges. The lacklustre approach towards legal education by the universities and the state has been primarily responsible for the present state of affairs. A few decades back there was a decision to segregate under graduate legal education from post graduate legal education, yet some form of clubbing rather than integration continues to be the order of the day. A marked distinction between professional legal education with that of philosophical groundings on theoretical precepts have to be maintained. Legal research has not been undertaken with deserving earnestness, pathbreaking results

[21] Attributed to the liberal pursuit of the Bar Council of India inspecting teams who implement the regulation governing permission and affiliation .

[22] People entrusted with policy initiatives and particularly those mandated to carry out the inspection of the institutions need to be made answerable for the sorry state of affairs. Lack of accountability on those who have failed the Bar Council, namely the personnel conducting the inspections , even though mostly belonging to the executive committee has led to such a situation. If standards of legal education are to be met, then the inspecting teams indulging in nepotism and suspect activities should be taken to task.

cannot be expected through a casual approach. Most of the investigations undertaken have been by way of compulsion towards fulfilling academic requirements rather than being action oriented or aimed at social utility. Without meaningful research by persons qualified and committed, desirable contributions in the field would continue to remain a dream in wilderness.

The Road Ahead- Negotiating the Shortcomings

The Bar Council of India and the UGC have to take appropriate steps and allow one system which would be beneficial for the legal profession as a whole. To produce good lawyers the creamy layer of the students should be attracted to the legal profession. For drawing such talents, a roadmap has to be laid. This will certainly help MNCs and intergovernmental organisations foray into the country in an enabling environment where legal scholarship can be relied upon.

The trend has been sought to be changed in rather an *adhoc* manner. The concept of National law School has taken gained recognition, but a good number of states are yet to come forward to set up such law schools as desired by the apex court, though it cannot lay any claim to deliver for the entire country. Supplementing the existing curricula rather than supplanting is the required desideratum. Besides added inputs, some optional courses may help attain the objectives. While we need to keep pace with developments globally, we cannot afford to ignore students, the exposure of the time tested traditional customary, socio cultural values much ingrained, as well as the ethos long established.

Some form of autonomy in curricula structuring has to be provided by the Ministry of Human Resources, if institutes of legal education have to respond and remain relevant in promoting a culture germane to legal education and research. Collaborative approach with credit transfer has to take place like those programmes under ERASMUS - MUNDAS , Tempus etc. in Europe or Columbia, University of Texas Governing Law, Loyola, Michigan etc in the United States or tying up with Alabama under the American Bar Association(ABA) mandated accreditation, which has

presence in Australia and Switzerland, Tel Aviv and University of Delhi, too need to be explored. The mission of ABA being to train graduates who can recognize problems that are international in character and scope, and who can directly assist or refer matters to appropriate legal professionals. A necessary prerequisite would be the standardisation of legal education by the University Grants Commission, aimed at the attainment of excellence. Along with it, a reorientation of the system of evaluation aimed at adequate reflection of the process of knowledge and applied skills has to be focussed. The changed circumstances have to, metaphorically speaking, chisel and equip emerging law graduates being service oriented, that is to perform as legal service providers with a transnational outlook, rather than train and prepare them primarily for the Bar. Addressed in the sub regional setting, by way of illustration mention may be made of exposure to the different SAARC Conventions ranging from terrorism and trafficking to trade related activities that offer interplay in cross national settings.

Though semester system has been introduced all over Indian Universities offering legal education, in some cases it has not been effectively worked at. In many universities the process of assessment being confined within institutions, have led to undesirable compromises at the expanse of students. This lays bare the defect in the evaluation system. In the examination process no specific word or space limit is prescribed for answering a question. It may be suggested that like NET or other competitive examination, specific pages or space limit may be allotted for answering questions.

A sound legal education system can produce good lawyers and legal professionals. In this context, the practical experience, hard labour, honesty, sincerity of a law teacher cannot be denied. The law teacher should acquire legal knowledge by reading at higher level, to be equipped to hone the traits. He has to be able to translate the acquired skills of analysis of case law and interpretation of statute law delving into the varied intricacies. He should be a visionary and an authoritative status in legal horizon. Such essential attributes can only be expected from a

teacher if she/ he is dedicated and committed besides well paid. Without incentives one cannot be expected to deliver. It is a fact that in the existing traditional legal educational institutions, more part-time teachers are appointed than the whole- time teachers. Though the full time teachers draw pay scale as fixed by UGC, the part-time teachers are not paid at per UGC. Moreover, even the earlier requisite student teacher ratio (40:1) and whole-time teacher and Part-time teacher ratio (75:25) are generally not maintained. The existing rules call for a minimum of 9 teachers besides the Principal in colleges having two streams. This does not include the teachers engaged for liberal disciplines as well as the requirement of three teachers possessing specialisation in each honours subject. Such anomalies should have been the point of concern for UGC, Bar Council of India and the Universities concerned, but in most cases they appear to have paid lip service to it so far.

It is pertinent to quote from Dr. A.S. Anand, former Chief Justice of India when he observed as follows: "it was realised and accepted that to improve the standards of legal education, there is need to have law teachers, well trained, well paid and dedicated to the cause... The task of a teacher is not only to fill in the students with the contents of his narration but to bring out the hidden talent in the students... there is, thus, need for continuing education of the law teachers and to infuse in them the desire to do research work..." This view of the former Chief Justice has been adopted by the UGC for selection of teachers in higher Education including the legal education. Justice Anand also put stress on practical experience of the law teachers so that good lawyers may be produced.

Emphasising upon the need to have a band of experienced academics, Prof. R.M. Goode,[23] had made an excellent statement reasoning the requirement of academics possessing practical experience as follows:

[23] Goode, R.M. in 129 NLJ 1117

> Ideally, a person seeking to become a law teacher at top level should not only be outstandingly able but also have some practical experience of the profession and some published or approved writings to demonstrate his ability in research. But few applicants have all these points to recommend, so most law teachers are appointed without having had practical experience---

Thus, for teaching under graduate law students practical experience of law teachers cannot be denied. Earlier, practicing lawyers were appointed for teaching LL.B. Students, but there were practical difficulties to continue the system. Thus the UGC abandoned the practicing lawyer as criteria for appointment of law teachers.

Regarding the higher legal education, there is a debate for introduction of one year LL.M. programme in place of traditional two-year LL.M. course. Some argue in favour of one year LL.M programme as prevailing in USA and UK, but others countered by stating that our LL.B. course is not sound, it should not be permitted. But the fact is that both the courses are not interrelated. The law graduates can start practice immediately after completion of the degree. Our aim is not only to produce lawyers but also law teachers, scholars and writers. As regards post graduate programme, stringent adherence to the specifications is more often than not violated. The initial restrictions on the limited intake have been grossly violated under the very nose of the Universities, they being the affiliating bodies. This has led to the rapidly deteriorating standards of higher legal education. The lack of qualified teachers has also been encountered. However, positive measures have been undertaken by the UGC. The National Knowledge Commission while examining the quality of legal education and research in the country recommended several steps to revamp the system towards achieving academic and professional excellence. Following those steps, the UGC has approved introduction of one year LL.M degree programme only in such universities/institutions which have a Centre for Post-Graduate Legal Studies having a dedicated team of senior teachers competent to guide post-graduate scholars including Ph. D. students, with Post-Graduate education in law being

offered only after fulfilling the minimum requirements in terms of faculty, infrastructure etc. prescribed under the Guidelines. This is a welcome development as the measure is aimed at setting standards of excellence.

VIII. Conclusion

From the above discussion, we may conclude that there is a paramount need to raise the standard of legal education .Well trained teaching faculty who can dedicate their service for the cause of legal education need to be identified and provided with a favourable academic atmosphere. Priorities should be given for admission of students with good academic career. In one academic institute both the law course for three year and five year should not be continued. There may be only one uniform law course after (10+2) all over India. To maintain the standard of legal education the Bar Council of India and UGC have to shoulder their responsibilities with right earnestness. The BCI has to visit and inspect Universities and colleges and factual position should be reported to the Council, so that the legal institutes stringently maintain the required norms and provide the requisite infrastructure. The standard of legal education can be raised to the desired level only if due steps are taken to eradicate or to reduce the main defects as discussed above. It is high time for all concerned authorities to give proper attention so that derogation in legal education may be checked. The state should devise a mechanism to supervise the entire process of affiliation, admission and curriculum content rather than entrust the task exclusively to the BCI. Each state should be mandated to set up a Directorate of legal education under the aegis, if possible, of the law ministry. In fine, it may be stated that sincere efforts have to be undertaken to promote need based socially relevant and oriented research activities in this vastly expanding and challenging scenario, towards attaining excellence in legal education.

SURROGACY: LAW AND ETHICS IN INDIA

Subhram Rajkhowa *****

I. Introduction

The desire for children among couples is an universal phenomenon. Religious belief systems and traditions too evoke their desire to have children to continue with their family, progeny and rituals. Psychologists point out that birth of a baby creates a bond between the spouses which can help stressful marriages to sustain in the long run,[1] though this may not be true in all such cases. Likewise the traditional belief systems are associated with respect being accorded to a child bearing woman; to the contrary infertility is only attributed to her if she cannot bear any progeny, even if the husband is found to be impotent .Infertility is seen as a major problem, has kinship and family ties are dependent on progeny. Such a state of affairs, coupled with the desire of procreation has led at attempts through medical research of treatment to explore avenues at procreation Such research brought about a breakthrough in the form of Assisted Reproductive Technology[2] (ART), particularly in the form of Surrogacy, considered to be a medical boon to parents suffering from lack of ability to reproduce. Such technique attempts to ensure pregnancy by manipulating the sperm or egg outside the body and then transferring the gamete or embryo into the uterus. Therefore it is not a cure for infertility. Hence, it cannot be termed as any treatment for infertility. Undoubtedly, it offers such childless couples the opportunity to avail of the same, provided they have the capacity to afford the costs of such procedures. The process gets initiated when a woman agrees to gestate a child on behalf of the intended parent of parents and also to relinquish the child and the rights and responsibilities as a mother. It involves some appurtenant moral and ethical issues arousing heated debate as to its efficacy. Proponents do seek to shelter on the aspect of constitutional liberty to procreate among others while those opposed attribute it as

* Professor and Head, Department of Law, Gauhati University.This paper is a revised version of the one published in ATMANAM.

[1] *Satish Sitloe V Ganga* AIR 2008 SC 2093.The apex court observed that even the birth of a son also failed to act as catalyst and bring about an amicable settlement between the couple

[2] ARTs are essentially technologies to assist any woman with biological and social infertilities or inabilities to conceive.

Artificial Insemination is a technique involving the artificial injection of sperm containing semen from a male into a female to cause pregnancy and In-vitro fertilization is a technique for conception of a human embryo outside the mother's body.

being equivalent to a form of black market baby selling advancing an exploitive and dehumanizing concept that is considered to devalue both the act of reproduction and the women who supply their wombs[3]. These issues are proposed to be discussed in brief in the following paragraphs. In doing so the grounding of the procedures within the legal ambit too are required to be considered, so that they are not subjected to misuse by couples who may not be incapable but unwilling to undergo the rigour of pregnancy. Instances are there of highly ambitious career women who consider career prospects a priority or put a premium on jobs. Similarly, the ethical issues of exposing the needy and the destitute to become a surrogate mother highly vulnerable to offer ones "womb for rent or outsourced pregnancies or baby farms" are very much there and need to be regulated through appropriate provisions as highlighted by the Supreme Court of India in *Baby Manji Yamada v Union of India*[4]. India is becoming a favourite destination for foreigners for surrogacy related fertility tourism, therefore legal and human rights issues should be taken care of under an appropriate legal regime in order to steer clear of the controversial issues surrounding the birth of such a baby.

Definition

The word 'surrogate' owes its origin to the Latin '*Subrogare*' meaning an arrangement through which a woman carries and bears a child of another person without any claim to such a child. It is a technique taken recourse to by couples whether married, live-in or lesbian relationship when a woman becomes the carrier of their child. It is regarded as a scientific extension of the natural ability to reproduce. Hence, it is considered apposite to have a proper understanding of the term. Surrogate mother refers to a woman agrees to bear a child for a couple who are childless due to the infertility or physical inability of carrying a developing fetus According to Black's Law Dictionary, a 'surrogate mother' is a woman who is artificially inseminated with the semen of another woman's husband. She conceives a child, carries the child to term, and after the birth assigns her parental rights to the birth father and his wife'. The New Encyclopedia Britannia defines 'surrogate motherhood' as a practice in which a woman bears a child for a couple unable to produce children.

[3] Robertson, Embryos, Families and Procreative Liberty: The Legal Structure of New Reproduction, 59 S.Cal.L. Rev 1014 (1986) Surrogate parenting uses the mother as a machine to produce a child for the selfish purpose of the donor.
[4] AIR 2009 SC 84 .

Warnock Report defines surrogacy as practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.[5] It has been defined in the American Law Reports as…'a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth'.

II. Types of surrogacy

Surrogacy arrangements may be classified under two heads: traditional surrogacy and gestational surrogacy. The former involves the insemination of the surrogate with the sperm of the husband of the commissioning couple[6]. In this case the surrogate is both 'genetic' and 'gestational' mother of the child. On the other hand when it involves the implantation of a pre-embryo, comprising the egg and the sperm of intended parents, or one or two gamete donors, it is known as gestational surrogacy. Here the surrogate is the gestational mother, but not the genetic mother. Also known as Host method, the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. On the other hand, in traditional surrogacy (also known as straight method) the surrogate is pregnant with her own biologic child with the intention of relinquishing the child. Such a child may be conceived by sexual intercourse, home artificial insemination or intra-cervical insemination being performed at a fertility clinic.

Surrogacy may be either commercial or altruistic for her pregnancy depending on whether the surrogate receives financial reward for carrying a child to maturity. Usually it is taken recourse to or commissioned by well-off infertile couples who can afford the costs involved or have the means to complete their dreams of being parents. The gestational carrier if paid to carry a child to maturity in her womb is termed as commercial surrogacy. Where the surrogate does not receive any financial reward during the course of her pregnancy or delivery apart from the medical expenses

[5] Report of the Committee of Inquiry into Human Fertilization and Embryology (1984)
[6] Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 Conn. L Review 127, 128 (Fall 2000) cited by Jyoti Mozika in Surrogate Motherhood and Law, p 149, R Bandyopadhyay and R D Dubey (ed), *Law and Gender A Quest for Justice*(Alfa publication, New Delhi, 2012).

incurred as medical expenses, maternity clothing and other related expenses is known as altruistic surrogacy. .

Due to the high success rate of surrogacy, presently ranging between 70to 90 percent consequent upon advancement of IVF technology, decline in tendency of adopting children as well as growth of infertility in modern society, infertile couples are coming forward to utilize the opportunity of having a child.

III. Moral and Ethical Issues

It is pretty much obvious that moral and ethical issues are involved in the entire process of child bearing by the surrogate. Opponents often harps on the issues of commoditization of the child, snatching the bond between the mother and the child since the fetus remains under the care of the mother for long and much depends on the way it is being nurtured. Another amoral aspect highlighted relates to the interference with nature, more often than not, leading to exploitation of the poor women predominantly in underdeveloped or developing countries. It is being viewed at risking their bodies or outsourcing their bodies simply for the sake of money. Further, the element of psychological considerations does come into play, which at times might lead to tensions and internal conflicts on the surrogate. These apart, ethical and socio-legal issues also need to be addressed as for instance the liberty of the mother intending to commission the baby to seek abortion on medical grounds, or considered from the prism of a commercial transaction, whether it is right to sell a baby by indulging in surrogacy. Another issue that raises ethical concerns is whether people who would otherwise have opted for the process of adoption should be encouraged by those involved in the business to go for commissioned baby or for that matter permitting fertile women to take the easy way out just for the reason that they either want to avoid the pains of pregnancy or feel that it might interfere with their career prospects. Another aspect relates to the condemnation of commercial surrogacy and it being prohibited by legislation in many countries. This aspect definitely needs to be addressed in a holistic manner.

At present many a person opine it to be a grey area in the realm of morals and ethics, and therefore calls for it being adequately addressed through law. In such a scenario the justification for a few countries expressly not prohibiting the same or their refrain from taking measures to outlaw the same has to be addressed by

providing stringent norms. Ethically one may advocate for its being banned but ground reality may propel a country to act otherwise. The proponents advocate the theory that prohibition on vague moral grounds without proper assessment of social ends and purposes which surrogacy can serve would be irrational.[7] They often believe that facilitating the procedure can create opportunities for poor women to earn their livelihood in a better way. Some do argue that in a country crippled by abject poverty it will be difficult or it would be improper on its part to restrain willing women not to go ahead with it; hence they consider it to be emancipator leaving the choice to men themselves. The justification put forth being the recognition of the right of women to make choice regarding her body as well as the right of procreation, be it in the form of a constitutional recognition or one under the Universal Declaration of Human Rights. Yet it has to be accepted that in adopting a stand on the issue, acceptability to the community has to be considered. The opponents base their views and arguments on grounds of health, morality and ethics. Some among them maintain that a surrogate is often treated as an emotionless machine whose purpose is to create life and then do the disappearing act. The deep feelings of emotional loss, remorse and post natal depression on having to part with the baby and the feeling or argument of the baby being treated as a chattel rather than a human being are cited against facilitating surrogacy.[105]Some among the proponents believe that surrogacy promotes incalculable benefits by bringing a human being into this world.

