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The Tamilnadu Dr.Ambedkar Law University

Ambedkar Law University Journal

(A Peer Reviewed Journal)

A Journal of The Tamil Nadu Dr. Ambedkar Law University

Annual Combined Issue

Volume: XI to XV 2016-2020

THE TAMIL NADU
Dr. AMBEDKAR LAW
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(A *State University)*

"Poompozhil, 5, Dr. D.G.S. Dinakaran Salai,
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From the Chief Editor's Desk

I am extremely happy to present the combined volume of the Ambedkar Law University Journal (ALUJ), Volume XI to XV for the years 2016 to 2020. The significant change that has been introduced with this combined volume is that the articles submitted for publication in the Journal are blind peer reviewed, in order to meet the research and academic expectations. Accordingly, the articles except the invited ones from eminent academicians, all other submissions are peer reviewed by the subject experts and basing on the recommendations, the research papers are included in the volume and the same will be continued in future, in order to maintain the academic and research outlook of the Journal.

Apart from the research papers, five speeches delivered at the University in the various Convocations, including a Special Convocation during the years 2018 to 2021 are included. These speeches were delivered by Hon'ble Shri. Ram Nath Kovind, President of India, Hon'ble Shri. M. Venkaiah Naidu, Vice-President of India, Hon'ble Justice S.A. Bobde, currently Chief Justice of India, Hon'ble Justice B.R. Gavai, Judge, Supreme Court of India, Hon'ble Justice A.P. Sahi, Former Chief Justice of High Court of Madras. The speeches underlined the changing dimensions of law and its various facets, in order to meet the socio-economic concerns of contemporary perspectives of India.

The invited articles and the peer reviewed research papers have analyzed the contemporary perspectives of law and policy on varied issues of Constitution, Labour Laws, Intellectual Property Rights, Human Rights, Environmental Law and Administrative Law.

I am grateful to all the dignitaries and the researchers who have contributed their papers in enriching the academic and research outlook of the University. I express my sincere thanks to all the members of the Advisory Board for consenting to guide the Journal. I also thank on my behalf and on behalf of the Editorial Board, all the peer reviewers for taking time out of their busy schedules in reviewing the papers and helping us to bring the Journal.

I thank the Editor Prof. Dr. K.S. Sarwani and the Members of the Editorial Board for their constant support. I also thank Rahul Reghu, Dr.B.Viswanathan for the constant support extended throughout to the editorial board in bringing out the volume. I hope that the readers of the Journal will find that the contributions are extremely useful for further research.

Prof. T.S.N. Sastry
Chief Editor

Special Convocation Address [1]

Hon'ble Shri Ram Nath Kovind

I am extremely happy to be among all of you today for this special convocation of the Tamil Nadu Dr Ambedkar Law University. Today, three eminent jurists - Justice Sathasivam, Justice Bobde and Justice Tahilramani are being conferred LL.D. (Honoris Causa) degrees for their distinguished services to law and justice. I am told that this is the first time in the country that a university is conferring LL.D (Honoris Causa) degrees on three jurists on the same occasion.

These three jurists have had distinguished careers. Former Chief Justice of India, Justice Sathasivam served as a Judge in the Supreme Court, High Court of Punjab and Haryana and Madras High Court. Justice Bobde was appointed Judge of the Supreme Court in 2013, and prior to that served as the Chief Justice of Madhya Pradesh High Court and as a Judge at the Bombay High Court. Justice Tahilramani who took over as the Chief Justice of Madras High Court in 2018, had served as a Judge of the Bombay High Court since 2001, including serving as the Acting Chief Justice of the Bombay High Court. She is the second successive woman Chief Justice of the Madras High Court, and she is a role model for millions of Indians, especially for our daughters. I congratulate these three eminent jurists for being conferred LL.D. (Honoris Causa) degrees and appreciate the University's decision to recognise their contribution to the field of jurisprudence.

This University was established by the Government of Tamil Nadu in 1997 for the advancement of knowledge in the field of law, to promote legal education and to further social justice.

1. Hon'ble President of India. Special Convocation Address (Excerpts) delivered at the University on July 13 2019.

The University was inaugurated by my predecessor as President of India, the late Shri K.R. Narayanan. In two decades of its existence, the University has added lustre to the task of legal education and research in Tamil Nadu and India. I am told that more than twenty thousand students are currently enrolled in courses offered by the University and its affiliate colleges spread across Tamil Nadu. I understand that the University also offers hybrid courses like B.Com-LLB and BCA-LLB. Such courses help expand the knowledge horizons and career opportunities of students. The Tamil Nadu Dr Ambedkar Law University has established a strong reputation both in teaching and research and is doing extremely well to meet its foundational objectives. Nothing less is to be expected from a University that is named after the Chief Architect of our Constitution, Babasaheb Dr B. R. Ambedkar.

Having been a student of law and lawyer myself, I would like to emphasize the significance of legal education for nation building and the role that universities, especially law universities, play in this regard. As a society and nation governed by the rule of law, we cannot but emphasize the text of, as well as spirit and intent behind, laws.

As our nation, society and economy evolve, so does the legal profession. While litigation in the courtroom remains at the core of legal practice, a law graduate finds many avenues open to him or her that were simply not available to previous generations.

Over the years, our understanding of law and its applications has become larger as well as more sophisticated. The nuances of privacy and of individual choice; the deeper interrogation of the concept of rights and responsibilities; and the search for a happy balance between autonomy for innovation and regulation for the greater common good in fields such as

biotechnology and communication technology are all examples.

Yet, in all this, are we paying enough attention to issues of legal infrastructure and access to justice, especially for ordinary citizens? There is a need to enhance legal literacy and simplify legal rules. It is important to not only take justice to the people, but also to make it understandable to litigating parties in a language they know. Perhaps a system could be evolved whereby certified translated copies of judgements are made available by the High Courts in the local or regional language. I had made this suggestion in October 2017 while addressing the Valedictory Ceremony of the Diamond Jubilee celebrations of the High Court of Kerala in Kochi. A few days later I visited Chhattisgarh, where I discussed this idea with the then Chief Justice of the High Court of Chhattisgarh Justice T. B. Radhakrishnan, who now is the Chief Justice of Calcutta High Court. And within a few days, the High Court of Chhattisgarh implemented the suggestion, and since then litigants can avail translated copies of the judgments of the High Court of Chhattisgarh in Hindi. I am happy to learn that some other High Courts have also responded to the suggestion positively. The language of certified copies could be Malayalam in the Kerala High Court or Tamil in the Madras High Court, as the case may be.

The need to make the provision of justice speedier and affordable places a great responsibility on the lawyer community. An advocate is a law officer of the court. He or she has a responsibility to the client, but also a duty to assist the court in delivery of justice. Our legal system has a reputation for being expensive and for being prone to delays. There are some who tend to use and abuse the instrument of adjournments as a tactic to slow down proceedings, rather than a response to a genuine emergency. This makes obtaining justice costly for the litigant. It would be a travesty of our republican ethic if a poor person did not get the same access to the law as a rich person. The legal profession must continue to address this collectively.

Eleventh Convocation Address [1]

Hon'ble Shri M. Venkaiah Naidu

It gives me immense pleasure to take part in the 11th Convocation of the Tamil Nadu Dr. Ambedkar Law University.

At the outset, let me congratulate all the graduating students who are receiving various degrees, awards and distinctions from this great institution. I compliment the Vice Chancellor and all the faculty members of the institution who have been shaping this University into a centre of excellence.

I am happy to note that a large number of alumni of this institution are holding important positions in public life as legislators and administrators, teachers and researchers, apart from being distinguished members of the Bar and Bench.

The concept of law is embedded in our ethos since time immemorial, evident in our age-old adage, ‗Dharmo Rakshati Rakshitah' or law protects us if we preserve its sanctity. In other words, if we follow the laws, we shall live orderly and peaceful lives.

The Preamble of our Constitution is an eloquent expression of our resolve of ‗securing Justice' to our people. In our diplomacy, we continue to stand steadfast to promote a peaceful, harmonious and rule-based world order.

Let me also recall the wisdom of illustrious saint, Thiruvalluvar who defined good governance in the following verse in his Thirukkural:

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[1] Hon'ble Vice President of India. Eleventh Convocation Address (Excerpts) delivered at the University on February 27, 2021.

–Ondhu kannodadu, Irai Purindhu, Yaarmattum Therndhu Saivadde murai"

which means a sound judicial system is one which is based on an objective enquiry, dispassionate analysis of evidence and delivery of even-handed justice to all citizens.

On this occasion, I recall that I was also a student of law once, planning to become an advocate. Due to the circumstances of the Emergency period, I had to fight for the people's cause and eventually took up a legislative career instead of a legal career. But I continue to have a great attachment with the field and so, it is a great pleasure to be among the legal fraternity.

Dear young friends, as you move out of the portals of this academic institution, please retain the ability to excel in your profession. Do not settle for mediocrity.

At a graduating ceremony, somewhat similar to this one, the Gurus of the Upanishadic age had advised the students – *Satyam Vada, Dharmam Chara, Swaadhyaayaanmaapramada (*speak the truth, live a righteous life and do not stop learning). I would like to add –do not be complacent. Try to constantly be among the best‖.

Empathy and excellence, ethics and enthusiasm should guide your actions. As Gandhiji reminded us in his talisman, the poorest man in want of justice must be the prime mover of your thoughts and actions, not temporary exigencies or material temptations.

Sisters and brothers,

You have a unique opportunity to deepen our country's democratic roots. You can make judicial system more accessible, affordable, understandable to every citizen.

The cost of legal processes are a major impediment in making justice accessible to all. A common perception is that there are many hidden costs in availing the legal route to resolve disputes. We have to find ways to reduce this out-of-pocket expenditure to the common citizen.

There is also a serious issue of protracted litigation. Timeliness in rendering justice is a major concern. As the maxim goes, justice delayed is justice denied. This delay is often attributed to huge pendency in courts, frequent adjournments and long leaves of courts. We have to address this problem of inordinate delay and do whatever is possible in our own purview to ensure speedier justice.

Young friends, there is no silver bullet to all these problems. We must find systemic solutions to these challenges.

For better access, more courts, special benches and adequately staffed courts with all posts filled up are required. Innovations like Lok Adalats and mobile courts have to be leveraged upon wherever feasible.

The system needs to be demystified and brought closer to the people by conducting court proceedings and delivering judgments in the language of local people.

We must strive hard to reduce the out-of-pocket expenditure for the underprivileged. Legal aid mechanisms may need to be more streamlined.

Some of you may choose to do public service by accepting cases of poor litigants ‗pro bono' and render free legal aid to needy litigants.

We have to also address the delay in our courts. I understand that there is lot of pendency of nearly 4 crore cases in

our judicial system. Cases have accumulated over the years and most of these are petty cases in the lower courts, where around 87 percent of the total pending cases lie.

The judicial system must evolve methods for speedy disposal of these cases. More avenues may have to be created for the quick resolution of disputes. Frequent adjournments could be avoided and except in extraordinary situations, we can develop a Standard Operating Procedure that limits the number of adjournments to a reasonable number like two or three. Simultaneously, alternative dispute redressal mechanisms like Lok Adalats may have to be fully leveraged.

Appointments to the courts should also be expedited and vacancies be filled in a time bound manner. This will bring great productivity gains especially in the lower courts, where most of the pending cases lie.

Speedier judicial process will not only provide timely justice to the aggrieved persons but also improve the business environment in the country.

The world is looking at India as a prime investment destination. In order to cement our place in the world of business, along with a predictable policy regime, we must also ensure a sound, hassle-free judicial system which can dispose off appeals in a time bound-manner.

Emphasis must be laid on the disposal of criminal cases in a speedy, dispassionate, objective manner to restore public confidence in the fairness and effectiveness of the system. Special courts can be constituted to exclusively deal with criminal cases involving public servants and elected representatives in a time-bound manner. Separate fast track courts can be set up to resolve electoral cases and to look into electoral malpractices.

Technology can be a major driving force for improving justice delivery. As young graduates, you must lead this wave of new innovations in legal jurisprudence and fully leverage it to improve access, to lower costs and to reduce pendency.

To begin with, both the bar and bench should effectively utilize Information and Communication Technologies (ICT). Digitization of all court records under the National Judicial Data Grid must be expedited.

The practice of online courts and e-filing was accelerated greatly during the COVID pandemic and they can continue to serve us greatly in not only improving the ease of access to justice but also reducing the associated costs and improving the ease of doing business.

Finally, we must understand that lawyers and courts alone cannot deliver justice to our people. They have to be ably supported by the other arms of the justice system. Police reforms and jail modernization should go hand in hand with reforms in the judicial system.

Legal institutions and education must also be tailored to meet the modern demands- for instance, expertise in cyber-crime, intellectual property violations, international law. Young and old practitioners alike must also try to specialize in these fields to enhance their professional competence.

I am happy to note that this university has introduced a five year Integrated programme of Bachelor of Computer Applications and Law in order to train the future lawyers to be competent, front-ranking legal professionals in the emerging world where technology will continue to be an important tool to improve governance. Once again, I am very happy to be with you at this 11th Convocation of your University.

This University is named after a great son of this soil, one of the most eminent jurists India has ever seen, and the chief architect of Indian Constitution, Dr. BR Ambedkar. To truly fulfill Babasaheb‘s dreams for our Republic, we need to ensure that the high ideals of our Constitution are implemented in true spirit so that they reach every person in the country.

India is at a crucial transformatory phase in its developmental journey. As we approach the 75th anniversary of our country‘s independence we need to reflect on our past experience and strengthen each organ of the state. Judiciary is a key pillar of our polity and it is our duty to ensure that we collectively improve the processes and achieve higher levels of effectiveness and efficiency.

We need to bring it much closer to the people who need its services. We need to refine our systems to make them citizen-friendly. We need to, if need be, re-invent, revamp and redefine the way we administer justice and enforce the rule of law to meet the needs of a aspirational, resurgent India.

I am sure that as students of law, you will always strive for positive social change. I am confident you will be the torchbearers of our quest for a just, inclusive and prosperous India.

I wish the University keeps up its record of excellence and achieve many more laurels in the years to come. My best wishes to all of you.

Ninth Convocation Address [1]

Hon'ble Justice S.A. Bobde

It gives me great pleasure to be here with you at the 9"convocation of The Tamil Nadu Dr. Ambedkar Law University. Inaugurated by His Excellency, then President Thiru K.R. Narayanan, this university represents a very carefully considered initiative in enhancing the standards of legal education, research and professional training. I am glad to learn that there are more than twelve thousand students pursuing their law degrees in this University and it has been ranked as one of the top 25 law institutions in the country. Being a centre of excellence, a University has a crucial role in preparing present and future generations. This institution along with the other universities, has significantly changed the landscape of legal education in the country

I have never attended a function in Chennai and have always wanted to come here. One has heard of the legends in law from this region. Sir T. Muthuswamy lyer, the first name in the world of law that anyone can think of from here. Sir Alladi Krishnaswamy lyer whose legacy as one of the makers of the Indian Constitution is unsurpassed, Sir S. Subramania lyer, Sir V. Bhashyam Aiyangar - the first Indian to hold the post of the Advocate General. He along with Sir T. Muthuswamy lyer and Sir S. Subramania lyer, form the glorious triumvirate of the legal world of Madras in the latter part of the 19" century. Judges like Sir Srinivasa Varadachariar who amongst other things headed the Ad-Hoc Committee of the Constituent Assembly which framed the draft provisions establishing the Supreme Court., P. V.

[1] Hon'ble Judge, Supreme Court of India, (Presently Chief Justice of India.). Ninth convocation address delivered at the University on September 8th 2018.

Rajamannar, Koka Subba Rao, M.K. Nambyar, Krishnama Chettiar Sundaram Chetty. Madras University is star-studded with Vice Chancellor‘s like Justice Hidyalatulla in a convocation speech at the Madras University quoted an imperative saying from the Upanishad[1]

It is an important quotation as it teaches you to go slow-very slow' about these five things which are:

1 long journey
2. long cloth
3. climbing a mountain
4. vidya
5. collecting a fund

Most of you might be planning to start your career in litigation; some of you may be looking for corporate jobs; law firms; planning for higher studies and taking up an academic job. I am also confident that some of you may be dreaming of joining the Judiciary. Being students of law, I assume that you will remain associated with the law and the legal profession in some way. The

[1] Malcolm Sathiyanathan Adiseshiah (18 April 1910—21November 1994), was an Indian development economist and educator. In 1976 he was awarded the, Padma Bhushan by the Government of India. In 1998 the UNESCO created 'The Malcolm Adiseshiah International Literacy Prize‘ in recognition of his contribution to education and literacy, He served as Vice Chancellor of Madras University from 1975—1978.

G R Damodaran was an educationist, an administrator, and founder of The GRD Trust in Coimbatore. He was the Chairman of the Southern Regional Committee of the AICTE and Chairman of the Govt. of lndia & High Power Committee on the Reorganisation of Polytechnic Education (196A1970). He was the Vice- Chancellor of the Madras University (1978-1981). He served as a Member of Parliament and of the Legislative Council of TamilNadu.

Prof S.P Thyagarajan former Vice Chancellor of University of Madras (07.09.2003 to 06.09.2006) an eminent scientist and academic, received the State Government's A.P.J. Abdul Kalam award from Chief Minister.

Prof. P. Duraisamy Current Vice Chancellor has served for over 28 years at the University of Madras (1986-2014) and was a professor for over 21 years. Subsequently he was Sir Sarvepalli Radhakrishnan National Fellow of the Indian Council of Social Science Research (ICSSR) and affiliated to the Madras Institute of Development Studies, Chennai (2014-2016).

emerging world, which you will be entering, is fast changing; everything is different than it used to be even five years ago. Traditions are being questioned, being modified, some being broken down with new things continuously taking the place of old ones. You will have to face such challenges. You have to be prepared to deal with virtually every area in life.

Many unconventional issues and even very traditional ones are falling for consideration before the Courts. Issues for determination revolving around the full cycle from the beginning of life till its end, and all the things that happen in between, have become subject matter of laws and cases before courts. Sometimes even matters relating to conception- the very beginning of life. The reproductive freedom of women, the right of a mother to terminate pregnancy, unfathomable questions like when does a foetus acquire an existence of its own. Issues dealing with the end of life like that of euthanasia and when it can be allowed. Whether there is an unqualified right to die, like whether there is an unqualified right to live. And also, the things in between the two events of birth and death i.e. nutrition, use and regulation of genetically modified plants, artificially bred animals, permissible fertilizers. Vast area of human rights- rights of people to use their own language, right to not believe in god, right to believe in god and the right to worship god in a particular way. Issues such as the entry of women in temples and dargahs, talaq, whether a Sikh can be compelled to wear a helmet in a cycle race. Determination of rights of sexual minorities like same sex couples. The legality of the rights if any, of the people who have migrated without permission to settle down. The determination of status of those who have illegally migrated. Whether the rivers can flow freely throughout the country or whether a State has a right to dam the flow for its purposes, and to what extent. The pollution of our magnificent rivers, the dumping of construction debris, decibel

levels of fire crackers and sound systems. Animal rights issues including the number of fish in an aquarium, the condition of animals when they are taken to a slaughter house. Compulsory free education, how much fee can be legitimately charged and the language instruction of education. Whether one can appeal for votes in the name of religion. Even whether a particular appeal for votes is an appeal on religion. Issues of privacy, compensation for accident victims, victims of crimes.

Every day we are faced with new facets of knowledge and new opportunities to learn, for instance the ever-expanding influence of Artificial Intelligence, intricacies of deep sea law, emergence of crypto currencies resulting in new application to old knowledge. In fact, many law schools are teaching Nyay Shastra and are focusing on teaching the ancient Indian form of logic and reasoning. Which according to some is even better than Aristotelian logic. The Supreme Court in many cases has used the Rules of Mimansa for interpreting laws.

Learning involves thought, thought is normally expressed in language and the use of language is crucial to clear thinking. As lawyers, fluency in language —a part of the art of communication is one of the most important qualities to inculcate. For with the art of communication, the art of expression is connected, the art of persuasion is connected. Lord Denning says in his book ‑Tools of the Law‖ that words are the most important tools for a lawyer this is based on the fact that we mostly think in words and that thoughts are most efficient when thought in a language that is familiar to us. One of the world‘s most profound works on ethical living, the Thirukkural says that the learned who lack the ability to communicate his ideas to others in an understandable way are like, a bunch of flowers with no fragrance.

Of late, a peculiar problem is arising on account of regional language and English. In Tamil Nadu, students have questioned the use of English in the NEET exam. In many states there is an assertion of the regional language foregoing English. In legal terms it is pitched on the ground of equality- equality of opportunity. But the fact remains that as a nation we need a common language and because the British ruled us for 200 years, English has become the Lingua Franca- there is no other reason. English is also our official language in the Constitution.