Indian Position, Judicial Response and the Proposed Law

One can go on debating this issue extending to several pages of this write up but due to constraints of space, analysis of the diverse issues are refrained from. The paragraphs to follow would therefore attempt to encapsulate in brief the position in India, touching upon only peripherally the relevant concerns that have been addressed in other systems. The issue has gained significance in our country primarily for the reason that commercial surrogacy through ART has turned into a Rs 25000 crores (USD $500 million) industry[8]. The following reasons account for the present state of affairs. India has turned into a surrogacy destination due to the increase in medical/health tourism prompted by the fact that better facilities are available in this

[7] The Hindu , Kolkota, Monday August 10, 2009 , p 13.
[8] N.Keane & D. Breo, The Surrogate Mother, 16-17 (1981) believe that women volunteer for surrogacy out of love for a friend, as a protest against abortion, and to have the experience of giving birth.

country at much affordable costs. Against the usual fee of anything between $25,000 to $ 30,000, in India cost effective treatment for infertility providing for surrogacy can be availed at 1/3 the cost that has to be borne in the USA or other developed countries[107].Hence, some of the cities in the country have been recognized as places for outsourcing commercial surrogacy. And is emerging as an international surrogacy destination with complete packages being offered that includes fertilization, the surrogate's fee, delivery of the baby, hotel and medical expenses and travel costs all put together. Together with a facilitating legal environment it has naturally become an important destination, hence the need for urgent regulatory mechanisms.

The Scenario in India and Beyond

The position in India as on date needs to be assessed. Though a Bill was introduced in the year 2008, the same could not muster legislative support as has been the case with many draft Bills. So one approaching surrogacy agencies or an inquisitive mind has to infer from the attendant circumstances as to whether surrogacy is legally permissible in India in the absence of any specific legislation. It may be stated that commercial surrogacy may pose many challenges in view of the fact that there are only a few counties across the globe that recognize it and even among those one finds a lack of uniformity of principles. Some countries have opted for complete surrogacy while others permit it selectively. While in some countries commercial surrogacy is prohibited, altruistic surrogacy is permissible. In countries like Canada and France surrogacy is prohibited, so is the case with commercial surrogacy in Italy, Germany, Switzerland, Greece, Spain, Norway and New Zealand, but Israel legalized gestational surrogacy under the 'Embryo Carrying Agreements Act'. In other words in Israel a form of state controlled surrogacy is permitted in which all such contracts require state approval subject to the stipulation that only Israeli citizens with the same religion being either single, widowed or divorced can become surrogates[9], that too only if sought to be hired by infertile heterosexual couples[10].In Australia the surrogate mother is deemed to be the legal mother of the child and any surrogacy agreement entrusting custody to others is void. Similarly in the UK until the year 2000 surrogacy

[9] Teman Elly, The Last Outpost oftheNuclear Family: A Cultural Critique of Israeli Surrogacy Policy" in Birenbaum- Carmeli, Daphna and Yoram Carmeli (ed), *Kin Gene, community:Reproductive Technology among Jewish Israelis*, 242 Berghahn Books (2010)

[10]D. Kelly Weisberg., THE BIRTH OF SURROGACY IN ISRAEL,University Press of Florida (2005).

contract were considered to be unenforceable in law under the Human Fertilization and Embryology Act, 1990. Under the amended Act passed in the beginning of the millennium, the commissioning parents are conferred the status of legal parents if genetically related to either of the commissioning parents. In the United States many of the states have recognized surrogacy with varying stipulations.

If one addresses the situation in India, one finds that despite the absence of any legislation either under the federal government of those of the federated states, it is permissible as provided for under the guidelines of the Indian Council of Medical Research (ICMR) along with the National Academy of Medical Sciences (NAMS)[11]. These guidelines were adopted in the year 2005 to check the use of assisted reproductive technology. These guidelines were issued to check the malpractice of ART but these guidelines being devoid of any legal force, being non-statutory, are not legally binding. For the surrogate mother providing the womb for an embryo from the egg and sperm of the prospective parents, the names of the genetic parents have to be recorded in the birth certificate. Surrogacy is considered legitimate in the absence of any specific prohibition in India, though it is equally true that no law explicitly permits surrogacy in India. Till now, a surrogacy contract is governed by the Indian Contract Act, 1872 only; hence the need to specifically regulate surrogacy through law.

The Judiciary

For the first time a controversy arose in the United states when the surrogate refused to part with the baby prompting the commissioning parents to knock the doors of the New Jersey Superior Court ,Chancery Division for justice in Re Baby M.[12]. On the surrogate mother refusing to revoke her parental rights upon giving birth the sperm donor and his wife instituted a suit against the surrogate to gain sole rights over the child. The court upheld the validity of the surrogacy ordering specific performance of the contract; its reasoning on the right to procreate and the best interest of the child mandated specific performance. Had there been a specific legislation regulating such a possibility would not have occasioned.

[11] National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, Indian Council of Medical Research National Academy of Medical Sciences (India), New Delhi - 110029, (2005).
[12] Steven M.Recht, " M" is for money: Baby M and the Surrogate Motherhood controversy, 37 Am. U.L. Rev. 1013.

The Supreme Court admitted a PIL in *Baby Manji Yamada v Union of India*[13]. It contended that many irregularities were committed in India, including money making racket, due to the absence of any law on surrogacy and prayed for a direction to the government to enact and enforce a stringent law in this regard. The plight of the surrogate baby came to light when due to a matrimonial discord between the biological parents. The surrogate delivered the baby on the 25th July, 2008 and as the father was compelled to leave for Japan due to expiry of visa, leaving behind the baby. The apex court had directed National Commission for Protection of Child Rights to take up the matter. The grandmother of the baby came down from Japan to obtain custody of the baby. She had to file a writ of Habeas corpus for custody of the child and only on receiving a direction from the Court to the Government for issue of a passport to the surrogate baby she could return to Japan along with the baby.

The plight of surrogate babies came to light in another case when an Israeli was restrained from taking his surrogate twins from Mumbai The order stated that it was beyond his jurisdiction to order the paternity test, required to prove parenthood and grant of citizenship to the children.[14]

The issue of grant of citizenship to children born of surrogate woman again surfaced in another incident involving the surrogate babies of a German couple, John Balaz and his wife. The direction of the Gujarat High Court to the Centre to grant citizenship to the child was challenged before the Supreme Court contending that the law does not provide for granting of citizenship to a child born to a surrogate mother. Though the matter was resolved with the German government deciding to grant a Visa to the surrogate twins, the Apex Court expressed the view that the Parliament would soon pass law to clarify the legal position.

IV. Efforts at Legislation

The few afore-mentioned instances amongst the innumerable have been provided to illustrate the developing complications that have surfaced due to the absence of any law governing surrogacy. The compulsions are all the more for legislation; an effective one at that, so as to provide protection to the surrogate woman as well as the

[13] [2008] INSC 1656 (29 September 2008)
[14] Usha Rengachary Smerdon *Crossing Bodies Crossing Border: International Surrogacy between the United States and India* 39 Cumb.L. Rev.25 2009.

surrogate baby in the event of a permissible law to that effect. The rights of the receiving couple too call for being considered. Any such legislation providing for surrogacy has to be based on the public policy being followed, extending to the extent of exploring the rights of individuals to enter into such contracts. Law makers should bear in mind that class structure plays an important role in noncoital reproduction as in surrogacy the interests of the wealthy contracting couples are better served than those of the surrogates[15]

History bears testimony to women being used, exploited and discriminated against by men. Hence, a gender neutral law based on humanistic considerations has to be enacted, wherein womenfolk are regarded as bearers of rights with dignity, excluding the possibility of them being even remotely suggestive of bearers of reproductive organs. Surrogate motherhood contracts could subject future generations of women to the same fate if they are treated solely as reproductive organs[16], grave possibility of discrimination would remain. Efforts made so far to have a law on the statute book have failed, largely because of the lack of political will, else the draft bill introduced in the year 2008 would have been given a serious thought, if not passed into law. A very brief evaluation of the Bill is being attempted to find out the intended purpose as well as the object it sought to achieve. The urgency may not be felt by the common man for such a legislation, but considered in the framework of surrogate tourism prompted by economic considerations for those in need[17], immediate legal protection is called for to address complex legal issues through a comprehensive legislation.

The Assisted Reproductive Technology (Regulation) Bill and Rules of 2008 stipulates the acknowledgement of surrogacy agreements and their enforceability ensuring that such agreements are treated at par with other contracts. The Bill also provides that single persons may also go in for surrogacy agreements.

The Bill lays down a mandatory provision under which a foreigner or foreign couple not resident in India or a non resident Indian individual or couple, seeking

[15] Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 Conn. L Review 127, 128 (Fall 2000) cited by Jyoti Mozika in Surrogate Motherhood and Law, 153.
[16] 217 N.J. super.313, 525 A 2d 1122 (1987)
[17] Lacayo, Whose Child is This?, TIME, Jan 19, 1987 at 57, Despite inadequate statistics, it is estimated that one out of every six couples in the United States are infertile. Attributive factors include changing work roles, sexual practices, postponement of marriage or child birth, the likelihood of infertility increases as they become older.

surrogacy in India has to appoint a local guardian casting upon him the legal responsibility for taking care of the surrogate during and after pregnancy till handing over of the baby to the commissioning parent(s). The later in turn is sought to be made legally bound to accept the custody of the child irrespective of any abnormality that such baby may have; with the stipulation that any refusal on their part would be deemed to constitute an offence. Similarly the surrogate mother would be required to relinquish all parental rights over the baby who would be regarded to be the legitimate child of the commissioning individual or couple. The Bill further lays down that in the event the commissioning couple separates or gets divorced, after going for surrogacy but prior to the birth of the baby, it would still be the legitimate child of the couple. Some of the other provisions relate to restricting any couple or individual the facility only once, besides explicitly providing for all expenses to be incurred, providing for the eligibility[18] of the surrogate mother apart from provisioning for obtaining the services of a semen bank and taking recourse to advertisement in case of need. However it prohibits ART clinics from advertising for clients.

The Bill also envisages that all personal information about surrogates would be required to be kept confidential. However the child may upon attaining majority may apply for information regarding the identity of the genetic parents or the surrogate mother. It also provides that the similar right may be exercised by the legal guardian if it involves the welfare of the child. In order to ensure that proposed legislation is adhered to strictly, it envisages that offences under it to be regarded as cognizable, non-bailable and non-compoundable.

The Law commission of India too has been seized of the matter. In its 228th Report 2009 report on the 'Need for legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy' has reasoned as to why surrogacy laws are needed. Its 2009 report on the 'Need for legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy' it observed that "The growth of ART methods is recognition of the fact that infertility as a medical condition is a huge impediment in the overall wellbeing of couples and cannot be overlooked especially in a patriarchal society like India. A woman is respected as a wife only if she is

[18] Between twenty one years and forty five years.

mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues.

Some authors put it as follows *The parents construct the child biologically, while the child constructs the parents socially:* The problem however arises when the parents are unable to construct the child through the conventional biological means. Infertility is seen as a major problem as kinship and family ties are dependent on progeny". The report went o n to recommend legalization of altruistic surrogacy arrangements while prohibiting commercial surrogacy.

It may be stated that another draft Bill has been proposed to do away with the lacunae of the previous bill. The said Bill prepared under the aegis of the ICMR lays down provision a provision that foreign and NRI couples shall have to obtain certificate from either the Embassy of their county in India or from the external affairs ministry, certifying that they permit surrogacy and that the child born through agreement in India will be given citizenship by them. Further it would require the appointment of a local guardian in India to take care of the surrogate mother during the period of gestation, through delivery till it is handed over to the commissioning parents. If the foreign parents fail to take delivery of the child within one month of the child's birth, the surrogate mother and the local guardian will be legally obliged to hand over the child to an adoption agency. In such an eventuality the baby would be entitled to get Indian citizenship. Hence the proposed legislation will ensure that surrogacy will be permitted only in case of proven medical infertility.

V. Conclusion

The country has witnessed a very high demand for surrogate mothers because of the comparative ease with which foreigners can find surrogate mothers. Finding a surrogate is extremely difficult overseas but not so in India. In the absence of such facility in many a countries, coupled with the affordable expenditures involved, India can be said to have offered itself for health tourists scouting for surrogate mothers. This has brought in various attendant complexities and inscrutable impact on the society due to a lack of a comprehensive piece of legislation. Since surrogacy involves conflicting interests it has become all the more urgent to be robed in through a legal regime. The lot of the surrogate mothers and the interests of the baby child born out of such surrogacy have to be protected from exploitation. Careful screening

is called for to protect the health and other interests of the gestational carriers from potential obstetrical risks. The ethical and emotional concerns with attendant consequences; the chances of child abuse have to be addressed so as to meet the challenges posed by the diverse complications and grave implications involving all stakeholders. Parallel, a well informed debate should be encouraged to facilitate feedback so that the loopholes in the proposed law can be effectively plugged.

COMPARATIVE STUDY ON COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS IN PRESENT DAY ECONOMY

Rupa Pradhan[*]

I. Introduction

The competition law and intellectual property rights became one of the most important issues of present day world economy due to its characteristics. The aim of competition law is to protect competition in market by prevention of concentration of economic powers in few hands. In short, we can say that competition law eliminates monopolies from the market. On the other hand intellectual property rights were considered to be creating monopoly in some manner. Competition stimulates innovation and encourages productivity by driving down prices. Monopoly has power to raise the prices of a product because in monopolistic market the only one manufacturer had right to produce the product and no substitute present for that product. And this automatically raised the price of that product. That's why the conflict between competition law and intellectual property rights exists. On one hand competition law tries to maintain the competitive spirit and competition in market whereas on the other hand intellectual property rights provide exclusive rights to the holders to perform a productive or commercial activity. The major concern of competition law in regard to intellectual property rights are the market power that may result from granting such rights and detrimental effects caused by anti-competitive exercise of intellectual property rights.

Intellectual property law and competition law are normally regarded as areas of two odds with each other. The reason behind the conflict is that the Intellectual property rights grant exclusive control to the investors and the competition law works against such market power. Sometimes that monopoly is abused. But in present day economy both are having the same purpose i.e. maximization of social welfare. The intellectual property law grants an exclusive right with hope to induce people to make investments in things which are needed in society. The competition law aims to provide the consumer highest quality of goods

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and services that too at the lowest price. Henceforth, both of them are adopting different path to achieve the same goal of consumer welfare.

II. Competition law and Intellectual Property Rights

The competition law's main agenda is to develop and sustain competition in market and open up the market for every person who wants to invest or to do business. In stark contrast with the agenda behind the enactment of competition law are Intellectual Property Laws which aim at supplying exclusive rights to creations of human intellect, both artistic and commercial.[1] There are certain exemptions to the competition law. While the intellectual property rights are also an exemption but is more complex areas of competition law. Protecting and conferring statutory monopoly rights over patent, trademark, and copyrights products, is aimed at creating not only incentives for inventive activity but also for the early disclosure of inventions, and can result in dynamic economic efficiencies.

Meaning of competition

The competition "is a situation in a market in which firms or sellers independently strive for buyer patronage in order to achieve particular business objective, for example profit, sales, turnover or market share".[2] The reason behind the competition law and policy is to preserve and promote competitions as a means of ensuring efficient allocation resources in an economy in order to ensure faster growth and equitable distribution of income. The need for the competition law arises from following factors:

- To take care of anti-competitive practices adopted by the firms to restrict the free play of market forces,
- To take care of unfair means adopted by firms against consumers and other market players to extract maximum possible benefits.
- And to promote competitive spirit in the present market.

Meaning of Intellectual Property

[1] Ritumbhara Singh Mathur, Competition Law and Parallel Imports, Competition Law Report 376 (Oct.- Dec 2008,)
[2] Competition Act 2002- An overview, 30 *Cochin U L Rev* 300 (2006).

Intellectual property law protects the legal rights of the creators and owners in relation to intellectual creativity. It lets people own the work they created. It is an intangible right "protecting commercially valuable products of human intellect."[3] It consists of bundle of rights in relation to certain material object created by the owner[4]. Intellectual property rights (IPR) can be regarded as a single generic term that protects applications of ideas and information that are of commercial value. The scope of intellectual property law is expanding very fast and attempts are being made by persons who create new creative ideas to seek protection under the umbrella of intellectual property rights. One characteristics shared by all types of IPR is that they are essentially negative: they are rights to stop other doing certain things-rights, in other words, to stop pirates, counterfeiters, imitators, and even in some cases third party who had independently reached the same ideas from exploiting them without the license of the right owner. This right also include right to exclude other from exploiting a non-corporeal asset. The intellectual property right includes:

a. Copy Right and related Rights
b. Trademarks
c. Patents
d. Designs (industrial Design)
e. Geographical Indication

It also includes industrial know-how and confidential information. The holders of the intellectual property rights had exclusive right to use and exploit the right. Intellectual property rights may sometime lead to significant market power, and they may amount to entry barrier and make it harder for new competitor to enter in the market.[5]

The law relating to intellectual property is based on certain concepts. Copyright is based on the concept of originality. It prohibits reproduction of original literary, dramatic, musical and artistic work, cinematography films and sound recordings in any material form. Patent law is based on the concept of novelty (or lack of anticipation) and inventive step (or lack of obviousness). It relates to novel

[3] Atul Patel, Aurobindo Panda, Akshay Deo, Siddarth Khettry and Sujith Philip Mathews, Intellectual Property Law and Competition Law 122,6 *Jr of Intn'tl Com L & Tech* (2011).
[4] P. Narayanan, *Intellectual Property Law 2*, (Eastern Law House, 3rd Edn, 2009) .
[5] Valentine Korah, Competition and Intellectual Property Rights 129, IN Vinod Dhall (ed.), Competition Law Today; Concepts Issues and Practice, (Oxford University Press, 2007).

products or process of manufacturing of a product. The design law centers around the concept of novelty or originality of the design which is not previously published, It relates to the non- functional appearance of a product which appeals solely to the eye. The law of trademarks is based on the concept of distinctiveness and similarity of marks and similarity of goods and consists of word, name, device, or getup used in relation to particular goods to indicate the source of manufacture or trade origin of the good.