Dr Ambedkar after whom this University is named proposed an interesting solution when he proposed Sanskrit as an official language. The resolution he passed was supported by numerous pandits, mullas, and scholars. This was based on the philosophy that Sanskrit is closer to all the lndian languages than English. lt should be interesting if the educational authority can explore the use of the local language and Sanskirt as the common language and English as optional. In reality we operate from the two- language formula; one the local language and the second English. Even this talk is being delivered in English.

And that takes us to a question which I believe has not been adequately dealt with. Some high courts have the regional language as the official language and some continue to use English. In some states there is a demand for the use of the vernacular language, but the language of the Supreme Court must of necessity be a language common to the whole country and that is English. Translation too poses its own problem. I do not advocate any drastic change in language, but it is necessary to rethink the language issue since a lot of people of excellent intellect and of great use to the nation are probably left out because they are not proficient in English. I‘m told there are highly advanced countries like Japan, China and Russia which carry out

their entire education in their own language. These countries constitute percentage 21. 57 percent of world population.

As a student you will feel the need to imbibe many qualities besides knowledge of law. The respect for truth, courage, good will, compassion are qualities which are as necessary as learning the law. We, in India have a great tradition to fall back on when we ignore the false notions about ourselves. Recently while reading a book by Freidrich Max Mueller I came across some interesting observations about India:"-

–The Indians are naturally inclined to justice and never depart from it in their actions. Their good faith, honesty, and fidelity to their engagements are well known and they are so famous for these qualities that people flood to their country from every side.‖ If civilization was to become an article of trade between England and India, Prof. Max Mueller was convinced that England would gain by the import cargo.

About Scholars and scholarship in India he said, –they have shots strength, but no rudeness: nay I know that nothing has surprised them so much as, the coarse incentive to which certain Sanskrit scholars have condescended, rudeness of speech being, according to their view of human nature, a safe sign of not only bad breeding but of want of knowledge. When they are wrong, they have readily admitted their mistakes: when they were right, they have never sneered at European adversaries.‖

He praises those who still value the truth and self-respect more highly than victory or applause at any price. After the Greek scholars like Ktesis, Megasthenes, Chinese, Persian and Arab Scholars, Prof Max Mueller eulogizes the high respect for truth as a national character of India's inhabitants and goes on to say:- There must surely be some ground for this, for it is not a remark that is frequently made by travelers in foreign countries, even in

our time, that their inhabitants invariably speak the truth. Read the accounts of English travelers in France, and you will find very little said about French honesty and veracity, while French accounts of England are seldom without a fling at Perfide Albion!

Shashi Tharoor notices the distortion in the administration of justice during the British times in these words:- –Justice, in British India, was far from blind: it was highly attentive to the skin colour of the defendant. Crimes committed by whites against Indians attracted minimal punishment; an Englishmen who shot dead his Indian servant got six months jail term and a modest fine (then about 100 Rupees), while an Indian convicted of attempted rape against an Englishwoman was sentenced to twenty years rigorous imprisonment. Only a handful of Englishman were convicted of murder in India in the first 150 years of British Rule. The death of an lndian at British hands was always an accident, and that of Briton because of an Indian‘s actions always a capital crime. Indian judges also suffered racial discrimination, as we have seen with the case of Justice Syed Mahmud.

A certain type of case popped up frequently in the British colonial courts. Many Indians suffered from enlarged spleens as a result of malaria (or other diseases); when a British master kicked a native servant in the stomach—a not uncommon form of conduct in those days—the Indian‘s enlarged spleen would rupture, causing his death. The Jurisprudential question was: did the fatal kick amount to murder or criminal misconduct? When Robert Augustus Fuller fatally assaulted his servant in these circumstances in1857 Fuller claimed he struck him on the face, but three witnesses testified that he had kicked him in the stomach—he was found guilty only of voluntary causing hurt‘, and was sentenced to fifteen days imprisonment or a fine of thirty rupees to be paid to the widow. (According to the coroner, the

servant‘s spleen was so enlarged that even ‗moderate‘ violence would have ruptured it.)

Jawaharlal Nehru, wrote in a 1936 letter to an Englishman, Lord Lothian, that British rule is ―based on an extreme form of widespread violence and the only sanction is fear. It suppresses the usual liberties which are supposed to be essential to the growth of a people, it crushes the adventurous, the brave, the sensitive, and encourages the timid, the opportunist, and time-serving, the sneak and the bully. It surrounds itself with a vast army of spies and informers and agent provocateurs. Is this the atmosphere in which the more desirable virtues grow or democratic institutions flourish? Nehru went on to speak of ―the crushing human dignity and decency, the injuries of the soul as well as the body which degrades those who use it well as those who suffer from it.‖

The Criminal Tribes Legislation, 1911 gave authority to the British to restrict movement, search and even detain movement of people belonging to certain groups because their members were deemed to be engaging in chronic criminal activity. In fact, one of my colleagues in the Supreme Court told me that when he was born, his parents had to inform the authorities of the birth of a male child.

I believe this gave great scope for the succeeding generations to ruthlessly prune the wasteful expenditure of time and money on antiquated procedures in accordance with the national genius of the country. One can see these traditional systems of justice operating in many parts of the country. The colonial legacy has meant system of interminable trials and long pending cases. In fact, some pending cases are there in India's lower courts, which were filed in the days of British Raj.

Leaders of nations often have their grounding in the law. The law depends on observation, facts and reason. Will Durant refers to Lord Bacon as one of the greatest minds of all times and describes him as a man who –turned the gaze of science to the self revealing face of nature; who carries in his brave soul, beyond any other man of that spacious age, the full spirit and purpose of the modem mind.‖

–Most of the freedom fighters were trained legal minds who fought against a mighty British empire. Mueller also writes about Elphinstone who is most severe on the real faults of people of India. He states that at present, want of veracity is one of the prominent vices of Indians, but he adds –that such deceit is most common in people connected with government, a class which spread far in India, as, from the nature of the land- revenue, the lowest villager is often obliged to resist force by fraud.‖

The idea is not to criticize the past that doesn't exist, but to draw attention to legacies which burden us even today so that we can throw out baggage which is oppressive and which instills fear in the minds of the people. In Bob Dylan‘s words come gather ‘round people,

> Wherever you roam
> And admit that the waters,
> Around you have grown
> And accept it that soon,
> You‘ll be drenched to the bone
> If your time to you is worth saving
> Then you better start swimmin‘or you‘II sink ike a stone
> For the times they are a-changin‘

It is time we realize that it is our law, our people, our country. Rulers are our own people and so are the ruled. It‘s time to shed to the distrust which was engendered by a very harsh exploitative rule. Today our nation requires trained legal minds to take up the issues of protecting the civil liberties of the people.

Having said that, training in law and its scholarship should be that of true learning and no arrogance. One must learn to distinguish between knowledge and information. Knowledge is generally something which is valid for different times and places. Information is that which is generally less encompassing and limited to that particular time and pade. I have a1ways found Kip1ing's Keep Six Honest Serving Men to be a guiding light and I hope it hopes clear any occasional cobwebs in your mind. The first stanza begins like this:-

I KEEP six honest serving-men
(They taught me all I knew);
Their names are What and Why and When
And How and Where and Who.
I send them over land and sea,
I send them east and west;
But after they have worked for me,
I give them all rest.

Lastly, the profession of an advocate needs patience and gains momentum with time and experience. Shri M.C. Setalvad, as an Advocate had very little work and spent considerable amount of time in reading the law reports, making his own notes on important cases, and reporting law cases for the press. His earnings were hardly anything during that period. One must remember that ‘learned people‘ are always respected and adored in the world and knowledge trumps monetary gains.

The goddess of wealth Lakshmi and a wise man, once got into a conversation

पद्मे मूरखजनेषु ददासि द्रिवणिं वद्विवत्सु कि मित्सरः
मूरखेभ्यो द्रवणिं ददामि नितिरां तत्कारणं श्रूयता
नाहं मत्सरणिी न चापि चिपला नैवास्तमि मूरखे रतः।
वद्विवान्सर्वजनेषु पूजतितनुः मूरखस्य नान्या गतः॥

The wise man asked Lakshmi, –Hey Lakshmi you bestow wealth on fools, are you jealous of learned people?‖ To which Lakshmi replied, –I am not jealous; nor am I fickle, nor do I have affection for fools. I always bestow wealth on fools, but pray listen to the reason. A learned person is respected by everyone but a fool has no other recourse.‖

You will undoubtedly make the fortune you seek in the pursuit of law while helping others to get their dues, but remember that in the initial years of learning, it is knowledge that will stand you in good stead.

Tenth Convocation Address [1]

Hon'ble Justice Bhushan Ramkrishna Gavai

It is a great honour and privilege to be here with you all today on the occasion of the 10th Convocation of Tamil Nadu Dr. Ambedkar Law University (TNDALU), in the ancient and fabled city of Chennai. This historic region is home to one of the oldest civilizations in India, stretching back almost uninterrupted for two millennia. It has made significant contributions to the culture, economy and history of both South Asia and independent India. Of particular significance is its contribution to the freedom struggle, be it Kattabomman's fight against the British; or Maruthu Pandiyar brothers of Sivaganaga quest against the British; or the adventures of Puli Thevar, or the Vellore Mutiny; or Salt March to Vedaranyam, extolling the virtues of non-violence by one of its greatest son Chakravarti Rajagopalachari (fondly called Rajaji). Tamil Nadu is truly a land of economic accomplishments, literary achievements and great cultural heritage

Today is a momentous day for all of you. So, let me begin by congratulating the graduating students for completing this demanding journey. This achievement is a culmination of your aspirations, ambition, determination and hard work. I wish you all success in your future endeavours. I am confident that you will bring glory to yourself as well as your alma mater wherever and in whatever field you choose to pursue as your career.

To many of you, including your parents and teachers, it may seem like it was only yesterday that you stepped into the halls of this wonderful institution. And today you stand on the threshold of becoming part of an immensely challenging, intellectually

[1] Hon'ble Judge, Supreme Court of India. Tenth Convocation Address delivered at the University on 1st February 2020.

stimulating and incredibly satisfying profession, part of a fraternity that counted among its members, luminaries like Mahatma Gandhi, Jawaharlal Nehru, Vallabhbhai Patel, C Rajagopalachari, Rajendra Prasad, Dr. B.R. Ambedkar and many others whose immense sacrifice and dedication to the cause of freedom immortalized them in the history of this nation.

This institution is named after Dr. B.R. Ambedkar, the architect of the Constitution of India, who considered law as an instrument of social Justice. However, one has to ask what is meant by ‗justice'? As a concept it is easily recognizable and intuitively understood but extremely difficult to describe. But unless we understand what just is, how would we be able to work towards achieving a just society. This understanding is important because as Dr. Ambedkar had once observed during the Constituent Assembly debates ‗continuing injustice in political, social and economic sphere, are the greatest threat to the very survival of the Constitution of India'. In his work, ‗The Theory of Justice' (1971) John Rawls argues that a society which protects the rights and liberties of people and provides all the economic and social advantages to the greatest benefit of the least advantaged sections in the society, could be considered as Just'. The answer, therefore I believe, lies in the notion of a social justice, which requires a concerted effort to address and remove social and economic justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, Tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality.

These observations are of immense relevance. They are a reminder to us that legal knowledge is empowering and as knowledge holders it is our bounden duty to utilize it to empower, enlighten and inform the underprivileged. Law is the most important instrument for securing the overall development and transformation of society. Therefore, one who is empowered with legal knowledge must reflect not only upon the role law plays but the role they can play in the social enrichment and transformation. Judge Benjamin N Cardozo once observed — ‒The final cause of law is the welfare of society.‖

As members of the legal profession you will be called upon to secure and promote the administration of justice. You must ensure that the doors of justice always remain open for the aggrieved, downtrodden, indigent, exploited, vulnerable and marginalized sections of society. You become the crucial interface between those seeking justice and the justice dispensation system, and it is your responsibility to persevere till they receive complete justice. The late Justice Chagla, once remarked ‒The legal profession is a great calling and it is a learned and noble profession. Remember always that it is a profession. It is not a trade or business. The distinction between the two is deep and fundamental. In business, your sole object is to make money. In the legal profession making money is merely incidental. You have traditions to which you have to be true. Like an artist there has to be a passionate desire to attain perfection. Service to society and your fellow men has to be the dominant motive underlying your work.‖ I commend you to remember and act upon words of Justice Chagla.

You all are extremely fortunate to obtain your legal education from a premier law university in the country. The vital significance of quality legal education cannot be over-emphasized. These new age law schools, as I like to call them, introduced a

paradigm shift in the field of legal education, by engaging highly trained quality faculty, encouraging vibrant curriculum, and in the process attracting top academic performers both nationally and globally. This coming together had both micro and macro ramifications. On a micro level this facilitated a shift away from emphasis on rote-learning to participatory pedagogy in turn enabling capacity for critical thinking and meticulous research among students. On a macro level, it enhanced inclusiveness of legal education through engagement of diverse sections of the community in demanding spaces and positions traditionally occupied by the elite and well connected.

Yet traces of exclusionary environment persists. It is important to recall that Dr. Ambedkar devoted his whole life to eradication of exclusionary tendencies from all aspects of the society. To him inclusiveness must pervade all aspects of human life including legal education. It is therefore important that Law schools accommodate socio-economic diversities. In this regard a 2010 report of the American Bar Association Commission on Diversity, titled ―*Diversity in Legal Profession: The Next Steps*‖, is instructive. It argued that the coming together of students from diverse social backgrounds generates the potential for learning both inside and outside the classroom. Diversity encourages more informed engagement with theories, doctrines and case-laws, and such engagement in turn contributes to dissolving the traditional social boundaries, which in case of India would be, caste, religion, class and regionalism. This combination would enable a more enriching learning experience.

A more diverse class enhances the experience of legal education for students not least because so much of legal history is wound up in the experiences of vulnerable and marginalized groups confronting unjust laws. Many specific legal issues such as

important constitutional, environmental, or rights debates, necessarily reflect society‘s values and the historical judicial temperament responding to public interest. If the student body lacks diversity of views on those issues, effective reflections, critical perspectives and meaningful discussions may be lost.

It is this vision that a law school must aspire for. A law school is not about infrastructure, facilities or even great faculty. All these are important factors no doubt. But for a law school to truly serve its purpose in a society, it must provide an ecosystem enabling intense learning through interaction between diverse faculty and students, which goes beyond the traditional teaching of substantive and procedural laws, to inculcating social and moral responsibilities of an individual as a member of the society and as a member of the legal profession. It is the duty of a law school of instill in its students a consciousness, an ability to look beyond the technical to the humane, for law as a social profession is not simply a means of livelihood, it is a way of living. Only a consistent and diligent focus on the part of law schools would create legal professionals who not only are technically competent but also socially aware, and ethically sensitized.

Law schools must attempt to produce social engineers with myriad competencies. Its curriculum must be so designed that it is able to accentuate technical competencies with other key competencies that would transform a law student into a knowledge worker. A 2016 report by the Harvard Law School, Centre on the Legal Profession, titled ―Lawyers as Professionals and as Citizens. Key Roles and Responsibilities in the 21st Century‖ outlined five competencies namely — ethical competency, a business sense, technological literacy, decision making ability, and capacity for teamwork, as critical competencies for preparing a complete lawyer. These ideas though outlined in the context of the United States, given the technology fueled educational advancements and

interconnectedness we are witnessing in today‘s globalizing world, are equally apt in the context of legal professionals in India.

I am confident that the last five years of grueling education has invested in all of you adequate competencies and skills. So, where do you go next?

I am given to understand that many of you are joining or already have joined leading law firms (both national and iinternational), Bar, some of you are preparing for judicial services, Indian Administrative services and many of you are keen on higher studies. For talented and hardworking individuals such as yourselves, success is but a natural outcome. But as you commence the next chapter of your life, you must remember that as intense as the last five years may have been, they represent only a chapter in your educational journey. Education is a lifelong journey, especially for a legal professional. Even though I have spent over 34 years in the legal profession of which 16 years on the bench, I still consider me to be a student of law.

At this juncture, I must point out that education needs to be distinguished from mere literacy and information acquisition. Education is a wider concept for it involves not only acquisition of knowledge but also skills to put that knowledge to good use. So what matters is not only what you gain intellectually, but how you utilize what you have gained for the benefit of those around you. The ultimate purpose of education is thus not simply acquisition of livelihood; instead it is for complete realization of self through service of others. For Dr. Ambedkar, education and the knowledge gained from it was the foundation of one‘s life and he advised students to develop their thinking power, maintain their intellectual stamina and challenge their abilities. He once observed –Coming as I do from the lowest order of the Hindu Society, I know what is the value of education. The problem of raising the

lower order deemed to be economic. This is a great mistake. The problem of raising the lower order in India is not to feed them, to clothe them and to wake them serve the higher classes. The problem of the lower order is to remove from them that inferiority complex which has stunted their growth and made them slaves to others, to create in them the consciousness of the significance of their lives for themselves and for the country. Nothing can achieve this purpose except the spread of higher education. This is in my opinion the panacea of our social trouble.‖ For him legal education and knowledge provided the stimulus for deepening democratic values of tolerance, of diversity and the willingness to resolve disagreements through constructive and informed dialogue. In turn, only such willingness enables articulation of an inclusive vision of justice that bridges the gap between legality and reality.

As students I am sure you would have heard enough advices to last you a lifetime. But if I have your indulgence, perhaps I can share with you one more piece of advice. I believe when you have heard them you would agree that they are invaluable. As you progress into professional life you must attempt to develop an Intellectual curiosity which would enable you to step outside your comfort zone and challenge yourself, and in the process grow as an individual. You must also Engage in deep work. Technology has a positive effect, but it also has a deep negative impact in the form of persistent personalized distraction, which in turn robs you of the ability to perform deep work. Success is contingent on your ability to do so, which would not be possible if you forever remain distracted. Finally, these days it seems everyone is leading a very demanding life. Professionals are no exception as they continuously face enormous work pressure. Such demanding lifestyle can have grave consequences on the health of an individual. I believe, we must no longer live in the hubris that only physical well-being is important. We all can agree

that mental wellbeing is equally, if not more important. Invest timely and adequately in both your physical and mental well-being. Law schools have a crucial role to play in this regard. They must ensure that there are open conversations about mental health on campus to de-stigmatize this idea and make available professional help, where necessary.

One of the cherished objectives of your University is –to develop in the students and research scholars, a sense of responsibility to serve the society in the field of law by developing skills in regard to advocacy, legal services, legislation, law reforms and the like.‖ If your University has succeeded in inculcating this glorious ideal into each one of you, then you ought to constantly enquire of yourself how you can best serve the society and what role you can and will play in promoting and protecting the ideals and values enshrined in the Constitution of India. These values must not only inform and guide your work, they must enable you to internalize respect for dignity and human rights of all.

Tenth Convocation Special Address [1]

Hon'ble Justice Amreshwar Pratap Sahi

Members of the legal profession have from time immemorial looked upon as those who led society because of their accuracy of thought and expression. Legal profession is looked upon as a congregation of those who fall within the category of truth surgeons, prophets and Flaw and ultimately, those who help in achieving the goal of justice. The very existence of the members of the legal profession is understood as one that serves public cause, as they articulate and translate all doubts through reason and persuasion to be resolved by Courts that are temples of justice. This is the onerous duty that they perform and this search of truth is accompanied by the harm of eloquence and the element of belief that is generated by the logic one develops in support of a cause. The member of a legal profession is no adventurist, even though we all know that there is no better way of using imagination than the study of law. This is not to create an atmosphere of an exaggerated reverence to the profession, but is rather to reflect the reality which this profession has to shoulder, dealing with the lives of men and their destinies. It is because of this that the profession is termed is ‒a learned profession‖. Members of the legal profession mean embodiment of hope with expectations from them that run high. There is a belief that members of this Profession with their magical talent can bring about miracles in human lives. This expectancy, hope and faith establish that a law professional is a man of affairs.

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[1] Hon'ble the then Chief Justice, High Court of Madras. Special Address delivered at the 10th Convocation of the University on 1st February 2020.

You fresh law graduates have today crossed only one milestone of having been honoured with a Degree of Law. There are many more milestones to conquer. Your future as an entrant into this profession is not only an opportunity for you to survive, but is an opportunity for all those who are in need of that help which aids in achieving the highest sense for which every man aspires, the sense of justice. You are entering into a world where you have to counsel; you have to advocate; you have to contribute towards the improvement of the profession; you have to contribute to the development of law and finally prove yourself to be a leader of public opinion unselfishly, but intelligently.