The protection is provided to the holders of Intellectual Property Rights. There are many reasons behind that. In case of patents, a few firms invest large resources in research and development, the inventor would meet competition from those who have not made a similar investment. . There would be no incentive to perform the original research and development if others could take a free ride on it. By making an application even before expiration of patent the protected invention can legally be used by other for research and development but not for the commercial purpose. With trademark of a product, the reputation of a company producing the product is connected with. By providing protection to the particular trademark of a product, the intellectual property rights try to save the consumers from confusion. Trademarks are indirectly a guaranty of quality.Some other reasons behind the promotion and protection of Intellectual Property Law are;[6]

- The progress and wellbeing of humanity rest on its capacity to create and invest new works in the areas of technology and culture
- Legal Protection of new creations encourages the commitment of additional resources for further innovation
- The promotion and protection of intellectual property spurs economical growth; creates new jobs and industries, and enhances the quality of enjoyment.

Intellectual Property and Monopoly

In normal understanding, intellectual property provides exclusive rights to the holders to perform a productive or commercial activity.But this does not automatically include their right to exert restrictive or monopoly power in a market or

[6]http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf..visited on 14TH June 2014.

society. In monopoly there was only one firm control the whole market and the prices of the product. And there is only one producer and supplier. There was no close substitute for that product exists. In the case of intellectual property rights also there is no close substitute on either the demand or supply side of the market present and this will lead to entry barrier and it become harder to new competitor to enter in the market where one man rule is present.

Monopolistic must the only game in the town. While the sources of monopoly are; barrier to entry, legal restriction, patents, control of scarce resource or input, deliberated erected entry barriers, long sunk costs and technical superiority.[7] A market for goods has to be conceived in terms of all the goods that consumers will treat the substitute for one another: will they switch for one to another if, for instance the price of the first is raised? The extent to which purchaser wants the product that is the subject of intellectual property and not some alternative is often difficult to determine. The degree of market power that may be secured in these different areas by the deployment of intellectual property is a matter that will take up topic by topic.

In few of the really successful cases the potential pejorative character of power may be unjustifiably great because of the public policies like the encouragement of inventions, but on the other hand if the investment of resources to produce ideas or conveying information is left unprotected the competitors may take advantage and benefited by not being obliged to pay anything for what they take. This may result a lack of incentive to invest in ideas or information and the consumer may be correspondingly the poorer. What is called for is a balance between unjustified monopolies and protection of the property holder's investment.[8]

While the intellectual property has very little capacity to generate market power leads to considerable difficulty in arguments over the proper scope of rights.On the one hand there is the potential disadvantage of power over a market in the few really successful cases-a power may sometimes be unjustifiably great even given the special public policies (such as the encouragement of invention), which may underlie the creation of the right in the first place. On the other hand, if the investment of

[7] William J. Baumol and Alan s. Blinder, *Microeconomics Principles and Policy* 195. (Thomson South-Western Publication, 9th edn).
[8] Intellectual Property Rights and Anti-Competitive Practices 20, Halsbury's Law s of England 9(2), (LexisNexis, 2008)

resources to produce ideas or convey information is left unprotected, it will be prey to the attention of a competitive imitator who will not be obliged to pay anything for what he takes. There will accordingly be little incentive to invest in the ideas or information and the consumers may be correspondingly the poorer. The only way out of this dilemma is, to make the best practicable estimate of the dangers that unjustified monopolies may produce and, on the other hand, to assess the degree to which the claimant's investment will be open to dissipation if he is not accorded his right.

Secondly, the intellectual property is capable of generating market power; it offers its owner (and his associates) the opportunity to reduce the output and raise price. What it does not bring about is the condition on which the monopolistic behave as though he were the only competitor in the market. Yet the more naïve arguments in favour of one or other exclusive rights often imply that this is alone will be effect of according the right sought. This intermediate condition can indeed be aimed at: through mechanisms such as direct price control, or through one or other forms of statutory or compulsory licensing. Accordingly it is no surprise to find that economists who doubt the justifiability of unconstrained intellectual property turn to the compulsory license as a moderating technique.[9] In theory at least it provides machinery for obliging the right- owner to accept a return (the royalty officially set under the license) at a rate below that which he would have accepted if left to exercise his market power unfettered.

Competition and Monopoly

Competition and monopoly are two sides of a coin. When one tries to stop the monopoly other tries to prevent the competition and wants to exist in the market as a single. The competition maximizes the welfare of the society by providing equal to chance to all but,on the other hand monopoly maximizes the welfare not for the society but for a single firm by restricting competition. In the case of monopolistic market the economic power is concentrated in one hand which also hampers the welfare measure for the society. But the economics of competition law is closely related to the monopoly.

[9] Cornish and Llewellyn, *Intellectual Property : Patents, Copyright, Trademarks and Allied Rights* 41(Sweet and Maxwell, London, South Asian edn, 2008).

Monopoly is a market structure with only one seller. And the consumer requires that product is under compulsion to buy it from the monopolistic at any price fixed by the monopolistic. They had the market power, as a result the buying consumer is paying more and paying is worse off. The monopoly price exceeds the cost of producing an extra unit, there are consumers whose value for the product exceeds the cost of producing it but is not high enough to justify paying the price being asked for. Monopolies maximize its profit by charging high prices which results in inefficiency.

An important consequences of the competition as against monopoly is to force firms to operate in the most efficient manner. Efficiency may be thought of in terms of the choice of technology, operation, management, etc.; anything that leads to reducing costs and hence, the conservation of resources. In general, the firms that choose an inefficient input-mix will have the higher cost of production. Competition ensures that a firm has incentive to find newer and better ways for reducing cost; otherwise, someone else will reduce their cost of production and take the market away from them. It is this pressure to reduce cost that monopolist never faces and therefore, does not fell motivated to search for better technologies that conserve scarce resources.

Most of the benefits that accrue to society from open competition are lower prices, higher quality, and freedom to enter a trade or business are clearly understood and highly valued in the modern world.

III. Indian Competition Law and IntellectualProperty Rights

The first competition legislation of India isthe Monopolies of Restrictive Trade Practices Act, 1969.In the year 2002, a new Act, the Competition Act 2002,was enacted.It repealed the 1969 Act as it was thought that its provisions were not compatible with the present globalized, liberalized economic system.

The intellectual property rights are also having the great importance and expanding enormously in the era of globalization.

The conflict between the intellectual property and the competition law come up before the Monopolies of Restrictive Trade Practices Commission in India

first time in *Vallal Peruman & Anor v Godfrey Philips (India) Ltd* (MRTPC1994)[10]. The commission observed as follows:

> It is an undoubted right to use trademark name etc. So long as the certificate of registration is used strictly in conformity with the terms and conditions subject to which it was granted. If however, while presenting the certificate misuse the same by manipulating distortion, contrivances and embellishments etc. So as to mislead or confuse the consumers, he would be exposing himself to an action of indulging in unfair trade practices. It will thus, be seen that the provisions of the Monopolies of Restrictive Trade rights protected.

The 2002 Act has made express provisions that responsible conditions as may be necessary for protection of Intellectual Property Rights during their exercise would not constitute anti-competitive practices. In other words unreasonable conditions in an IPR agreement that will not form a part of the bundle of rights that normally form a part of IPRs would come under mischief of the Act.

The IPR provides protection to that bundle of rights which are creation of human mind and the IP laws protect the ideas, expression of human mind. Only those bundles of rights are protected under the IPR which did not affect the competition adversely. But other than those are strictly prohibited under the competition Act. The rationale for this exception is that the bundle of rights is subsumed in intellectual property rights should not disturb the innovative power of human mind. But without protecting such rights there will be no incentives for innovation, new technology and enhancement in the quality of products and services. However, it may be noted that Act does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. The Act therefore declares that "reasonable conditions as may be necessary for protection", any IPRs will not attract the provisions relating to anti-competitive agreements. The expression "reasonable conditions" has not been defined or explained in the statute. By implication reasonable conditions that are attached to IPRs will constitute anti-competitive agreements. Section 3 of the Competition Act prohibits those anti-competitive agreements which adversely affect the competition.

[10] (1995)16 CLA 201.

The Competition Act does not impose an obligation on dominant firms to supply or license, but section 4 provides that:

1. No enterprise shall abuse its dominant position.
2. There shall be an abuse of dominant position under sub-section (1), if an enterprise,
    a) Directly or indirectly, imposes unfair or discriminatory
        i) Condition in purchase or sale of goods or services: or
        ii) Price in purchase or sell (including predictor price) of goods or service
    b) Limits or restricts
        i) Production of goods or provision of services or markets thereof; or
        ii) Technical or scientific development relating to goods or services to the prejudice of consumers; or
    c) Indulge in practice or practices resulting in denial of market access; or
    d) Make conclusion of contracts subject to acceptance by other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts; or
    e) Uses its dominant position in one relevant market to enter into, or protect, other relevant markets.

In *Hawkins Cokker Ltd. v M/S Murugan Enterprises*[11] it was held that court could not encourage the dominance of firm if such dominance was abused by the companies by creating monopoly in the market with respect to trade marks which effects market share of other firms who are in direct competition with such dominant firm.

The provisions of abuse of dominant position are also sometime attracted by the Intellectual Property Rights which had great importance in competition law. The dominant and big firms want to established their monopoly position in the market and extract all possible profits from the market by restricting others from entering in the market and competing with the firm. While the

[11] [2008]36PTC 290(Del).

IPRsprovide them protection under the patent, copyright or trademarks etc, the big firms can invest the large sum of resources in the research and development and cheaper access to capital. In that case the barrier to entry is higher. However the World Trade Organization (WTO) rounds and General Agreement Trade in Services (GATS) reduce the tariff quotas for goods have been reduced, but they still exist. Where in particular sector entry barriers are high any market power conferred by IPRs is likely to last longer. While the agreement for Trade Related Intellectual Property (TRIPs) all members of the WTO were required to make product pattern generally available. They are allowed to provide compulsory license.

IV. European Union Competition Law and Intellectual Property Rights

The European Community was established by the Treaty of Rome in 1957. The laws relating to competition as well as intellectual properties are found in the treaty. Article 30 of the EC Treaty refers to an industrial and commercial property, and this clearly includes patents, trademarks.[12] But later on European Court of Justice (ECJ) held that while the copyright is clearly not there in art.30 but that article includes copyrights. Article 81 of the EC Treaty directed against agreement and equivalent practices which prevent or restrict or distort competition. And the agreement relating to copyright may restrict the competition and thus may fall within the scope of art 81. Such infringing agreements will involves an improper and abusive exercise of copyright as conformity by the ECJ in *Coditel SA v Cine Vog Films*[13] Article 82 of EC Treaty deals with abuse of dominant position and in each case includes patents, trademarks and copyrights. Copyright is a difficult area because its scope is extremely wide and it protects very difficult types of work. The essential function of the copyright was first describedin the European Court in the *Magill cases*[14], which are concerned with the competition law, as being "to protect the moral rights in the work and to ensure a reward for the creative effort, while respecting the aims of particular article."

The largest number of casesin article 82 of EC Treaty applied to copyright relates to, those involving collective societies. The ECJ has indicated that there is

[12] Holak and Torremans (eds), *Intellectual Property Law* 288,(Oxford University Press,5th edn.)
[13] SA (1982) ECR 3381, [1983] CMLR 49.

[14]*Radio Telefis Eireann v. Commission* [1991] 4 CMLR 586, *BBC v. EC Commission*[1991] 4 CMLR 669, *Independent Television Production v. EC Commission*[1991] 4 CMLR 745.

nothing intrinsically objectionable in establishing collective societies for enabling individual artists to obtain reasonable return for their endeavor.But usually, these collective societies occupy a dominant position as they *de facto*operate as monopoly in the member states. Trade between member states is affected by the fact that the creation of a single market for copyright services is prevented. So the way in which these collective societies exploit their dominant position will be closely examined and improper exploitation will be infringement of Art 82.

The main issue regarding the competition law and intellectual property rights is that whether an undertaking in a dominant position can itself be forced to grant license of intellectual property that it holds and if a refusal to do so implies an abuse of dominant position.[15] This issue arose first time in two cases that were concerned with designs for spare parts for cars: *Maxicar v. Renault*[16] and *Volvo v. Veng*.[17] Maxicar and Veng were involved in car repairs and maintenance, and wanted to obtain a licence to produce spare parts themselves. But when they could not obtain it, they argued that Volvo and Renault occupied a dominant position in the relevant market and that, by refusing to grant licences, they abuse their dominant position. They wanted to see that Volvo and Renault are obliged to grant licences, and submitted that the ECJ should interpret article 82 accordingly.

The court held that the existence and issue of obtaining an intellectual property right is the matter for national rules of the member states.These rules determine the nature and extent of protection. In the *Maxicar case*, the court stated that 'the mere fact of obtaining protective rights --- does not constitute an abuse of dominant position within the meaning of article 82.'

The exercise of those intellectual property rights are prohibited under article 82 which is liable to affect trade between member states. This situation will create when if the owner of particular intellectual property right refuse to supply spare parts, fixes prices at an unfair level, or discontinues production. And in that case the grant of compulsory licence becomes possible. But it is clear from the cases that more than the existence of the right creating a dominant position and the simple refusal to grant a

[15] Holak and Torremans (eds), *Intellectual Property Law297,* (Oxford University Press, 5th edn).
[16] *Consorzio Italian Della Componentistica di Ricambio per Autoveicoli and Maxicar V. Regie national des usines Renault* [1988] ECR 6039, [1990] 4 CMLR 265.
[17] *AB Volvo V. Erik Veng (UK) ltd*. [1988]ECR6211, [1989] 4 CMLLR122.

licence is required if an abuse is to proved. The starting point must be that the power to decide whether or not to grant licences is an essential component of the right with which article 82 does not interfere. *Volvo v Veng* dealt with design, but the court's ruling in *Maxicar v Renault* does not permit any different conclusion when patents are concerned. However in the *Magill cases*,[18] the Court of First Instance also stressed that it is enough, in order for article 82 to be applicable, that the abusive conduct is capable of affecting trade between the member states; no present and real effect on such trade is required. But the interpretation of article in that way is not totally correct. Refusal to licence intellectual property rights can contravene article 82 in exceptional circumstances. The court argued that a refusal may in exceptional circumstances, constitute abuse.

V. Intellectual Property Is In Conflict With Competition Law

There is no doubt about the presence of the dichotomy between the Intellectual Property Rights and Competition Law. The former endangers competition while the latter engenders competition. This conflict or dichotomy is not incapable of resolution. A workable solution can be predicted on the distinction between the existence of a right and its exercise. In other words during the exercise of a right, if a prohibited trade practice is visible to the determent of public interest or consumer interest, it ought to be assailed under the competition law. Intellectual property law refers to creation of mind: Invention, literary and artistic work and symbols, images and designs used in commerce.

The Intellectual Property Rights results barrier to entry some important industries being concentrated. The purpose of the competition law is to stop monopolies created and sustained. Every nation adopting competition law aims to enter in international business and compete with other countries in international market. This is the era of globalization and competition may become an enduring force behind globalization. In the same manner, the twenty first century is the century of knowledge. Innovation in this century is the key for the production as well as processing of knowledge. A nation's ability to convert knowledge into wealth and social good through the process of innovation will determine its future. In this

[18] *Radio Telefis Eireann V. Commission* [1991] 4 CMLR 586, *BBC v. EC Commission* [1991] 4 CMLR 669, *Independent Television Production v. EC Commission* [1991] 4 CMLR 745

context, issues of generation, valuation, protection and exploitation of intellectual property are going to become critically important all around the world.

All forms of Intellectual Property have the potential to raise competition law problems. Presently, competition laws are generally viewed in the context of economic theories about the way in which various forms of business practices, broad leveled "anti-competitive" interfere with and distort the free market. Competition laws are not merely to be understood in the light of economic theories, but it should be viewed as a response to what, at any time is full to be fair and just in business practice.

Conditions Compatible with Competition Law

The bundle of rights that usually accompany the intellectual property rights (which can be regarded as reasonable) needs to be listed by way of illustration. The following will, constitute so called "reasonable condition" of an Intellectual Property Rights in the context of licensor (patentee) and the licensee entering into a licensing agreement of the Intellectual Property Right;[19]

- Any obligation on a licensor not to exploit the licensed technology in the licensed territory himself.
- An obligation on the licensee not to manufacture or sell the licensed product in territories which are licensed to other license.
- An obligation on licensee to use only the licensor's trademark to distinguish the licensed product during the term of agreement.
- An obligation on the licensee not to divulge to others to know how communicated by the licensor.
- An obligation on the licensee not to grant sub-licenses and assign the license.
- An obligation to the licensee not to exploit the licensed know-how or patents after the termination of the agreement as long as the know-how is secret and patents are enforced.
- An obligation on the licensee not to restrict his exploitation of the licensed technology to one or more technical fields of application covered by the technology.

[19]: Intellectual Property Rights and Anti-Competitive Practices 22, Halsbury's Laws of England, vol.2, Issue 09 (LexisNexis, 2008).