There are basics which should be embedded in your mind. Personal behavior, maintaining a high ethical standard and exhibiting a strong character are some of the primal facets which have to be observed. I say this, that in contemporary times, even though it still remains the noble profession, law is looked up with respect, but unfortunately, at times, in public opinion, lawyers are suspect. You have to, by your professional conduct, improve upon this opinion. Your intellect has to be guided more by commonsense, 1ogic and the applicability of law to life, rather than your prowess of superior intelligence that may only lead to theoretical heights without pragmatic results. Today‘s society, as civilized as it is today, is still strewn with strife, where tensions mount high due to rival thoughts — whether the issue be of the thickness of a pin or the width of the galaxies. A lawyer, therefore, has to train himself and his mind to keep within the confines of the cause, but at the same time not let his imagination be curtailed, as a petty problem today may be a universal problem tomorrow. Illustrations are not far to see, as to whether the throwing of a paper on the road side is only a petty menace or the dumping of nuclear garbage in the seas is a far greater threat to humanity.

Lawyers and members of the legal profession, in whatever field they are, their devotion of thought process has to travel the entire horizon, conquer mirages and at times even travel into the unknown. We have to deal with history, mythology, science, literature and for that matter any subject under the sun, as law today regulates our entire lives. The air we breathe, the water we drink and the system in which we survive are all regulated by law. It is for this reason that this profession assumes the greatest position amongst the multifarious walks of life and is pervasive in every nook and corner, like the air which surrounds us and the sunlight which gives energy.

India has now emerged as a nation with potentials that match some of the most powerful countries in the world. The expanding needs of a great and growing people, the rapid change of rural life and urbanization with the impact of science and technology have brought new challenges to be faced by society. We are, therefore, living in a time that is experiencing a galloping change in human activities some of them are unexpected and have brought about a revolutionary change in contemporary thought.

The democratic philosophy of our Constitution is experiencing new heights and the judicial intervention is encouraging new unchartered fields of interpretive devices. The profession that was 50 years hence now stands transformed vigorously and this we can very easily visualize with all the Law Schools that have come up successfully producing better legal minds, more suited to modern times. This has brought about a great element of competitiveness. Specialization and concentration in specific fields, therefore, is the need of the day and this in turn opens up new and better chances of learning and exposition to the various facets of law. The changes that have been brought about in the past decade have opened vast opportunities in the field of Academics, Corporate involvement, Litigation, Research

Occupations, Paralegal Forums, Alternative Dispute Mechanisms and Judicial Local Self-Governance like Village Level Courts that have seen shape in many States like in Bihar, where I found Grama Kutcheries functioning, where the Secretaries were fresh modern law graduates, even from Five-Year Law Schools.

There is a lot of hope, a lot of opportunities a scope of massive involvement of the legal fraternity in every sphere of life. It, therefore, now depends on us and on you, who are now going to step out, as to how we shape our own civilization.

The profession of law is no longer speculative and with scientific advancements it is becoming more calculative and result oriented. It is, therefore, to be made more litigant friendly providing easier methods for resolving disputes, particularly in adversarial litigation.

However, the championing of causes against the might of the State and realization of fuller rights under the Constitution still remains a substantial challenge to be faced by the Society. State control and the sovereignty of the State, being focused more on the lives of the citizens in the name of welfare, have also brought about massive regulations. These do affect the individual rights and you have seen litigations being fought like on issues relating to right of privacy, right of freedom of worship and the right of citizenry. This evolution in law is guided by social, economic and political factors. You have, therefore, to be alert and alive to all such issues by thinking and rethinking as to what is in the best interest of the society. It is this process of thought which will mould your own line of persuasion and contribution to law. This variety emanates' from regional and local needs, but all of them are grounded in one way or the other on the rights that flow from the Constitution and the laws.

My advice to you on this grand day of your achievement is that you are now going to be the tool for liberating the human mind from its tensions that grip it amidst this multifarious regulation of human life by man- made laws. It includes preservation and conservation of environment and nature, all individual rights and all collective opinions as to how people would govern themselves. You have to be responsive not only to local, regional and national needs, but you have to also keep in mind as to how other developing nations are marching ahead when facing such problems. We are now witnessing a very substantial change in a thrust generated by the youth of today. Your Parliament and legislatures are now manned by younger minds than ever before. Globally you have the youngest Prime Ministers leading countries like New Zealand and Finland. The time has come when the youth has a greater involvement in governance, with a more sense of expectancy, enthusiasm and zeal to transform human life. This driving force in this contemporary world is itself an indicator that you have now to perform the best. You have, therefore, to now lead and not be simply led.

With your cooperation, devotion and dedication in the profession all can move civilizations. We have a far greater cause to accomplish and that is the cause of justice. A man can tolerate many losses, but the sense of injustice pains him most. I am reminded of what a famous English Lawyer, Reginald Heber Smith once said:

—Nothing rankels more in the human heart than a brooding sense of injustice. Illness we can put up with; but injustice makes us want to pull things down.‖

I beseech you today, on this solemn occasion, to realize the importance of the profession that you have chosen for yourself. Please remember that you are the vehicle of change and that

nothing is permanent in life except change itself. You have to prove yourself to be a better tool of this change in the history of human civilization. Your job is the most difficult in the world and that is the art of persuading the human mind to make one believe that whatever you are saying is the best.

Dilution of Labour Laws Amidst COVID-19: Issues & Challenges

Dr. S. C. Srivastava[1]

Abstract

This paper seeks to examine the legislative amendments made by the State Governments amidst COVID-19 after relaxation of lockdown. The author analyses and evaluates various provisions contained in the U.P. Ordinances and legislative amendments made by some other States. The author has asserted that some of these legislation have diluted labour laws and thereby deprives the workers from the rights conferred upon them under the Constitution and labour legislation. The author also identifies the shortcomings and lacunae in the existing provisions in the labour legislation. The paper further examines whether the notification issued by the State Government in regard to relaxation in the working hours and overtime rate under section 5 of the Factories Act, 1948, is permissible under the said Act. For the purpose the author has discussed the recent Supreme Court decision. The author further examines whether relaxation in the working hours violate ILO Conventions particularly those ratified by India. The author argues that notification issued under section 65 of the Factories Act is not an amendment in the existing labour legislation but is an exercise of administrative discretion vested in the existing legislation which is in operation since 1948. Even so he feels that a blanket notification of exemption to all factories, even under section 65 of the Factories Act, 1948, should not be used with the intention to capitalize on the pandemic to force

[1] LL.D.(Cal.);Secretary General, National, Labour Law Association ,New Delhi; Formerly Professor and Dean, Faculty of Law, Kurukshetra University and University of Calabar,(Nigeria): Director, Institute of Industrial Relations and Personnel Management, UGC National Fellow and Research Professor, Indian Law Institute, New Delhi.

workers into the chains of servitude. Moreover denial of overtime to the workers at the rate permissible under the Factories Act is not permissible.

1. The Contextual Frame-work for Diluting Labour Laws

COVID-19 is "the worst global crisis since World War II". On March 11, 2020 the World Health Organization (WHO) declared COVID-19 a pandemic. However in India the Prime Minister on 24th March 2020 declared a nationwide lock down restricting movement of the people as a preventive measure against the COVID-19 pandemic. As a result of lock down over 122 million people lost their job by April, 2020 as per the estimates from Centre for Monitoring Indian Economy. While Tamil Nadu was among the worst-hit States Kerala had the lowest labour participation rate in April, 2020. [1] Out of this 75% were small traders and wage-workers, a majority of them were from unorganized sector. Among them the worst affected were inter-state migrant workers who were denied employment, paid no wages or less wages and even evacuated from quarters or residential accommodation provided to them. In these circumstances even though there was lockdown thousands of migrant workers started to return to their home state with their family including children on foot as no means of transport were available due to the lockdown. Later when *Shramik* Special trains started and bus facilities were made available majority of migrant labour went to their native place. After migrants reached their home States, the Central Government allocated Rs 1000 crore to support the states in ‒providing accommodation facilities, making food arrangements, providing medical treatment and making transportation arrangements of the migrants,‖[2]

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1 The Hindu, May 07, 2020.

2 See Hindustan Times, May 14,2020.

On April 20,2020 some relaxation was made in lockdown by the Central government and some factories, business sector and farming in rural areas and among others small retail shop etc were permitted to carry on their activities . At that time some States also faced the problem of shortage of labour due to departure of thousands of migrant labour. In order to meet an economic crisis, to boost economic activities after lockdown and generate employment in post-lockdown period several states amended existing labour laws, either by suspending them or by making necessary amendment in labour legislation or exercising administrative powers vested under labour legislation .

This paper seeks to examine the legislative amendments made by the State Governments. The analysis focuses as to how and to what extent such legislative amendment has deprived the workers from the rights conferred upon them under the Constitution and labour legislation. The paper also examines the legality of various provisions provided by the said amendments .It further examines whether the **r**elaxation in working hours by State Government by notification issued under the Factories Act,1948 is permissible and also whether it violates ILO Conventions particularly those ratified by India.

I. Exemption from Labour Legislation in the State of Uttar Pradesh

A. Why Suspension of Labour Law

On May 08, 2020, the Uttar Pradesh Temporary Exemption from certain Labour Legislation Ordinance, 2020 was promulgated mainly for two reasons: (i) Covid- 19 virus pandemic outbreak badly affected industrial and economic activities in manufacturing establishments which had ultimately adversely affected the working class. (ii) The nation-wide lockdown slowed

the pace of industrial and economic activities in the state, which has adversely affected the laborers.

The main thrust of the Ordinance is that it will activate and revive the industrial and economic activities and attract Indian and foreign investment.

B. What is Legal Frame-work of the Ordinance

The Ordinance grants temporary exemption from application of all labour legislation except (i) the Bonded Labour System (Abolition)Act, 1976 (ii) the Employees' Compensation Act, 1923, (iii) the Building and Other Construction (Regulation of Employment and Conditions of Service) Act 1996 (iv)Time limit prescribed under the Payment of Wages Act, 1936 and (v)Labour legislation relating to employment of women and children for three years .

Initially Uttar Pradesh government proposed in the Ordinance to provide for 12 hours in a day in industrial units, against the existing 8-hour work in a day. But later it has withdrawn through a separate executive order after a notice from the Allahabad High Court. However, the provision to exempt establishments in the state from all labour laws but five remains unchanged.

Since labour is a concurrent subject, states can frame their own laws but will need the approval of the Centre to enforce them. Therefore, the ordinance was sent to the Central government for approval.

C. What are the issues involved in the Scope and Coverage of labour laws retained by the U. P. Ordinance

1. Issues arising out the law relating to employment of children

The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, as amended in 2016, prohibits employment of a Child below 14 years in any employment. However a child is permitted to help family in family enterprises or act as a child artist. Under the Act a "child" means a person below the age of 14. The Act permits employment of adolescent who is above 14 years and below 18 years except in hazardous occupation or process. However the Ordinance does not cover adolescent and, therefore they would fall in the category of temporary exemption.

2. Issues arising out the law relating to Employment of women

The following Acts prohibits employment of women.

(a) Factories Act, 1948

Section 22(2) of the Factories Act, 1948 provides that no woman shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman to risk of injury from any moving part either of that machine or of any adjacent machinery.

Section 66(1) (b) of the Factories Act, 1948 states that no woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m.

(b) Other Legislation

Section 25 of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 stipulates that no woman shall be required or allowed to work in any industrial premise except between 6 a.m. and 7 p.m. Likewise section 46(1) (b) of the Mines Act, 1952 prohibits employment of women in any part of a mine which is below ground. The Act also prohibits employment of woman in any mine above ground between 6 a.m. to 7 p.m.

(c) Maternity Benefits Act, 1961

The Act prohibits employment of woman to work during a certain period of pregnancy and provides for paid maternity leave from 12 weeks to 26 weeks for women employees, unless they have two or more surviving children six weeks immediately after the delivery of child.

(d) The Issues arising out of employment of women

A perusal of the labour legislation relating to employment of women raises a question whether women would be entitled to avail the provision for separate latrines and urinals for female workers provisions for separate washing facilities for female workers ,provision for crèches for their children and other safeety provisions under labour legislation.

3. Issues relating to building and other construction workers

As mentioned above the provisions of the Building and Other Construction Workers (Regulation of Employment and

Conditions of Service) Act 1996 would continue to be applicable. It, therefore raises a question whether the provisions of the Building and Other Construction Workers' Welfare Cess Act, 1996 which has been enacted with a view to augmenting the resources for the welfare schemes by providing the levy and collection of a cess on the basis of cost of construction would be applicable in Uttar Pradesh which may deprivation building and other construction workers from welfare and social security.

4. Issues relating to time limit prescribed under the Payment of Wages Act, 1936

Section 5[3] of the Payment of Wages Act, 1936 which prescribes the time for payment of wages raises three issues, namely (i) whether the provisions of section 13 A of the Payment of Wages Act, 1936 which imposes a duty upon the employer to maintain register and record ,*inter alia*, for the wages paid to

[3] Section 5 of the Payment of Wages ,Inter alia provides:

(1) The wages of every person employed in:

(a) any railway, factory or industrial or other establishment in which less than one thousand persons are employed, shall be paid before expiry of the seventh day,

(b) any other railway, factory or industrial or other establishment shall be paid before the expiry of the tenth day, after the last day of the wage-period in respect of which the wages are payable.

Provided that in the case of persons employed on a dock, wharf or jetty or in a mine, the balance of wages found due on completion of the final tonnage account of the ship or wagons loaded or unloaded, as the case may be, shall be paid before the expiry of the seventh day from the day of such completion.

(2) Where the employment of any person is terminated by or on behalf of the employer, the wages, earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated:

Provided that where the employment of any person in an establishment is terminated due to the closure of the establishment for any reason other than a weekly or other recognized holiday, the wages earned by him shall be paid before the expiry of the second day from the day on which his employment is so terminated.

persons employed by him would apply? (ii) Whether the provisions of sections 15 of the Payment of Wages Act, 1936, which provides that claims arising out of delay in payment of wages may be made before the authorities mentioned therein would be applicable; and (iii) Whether section 17 of the Payment of Wages Act, 1936 which provides for appeal would be available to employed persons or not?

We now turn to examine constitutional and other legal issues involved in suspension of labour laws.

C. Constitutional and other Legal Issues involved in Suspension of Labour Law

The U. P. Ordinance which has sought to suspend all labour labour laws (except those expressly included therein) for three years ignores certain fundamental rights guaranteed to workers as laid down by the Supreme Court. Let us turn to examine them.

1. Issues Arising out of Exemption from Minimum Wage

Whether suspension of the Minimum Wages Act violate the rights guaranteed under Article 19(1) (g) and 23 of the Constitution? This issue was examined in a number of decided cases by the Supreme Court. Thus the Supreme Court in *Crown Aluminum Works v. Their Workmen*[4] ruled that " (i)f an employer cannot maintain his enterprise without cutting down the wages of his employees below even a bare subsistence or minimum wage, he would have no right to conduct his enterprise on such terms."

[4] ([1958] S.C.R. 651). The view was reiterated by the Supreme Court in in *Express Newspapers Pvt. Ltd v.Union of India*, 1961)2 LLJ.339.

The second issue was raised in *People's Union for Democratic Republic v. Union of India* [5] wherein the Supreme Court laid down the following principle:

Where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words _forced labour' under Art. 23 (of the Constitution). Such a person would be entitled to come to the Court for enforcement of his fundamental right under Art. 23 by asking the Court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be _forced labour' and the breach of Art. 23.

From the aforesaid it is clear that payment of less than the minimum wage for labour or service provided by a person falls within the scope and ambit of the words _forced labour' under Art. 23 of the Constitution.

In view of above it is felt that exemption of application of the Minimum Wages Act, 1948 would deprive workers to claim minimum wage and therefore would amount to ‒forced labour‖ which is prohibited under Article 23 of the Constitution.

2. Issues arising out denial of health, safety and medical facilities to workers

The right to health i.e. right to live in a clean, hygienic and safe environment and medical care to protect the health and vigor of a worker while in service or post retirement have been held to be a fundamental right under Article 21 of the Constitution and therefore, this right cannot be taken away by labour legislation.[6]

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5 (1982) 2 LLJ 454

6 Occupational Health and Safety Association v. Union of India, 2014) 3 SCC 547

Further every State has a duty to provide at least the minimum condition ensuring human dignity. Moreover every State has a duty to provide at least the minimum condition ensuring human dignity. But the Ordinance deprives the workers even from this right.

3. Issues Relating to Registration of Trade Unions

The U.P. Ordinance excludes among others the Trade Unions Act, 1926. This Act was enacted with a view to encourage the formation of permanent and stable trade unions and to protect their members from certain civil and criminal liabilities.

In *Kesoram Rangan Workmen's Union v. Registrar of Trade Union* [7]the Calcutta High Court held that the freedom guaranteed under Article 19 (1) (c) of the Constitution belongs to all workmen, so that every workman has the freedom to join a union of his own choice.Thus the suspension of the Trade Unions Act, 1926, in effect, would deprive the workers to form new trade union and get it registered under the said Act. Further the provisions in respect to immunity from civil suit and criminal conspiracy would not available to them.

4. Right to social security

The right to social security *is recognized as a human* right. Even though it has not yet been included in the fundamental right but Directive Principles of State Policy contain several provisions for the same. But the UP Ordinance excludes the Employees' Compensation Act, 1923 the Employees' Provident Fund Scheme ,1952, the Employees' Pension Scheme 1995 the Employees' Deposit-Linked Insurance Scheme ,1976 ,the Payment of Gratuity Act and the Unorganized Social Security Act, 2008. The Ordinance also impliedly exclusion of the Maternity Benefit Act,

[7] 1968) 1LLJ 3359.

Thus the U.P. Ordinance deprives workers to avail the minimum standards of social security.

E. Issues emerging for violation of ILO Standards

The Uttar Pradesh Temporary Exemption from certain Labour Legislation Ordinance, 2020 does not appear to be in conformity with the ILO Convention No 01- Hours of Work (Industry) Convention, 1919[8], Conventions No 26 -Minimum Wage- Fixing Machinery Convention, 1928 [9] , Convention No. 81- Labour Inspection Convention, 1947[10], Convention No. 100- Equal Remuneration Convention, 1951[11] and Convention No. 111- Discrimination (Employment and Occupation) Convention, 1958[12]

I. Legal Implications of Labour Law Amendments & Exemptions made by the State of Gujarat, Madhya Pradesh, Haryana and Himachal Pradesh

In order to boost economic activities after lockdown and generate employment in post-lockdown period the Government of Gujarat, Madhya Pradesh, Haryana and Himachal Pradesh have amended labour laws in their States. Let us turn to examine them.

A. Amendments in existing Labour Legislation enacted by the State of Gujarat

1. Amendment in the Contract Labour (Regulation and Abolition) Act, 1970

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8 Ratified by India on 14 July, 1921

9 Ratified by India on 10 January, 1955.

10 Ratified by India 7.4.1949.

11 Ratified by India 25.9.1958.

12 Ratified by India on 03 June 1960.

The aforesaid Act has undergone change more than once during continuance of the COVID-19. Thus the Government of Gujarat [13] on 13th May 2020 amended the above Act whereby the Act which was applicable to establishments employing ten or more workmen would not be applicable unless twenty or more workmen are employed. This Act was again amended on 20th July, 2020 whereby the Governor promulgated the Contract Labour (Regulation and Abolition) (Gujarat Amendment) Ordinance, 2020. [14] By this Ordinance the requirement of minimum number of person to be employed in an establishment has been raised from twenty or more workmen to fifty or more workmen.

Validity of aforesaid amendment

The first of the aforesaid amendments is in conformity of the central Act, namely, the Contract Labour (Regulation and Abolition) Act, 1970. But the second amendment in the Act through Ordinance is not in conformity with the Central Act . In view of this under Article 254(1) of the Constitution the law enacted by the State shall be void to the extent it is repugnant to Parliament law. But under Article 254(2) of the Constitution the proposed amendment through Ordinance would prevail if it has been reserved for the consideration of the President and has received his assent.[15]

[13] Vide notification No.GHR/2020/59/CLA/152020/210/M-3.

[14] vide ordinance No. 07, 2020 dated 20th July 2020

[15] Article 254(2) defines that if any provision of law or law made by the legislature of the State on the matter enumerated in concurrent list, is repugnant to the any provision of law or law made by the Parliament and if it has been reserved for the assent of the President and got the assent from the President ten State law will prevail over the law enacted by Parliament.