- An obligation on the licensee not to use the licensor's technology to construct facilities for third parties.
- An obligation to the license to use his best endeavours to manufacture and market licensed product.

The basic goal of the competition law is to consumer welfare the welfare is maximizing in perfectly competitive markets. When there is competition in the market or there are many substitutes of a product than the price of the good will reduce and in case of a product and no substitutes of the product is their demand of the product automatically raises and supply is low the price also will raised. The intellectual property rights also aimed to provide the consumer good qualities product and by not allowing the competition they escape the consumers from confusion and buying the products which are not better quality.

Condition not compatible to competition law

Any unreasonable condition forming a part of protection or exploitation of intellectual property rights is not likely to be compatible with competition law, for example a licensing agreement may include restraints that adversely affect competition in good market by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merge the research and development activities of two and few entities that could plausibly engaged in research and development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to anti-competitive concerns includes cross licensing by parties, collectively processing market power, grant backs and acquisitions of the intellectual property rights. A few such practices are described below;

- Patent pooling is a restrictive practice, which will not constitute being the part of the bundle of rights forming part of intellectual property rights. This happens when the firms in the manufacturing industry decide to pool their patents and agree not to grant license to third parties quotas and prices.
- Tie-in-agreement is another such restrictive practices. A licensee may be require to acquire particular goods (unpatented materials e.g. raw

materials) solely from the patentee, thus for closing the opportunities of other producers.

- An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent.
- There could be a clause which restrict the petition in research and development or prohibit a licensed use rival technology.
- A license may subject to condition not to challenge the validity of intellectual property rights in question.
- A licensee may require to grant back to licensor any know-how or Intellectual Property Rights acquire and to grant license to anyone else.
- A licensor may fix the prices at which the licensee should sell.
- The licensee may restrict territorially or according to categories of
- A licensee may coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them.
- A condition imposing quality control on the licensed patented product beyond those necessary for granting the effectiveness of the licensed patent is anti-competitive.
- Restricting the right of the licensee to sell product of the licensed know-how to persons other than those designated by the licensor is violative of competition.
- Imposing a trademark use requirement on the licensee is prejudice to competition.
- A condition Imposed on licensee to employ or use staff designated by the licensor is anti-competitive.

There is basic complementarily relation between intellectual property and competition law. Intellectual property laws provide for intellectual property to be valued and exchanged and competition law ensured that the market assigned a fair and effective value of this property.

Tying agreement in licence could be good material for anti-competition and would generally lend them actionable. Tying is an agreement by a party to sell one product on the condition of that the buyer also purchases a different product (tied

product) or at least agrees that he will not purchase that tied product from any other supplier.

While there is always a conflict between the competition law and intellectual property rights but, both are concern of international trade. Both are equally important in the business world, and are subject of protection. That's the reason for creation of number of International Treaties, Organizations and Conventions for their protection.The Organization for Economic Corporation and Development (OECD) is an important global forum created for the protection of the competition in the market by preventing monopoly practices. OECD had published a number of recommendations and reports in the field of competition. And on the other hand the World Intellectual Property Organization (WIPO), General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO), Trade Related Intellectual Property Rights (TPIRs) etc. are the global fori for the protection of the intellectual property. WIPO is an international organization dedicated to protection of the rights of the creators and owners of the intellectual property worldwide. There is need to have a common international framework to conduct trade relations among the different countries.

TRIPs provides a multilateral framework for the protection and enforcement of intellectual property rights and is become an integral part of WTO in the year 1995 which is binding on the all member countries of WTO. The protection and enforcement of the intellectual property rights should contribute to the promotion of technological invention and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledgeand to the balance of rights and obligation.

India is also a member country of WTO agreement so is obliged to comply with the minimum standards of agreement. IPRs and competition law are not antithetical to each other. While IPRs require to be protected in the interest of creativity and innovation, such protection needs to be reasonable allowing only such conditions that constitute bundle of rights that usually accompany IPRs and are compatible with the competition principles. Those conditions outside the bundle of rights as are incompatible with competition principles need to be assailed in larger interest of the consumers and public.

VI. Conclusion

The relationship between competition law and intellectual property rights is inherently contradictory.There is a potential conflict between the two.The exercise of intellectual property rights may often produces anti-competitive effect, through the monopoly power granted to the holder of the rights. The European Court of Justice made a distinction between the intellectual property rights and their exercise. Within this dichotomy all aspects of a right which related to its exercise may be capable of regulation if they are anti-competitive. The conflict between the intellectual property law and competition law will always remain present. But both are the concern of international trade and are equally important in the present day economy and are the subject of protection. Some provisions of the intellectual property laws encourage the competition also. The conflict between the two arises due to the monopolistic effects of the Intellectual Property Rights. But the monopolies granted under the IPR are the short term monopolies. The aim of intellectual property legislations is not to create monopoly always somehow the intellectual property rights creates monopoly. Those rights do not last forever, it means for limited period of time. . Both of them share same economic rationale and they are important for establishment of competitive and innovative market conditions. The common object of there is to promotion of innovation which leads to economic development of the country which should not be detrimental to public policy. The balance between both the laws will result in economic as well as consumer welfare.

ENVISIONING REFORM: TRADITION AND CHANGE IN ENVISIONING REFORM: TRADITION AND CHANGE IN **JUDICIAL APPOINTMENTS** IN HIGHER COURTS IN INDIA

Faizanur Rahman[*]

I. Prologue

The Judicial Appointments Commission Act, 2014 seeks to set up a six member body under the Chairmanship of the Chief Justice of India for the purpose of recommending names of individuals having outstanding legal acumen and impeccable integrity and credibility to the post of Judges of Supreme Court (SC) and the High Courts, to the President of India. It also recommends transfer of judges of one High Court (HC) to another to the President of India. The appointment of judges to the Supreme Court and the High Courts, as per the provisions of the Constitution as it existed when Constitution was adopted, was made by the President of India in accordance with the provisions of Arts. 124(2) and 217(1) of Constitution of India respectively. Transfer of Judges from one High Court to another is done by the President of India in accordance with the provisions of Art. 222(1) of the Constitution of India.[1] The creation of a Judicial Appointments Commission is not a step back to the original constitutional position in the Constitution of India but rather, a concrete opportunity to create a new participatory and transparent method of appointment to the judicial positions in line with the contemporary constitutional design. This reform would restore parity between executive and judiciary in appointment of judges, which is constitutional and in conformity with rule of law and separation of powers. In this backdrop, the present paper undertakes review of the appointment process as it currently stands, by analyzing relevant judgments and the socio-political conditions surrounding them. Further, the author offers a comparative and critical assessment of efficacy of the present Collegium System and the proposed National Judicial Appointments Commission in the appointment of Judges of Higher Courts.

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[1] Manas Chakrabarty, *Judicial Behaviour and Decision Making of the Supreme Court of India 120* (Deep & Deep, New Delhi, 2000).

II. Envisioning Problems and Polemics

Articles 124 and 217 of the Constitution of India deal with the appointment of the Supreme Court and High Court Judges respectively. Although the provisions are theoretically simple and clear, their practical implementation has been highly controversial. There has been an unfortunate power struggle on the question of supremacy or primacy in the matter of appointment of such Judges.[2] The members of the Constituent Assembly, who drafted the Constitution of India, would have scarcely imagined that these simple provisions would have led to so much of acrimony and debate. Historically, judicial appointments in India were never made by anyone's authority. A mutually restrained executive and judiciary together harmoniously handled judicial appointments till early 1970s. This mutuality was drastically altered in 1970s. What started off as the demand for a judiciary committed to the socialist character of the executive drifted into superseding Supreme Court judges in 1973 and the drift later culminated in constitutional dictatorship in 1975. Subsequently, in 1981, with the second in command in the judicial hierarchy targeting his own chief, the judiciary's primacy was almost compromised by the Supreme Court itself conceding that the executive could overrule the Chief Justice for "cogent" reasons. In 1993, the Supreme Court restored judiciary's primacy. Later in 1998, answering a Presidential Reference on judicial appointments, the Supreme Court instituted the collegium consisting of the Chief Justice and four senior most judges to decide on appointments and transfers of judges.[3] In a recent development in the judicial arena of the country, President of India has replaced the old Collegium system of appointing High Court and Supreme Court judges with the new National Judicial Appointments Commission (NJAC). It grants constitutional status to NJAC and its commission. It will make way for setting up of NJAC which will appoint and transfer judges to Supreme Court and High Courts. Chief Justice of India will head this new body of appointing judges. Besides him, the judiciary would be represented by two senior judges of the Supreme Court, two eminent personalities and the central law minister. However, with this new

[2] Pratao Kumar Ghosh, *The Constitution of India: How it Has Been Framed* 255 (World Press, University of California, 2010).

[3] Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*, 208 (Oxford University Press, New Delhi, 2014)

trend in place, the entire panel of NJAC including the Law Minister also will have a say in appointment of judges for both Supreme and High Court.

But, whether the judiciary had led the appointment process or executive, the accepted norm was always secret soundings within a very small group in the executive and judiciary. This led to lobbying and has corrupted the appointments process. It does not need a seer to say that transparency in judicial appointments is a key to judicial independence. Secrecy and transparency can never go together. Secrecy can suppress the true facts about a wrong judge and sail him to the highest judiciary. Equally it can suppress the truth about the right judge and impede his elevation. Secret soundings can work both ways. It may help in elevating a judgeas it almost happened in the case of Justice P. D. Dinakaran, likewise it may as well stall the elevation of a judge as in the case of Justice K.L Manjunath. Discarding secret soundings and ensuring transparency in judicial appointments seem the only answer.[4]

III. Appointment of Judges of Higher Courts: Constitutional Provisions

The appointment of judges to the Supreme Court and the High Court is provided for, under art 124(2) and art 217(1) of the Constitution of India, 1950. The appointment of Judges of the Supreme Court and the High Courts and transfer of judges from one High Court to another is primarily an act of the executive as the President acts in accordance with the advice tendered by the Council of Ministers under art 74(1) of Constitution of India. But constitutional obligation is cast upon the President of India under arts 124(2), 217(1) and 222(1) to consult the Chief Justice of India/Chief Justice of High Court concerned for appointment and transfer of judges of higher judiciary. The Supreme Court in the case of *Supreme Court Advocates-on-Record Association v. Union of India*[5]in dealing with arts 124(2) and 217(1) of the Constitution interpreted the word "consultation" to mean "concurrence". The Advisory Opinion of the Supreme Court in 1998 prescribed a distinct process of appointment whereby the judiciary through its "collegium" consisting of the Chief Justice and two or four senior judges, as the case may be, would recommend names to the President, who then is bound by the decision of the collegium. This procedure of

[4] The New Indian Express, *Judicial Transparency: Dinakaran's case versus Manjunath's*, 19th October, 2014 available at: http://www.newindianexpress.com/columns/s_gurumurthy/Judicial-Transparency-Dinakarans-case-Vs-Manjunaths/2014/10/19/article2484300.ece (Last visited on November, 2014).

[5] (1993) 4 SCC 441.

appointment, in effect, confers upon the judiciary the power to appoint judges of the higher courts.[6]

Article 124(2), which deals with appointments of Supreme Court judges, reads: 'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that -

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4).

Article 124(3) prescribes the qualification of a person who can be appointed as a Judge of the Supreme Court and reads as follows:-

A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and

(a) has been for at least five years a Judge of a High Court or of two or more such Court in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist

The appointment has to be made by the President who issues a warrant of appointment. In India, the President has to act on the aid and advice of the Council of Ministers. Therefore, the appointment by the President is not an independent decision left entirely to his discretion.

Article 217 deals with the appointment of High Court Judges and reads as follows:-

[6] P M Bakshi, *The Constitution of India* 78 (Universal Law Publishing, New Delhi, 2010)

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor or the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and [shall h old office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of (sixty two years)]:

Provided that:

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President of India to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

The qualification of a High Court Judge is set out in Article 217(2) which reads as under:-

A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and:

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession;

It is ironical that a distinguished jurist can be appointed to the Supreme Court but not to the High Court. It is evident from the constitutional provisions that the appointment/transfer of judges of higher judiciary is a joint venture of the Executive and the Judiciary in participative and consultative way to protect independence of judiciary which is a "Basic Structure" of the Constitution. Independence and impartibility of judiciary could only be sub-served by appointing individuals of outstanding legal calibre and impeccable integrity and credibility with correct consideration to the Bench of higher judiciary.[7]

[7] J. C. Johari, *The Constitution of India-A Politico-Legal Study* 254 (Sterling Publishers Pvt. Ltd, New Delhi, 2007)

IV. Judicial Interpretation on Appointment of Judges of Higher Courts

The method of appointment of Judges of Higher Court under the provisions of arts 124(2), 217(1) and 222(1) have been interpreted by judiciary from time to time. In *S.P. Gupta and Ors v. Union of India*[8], the Supreme Court took the following views:

(a) that opinion of Chief Justice of India does not have primacy in the matter of appointments of judges of Supreme Court and High Courts;
(b) the primacy is with the Union Government of India, which is to take decision after consulting all constitutional functionaries and the Union Government is not bound to act in accordance with the opinion of all constitutional functionaries; and
(c) the Executive should have primacy since it is accountable to people while the Judiciary has no such accountability.

The Judiciary had a consultative role in the appointment of judges of higher judiciary till a nine-judge Bench of the Supreme Court overruled the majority view of the *S.P. Gupta case* (First Judges Case) in *Advocate on Records v. Union of India* (Second Judges Case)[9] in 1993. Without going into its merits, it would be suffice to summarise the conclusions made by the Supreme Court in this case:

(a) Articles 124(2) and 217(1) of Constitution of India impose a mandate in the highest functionaries drawn from the Executive and the Judiciary to perform the constitutional obligation of making appointment of judges to the Supreme Court and the High Courts collectively in consultation with each other;
(b) in the event of disagreement in the process of consultation, view point of judiciary being primal has to be preferred;
(c) the Executive can appoint judges only if that is in conformity with the opinion of the Chief Justice of India;
(d) the opinion of the Chief Justice of India is determinative for transfer of judges of High Courts.

The judgement is highly confusing and it is very difficult to decipher clear propositions. The Supreme Court recommended that a Memorandum of Procedure should be prepared by the Government of India after consulting the Chief Justice of

[8] AIR 1982 SC, 149.
[9] AIR 1994 SC 268.

India, so that it could be followed for all future appointments. This memorandum was never prepared.

Since 1993 the recommendations of the Chief Justice of India for appointment and transfer of judges to higher judiciary became binding upon the Executive which amounted to concurrence with the opinion of the judiciary, the aid and advice tendered by the Council of Ministers to the President of India under art 74(1) of Constitution got circumscribed by judicial interpretation of arts 124 (2), 217(1) and 222(1) on the Second Judges Case. It made the judiciary the *de facto*appointing authority of themselves which was not the intention of Constitution framers as gathered from the Constituent Assembly Debates.

The framers of Constitution of India had given absolute discretion neither to the Executive nor to the Judiciary in the participatory and consultative process for the appointment of judges to Supreme Court and High Courts. The Constituent Assembly after due deliberations, preferred the word 'consultation' to 'concurrence' in the process of appointment of judges knowing fully that appointment of Judges was the sole discretion of the Executive (The Crown) under Government of India Act, 1935. The term 'collegium' has not been used in the Constitution of India by framers of Constitution. However, the Supreme Court, through its power of interpretation of the Constitution under art 141, has expanded the term 'the Chief Justice of India' occurring in arts 124 (2), 217(1) and 222(1) to mean a collegium of select Judges which was three in the Second Judges Case (1993) and further extended to five in the Third Judge Case (1998). In effect, the opinion of the Chief Justice of India really means the views of Chief Justice taken in consultation with his four senior-most colleagues.

On 23rd July, 1998 the President of India referred nine questions for consideration of the Supreme Court.[10] These questions related to three aspects:

(a) Consultation between the Chief Justice of India and his brothers judges in the matter of appointments of Supreme Court and High Court Judges and transfer of the latter;

(b) judicial review of transfers of Judges; and

(c) the relevance of seniority in making appointments to the Supreme Court

[10]AIR 1999 SC 1.

The Supreme Court is of the view that Consultation with the Chief Justice of India does not mean consultation only with the Chief Justice. It requires consultation with a plurality of judges. The Chief Justice of India has to form a collegium of four senior most *puisne* judges of the Supreme Court. This is necessary for appointments for judges of the Supreme Court or to transfer a High Court Chief Justice or judge. The Supreme Court's nine-Judge Bench again confirmed that the opinion of the collegium of Judges has primacy in the appointment and transfer of Judges of higher judiciary. In the light of the opinion preferred by the Supreme Court, a detailed Memorandum of Procedure for the purpose of appointment and transfer of Judges of higher Judiciary was prepared by the Department of Justice, Ministry of Law and Justice, Government of India.

While giving advisory opinion to the President of India, the Supreme Court kept a condition before the then Government that the apex court would tender the opinion if law laid down in Second Judges Case is considered binding upon the Government and the opinion to be tendered by it would also be binding upon the Government of India. The then Attorney- General had accepted the condition of the apex court on behalf of Government of India and as a result of which the primacy of opinion of collegium of Judges in the appointment and transfer of Judges to the higher Judiciary has the validity of law of land till now.

V. National Judicial Appointments Commission

The Constitution (Sixty-seventh Amendment) Bill, 1990 proposed the formation of a National Judicial Commission for the appointment of Supreme Court and High Court Judges and for the transfer of Judges from one High Court to another. The object was to prevent any arbitrariness in appointments and transfer. This Judicial Commission was based on the recommendations of the Law Commission of India expressed in it's the 121st Report.[11] It was to consist of the Chief Justice of India, two Senior Supreme Court Judges, Chief Justice and two Judges of the High Court wherein appointments were to be made. This Bill was never passed.[12]

[11] Law Commission of India, Report on 121st Report on "*A New Forum For Judicial Appointments*", 44.

[12] Arvind P. Datar , *Judicial Appointments -The Indian Perspective*, available at: http://www.law.cam.ac.uk/faculty-resources/download/judicial-appointments--the-indian-perspective-by-arvind-p-datar/862/doc (Last visited on December, 2014).

The proposal for a National Judicial Commission has been resurrected by the Constitution (Ninety-eighth Amendment) Bill, 2003 and once again contemplates the formation of a National Judicial Commission. It proposes to introduce a new Chapter consisting of just one article in the Constitution and also proposes to make consequential amendments to other articles in the Constitution. It was to consist of the Chief Justice of India, two other Judges of the Supreme Court next to the Chief Justice of India in seniority, the Union Minister in-charge of Law and Justice; and one eminent citizen to be nominated by the President of India in consultation with the Prime Minister for a period of three years.

The Commission is to draw up a Code of Ethics for the Judges of the Supreme Court, the Chief Justices and the Judges of the High Courts and can inquire into cases of their misconduct or deviant behaviour and advise the Chief Justice of India or the Chief Justice of the High Court concerned appropriately. The composition of the National Judicial Commission is seriously flawed. The Commission does not refer to consultation with the Chief Justices of the High Court or senior High Court Judges in cases where appointment has to be made to the respective Courts. This Bill also failed to see the light of the day because of the lack of a majority in Parliament by the ruling Government. It is rumoured that the opposition does not accept the Bill in its present form.

In 2013, two Bills were introduced to reform the process of judicial appointments in the Supreme Court and the High Courts. The Constitution (One Hundred-twentieth Amendment) Bill, 2013 and the Judicial Appointments Commission Bill, 2013 seek to establish a Judicial Appointments Commission (JAC) to appoint judges to the Supreme Court and the High Court.[13] The Standing Committee submitted its report on the JAC Bill, 2013 in December 2013. However, The Constitution (One Hundred-twentieth Amendment) Bill, 2013, which was passed by the Rajya Sabha, lapsed with the dissolution of the 15th Lok Sabha. The JAC Bill, 2013 was withdrawn on August 11, 2014 and the Constitution (One Hundred-twenty First Amendment) Bill, 2014 and the National Judicial Appointments Commission Bill, 2014 were introduced in the Lok Sabha on August 11, 2014. They seek to amend the Constitution to replace the

[13] available at http://clpr.org.in/wp-content/uploads/2014/02/JAC-Working-Paper.pdf (Last visited on November, 2014).

method of appointments to the higher judiciary with that of a National Judicial Appointments Commission (NJAC).[14]

The Constitutional (One Hundred-twenty First Amendment) Bill, 2014 seeks to amend art 124(2) of the Constitution that provides for appointment of the judges of higher judiciary and inserts art 124A, art 124B and art 124C providing for composition and function of the National Judicial Appointments Commission. On the other hand, Judicial Appointments Commission Bill 2014 lays down the procedure to be followed by proposed six-member body for appointment and transfer of judges of higher judiciary. The Parliament enacted a law National Judicial Appointments Commission Act, 2014 regarding composition, function and procedure of the National Judicial Appointments Commission.

(i) Composition and Function of NJAC

As per the amended provisions of the constitution, the Commission consist of the following persons:

(a) The NJAC comprises of six-members which include Chief Justice of India as Chairman, Union Law Minister, two senior-most Supreme Court judges and two eminent persons.

(b) Two eminent persons to be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India and the leader of the opposition in the Lok Sabha or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the Lok Sabha, provided that of the two eminent persons, one person would be from the SC, ST, women or minority community, preferably by rotation. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.[15]

(c) The NJAC will recommend to the President for the appointment and transfer of judges of higher judiciary, viz., Supreme Court and High Courts.

(d) It will also make recommendations for the appointment of Chief Justice of India and Chief Justices of High Courts.[16]

[14] available at http://www.prsindia.org/uploads/media/national%20judicial/Comparison%20of%20the%20Bill,%202013%20and%202014.pdf (Last visited on November, 2014).

[15] Art 124A of the Constitution of India. Inserted by the Constitution (One Hundred and Twenty-first Amendment) Act, 2014.

[16] Art 124B.

(ii) Procedure Adopted by the Commission

The National Judicial Appointments Commission Act, 2014, has laid down the following procedures for the selection of the Judges of the higher judiciary:

(a) The NJAC shall recommend the senior most judge of the Supreme Court for appointment as Chief Justice of India. This is provided he is considered fit to hold the office.[17]

(b) The NJAC shall recommend names of persons for the appointment as a Judge of the Supreme Courton the basis of their ability, merit and other criteria specified in the regulations.[18]

The Commission shall not recommend a person for appointment if any two members of the Commission do not agree to such recommendation.

(c) The Commission is to recommend a Judge of a High Court to be the Chief Justice of a High Courton the basis of inter-se seniority of High Court judges and ability, merit and other criteria of suitability as specified in the regulations.[19] The Commission shall not recommend a person for appointment if any two members of the Commission do not agree to such recommendation.[20]

(d) The Commission shall seek nominations from Chief Justice of the concerned High Court for appointments of High Court Judges[21] or the Commission shall nominate names for appointment of HC judges and then forward such names to the Chief Justice of the concerned High Courts for his/her views.[22] In both cases, the Chief Justice of the High Court shall consult two senior most judges of that High Court and any other judges and advocates as specified in the regulations.[23] The Commission shall elicit the views of the Governor and Chief Minister of the state before making recommendations.[24] The Commission shall not recommend a person for appointment if any two members of the Commission do not agree to such recommendations.[25]

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[17] Sec 5(1), National Judicial Appointments Commission Act, 2014.
[18] Sec 5(2), NJACA 2014.
[19] Sec 6(1), NJACA 2014.
[20] Sec 6(6), NJACA 2014.
[21] Sec 6(2) , NJACA 2014.
[22] Sec 6(3) , NJACA 2014.
[23] Sec 6(4) , NJACA 2014.
[24] Sec 6(7) , NJACA 2014.
[25] Sec 6(6) , NJACA 2014.

(e) The NJAC would make recommendations for transfer of Chief Justices and other judges of the High Courts. The procedure to be followed will be specified in the regulations.[26]

(f) When a vacancy arises in the SC or HCs, the central government will make a reference to the NJAC. Notification of existing vacancies will be notified to the NJAC within thirty days of the Act entering into force.[27] When a vacancy arises due to the completion of term, a reference will be made to the NJAC six months in advance[28] and vacancies due to death or resignation, within thirty days of its occurrence.[29]

(iii) Assessment of the Formation of NJAC

Under the Collegium system, the Chief Justice of India would consult the four senior most judges of the Supreme Court for Supreme Court appointments and two senior-most judges for high court appointments. The judiciary, in fact, rewrote the constitutional arrangement enumerated in art 124 and art 217 of the Constitution which provided for a plurality of functionaries (executive and judiciary) by ensuring plurality of functionaries only within the judicial system. It is often lamented that India is the only democratic country where only Judges appoint Judges. It is a fact that collegium system over the years has come under severe criticism on account of opaqueness in appointment and transfer of judges of higher judiciary. Besides, the growing corruption and nepotism within the judiciary calls for transparency. Besides, it is criticised that collegium system does not provide an adequate tenure for the chief justices of the High Courts, the consultation process is secretive and unknown to the judiciary and the public, and meritorious candidates from the bar and high courts are denied an opportunity to serve on the bench for undisclosed reasons.

The legal fraternity argues that NJAC is a ploy to bring the judiciary within the ambit of executive in the garb of reforming collegium system. Thus, NJAC will limit the judiciary in scrutinising the executive's malafide actions and its overreach. It will compromise the independence of judiciary which has been cornerstone in ensuring the peoples' faith in democracy. The role of judiciary in the 2G and the Coalgate scam is a point in this direction. Besides, it is argued that the NJAC has not laid down an

[26] Sec 9 , NJACA 2014.
[27] Sec 4 (1) , NJACA 2014.
[28] Sec 4(2) , NJACA 2014.
[29] Sec 4(3) , NJACA 2014.

objective procedure for appointments. These include norms to ensure transparency in nominations, criterion for assessing the suitability of the candidates and objective guidelines for determining meritorious candidates. Judges must also be ensured security of tenure as well as an adequate tenure period through the new mechanism.

(iv)Enforcement of National Judicial Appointments Commission Act

With the Presidential assent of National Judicial Appointments Commission, setting the stage for the scrapping of the decades-old collegium system of judges appointing judges. Under the new system, the government will have some say in such appointments. A six-member panel led by the chief justice of India will decide all appointments of judges to the Supreme Court and the High Courts. The NJAC will now be a constitutional body like the Election Commission, Comptroller and Auditor General etc.[30]

But the government has however put on hold the implementation of a new law on appointing judges to the country's top courts portending a fresh tug-of-war with the judiciary on a vexed subject. There will not be any appointment of judges to the Supreme Court or high courts until two public interest litigations filed in the Supreme Court challenging the validity of the National Judicial Appointments Commission (NJAC) Act, 2014, are disposed of.The SC Advocates-on-Record Association in its petition contended that the new law was beyond the legislative competence of Parliament and in violation of Arts 124(2) and 217(1) of the Constitution and as such was invalid and void. Meaning thereby, judges to the top courts can still be appointed under the collegium system until the new Commission is established.[31]

VI. Concluding Summation

In the end, it must be mentioned that appointments by the executive before independence were reasonably fair and well received. Under the Government of India Act, 1919 and the subsequent Government of India Act, 1935 appointments to the High Courts were the prerogative of the Crown with no specific provision for

[30] The Hindu, *President okays constitutional status for judicial jobs panel*, 1st January, 2015 available at: http://www.thehindu.com/news/national/president-gives-nod-to-judicial-appointments-commission-bill/article6741854.ece (Retrieved on January, 2015)

[31] The Economics Times, *Government puts appointments of Supreme Court, High Court judges on hold*, 30th January, 2015 available at: http://articles.economictimes.indiatimes.com/2015-01-30/news/58625342_1_collegium-system-national-judicial-appointments-commission-njac-bill (Retrieved on January, 2015).

consulting the Chief Justice in the appointment process. If the Constitutional authorities and the executives have the interest of the judiciary at heart, there can be no difficulty in ensuring that the best possible persons are appointed to the high office of Supreme Court or High Court Judge

Most constitutional democracies of the world adopt and follow an inter-institutional model of judicial appointments. This could be either an 'executive-judiciary' model or an 'executive-legislature' model. The recent trend however is a JAC model of appointment, realizing it as the best of the available models. India is the only nation where the appointment of judges to the higher courts is an insulated process with little or no involvement of the executive or the judiciary. So restoring parity between the executive and the judiciary in the appointment process is in accordance with rule of law and separation of powers.[32] The proposed Indian model of the JAC is therefore a novel shift into an institutional niche allowing for a transparent collaborative process between the executive and the judiciary. The JAC model in itself is constitutionally justifiable. The independent and transparent judiciary is the *sine qua non* of a healthy democracy. In order to ensure independence of judiciary it is pertinent that the enacting of law relating to composition, function and procedure relating to NJAC should not be left to the Parliament which it can do it by simple majority. On the other hand, the wider representation in the selection process will ensure that there is transparency and accountability in appointments and transfer of judges of higher judiciary.

[32] Laxmi Mall Singhvi, *Parliamentary Democracy in India* (Prabhat Prakashan, New Delhi, 2012) 80-82.

NEED FOR WITNESS PROTECTION IN INDIA: A LEGAL ANALYSIS

Zubair Ahmed Khan[*]

I. Introduction

Fair justice is not difficult to comprehend in Criminal justice system, but due to various complexities it is difficult to obtain. Fair justice has various aspects like fair investigation, fair inquiry, expeditious, and fair trial. Since India follows adversarial system of court proceeding wherein impartiality holds the key, it is important to note that procedural justice is the cornerstone for achieving fairness. Procedural justice is the objective which warrants transparency during investigation & trial by following due procedure established by law. But, there are many important considerations that need to be followed, like responsible & vigilant role of the government, the police and the public prosecutor, for ensuring transparency and fairness in the administration of justice. Fair trial has certain inherent features like equal opportunity of representation in court-hearing to both the sides and speedy trial. In the adversarial Court of proceeding, it is also expected that all possible evidence, oral & documentary, should be heard, verified and cross-examined wherever possible. There is one crucial point, which has to be considered seriously that is vulnerable position of victim/witness during pre-trial, trial & post-trial stages. The fate of a case depends on version represented or information given by witnesses. The principle of equity and natural justice, however, rests on reliability & credibility of evidence provided by witness even in those cases where there is some sort of conflict in direct evidence and circumstantial evidence. So it is quite evident that witness plays a very important and responsible role for any case in the dispensation of justice.

The word witness is not specifically defined in the Indian Evidence Act, 1872 (hereinafter IEA). But, legislators are tried to explain the concept of witness through sec118 of the IEA, where competent person can give testimony under declaration of

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oath.[1] It means any person who is directly connected with the case or who is aware of facts of the case or knows the accused & victim or someone who is experienced in a specific field and possesses specialized knowledge on general issues related to the case. Though, there are certain references in the Criminal Procedure Code, 1973 (CrPC) related to preliminary stage of investigation wherein witness has significant role to play. A police has the power to call upon any witness in the police station for getting information related to facts & circumstances of the case.[2] A witness can be examined by the police officer and he has to respond to the questions in appropriate way that may be reduced in writing.[3] However, statements made before the police officer in the police station cannot be considered as *primafacie* evidence for the simple reason, witness is only permitted to give evidence before judge in the Court of law as mentioned in sec 3 of the IEA.

But the relevancy of evidence procured through witness can serve the purpose of justice especially when it is made in the absence any kind of biasness, false, misleading & deceptive statements. That is why it is important to expedite the process of investigation & trial so that there won't be considerable gap in which the accused or his close associate put undue influence on the witnesses to instill fear in them or pressurize them. But there are other issues, which further aggravate complications for fair justice delivery system. Lack of well-trained police officers, non-sensitivity of media over the issues, involvement of influential persons (politicians, mafia gangster) in high-profile cases, non-cooperation of the state, influence over witness through convincing methods like providing bribe, threat of any sort, are a few to name. These situations, in combination or isolation, will directly or indirectly generate a sense of fear & intimidation in the mind of witness. As a consequence of it, he will either lose his interest and confidence in giving true information in the court or will abstain from presenting himself before the court even after he receives summon.

In *Mrs. Neelam Katara v. Union of India & others*[4] the Delhi High Court has stressed that it is the fundamental principle of justice that, witness should testify before court of law by providing true facts without any fear or temptation. His truthful statement

[1] S 118, Indian Evidence Act, 1872.
[2] S 161, Code of Criminal Procedure 1973.
[3] S 162, Code of Criminal Procedure 973.
[4] ILR (2003) II Del 377.

can decide the nature of circumstances of the case through which guilt or innocence will be proved. But testimony under fear, undue pressure & temptation will vitiate the proceeding of the case and compromised with justice.

Production of ocular & other substantive evidence will definitely help every criminal trial to reach its last stage without any foul play. A sensible & impartial judgment will come into picture when investigating officer completes his job sincerely without any delay and every person who has relevant information related to the case brings the same to notice of the investigating officer and the court whenever he is summoned. If any person avoids such responsibility in facilitating information, then court's verdict will be hampered and the public will lose their confidence in criminal justice system.

In *Swaran Singh v. State of Punjab*[5], the Supreme Court also highlighted role of witness in justice delivery system in general. In many cases, witness has to face multiple ordeals in overall court proceeding. Sometimes witness gets killed, beaten up as no specific protection is available to them. Sometimes they are unnecessarily harassed during cross-examination for a long period of time, so common people often try to maintain distance from court & investigating authorities. They don't turn up as witness. Due to absence of effective protection from the state & police, the situation becomes more vulnerable during investigation and trial.

The Committee on Reforms of Criminal Justice System under the chairmanship of Dr. Justice V. S. Malimath categorically emphasized the importance of evidence procured through witness. A sensible responsibility of witness is to assist the court in determining guilt or innocence of the accused. He should not refuse to part with the information he is having with him about the case and to respond to questions posed to him during cross-examination. It is for the judge to uphold justice by preserving rights of victim and thereby to avoid the miscarriage of justice.[6]

[5] AIR 2000 SC 2017.

[6] See Dr. Justice V.S. Malimath,*Report*: *Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, Government of India, 2003), available at:http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf(Last Visited on 12th June,2015)

II. Introduction to Hostile Witness

The term hostile witness is not defined in the IEA. Legislators might not have imagined the existence of such a term in trial. But the problem of hostile witness becomes very prevalent now-a-days in many criminal cases. The concept of hostile witness is basically inspired from the common law principle. It is important to provide safety against the adverse statements made deliberately by a witness in court of law. There is no clarity as such on the term hostile at that time when it was coined. After independence, Court's observation has given some clarity where it is shown to be contrary, adverse and inconsistent.