2. The Industrial Disputes (Gujarat Amendment) Ordinance, 2020

On 3rd July 2020[16] the Governor of Gujarat promulgated the Industrial Disputes (Gujarat Amendment) Ordinance, 2020 amending section 25 K of Industrial Disputes Act, 1947. Section 25(k) provided that chapter V-B of the Industrial Disputes Act provides that the provisions relating to lay-offs, retrenchment, closure of certain establishments would be applicable to an industrial establishment where the number of workmen employed are not less than one hundred workmen. The Ordinance now provides that Chapter VB would not be applicable unless an industrial establishment employs not less than three hundred workmen. The Ordinance also added in the existing section 25F (b) [17]of the Industrial Disputes Act, 1947, an additional condition, namely‖ an amount equivalent to last three months average pay‖.

Validity of aforesaid amendment

The aforesaid Ordinance is not in conformity with section 25 K of the Industrial Disputes Act, 1947(Central Act). Further insertion of an additional condition to the existing section 25F(b) [18]of the Industrial Disputes Act, 1947, namely,‖ an amount equivalent to last three months average pay‖ is also not in conformity with section 25F(b). Even though under Article 254(1) the law enacted by the State shall be void to the extent it is repugnant to Parliament law but under Article 254(2) the repugnancy can be cured if it has been reserved for the assent of

[16] vide notification No.5 of 2020

[17] Section 25F (b) of the Industrial Disputes Act provides that the workman must be paid at the time of retrenchment ,compensation which shall equivalent to fifteen days‘ average pay for every completed year of continuous service or any part thereof in excess of six months.

[18] Ibid.

the President and gets his assent. In such case State law would prevail over the law enacted by Parliament.

B. Amendment in existing Labour Legislation enacted by the State of Madhya Pradesh

The 'Madhya Pradesh Labour Laws (Amendment) Ordinance, 2020 issued on 6th May, 2020 sought to amend the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 and the Madhya Pradesh Shram Kalyan Nidhi Adhiniyam. Let us examine them.

1. Amendment to the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961

Clause (a) of sub-section (l) of Section 2 of the Madhya Pradesh Industrial Employment (Standing Orders) Act, 196l[19] which was applicable to establishments employing more than fifty persons was amended to insert for the words "more than fifty", the words "more than hundred" shall be substituted.

The net effect of the aforesaid amendment would be that the Act would no longer be applicable to establishments employing between 50 and 100 workers who were previously covered.

Validity of the Amendment to the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 Examined

The amendment to the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961[20] in clause (a) of sub-section (l) of Section 2, namely, for the words "more than fifty",

[19] (No. 26 of Amendment to 196l),

[20] No. 26 of 196l.

the words "more than hundred" shall be substituted has been made in accordance with the provisions contained in *section 5 (a) of the M. P. Industrial Employment (Standing Orders) Act, 1961 which empowers* the State Government to exempt any undertaking or class of undertakings from the operation of all or any of the provisions of this Act when it is of the opinion that it is necessary and expedient in the public interest so to do, it may, by notification and subject to such conditions, if any, as it may specify in the notification. Moreover it is not for the first time that that such amendment has been made. When the Act was originally enacted section 2(a) provided that this Act shall apply to (a) every undertaking wherein the number of employees on any day during the twelve months preceding or on the day this Act comes into force or on any day thereafter, was or is more than twenty. But on 30th December, 2014 the said Act was amended and for the words ‒more than twenty ‒the words ‒more than fifty‖ was substituted . Moreover the 2020 amendment in the standing order is in in conformity with the Central Act, namely, the Industrial Employment (Standing Orders) Act, 1946 which applies to every industrial establishment wherein one hundred or more workmen are employed, or were employed on any day of the preceding twelve months.

2. Amendment to the Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982. (M.P.Labour Welfare Fund Act,1982).

The Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982 which seeks to provide for the constitution of a Fund to finance activities related to welfare of labour was amended in 2020. By this amendment, the following sub-section was be added, after sub-section (2) of Section 28, of the the Madhva Pradesh Act No. 36 of 1983

(3) "The State Government may, by notification, exempt any establishment or any category of establishments from any or all of the provisions of this Act, subject to such condition, as may be specified in the notification.‖

From the above it is evident that the Ordinance empowers the state government to exempt any establishment or class of establishments from the provisions of the Act through a notification.

Validity of Amendment to the Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982 *Examined*

The Amendment to the Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982 (No. 36 of 1983) appears to be in conformity with similar provisions contained in almost all the other labour legislation.

3. Amendments to the Madhya Pradesh Factories Rules, 1962

The Government of Madhya Pradesh[21] has amended the Madhya Pradesh Factories Rules, 1962. As per the notification, the due date to file an annual return has been amended from 15th January to 1st of February every year to be filed online as prescribed.

The Madhya Pradesh government has also notified changes in labour laws to do away with the need to avail multiple licences for hiring contract workers and setting up factories. It has exempted firms from various welfare provisions under the Factories Act, 1948, along with replacing inspections with third-

[21] Vide notification No. 275/1143/2019/A-16. This notification became effective from 13th May, 2020.

party certification and giving exemptions from industrial relations laws.

Validity of the Madhya Pradesh Factories Rules Examined

The power to make rules is a subordinate legislation and such power is conferred upon the State Government in respect to legislation passed by the State. Thus the amendment therein also falls within the purview of the State legislation.

4. Amendment to the Madhya Pradesh Industrial Disputes Act

The Madhya Pradesh government has exempted all new factories from certain provisions of the Madhya Pradesh Industrial Relations Act, 1960.[22] However the provisions relating to lay-off and retrenchment of workers, and closure of establishments would continue to apply. But other provisions such as those related to industrial dispute resolution, strikes and lockouts, and trade unions, are not applicable for new factories. These exemptions will apply for a period of 1,000 days (33 months) from the date of notification[23]. Further the Madhya Pradesh Industrial Relations Act, 1960 has also permanently exempted establishments in certain industries such as textiles, iron and steel, sugar, and chemicals from all provisions of the Madhya Pradesh Industrial Relations Act, 1960[24].

Effect of the aforesaid amendment

The aforesaid amendment make a distinction between new factories and establishments in certain industries such as textiles, iron and steel, sugar, and chemicals. Both the categories have been

22 Notification No. 956-02-2020-A-16, Labour Department, Government of Madhya Pradesh, May 5, 2020.

23 May 5, 2020.

24 Notification No. 957-02-2020-A-16, Labour Department, Government of Madhya Pradesh, May 5, 2020.

exempted from certain provisions of the Madhya Pradesh Industrial Relations Act, 1960 (except in regard to the provisions relating to lay-off and retrenchment of workers, and closure of establishments). Further in both categories provisions such as those related to industrial dispute resolution, strikes and lockouts, and trade unions would not be applicable. But the distinction lies in respect to the period of exemption. While in new factories these exemptions will be applicable for a period of 1,000 days (33 months) from the date of notification but in certain industries such as textiles, iron and steel, sugar, and chemicals the exemption from all provisions of the Madhya Pradesh Industrial Relations Act, 1960 would not apply for all times.

Thus like UP Ordinance the suspension of the Trade Unions Act, 1926, in effect, would deprive the workers to form new union and get it registered under the said Act and the provisions in respect to immunity from civil suit and criminal conspiracy would not available to them. Moreover workers would be deprived from approaching the dispute settlement machinery to redress their grievances. This amendment is not in consonance with the relevant central labour legislation and, therefore, would require the approval of the President under Article 254(2) of the Constitution in order to prevail over the concerned Central labour legislation.

C. Labour Legislation enacted by the State of Haryana

1. Applicability of the Factories Act

The Government of Haryana[25] sought to amend the Factories (Haryana Amendment) Act, 2018 with effect from 20th July 2020. As per the notification, the government has increased

[25] Vide notification No. Leg.17/2020 dated 20th July 2020

threshold limit for applicability to the Factories Act, 1948 from ten or more workers to twenty or more workers for factories operating with the aid of power and from twenty or more workers to forty or more workers for factories operating without the aid of power.

Validity of aforesaid amendment

The aforesaid Ordinance is not in conformity with section 25 K of the Industrial Disputes Act, 1947. In view of this under Article 254(1) the law enacted by the State shall be void to the extent it is repugnant to Parliament law. But under Article 254(2) the repugnancy it can be cured if it has been reserved for the assent of the President and gets his assent. In such case State law will prevail over the law enacted by Parliament.

D. Amendment in existing Labour Legislation enacted by the State of Himachal Pradesh

The Contract Labour Regulation and Abolition Himachal Pradesh Amendment Ordinance, 2020[26] provides that the Contract Labour (Regulation and Abolition) Act (CLRA Act) shall be applicable to every establishment in which thirty or more workmen are employed or were employed on any day of the preceding twelve months as contract labourer.

Validity of aforesaid amendment

The aforesaid Ordinance is not in conformity with section 25 K of the Industrial Disputes Act, 1947. In view of this under Article 254(1) the law enacted by the State shall be void to the extent it is repugnant to Parliament law. But under Article 254(2) the repugnancy can be cured if it has been reserved for the assent

[26] Vide Gazette notification dated 9th July 2020

of the President and gets his assent. In such case State law will prevail over the law enacted by Parliament.

E. Amendment in existing Labour Legislation enacted by the State of Karnataka

The Governor of Karnataka[27] has promulgated the Industrial Disputes and Certain Other Laws (Karnataka Amendment) Ordinance, 2020 which seeks to amend the following Acts:

1. Amendment in the Industrial Disputes Act, 1947

The Ordinance provides that the provisions relating to layoffs, retrenchment, closure of the certain establishment under section 25 K of the Industrial Disputes Act, 1947 will be applicable to an industrial establishment where the number of workmen employed is not less than three hundred workmen instead of the existing provision of one hundred workmen.

Amendment in the Factories Act, 1948

The Government of Karnataka through Ordinance has increased the threshold limit for applicability of the Factories Act, 1948 from ten or more workers to twenty or more workers for factories operating with the aid of power and from twenty or more workers to forty or more workers for factories operating without the aid of power. Further the number of hours for which a worker would be allowed to work overtime has been increased from seventy-five hours to one hundred and twenty-five hours in any quarter

[27] Vide ordinance no 15 of 2020 dated 31st July 2020. The amendment came into force from 31st Jul, 2020.

Amendment in the Contract Labour (Regulation and Abolition) Act, 1970

By the aforesaid amendment the requirement of minimum number to be employed in an establishment for applicability of the Act has been raised from 20 to 50.