During preliminary investigation, police has power to call a witness in the police station to seek permission.[7] Police has also power to examine any witness and put him certain questions k and seek answers thereto.[8] Now situation of hostile witness will arise especially when party takes permission from court to call witness in the court of law for ascertaining veracity of his statements through cross-examination.[9] This is the time where witness makes contradictory and adverse statements. Then he is called as a hostile witness. A hostile witness actually weakens the case of the prosecution for whom he is making the statements. Leading question can be put to him when Judge declares him a hostile witness. Since, no specific definition of hostile witness is available; identification for the same is a matter of discretion for the court. Generally, Judge has to give notice on the nature of statement with great scrutiny because it is a matter of conviction or acquittal. Sometimes, there is thin difference between merely unfavorable or disagreeable witness and a hostile witness. An impartial Judge needs to find the major inconsistent part of the oral evidence given by the witness. Sometimes, a witness concocted the whole version of his story in such a way so that it favors the opposite party.

III. Reasons for Witness Turning Hostile

One inference can be drawn that hostility arise whenever a witness conceal certain true facts. His statement may be directly or indirectly in favor of opposite party. This is quite obvious when unscrupulous methods are adopted to vitiate the fair proceeding

[7] S 160, the Code of Criminal Procedure 1973.
[8] S 161, the Code of Criminal Procedure 1973.
[9] S 154, the Indian Evidence Act,1872.

of the case. Witness intimidation is the most common reason for hostility. Scare tactics created pressure that can obviously effect psychologically.

In a very famous case, *Zahira Habibulla H. Sheikh & Anor v. State of Gujarat & Ors*[10], the Supreme Court stressed that proper justification, rational investigation and fair exoneration of guilt give the foundation of justice and instill confidence in the society. Continuous oppression and political patronage and despotism, the court observed, will lead to mockery of justice and will completly breakdown the social order. Supreme Court reminded the State of its obligation to protect the rights and interest of citizens and the police of their official duty to provide possible safeguards to witness.

In *Surinder Singh v. State of Haryana*[11], the Supreme Court has also shown its great concern over the plight of witness and his role in administration of criminal justice. It advised trial courts to be more vigilant and take prompt action against hostile witness. It advised the courts to start summary procedure for trial under sec 344 of the CrPC, when fabricating evidence is creeping in. An impartial Judge needs to give moral boost and confidence to vulnerable victims & witnesses.

IV. Precautions taken during Investigation and Trial for Witness Security as per Procedural Laws

Proper implementation of Procedural laws can ensure administration of justice. But, practical application of laws is very difficult due to the presence of different complexities in crime. The literal meaning of witness protection is safety of witness from physical suffering & life threat. But, interpretation of limited provisions related to witness protection is against hindrances in obliging legal duty & disruption.

Fair trial & investigation ensures equal rights to accused and victim. There are some fundamental principles of natural justice, like presumption of innocence, *audi alteram partem*, right to have legal representation, right against double jeopardy, etc. that need to be observed. Whereas victim and more specifically witness don't enjoy such liberty and basic rights. Plausibly, a witness will abhor in becoming a witness in such an

[10] (2006) 3 SCC 374.
[11] (2014) 4 SCC 129.

entangled and wearisome position. This is the common reason why witness either avoids visiting court or absconding from the place in spite of issuance of summons. There can be three situations in this dilemma, namely[12]:

1.) Victim and accused are familiar to each other before the incident of crime
2.) Accused is not acquainted with witness's identity
3.) Accused is not acquainted with victim & witnesses (a case of genocide or terrorist act)

It is evident that accumulation of evidence starts from the stage of investigation. Investigation is the stage where facts & circumstances of the case come into picture. It includes many aspects like search at the location of crime, knowledge of victim's condition, and other prevailing circumstances around the location, etc. [13]

For the purpose of filing a First Information Report, a formal preliminary inquiry needs to be completed by a police officer. Collection of direct and circumstantial evidence is utmost priority for an investigating officer. Since there is always reasonable apprehension that accused or his associates may tamper or destroy evidence at the initial stage, it is important for a police officer to complete his probe in a fair & expedite manner with strict scrutiny. A police officer may examine the witness related to the facts of case provided if there is any inconvenience or threat to witness, and then witness's statement can be recorded through audio-video electronic means.[14] While preparing a report by police officer, after the investigation is complete, if he thinks that certain statement of the witness is not to be disclosed to accused, he can send it to the Magistrate separately with reasons in a secret note to maintain fair investigation.[15] Now it is explicit that when trial starts witness's role becomes more crucial. A witness can face any kind of hindrance during trial, so if he receives any kind of threat from someone to give false & fabricating evidence, he can file a complaint for the same before the Court of law under the offence mentioned in sec 195A of Indian Penal Code. [16]

[12] Law Commission of India, *One Hundred Ninety-Eighth Report: Witness Identity Protection and Witness Protection Programme*(Government of India, 2004), , *available at:*http://lawcommissionofindia.nic.in/reports/rep198.pdf(Last Visited on11th June, 2015)
[13] Ibid.
[14]S 161 proviso, the Code of Criminal Procedure, 1973.
[15] S 173(6), the Code of Criminal Procedure 1973.
[16] S 195A, The Code of Criminal Procedure 1973.

A Judge has also some responsibility in protecting interests & rights of witness during trial. Court can check the reasonableness of questions whether it can be asked or not.[17] Court cannot permit improper conduct of cross-examination. He can prohibit the party from putting offensive, defamatory and annoying questions.[18] Similarly, it can give prompt disapproval/repudiation when certain offensive questions are asked to rape victim, who is also a witness, during cross-examination.[19]

Generally, defense party adopts some delaying tactics during trial and seeks frequent adjournments on one or the other ground. As a result, witness may desist from visiting the court every time. Court, with a view to avoid such a situation, may order the State Government to bear reasonable expenses of the witness, so that hassle-free inquiry or trial can be carried out.[20]

There can be some circumstances where accused disrupt the trial continuously and thereby vitiate the Court proceeding by threatening or inducing victim/ witness. This type of situation can be possible either in heinous criminal case or in case involving influential people especially nexus of criminal gangs & politicians. Accordingly, Court can start the trial in the absence of accused for a particular period of time in which witness's statement can be taken though defense counsel is allowed to appear during the trial. Later on, Court can direct accused's presence appearance in the trial. Technically, this can ensure impartial & legitimate trial or inquiry before Court.[21] So, analysis of Criminal Procedure Code, 1973 and Indian Evidence Act, 1872 can give clear picture that witness protection is not properly described. Though, it lays down responsibilities of the Police and Court at certain level. But there is no scope of witness protection after trial in procedural laws, which is a matter of taking undue advantage by accused or his associates.

There is a specific Act named as the National Investigation Agency Act, 2008 under which National Investigation Agency is established to investigate terrorism based cases with professional skill. This Act provides protection for witness (under section 17) where different constructive steps can be taken. In camera proceeding and classified & undisclosed records of identity (including address) of witness should be

[17] S 149, the Indian Evidence Act, 1872.
[18] Ss 151 & 152, the Indian Evidence Act, 1872.
[19] S 146 proviso, the Indian Evidence Act, 1872.
[20] S 312, the Code of Criminal Procedure 1973.
[21] S 317, the Code of Criminal Procedure, 1973.

maintained. If a witness or public prosecutor wrote a formal requisition for taking protection to the Special Court, process will become more convenient.[22] There are few susceptible circumstances in any case in which threat & insecurity are imminent for witness, so the act provide few contemporary facility wherever possible like proceeding can started at different place as decided by the Special Court. Similarly, non-divulgence of identity of witness in the judgment should be implemented along with restriction on print publication of court proceeding to maintain privacy.[23]

Similarly, Law Commission of India has recommended a specific procedure in which a witness will get benefitted through Witness Protection Programme. Accordingly, formal requisition in the form intimation can be given by public prosecutor to Magistrate by which witness can be given a new identity for the trial and if necessary his position & location will be readjusted secretly. A witness needs to enter into Memorandum of Understanding with State Legal Aid Authority out of which his bare expenses & maintenance charges will be taken care by State. A witness needs to complete his responsibility by giving true evidence. If he fails to give evidence in the trial, it will result into exit from Witness Protection Programme. So, this procedure creates a reciprocal responsibility of State and Witness to complete their respective duty.[24] The apex court realized in *State of Punjab v. Gurmit Singh*[25]that administration of justice through fair trial without any hassle could arise if there is reasonable protection available for victim and witnesses especially in serious criminal offence like rape. Supreme Court emphasized the importance of trial in camera on the basis that it can provide a kind of convenience &comfort for victim to depose before court as mentioned in sec 327 of the CrPC. It can avoid the disruption in the form hesitation or any kind of oral threats, unnecessary psychological pressure that can be possible from accused either through continuous gazing or other means. Similarly, in *National Human Rights Commission v. State of Gujarat*[26], the Supreme Court, while forming Special Investigation Team, observed that the principle of fair trial has many legal dimensions, which needs to be taken care with equity and reasonableness. Since witness plays a very important role in the trial, it is important for State to take every

[22]S 17, the National Investigation Agency Act,2008.
[23] Supra n.23.
[24] Supra n.13.
[25]1996 (2) SCC 384.
[26]AIR 2009 (SCW) 3049

possible step to protect him and victims of crime. Interest of justice will be failed if witness cannot appear before the Court of law and give statements. The Supreme Court also emphasized the practice of witness anonymity as a part of witness protection. The Punjab & Haryana High Court made a bold & painful admission in *Bimal Kaur Khalsa v. State of Punjab*[27] that there is no possibility of complete security or protection for the witness or any investigator. Court or Government cannot give assurance for the same. Since a witness who provide evidence in a case as a responsible duty, so it is incumbent upon Court to provide secrecy in case of identity & address of witness and wherever it is possible for Court to take protective steps like in Camera proceeding or screen trial or video- conferencing so as to project the interest of witness by best possible means. Thus, modern technology and innovative tactics can make convenient in functioning of the Court trial efficiently. So, additional measures like video-conferencing, screen arrangement can avoid direct showdown between accused and witness. Practically speaking, physical distance will ensure safe environment in which witness can give his statement. In *Saint Shri Asharam Bapu v State of Rajasthan*[28], the bail application was rejected by the Rajasthan High Court because grant of bail will vitiate the fair proceeding of the case. It is important to avoid miscarriage of justice by all possible means, because there is a reasonable apprehension that it may meddle with witnesses and coercive means will adopted to influence the witness so that he give adverse statement favorable to the defence side. Unfortunately, in spite of public outcry and huge media attention, no serious effort has been taken as a result of which three witnesses are already shot and few other witnesses are attacked. There is no effective measure for witness protection that has been adopted by the State.

V. Witness Anonymity

Witness anonymity is a kind of witness protection. Though it is not defined explicitly anywhere. Basically it means a sort of non-divulgence and non-revelation of the identity of witness. But, there are many issues of deliberation related to its validity and practical implementation, which needs to be discussed. Since it is the responsibility of the police and Court to provide protection to witness, but a Court can order for witness anonymity. Secondly, it is reasonable to provide witness anonymity

[27] AIR 1988 P & H 95.
[28] S.B. Criminal misc.2nd Bail Application no.10115/2013.

at preliminary inquiry or investigation stage where an investigating officer has to be alert and cautious about the same fact. Thirdly, it is not an easy task to implement witness anonymity at the inquiry or trial stage because of following legal complications:

1. Whenever the matter of taking evidence comes before the Court, it is necessary that all kinds of evidence must be produced & taken in the presence of accused or if his presence is done away with, then in the presence of his pleader i.e., his pleader's presence is deemed to be the presence of accused. So it signifies that all evidence will be secured & taken either in the physical or legally constructive presence of the accused.[29]
2. It is necessary to give equal opportunity to both parties for cross-examining opposite party & their witness in the Court proceeding because it is a fundamental part of principle of natural justice and right to have fair hearing. Accordingly, parties can send their written questions to Court for consider it relevant. Then, Court can ask the party to cross-examine witness.[30]
3. It is important for Court to enquire or go for trial without any kind of restraint in accessing the same in public for the purpose of transparency & fairness in trial in the interest of justice. Though in exceptional cases, Court can put complete restriction on printing & publication of the trial proceeding in the case related to rape to maintain privacy.[31]

That is why Supreme Court took strong notice of the same u in *Delhi Domestic Working Women's Forum v. Union of India*[32], wherein it has emphasized that rape case should be dealt with broader sensitivity in the interest of justice because of two reasons, namely, victim's vulnerable nature & victim's position as a witness.

Similarly, Supreme Court took a serious note in the case *Sakshi v. Union of India*[33] on the issue of victim/ witness protection with a different new perspective. It was observed that there wouldn't be any compromise with fair trial.

VI. Challenges

[29]S 273, the Code of Criminal Procedure, 1973.
[30]S 287, the Code of Criminal Procedure, 1973.
[31]S 327, the Code of Criminal Procedure,1973.
[32]1995 SCC (1) 14.
[33]2004 (6) SCALE 15.

There are few challenges that can become hindrance for any Witness Protection Programme. There is complete ambiguity on two broader issues, namely, application and organizational structure. There is no clarity about the duration of period of witness protection, so time for witness protection is not explicitly fixed. It is very difficult to provide protection after the end of Court proceeding. Next problem is consistent adjournment of cases, which doesn't come with appropriate solution. One of the major issues is unnecessary political interference in the whole process of Justice delivery system as a result of which it encourages anti-social elements in the society. This problem is aggravated further with another factor where protectors themselves are not sufficient in number, i.e. lack of police officers & security guard in State level according to population in a particular area.[34]

VII. Conclusion

Different Law Commission Reports and landmark judgments delivered by the Supreme Court have paved a clear way in the form of documentation for legislature to frame legislation, namely, Witness Protection Act. If legislature framed legislation as Whistleblower Protection Act, 2014 (though not implemented yet) for the protection of Whistleblower, then why shouldn't there be legislation for the security & safeguarding the interests of witness. It is important to have legislation flexible in nature so that it is convenient to witness's position. Successful implementation of legislation depends on cooperation of police, Judiciary and society. There are some basic principles which need to be followed for a proposed legislation for witness protection:

1. Policy and guidelines for Witness Protection Unit should be framed in confidential manner. Personal details related to recognition of witness should be kept private in nature. His changed destination or location should also be kept secret. Even

[34]Naveena Varghese, Witness Protection: Problems Faced and Need for a Protection Programme in India, *Lawctopus' Law Journal, Academike* (Feb.,14,2015) ,available at : http://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india/#_edn34(Last Visited on 09th June,2015)

Confidentiality clause includes details of police officer or special security guards who are employed for witness protection.

2. While framing the Witness Protection Act, if any specific authority will be given the main charge to provide protection for witness, it is important that Departmental & Managerial independence should be deeply rooted in the regulation of that specific authority so as to eliminate all possible kinds of influence from financial or political power. A magistrate can decide whether witness has to be protected or not in a particular case. While deciding the same, it is important to have impartial approach by observing the gravity of case.

3. There can be two situations wherein witness may seek protection from the Court or Court itself takes up the case suo-motu, in both the situations witness needs to enter into Memorandum of Understanding with the authority in which a witness will be given protection in all dimensions. The agreement must not have ambiguous provisions with respect to entry of witness under protection and exit from ambit of protection. Non-obligation of responsibility of witness should result into exit from the protection. The authority should extend their purview to provide protection from giving new temporary identity to changing address temporarily. It is obvious that policy & legislation related to Witness protection programme can be successful only when some reformative steps are taken simultaneously in the functioning of court & police station. It is necessary to enhance the capacity of fast-track court for speedy justice. It is also incumbent upon the State to increase the numbers of the police personnel so that employment for witness protection become convenient.

THE EVIL OF FEMALE FOETICIDE IN INDIA: CAUSES, CONSEQUENCES AND PREVENTION

*Sauradeep Rakshit**

I. INTRODUCTION

Female foeticide is the act of aborting a foetus because it is female. This is a major social problem in India and has cultural connections with the dowry system that is ingrained in the Indian culture, despite the fact that it has been prohibited by law since 1961. In India a strong preference for sons over daughters exists, unlike in Western cultures. Pregnancies are planned by resorting to 'differential contraception' — contraception is used based on the number of surviving sons irrespective of family size. Following conception, foetal sex is determined by pre-natal diagnostic techniques after which female foetuses are aborted. Foetal sex determination and sex-selective abortion by medical professionals has grown into a ₹1,000 crore industry (US$244 million). Social discrimination against women and a preference for sons have been promoted. Since 1991, 80% of districts in India have recorded an increasingly masculine sex ratio with the state of Punjab having the most masculine sex ratio. According to the decennial Indian census, the sex ratio in the 0-6 age group in India went from 104.0 males per 100 females in 1981, to 105.8 in 1991, to 107.8 in 2001, to 109.4 in 2011. The ratio is significantly higher in certain states such as Punjab and Haryana.[1]

II. Magnitude of the Problem

It is estimated that more than 10 million female foetuses have been illegally aborted in India. Researchers for the *Lancet* journal based in Canada and India stated that 500,000 girls were being lost annually through sex-selective abortion[2].

Pre-natal sex-determination was banned in India in 1994, under the *Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act*. The act aims to prevent sex-selective abortion, which, according to the Indian Ministry of Health

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[1] Rao Mamta, *Law Relating to Women and Child* 88-96 (Eastern Book Co, 2nd edn, 2008).
[2] ibid

and Family Welfare, "has its roots in India's long history of strong patriarchal influence in all spheres of life."

It is most prominent in Gujarat and the North Indian states, which according to census data[3] have an alarmingly low ratio of female children. Certain castes regularly practiced female infanticide and later female foeticide. The castes with a much lower proportion of female children to male children included *lewa patidars* and the *rajputs* in Gujarat; i, i, *khutris* and *moyal brahmins* in undivided Punjab, and *rajputs&gujars* in Uttar Pradesh.[4]

Origin

This process began in the early 1990s when ultrasound techniques gained widespread use in India. There was a tendency for families to continuously produce children until a male child was born. This was primarily due to the large sexist culture that exists in India against women. This is reflected by literacy rates among women as well as economic participation, which are both particularly low in states where female foeticide is prominent and an unequal population ratio exists alongside. The government initially supported the practice to control population growth. The Preconception and Prenatal Diagnostic Techniques (PCPNDT) Act was passed in 1994, making sex-selective abortion illegal. It was then amended in 2003 holding medical professionals legally responsible. However, the PCPNDT Act has been poorly enforced by authorities.[5]

Causes

1. The root cause of female foeticide is the dowry system in our society. A number of girls are killed inside the womb due to fear of dowry by many poor class families. They are worried about giving the dowry during the marriage of their girls, which poor people can't afford.

2. Girls are considered as financial obligation by many parents. They conceive that money spend on a girl will be total waste as she will go to her in-law's home after the marriage. According to Hindu's mythology, birth of a boy is considered as a path to

[3] Census by The Govt. of India, 1995, as per the available data
[4]Data collected from reports published by The Ministry of Health and Family Welfare, India in 1990
[5]Available at https://www.legalservicesindia.com/article/femalefoeticide (last visited on 10th August, 2015)

heaven. Being trapped in such orthodox ideas the girls are put to death before their birth.

3. The other root cause of female foeticide is rise in the inflation. Due to rise in inflation parents think hundred times before giving birth to a girl child. They worry about the educating and marrying their daughter.

4. The advancement in technology is the major cause of female foeticide. Nowadays parent determines the sex of a child before birth and kill if not according to their choice.

5. Corruption is another major factor in the rise of female foeticide. Some of the doctors do this heinous act to fulfil their money desire[6].

III. Consequences and Social Effects of Female Foeticide

Due to female foeticide there is steep decrease in the female's population. Due to which it is becoming difficult to find girls for marriage. This in turn leads to girl's trafficking. According to news girls from Assam and West Bengal are kidnapped and sold in Haryana for marriage, where the child sex ratio is least in the country. Due to diminution in the female's population our society is becoming male dominant, which is not a good indication. As the decrease in number of women, men consider themselves more superior and above law, which in turn results in women's exploitation.

Female foeticide has led to an increase in human trafficking. In 2011, 15,000 Indian women were bought and sold as brides in areas where foeticide has led to a lack of women[7].

IV. Control Mechanism

Certain methods can be summarized as under which may prevent or at least, lessen the amount of female foeticide practiced in India:

[6]Kapoor, S K, *Human Rights under International Law and Indian Law* 100-115 (Central Law Agency, 16th edn, 2007).
[7]*Íbid*.

1. There should be registration of all the nursing homes and rigorous action should be taken against the defaulters.
2. Government must deploy national wide campaign to spread cognizance among the people. They should aware the people about the importance of girls and should not consider them as stigma to their families.
3. More reservation should be given to the girls in education. Government should provide financial support to those families who are not able to educate their children.
4. Proper measures should be taken to implement anti dowry law and culprits should be punished. Government should provide financial support for the marriage of girls belonging to poor families.
5. Emphasis should be given to women empowerment. Women education will help in eradicating this problem. As the women will become independent, they can take decision according to their volition.
6. There is a need of remove the myth of son preference from our society only then this problem can be tackled.

V. Creating Social Awareness

Increasing awareness of the problem has led to multiple campaigns by celebrities and journalists to combat sex-selective abortions. Aamir Khan devoted the first episode "Daughters Are Precious" of his show *Satyamev Jayate*[8] to raise awareness of this widespread practice, focusing primarily on Western Rajasthan, which is known to be one of the areas where this practice is common.[9] Rapid response was shown by local government in Rajasthan after the airing of this show, showing the effect of media and nationwide awareness on the issue. A vow was made by officials to set up fast-track courts to punish those who practice sex-based abortion. They cancelled the licenses of six sono graphy centers and issued notices to over 20 others.

This has been done on the smaller scale. Cultural intervention has been addressed through theatre. Plays such as 'Pacha Mannu', which is about female infanticide/foeticide, has been produced by a women's theatre group in Tamil Nadu. This play was showing mostly in communities that practice female infanticide/foeticide and has led to a redefinition of a methodology of consciousness

[8] Courtesy: Star Plus; 'Satyameva Jayate' - A show hosted by actor Amir Khan
[9] Its sex ratio dropped to 883 girls per 1000 boys in 2011 from 901 girls to 1000 in 2001.

raising, opening up varied ways of understanding and subverting cultural expressions.[10]

The *Beti Bachao,* or Save girls campaign, has been underway in many Indian communities since the early 20th century. The campaign uses the media to raise awareness of the gender disparities creating, and resulting from, sex-selective abortion. *Beti Bachao* activities include rallies, posters, short videos and television commercials, some of which are sponsored by state and local governments and other organizations. Many celebrities in India have publicly supported the *Beti Bachao* campaign.

VI. Laws in India for the Unborn

The Constitution of India, 1950

Section 312 of the Indian Penal Code 1860 read with the Medical termination of Pregnancy Act, 1971 where all the restrictions imposed therein, including the time limit of 20 weeks, other than the ones to ensure good medical conditions, infringe the right to abortion and the right to health, which emanate from right to life as guaranteed under **Article 21** of the Constitution. Right to abortion is a species of right to privacy, which is again proclaimed a continuance of the right to life under Art 21 of the Constitution.

The Indian Penal Code, 1860

Sections 312-316 of the Indian Penal Code (IPC) deal with miscarriage and death of an unborn child and depending on the severity and intention with which the crime is committed, the penalties range from seven years of imprisonment and fine to life imprisonment.

Section 312. Causing miscarriage

Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with

[10]References obtained from The lawyers' collective, published in 2002

child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Explanation:- A woman who causes herself to miscarry, is within the meaning of this section.

Section 313. Causing miscarriage without woman's consent

Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [imprisonment for life] or with imprisonment of either description for a term which may extend to ten years.

Section 314. Death caused by act done with intent to cause miscarriage
Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term may extend to ten years, and shall also be liable to fine.

If the act is done without the consent of the woman, shall be punished either with [imprisonment for life] or with the punishment above mentioned. Explanation: - It is not essential to this offence that the offender should know that the act is likely to causedeath.

Section 315. Act done with intent to prevent child being born alive or to cause it to die after birth

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years or with fine.

Section 316. Causing death of quick unborn child by act amounting to culpable homicide

Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years.

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

Until 1970 the provisions contained in the Indian Penal Code (IPC) governed the law on abortion. The Indian Penal Code 1860 permitted 'legal abortions' carried out with no criminal intent and in good faith for the express purpose of saving the life of the mother. Liberalisation of abortion laws was also advocated as one of the measures of population control.

The Medical Termination of Pregnancy Act, 1971

The Medical Termination of Pregnancy Act was passed in July 1971, which came into force in April 1972. This Act was conceived as a tool to let the pregnant women decide on the number and frequency of children. It further gave them the right to decide on having or not having the child. However, this good intentioned step was being misused to force women to abort the female child. In order to do away with the lacunae inherent in previous legislation, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed in 1994, which came into force in January 1996. The Act prohibited determination of sex of the foetus and stipulated punishment for the violation of provisions thereof. It also provided for mandatory registration of genetic counselling centres, clinics, hospitals, nursing homes, etc.

Thus, both these laws were meant to protect the childbearing function of the woman and legitimise the purpose for which pre-natal tests and abortions could be carried out. However, in practice we find that these provisions have been misused and are proving against the interest of the females.

The Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

To combat the practice of female foeticide in the country through misuse of technology, done surreptitiously with the active connivance of the service providers and the persons seeking such service, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted on September 20, 1994. The Act was amended in 2003 to improve regulation of technology capable of sex selection and to arrest the decline in the child sex ratio as revealed by the Census 2001 and with effect from 14.02.2003, due to the amendments, the Act is known as the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

Its Purpose:-

The main purpose of enacting the PC&PNDT (prohibition of Sex Selection) Act, 1994 has been to:

i) Ban the use of sex selection techniques before or after conception.

ii) Prevent the misuse of pre-natal diagnostic techniques for sex selective abortions.

iii) Regulate such techniques Stringent punishments have been prescribed under the Act for using pre-conception and pre-natal diagnostic techniques to illegally determine the sex of the foetus.

Authorities Empowered and pertinent:

- The appropriate Authorities at the District and State levels are empowered to search, seize and seal the machines, equipments and records of the violators.

- The sale of certain diagnostic equipment is restricted only to the bodies registered under the Act.
- Government has also taken various steps to support implementation of the legislation, including through constitution of a National Inspection & Monitoring Committee (NIMC), Central and State Supervisory Boards, capacity building of implementing agencies, including the judiciary and public prosecutors and community awareness generation through PRIs and community health workers such as Auxiliary Nursing Midwives (ANMs) and Accredited Social Health Activists (ASHAs).
- The Act has a central and state level Supervisory Board, an Appropriate Authority, and supporting Advisory Committee. The function of the Supervisory Board is to oversee, monitor, and make amendments to the provisions of the Act. Appropriate Authority provides registration, and conducts the administrative work involved in inspection, investigation, and the penalizing of defaulters.
- The Advisory committee provides expert and technical support to the AppropriateAuthority.

  i. Sec. 6 of the said Act, clearly says that determination of sex is prohibited.
  ii. Sec. 22 prohibits advertisements relating to pre-natal determination of sex and punishment for contravention.]

  iii. Sec. 23 (3) of the said Act, lays down that any person who seeks the aid of a genetic counselling centre, a genetic laboratory or a genetic clinic, or of a medical geneticist, gynaecologist or registered medical practitioner, for applying pre-natal diagnostic techniques on any pregnant women (unless there is evidence she was compelled to undergo such diagnostic techniques) for purposes other than those specified, shall be punishable with imprisonment for a term that may extend to 3 years and with a fine which may extend to Rs.10,000 and any subsequent conviction may involve imprisonment which may extend to 5 years and a fine of up to Rs.50,000.

Before conducting any prenatal diagnostic procedure, the medical practitioner must obtain a written consent from the pregnant woman in a local language that she understands.

Prenatal tests may be performed in various specified circumstances, including risk of chromosomal abnormalities in the case of women over 35, and genetic diseases evident in the family history of the couple.

A survey of the implementation of the Act

A survey was conducted to assess the implementation of the 1994 Act in South Delhi and to make recommendations for its improvement. This involved examining the organizational structure, observing 26 clinics, and distributing a questionnaire to patients. The results showed up serious failures in management and implementation, lack of commitment and motivation, widespread corruption, and little knowledge in clinics of the provisions of the Act. The presence of individuals outside the medical profession, in particular those involved with human rights, would have helped to prevent fraternity bias – an unwillingness to bring medical colleagues to account.

The survey of patient attitudes showed that only 40% of male patients and 30% of female patients were aware of the prohibition of sex determination. While 90% purported to agree with the principle of the Act, they nevertheless maintained that a male child was important for the strengthening of the family.[11]

***Enforcement and effectiveness*:-**

In India, the policy environment is supportive of the reproductive choices of women and men. The medical termination of pregnancy Act is legal and it allows for induced abortions where pregnancy carries grave injury to women's health. A negative outcome of the PNDT act was that the practice of sex determination was driven nonetheless and the availability of services proliferated correspondingly. Ultra sound machines continued to be widely available and simple to use. In such an environment it is very difficult to enforce a law which sought to control information that travels through informal channels and can operate secretly. Law cannot control the information that is conveyed through a mere smile or frown face. Unsurprisingly, the enforcement, if law becomes weak. There is still utmost controversy as to whom will serve as the watch dog to control the misuse of the practice of female foeticide and its implementation is difficult and considering it can only be the doctor who carries out

[11] Available at https://www.gifts4u.com/women/sextests (last visited on 10th August, 2015)

the abortion or mother of the foetus who can be punished. Other reasons for limited effectiveness of the law include lack of political will to ensure enforcement. Experience has shown that in general the role of legislation is subverting a social practice is limited.

The ministry of health and family welfare had proposed a series of amendment to the 1994 Act. The act was amended in 2002 and in 2003 Rules were framed by the central government under sec 32 of the Act. These rules may be called Pre-conception and pre-natal diagnostic techniques (Prohibition of sex selection) rules 1996[12].

VII. Government Action-Plan and Policy Framework

National Plan of Action exclusively for the girl child (1991-2000)[13] was formulated in 1992 for the "Survival, Protection and Development of the Girl Children". The Plan recognized the rights of the girl child to equal opportunity, to be free from hunger, illiteracy, ignorance and exploitation. Towards ensuring survival of the girl child, the objectives are to:

- Prevent cases of female foeticide and infanticide and ban the practice of amniocentesis for sex determination;
- End gender disparity in infant mortality rate; eliminate gender disparities in feeding practices, expand nutritional interventions to reduce severe malnourishment by half and provide supplementary nutrition to adolescent girls in need;
- Reduce deaths due to diarrhoea by 50% among girl children under 5 years and ensure immunization against all forms of serious illnesses; and
- Provide safe drinking water and ensure access to fodder and drinking water nearer home.

Balika Samriddhi Yojana:

The launching of the *Balika Samriddhi Yojana* in 1997 is a major initiative of Government to raise the overall status of the girl child. It intends to change family and

[12] Dewan, V K, *Laws Relating to Offences against Women* (Orient Lasw House, New Delhi, 1st ed. 1996).
[13] Government of India, *the Woman – Rights and Obligations: A Report by the Government of India*.

community attitudes towards her and her mother. Under this scheme about 25 lakh girl children born every year in families below the poverty line are to be benefited. The first component of the scheme, which has already been launched, is to provide Rs.500/ - as a post-delivery grant to the mother of the girl child as a symbolic gift from Government. The other components proposed under the scheme are provision of annual scholarships to the beneficiaries when they go to school and assistance for taking upon income generating activity when they attain the age of maturity.

Besides having specific legislation and policy proclamations to deal with this menace, the precipitating factors such as dowry, poverty, and woman's economic dependence etc., leading to the problem of foeticide and infanticide have been addressed by enacting various legislations as:

- Dowry Prohibition Act, 1961(Amended in 1986);
- Hindu Marriage Act, 1955;
- Hindu Adoption and Maintenance Act, 1956;
- Immoral Traffic Prevention Act, 1986
- Equal Remuneration Act, 1976.

It is sincerely hoped that such measures would equip women to exercise their rights. The Ministry of State for Health and Family Welfare is also embarking on a massive national level awareness and sensitisation programme on a sustained basis to check female foeticide. Non-government organisations, media, entertainment industry, spiritual leaders, medical fraternity and youth will be involved in a big way as agents of social change in the campaign.

Deterrence (enforcing the law), counselling (community education) peer pressure (holding last rites after abortions to unnerve the family and doctors) and incentives for informers can be used as effective tools to bring about an appreciable change in attitude.

VIII. Recent Reports Relating to Female Foeticide in India

Study shows girls increasingly aborted in India

More and more Indian families with one girl are aborting subsequent pregnancies when prenatal tests show another female is on the way, according to a new study. The decline in the number of girls is more pronounced in richer and better educated households, according to research published May 26, 2011 in the medical journal Lancet. The study said that between 4 million and 12 million girls are thought have been aborted from 1980 to 2010[14].

Raw data from India's census released in March1980 showed 914 girls under the age 6 for every 1,000 boys. A decade ago, many were horrified when the ratio was 927 to 1,000. The ratio was 906 girls under 6 to every 1,000 boys in 1990 and had declined further by 2005, when it was 836 to every 1,000. The study was led by Prof. Prabhat Jha of the Centre for Global Health Research, Dalla Lana School of the University of Toronto and other researchers, including the former Registrar General of India, Jayant K.Banthia.

Guard against misuse of gender tests

Describing female foeticide as a "disgrace" to society Mrs. Pratibha Patil India's first women President has called upon the medical fraternity to ensure that diagnostic tests are not misused for pre-natal gender determination. "We have laws and legal provisions that specially prohibit medical practitioners from disclosing the gender of the foetus. It is not only illegal, but it is socially immoral and detrimental to society. It is very important that all medical facilities, doctors and radiologists adhere to this so as to prevent female foeticide," Ms. Patil said inaugurating the 64th National Conference of the Indian Radiologist and ImagingAssociation[15].

"A skewed population composition, due to a bias against the girl child, can have many adverse social consequences. We have a social responsibility to bring about an end to prejudices and discrimination against the girl child. We must encourage all such steps that will contribute to the welfare of the girl child — proper nutrition,

[14] Indian census reports prior 2010
[15]held on January 28, 2011

education, opportunity to work and to be financially independent. A girl child is an asset to the nation."[16]

Educate and empower less fortunate women

Mrs. Meira Kumari first women Lok Sabha Speaker said, Women have great power hidden within them. Even the Mahatma believed in this and decided to involve them in the freedom struggle…But today we live in a country where rampant female foeticide and female infanticide take place. The condition of women in our country needs attention," Ms. Kumar said in her address on January 5, 2011 during Shreemati Nathibai Damodar Thackersey (SNDT) Women's University annual convocation ceremony. She appealed to a representative group of the 21,803 women students who were awarded diplomas and degrees here, to educate and empower less fortunate women.

Religious leaders on female foeticide

On April 20, 2011 a widely respected and one of the oldest Islamic seminaries in Lucknow has said that female foeticide was nothing less than a murder and was not permitted in Islam. In a "*fatwa*", the Lucknow-based "*Darul Uloom Firangimahal*" has said that it is "un-islamic" to abort the foetus after determining its sex. "Islam does not permit abortion," said Maulana Khalid Rashid Firangimahali, chief of the institution and a senior member of the All India Muslim Personal Law Board, an apex organization of the Muslim community in the country.

The "*fatwa*" was issued on Tuesday in response to a query by one Dr Huma Khwaja, who wanted to know what the *shariat* (Islamic law) stand is on termination of pregnancy after determining the sex of the foetus. "Just as a murder is a sin, to cut off a part of the body (foetus) is also a sin in the eyes of Islam," Maulana Firangimahali said in the fatwa. He said that it was the duty of the human beings to consider the girls (female feotuses) as gifts of the god. "Society will progress only if the girls survive," the well-known sunni cleric said in his fatwa. The Maulana has also called for stern

[16]Mishra O P, *Law Relating to Women and Child* 69-75 (Central Law Agency, 2nd edn, 2003).

punishment to those indulging in female foeticide. The *fatwa* assumes significance in view of the recent census report, which pointed out that 63 districts in Uttar Pradesh had disproportionate male-female ratio. The census also reported that the number of girls in 0-6 age group in the state had dropped by 10 lakh even though the population of the state went up by three crore. In a show of unity, several religious leaders assembled at New Delhi on June 24, 2006 and pledged to launch a nationwide movement for the abolition of female foeticide. Condemning the increasing ``inhuman and shameful'' practice of female foeticide, they said: ``At this national convention of religious leaders, we all take oath that we would use all resources at our command to propagate to the masses to shun the atrocious act of female foeticide in our country.'' The National Convention of Religious Leaders on Abolition of Female Foeticide and Infanticide[17] was organized by the Indian Medical Association, the UNICEF and the National Commission for Women in the context of the alarming decline of female population, as indicated in the latest Census[18].

Sex Ratio and Girl Child

The Ministry of Women and Child Development is implementing the scheme of "*Dhanalakshmi*" as a pilot program to provide a set of staggered financial incentives for families to encourage them to retain the girl child. The Government has also declared 24th of January every year as a "National Child Day to bring forth the problems faced by the girl child and create national awareness. The Government has also taken several measures to improve the sex ratio at birth in the country. During the 1991 Census, sex ratio in the country was 927 females per one thousand males, which increased to 933 females per 1000 males during the 2001 census. The Government has enacted the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selections) Act, 1994 under which stringent punishments have been prescribed for using pre-conception and pre-natal diagnostic techniques to illegally determine sex of the foetus.

[17] Held in 2001
[18] The Times of India (Kolkata, June 25, 2006).

IX. CONCLUDING REMARKS

In India, the available legislation for prevention of sex determination needs strict implementation, alongside the launching of programs aimed at altering attitudes, including those prevalent in the medical profession. More generally, demographers warn that in the next twenty years there will be a shortage of brides in the marriage market mainly because of the adverse juvenile sex ratio, combined with an overall decline in fertility. While fertility is declining more rapidly in urban and educated families, nevertheless the preference for male children remains strong. For these families, modern medical technologies are within easy reach. Thus selective abortion and sex selection are becoming more common.

The National Plan of Action for the South Asian Association for Regional Cooperation (SAARC) Decade of the Girl Child (1991-2000) seeks to ensure the equality of status for the girl child by laying down specific goals for her dignified survival and development without discrimination. The codified law world over considers human life as sacred and specific legal provisions have been devised to protect the life of the born and the un-born[19].

However, the objective of the law gets defeated due to lacunae in the law and lack of proper implementation. Even though the law is a powerful instrument of change, yet law alone cannot root out this social problem. The girls are devalued not only because of the economic considerations but also because of socio-cultural factors, such as, the belief that son extends the lineage, enlarges the family tree, provides protection safety and security to the family and is necessary for salvation as he alone can light the funeral pyre and perform other death related rites and rituals. Evidence indicates that the problem of female foeticide is more prevalent in orthodox families. It is, therefore, essential that these socio-cultural factors be tackled by changing the thought process through awareness generation, mass appeal and social action. In addition to this all concerned i.e. the religious and social leaders, voluntary organizations, women's groups, socially responsible media, the doctors; the Medical Council/Association (by enforcing medical ethics and penalties on deviant doctors) and the law enforcement personnel should work in a coordinated way.

[19] Available at https://www.humanrightsinitiative.org/programmes/femalefoeticide (last visited on 20th August, 2015)

The recent technological developments in medical practice combined with a vigorous pursuit of growth of the private health sector have led to the mushrooming of a variety of sex-selective services. This has happened not only in urban areas but deep within rural countryside also. Female infanticide in most places has been replaced by female foeticide. Female foeticide or sex selective abortion is the elimination of the female foetus in the womb itself. The sex of the foetus is determined by methods like amniocentesis, chrion villus Biopsy and now by the most popular technique ultra sono-graghy. Once the sex of the foetus is determined, if it is a female foetus, it is aborted. The increase in female foeticide has seen the proportionate decrease in female sex ratio which has hit an all time low especially in the 0-6 age group and if this decline is not checked the very delicate equilibrium of nature can be permanently destroyed.

LAW RELATING TO GUARDIANSHIP OF CHRISTIAN MINOR AND RIGHT TO WITHHOLD THE NAME OF FATHER OF HER CHILD BY UNWED MOTHER: A COMMENT ON *ABC V. THE STATE (NCT OF DELHI)*

I. Introduction

A Guardian is a person having the care of the person of a minor or of his property or of both his person and property[1]. It refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor[2]. These rights include right to determine the child's upbringing in the regard to religion, education, and other matters such as the disposal of properties and so on. A guardian is vested with the duty to act for the welfare of the minor[3]. The law relating to guardianship of minor is mainly dealt under personal laws in India. For example, the law relating to guardianship of a Hindu minor is dealt under the Hindu Minority and Guardianship Act. However, it is to be noted that there is no specific personal law dealing with the guardianship of a Christian minor, though the Guardians and Wards Act, 1890 provides for the procedure for appointment of a legal guardian. In the absence of a specific law, there can be chances of various disputes about the guardianship of a Christian minor. One such issue is discussed in the case of *ABC v. State (NCT of Delhi)*[4].

II. Background of the Case

The appellant, a follower of Christian faith gave birth to her son in 2010, and has subsequently raised him without any assistance from or involvement of his putative father. Desirous of making her son her nominee in all her savings and other insurance policies, she took steps in this direction, but she was informed that she must either declare the name of the father or get a

[1] Section 4 (2) of Guardians and Wards Act, 1890

[2] Law Commission of India, Two hundred fifty-seventh Report: *Reforms in Guardianship and Custody Laws in India* (Government of India, 2015).

[3] See, http://cbseacademic.in/web_material/doc/Legal_Studies/XI_U5_Legal_Studies.pdf, visited on 8. 09. 2015.

[4] Decided on 6th July 2015. Full text is available at http://supremecourtofindia.nic.in/FileServer/2015-07-06_1436184974.pdf, (Last visited on 8th September, 2015).

guardianship/adoption certificate from the Court. So she filed an application under Section 7 of the Guardians and Wards Act, 1890 before the Guardian Court for declaring her as the sole guardian of her son. Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed. Therefore, appellant has published a notice of the petition in a daily newspaper without mentioning the name of the father. She has filed an affidavit stating that if at any time in the future the father of her son raises any objections regarding his guardianship, the same may be revoked or altered as the situation may require. However, the Guardian Court directed her to reveal the name and whereabouts of the father. But she refused to comply with the directions of the Guardian Court and as a result, the Court dismissed her guardianship application. The Appellant had approached the High Court and the appeal before the High Court was dismissed *in limine*, on the reasoning that her application for declaration that, she is a single mother and guardian of the child could only be decided after notice is issued to the father. The Court also stated that a natural father could have an interest in the welfare and custody of his child even if there is no marriage and that no case can be decided in the absence of a necessary party like natural father.

III. Disputed Arguments and Questions

The Counsel for the Appellant submits that, "the Appellant does not want the future of her child to be marred by any controversy regarding his paternity, which would indubitably result should the father refuse to acknowledge the child as his own. This is a brooding reality as the father is already married and any publicity as to a declaration of his fathering a child out of wedlock would have pernicious repercussions to his present family. There would be severe social complications for her and her child. As per sec 7 of the Act, the interest of the minor is the only relevant factor for appointing of a guardian, and the rights of the mother and father are subservient thereto. In this scenario, the interest of the childwould be best served by immediately appointing the Appellant as the guardian". Further, it is also argued that, "the fundamental right to privacy of appellant will be violated if she is compelled to disclose the name and particulars of the father of her child".

The learned council for State contended that sec 11 requires a notice to be given to the 'parents' of a minor before a guardian is appointed; and that as postulated by Section 19, a guardian cannot be appointed if the father of the minor is alive and is not, in the opinion of the court, unfit to be the guardian of the child. Therefore, the judgment of the lower court is in accordance with the Act and should be upheld. From the arguments of both the sides two important questions came up for consideration of the Supreme Court:

1. Whether the single unwed mother should comply with the procedures mentioned under the Guardians and Wards Act, 1890?

2. Whether a single unwed mother can be compelled to disclose the name of the father of her son?

IV. Judgment

The Supreme Court discussed the case in detail and took recourse to earlier cases like *Laxmi Kant Pandey v Union of India*[5] and *Githa Hariharan v. Reserve Bank of India*[6]. The Court observed that, "in a case where one of the parents petitions the Court for appointment as guardian of her child, we think that the provisions of sec 11 would not be directly applicable. It seems to us that sec 11 applies to a situation where the guardianship of a child is sought by a third party, thereby making it essential for the welfare of the child being given in adoption to garner the views of the child's natural parents. The views of an uninvolved father are not essential, in our opinion, to protect the interests of a child born out of wedlock and being raised solely by his/her mother". Further the Court stated that, "Sec 11 is purely procedural; we see no harm or mischief in relaxing its requirements to attain the intendment of the Act. Given that the term "parent" is not defined in the Act, we interpret it, in the case of illegitimate child whose sole caregiver is one of his/her parents, to principally mean that parent alone. Guardianship or custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril. The uninvolved parent is therefore not precluded from approaching the Guardian Court to quash, vary or modify its orders if the best interests of the child so indicate. There is thus no mandatory and inflexible

[5] 1985 (Supp) SCC 701.
[6] (1999) 2 SCC 228.

procedural requirement of notice to be served to the putative father in connection with a guardianship or custody petition preferred by the natural mother of the child of whom she is the sole caregiver".

Regarding the right of an unwed mother to keep secret the name of the father of her child the Court observed, "We do not find any indication that the welfare of the child would be undermined if the Appellant is not compelled to disclose the identity of the father, or that Court notice is mandatory in the child's interest. On the contrary, we find that this may well protect the child from social stigma and needless controversy". By answering the questions of dispute in this manner the Apex, directed to the Guardian Court to recall the dismissal order passed by it and thereafter consider the Appellant's application for guardianship expeditiously without requiring notice to be given to the putative father of the child.

Analysis of the Judgment

This case highlighted the issue of laws applicable to guardianship of Christian minor. Other religions have their own personal laws to deal with the questions of guardianship. However there is no personal law dealing with the guardianship of Christian minor. In this case the question of guardianship is discussed on the basis of the Guardians and Wards Act, 1890. It is to be noted here that the application of the Guardians and Wards Act, 1890 in this case raises serious concerns. This is because the basic purpose of the Guardians and Wards Act, 1890 is to protect the welfare of the child when the natural parents are absent or unable or unwilling to ensure the interest of such child. Therefore, the Act envisages a situation in which the Court confers guardianship to a third party who is interested in the welfare of the child and able to do so. Thus, the Act does not contemplate a situation where a natural parent is applying for guardianship. The judgment of the Court in this case can be appreciated to the extent it impliedly accepted any question relating to the custody of a Christian minor can be discussed under the Guardians and Wards Act, 1890. However, it can be criticized on the ground that, the judiciary could have made an open declaration about the legislative gap existing in the Indian legal framework, i.e. the law relating to guardianship of Christian minor. The Court also sympathized about his position of law in the following words: "Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone, without the requirement of any notice to the putative fathers".

The Court could have made a recommendation to the legislature to take steps for drafting a law thereby declaring clearly the guardianship of a Christian minor like the Hindu Minority and Guardianship Act, 1956. If there is a law that specifically deals with the issue of guardianship of Christian minor, like HMGA, disputes, like in the present, does not arise in future. When there is a specific law recognizes the rights of natural parents as guardian of their child, the official application forms do not require a declaration from the court in this regard.

Regarding the question whether compelling an unwed mother to disclose the name of the father of her child, the Court did not address the scope of right to privacy for its determination. Rather the Court has stated simply the non-disclosure will protect the interest of child and hence she shall not be compelled to answer. It is to be noted, the right to privacy of an individual as a basic human right is articulated in a myriad of international human rights instruments[7]. In most of these human rights instruments, the right to privacy is expressed in general terms and, in essence, simply means that individuals have a human right to privacy or private life. It is generally accepted that the notion of privacy is broad in scope and encompasses within its meaning various other facets which are essential for the realization and enjoyment of this right[8]. An analysis of foreign legal systems as well as domestic law of India reveals that the human right to privacy is very closely linked to and in fact an essential component of family life including the right to make reproductive choices[9]. It can be seen that the notion of right to privacy of a women encompasses all possible aspects of her decision 'whether to bear or beget a child including the aspect with whom and when'. It necessarily includes right to withhold the name the father of her child. This case was provided a great opportunity to Indian judiciary to expressly declare the right to withhold the name of the father as a facet of right to privacy. However, unfortunately, the Apex Court has not ventured to analyze the said issue in the angle of right to privacy.

Further, this judgment will open the room for a new legal discussion and closed a door for legal disputes by declaring, "we direct that if a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require

[7] See, art 12 of the UDHR, 1948; art 12 of the ICCPR, 1966; art 16 and art 40 of the Convention on the Rights of Child, 1989, art 4 of the African Charter on Human Rights and Peoples Rights, 1981; art 22 of the Convention on the Rights of Persons with Disabilities, 2006; and art 8 of the European Convention on Human Rights, 1950.

[8] Berta E. Hernandez, To Bear or Not to Bear: Reproductive Freedom as an International Human Right, 37 *Brooklyn Journal of International Law* 309 (1991)329.

[9] Aneesh V. *Pillai, Surrogate Motherhood and the Law* 139 (Regal Publications, 2015).

her to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary". Thus the Court has declared the right to get a birth certificate of children born to unwed mothers. The decision in this case stands as a reminder to the Indian legislature to take adequate steps to protect the welfare of the Christian Minor by establishing adequate law dealing with guardianship.

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BOOK REVIEW

LAW AND REALITY (2014), By Justice Devi Prasad Singh. Universal Law Publishing Co. Pvt. Ltd, Pp 320, Price Rs 495.

The book is a compilation of his articles published in different journals, lectures delivered from different forum.

The book offers his assessment of the judicial process, the doctrine of separation of powers; judicial review; sanction for prosecution of corrupt officials; legislative overruling, the right to information, and mediation in commercial and matrimonial disputes. It also addresses to some contemporary burning issues, like corruption, terrorism, female foeticide, and child sexual abuse.

The author, stressing that the nature and extent of separation of powers between three wings of State depend upon the country's socio-politico-cultural matrix and polity, demonstrates how criminals have developed direct nexus with the politicians and bureaucrats succumb to political pressure and thereby desist to tender right advice to the government, argues how long the law-makers and bureaucrats be permitted to claim immunity for their improper conduct under the garb of Separation of Powers. He stresses that in democracy no wing of the government has unfettered discretion, Success of a democratic polity lies in effective counter balance and checks amongst these three wings. In this backdrop, the author offers his criticism to the unfettered discretion of the executive in dealing with mercy petitions and granting executive sanction (under s 19 of the Prevention of Corruption Act, 1988) for prosecuting corrupt public servants.

He believes that misuse of power or position in pursuit of a private satisfaction amounts to corruption and commercialization of politics is the root cause of corruption. Multiple scams, wherein billions of public funds have been misappropriated, occurred in the sixty five years of independent India stand as testimony of rampant corruption. He defends the right to information as a means to check abuse of powers and the resultant corruption in public life. He pins his hope on the Information Commissioner for the purpose.

The author also enlightens his readers how growing terrorism remains unarrested and reminds them it requires strong will-power and rigorous enforcement of anti-terrorism laws with unreserved commitment to national security.

The author, admitting that higher judiciary has the power of judicial review of legislation and the State's right to invalidate a judicial decision, argues that it is morally and ethically inapt for the legislature to invalidate a judicial ruling declaring a legislative instrument unconstitutional.

Interestingly, the book under review does not include in it any of the author's reflections on judiciary, judicial behavior and accountability, and misconduct of judges. It also does not make mention of the law contempt of court vis-à-vis the why not to judge judges.

The author also dealt with sexual abuse of child and female foeticide, has suggested a preventive measures, like constitution of specialized separate courts, for ensuring juvenile justice k within a specified period. He, commenting on the Pre-conception and Pre- Natal Diagnostic Techniques Act, 1994, pleads that no foeticide, female or male, be legally permitted except on medical grounds and punishment therefor should be at par with that for unlawful homicide. Mediation in Commercial and Matrimonial Dispute has been analyzed by the author to lessen the burden on judiciary. He emphasizes on creating awareness among litigants and particularly in class litigants like businessmen which can be effectuated by organizing seminars and conferences at district and taluka levels.

The author concludes his book by writing about Swami Vivekananda as the soul of India. The book is beneficial for lawyers, judges, bureaucrats, and legislature and public at large while dealing with subjects at appropriate level.

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