Validity of aforesaid amendments

The aforesaid Ordinance is not in conformity with central Act ,namely section 25 K of the Industrial Disputes Act, 1947, the Factories Act, 1948 and the Contract Labour (Regulation and Abolition) Act, 1970. Here it may be pointed out that under Article 254(1) the law enacted by the State shall be void to the extent it is repugnant to Parliament law. But under Article 254(2) the repugnancy can be cured if it has been reserved for the assent of the President and gets his assent. In such case State law will prevail over the law enacted by Parliament.

II. Relaxation in working hours by State Government

Another controversial State legislation which has made hue and cry and attracted the print media relates to relaxation made in working hours by State Government under the Factories Act,1948. Let us examine them.

A. Why Relaxation in working hours under the Factories Act, 1948

A survey of the preamble and object and reasons annexed to the notifications and orders issued by State of Gujarat, Goa, Karnataka, Himachal Pradesh, Haryana, Punjab, Orissa, Assam, Uttarakhand and Madhya Pradesh reveals that mainly four reasons led to exercise of powers by the States under the Factories Act, 1948: (**i)** to boost economic activities after lockdown and generate

employment in post-lockdown period". (ii) to limit the movement of people from work to home and back during the day by half instead of having people to move to and from in the morning and evening (iii) to attract more foreign investment in India and to strengthen the existing establishments. (iv) to increase factory production and make up for the loss of man days when the lock down was enforced and (vi) to provide flexibility to employers and to facilitate the ease of doing business .

The main thrust of relaxation was that it will activate and revive the industrial and economic activities and create conducive atmosphere for Indian and foreign companies to set up new factories.

B. Exercise of power under the Factories Act by the State Government

A survey of the provisions contained in the notification issued after relaxation in the lockdown reveals that Assam Goa, Punjab and Haryana acted under section 65 which empowers the State to exempt factories from any or all of the provisions of sections 51, 52, 54 and 56 to deal with an exceptional press of work. However the position of Orissa is not clear. Karnataka and Uttar Pradesh which relaxed working hours by notification under section 5 withdrew the said notifications after they were challenged in High Courts. But the State of Gujarat , Karnataka, Himachal Pradesh , Madhya Pradesh and Uttarakhand acted under section 5 of the Factories Act ,1948 which empowers the State to exempt any factory in public emergency up to three months. However the validity of notification issued by the State of Gujarat was challenged before the Supreme Court which is discussed in section.

Issue arising out of anomaly in exercise of power under the Factories Act by the Government of Odisha

The notification issued by the Government of Odisha provides:

–In exercise of power conferred by Section 5 and 65 of the Factories Act, 1948, the Government of Odisha hereby directs that all the factories registered under the said Act will be exempted from provisions relating to weekly, daily hours and interval of rest of adult workers under Section 51, 54, 55 and 56 for a period of three months and a 12-hour shift is allowed in the period,‖[28]

A perusal of the aforesaid provision creates an anomaly as the State has not specified as to whether it is exercising the power under section 5 or section 65 of the Factories Act.

C. Relaxation in Daily and weekly hours of work

A survey of notification and /or orders issued by the State of Assam, Gujarat, Goa, Karnataka, Himachal Pradesh, Haryana, Punjab , Orissa and prescribed that in every factory no adult worker shall be allowed or required to work in a factory for more than 12 hours in any day but as far as weekly hours while Goa and Karnataka prescribed that weekly hours shall not exceed 60 hours in a week Gujarat**,** , Himachal Pradesh, Haryana, Punjab and Orissa fixes maximum limit in a week to 72 hours. This relaxation has been made in the existing provisions of the Factories Act which prescribes that no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week and no adult worker shall be required or allowed to work in a factory for more than nine hours in any day**.**

[28] Orissa- notification no.LL2-FE-0003-2020/2716 /LESI dated 8 May,2020

D. Interval of Rest

A survey of the provisions contained in the notification issued by States regarding interval of rest reveals that while in Goa the period of rest interval is allowed after 5 hours, Gujarat, Punjab ,Himachal Pradesh and Orissa allows rest interval after 6 hours. This interval after six hours falls within the purview of the State Government.

E. Spread over

A survey of the provisions contained in notification issued after lockdown was lifted reveals that while Goa, Punjab and Orissa provides for spread over up to thirteen hours other States have not prescribed the maximum spread over period .Here it may be mentioned that section 65(ii) of the Factories Act permits that spread over, inclusive of intervals for rest, shall not exceed thirteen hours in any one day. Quite apart from this provision to section 56 authorizes the Chief Inspector to increase the spread over up to twelve hours.

F. Rate of overtime

Issues relating to rate of payment of overtime wages in Himachal Pradesh

A survey of notification and/or orders issued by the State of Himachal Pradesh reveals that while clause (iii) of the notification says that wages in respect of increased working hours as a result of this exemption, namely, three hours in a day or twenty four in a week shall be given in proportion to existing minimum wages fixed by Government of Himachal Pradesh under Minimum Wages Act, 1948 but clause (iv) provides that that provisions of section 59 regarding overtime wages shall continue to be applicable without any change. According to section 59 where a worker works in a factory for more than nine hours in any

day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages. Thus clause (iii) and (iv) of the notification contradicts each other. Thus there is a need to review the aforesaid provisions and remove this anomaly.

G. Issues arising out increase in hours of work and denial of statutory rate of overtime wages in Gujarat

On 17 April 2020, after the lockdown was extended the second time on 14 April 2020 the Labour and Employment Department of the State of Gujarat issued a notification under Section 5 of the Factories Act to exempt all factories registered under the Act ‒from various provisions relating to weekly hours, daily hours, intervals for rest etc. for adult workers‖ under Sections 51, 54, 55 and 56, *inter alia*, with the following conditions from 20th April till 19th July 2020 which was later extended from 20 July 2020 till 19 October 2020:

(1) No adult worker shall be allowed or required to work in a factory for more than twelve hours in any day and Seventy Two hours in any week.

(2) The Periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed six hours and that no worker shall work for more than six hours before he has had an interval of rest of at least half an hour.

(3) Wages shall be in a proportion of the existing wages (e.g. If wages for eight hours are 80 Rupees, then proportionate wages for twelve hours will be 120 Rupees).‖

The validity of the aforesaid notification was challenged by registered trade unions of workmen and federation of registered trade unions before the Supreme Court in *Gujarat Mazdoor Sabha*

& Anr.v. The State of Gujarat[29] mainly on two grounds, namely: (i) The exercise of the power by notification under section 5 of the Factories Act, 1948 relaxing the daily hours of work from nine to twelve hours in any day and weekly hours from forty hour to seventy Two hours in all factories under section 5 of the Factories Act, 1948 was not permissible on the ground of ‗public emergency' because the explanation to section 5 of the Factories Act covers case of ―grave emergency‖ which threatens the security of India or of any part of the territory by war, external aggression or internal disturbance and not lock down due due to COVID-19 pandemic and thereafter. ?; (iii) The notifications which exempts the application of section 59 of the Factories Act(which mandates payment of double the wages for overtime) violates the spirit of the Minimum Wages Act, 1948 and amounts to forced labour? The Court held that section 5 of the Factories Act could not have been invoked to issue a blanket notification that exempted all factories from complying with humane working conditions and adequate compensation for overtime, as a response to a pandemic that did not result in an ‗internal disturbance' of a nature that posed a ‗grave emergency' whereby the security of India is threatened. In any event, no factory/ classes of factories could have been exempted from compliance with provisions of the Factories Act, unless an ‗internal disturbance' causes a grave emergency that threatens the security of the state, so as to constitute a ‗public emergency' within the meaning of Section 5 of the Factories Act.[30] The Court further held that the principle of paying for overtime work at double the rate of wage is a bulwark against the severe inequity that may otherwise pervade a relationship between workers and the management. Further the workers cannot contract out of receiving double the rate for

29 Writ Petition (Civil) No. 708 of 2020.

30 Para45.

overtime as a way of industrial settlement. [31] In the course of judgment the Court also laid down the following principles:

(i) The Factories Act is an integral element of the vision of state policy which seeks to uphold Articles 38, 22 39, 23 42, 24 and 4325 of the Constitution. It does so by attempting to neutralize the excesses in the skewed power dynamics between the managements of factories and their workmen by ensuring decent working conditions, dignity at work and a living wage. Ideas of _freedom' and _liberty' in the Fundamental Rights recognized by the Constitution are but hollow aspirations if the aspiration for a dignified life can be thwarted by the immensity of economic coercion.[32]

(ii) A workers' right to life cannot be deemed contingent on the mercy of their employer or the State. The notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and right against forced labour that are secured by Articles 21 and 23 of the Constitution. [33]

(iii) .Clothed with exceptional powers under Section 5, the state cannot permit workers to be exploited in a manner that renders the hard-won protections of the Factories Act, 1948 illusory and the constitutional promise of social and economic democracy into paper-tigers. It is ironical that this result should ensue at a time when the state must ensure their welfare**.**[34]

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31 Para41.

32 Para 42.

33 Para 44.

34 Para43.

The Supreme Court accordingly struck down the Gujarat government‘s notification which allowed all factories in the state to extend work shifts to up to 12 hours . The Court further directed that overtime wages shall be paid, in accordance with the provisions of Section 59 of the Factories Act to all eligible workers who have been working since the issuance of the notification .

H. Does the notification making relaxation in working hours violate ILO Convention

It has been asserted by trade unions and some activists that the notifications issued by the State of Gujarat , Karnataka, Himachal Pradesh , Madhya Pradesh and Uttarakhand acted under section 5 of the Factories Act ,1948 and States of Assam Goa, Punjab and Haryana acted under section 65 of the said Act relaxing hour of work from 9 to 12 hours in a day and 48 to 72 hours in a week does not conform the International Labour Organization (ILO) Hours of Work (Industry) Convention, 1919 (No. 1) ,ratified by India on 14 June, 1921, which lays down general standard at forty eight hours of work per week, with a maximum of eight hours per day.

In order to determine whether the notification making relaxation in working hours violate ILO Convention it necessary to mention that section 65(2) empowers the State Government or the Chief Inspector exempt, any or all of the adult workers, in any factory or group or class or description of factories from any or all of the provisions of sections 51, 52, 54 and 56 on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work. We do not anticipate any problem in respect to the State who acted under section 65 of the Factories Act, 1948 because it empowers the State Government to

exempt, on such conditions as it or he may deem expedient, any or all of the adult workers, in any factory or group or class or description of factories from any or all of the provisions of sections 51, 52, 54 and 56 on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work. Indeed it is not an amendment. Hence in this situation exercise of the power by State Government does not violate ILO norms. Be that as it may a blanket notification of exemption to all factories even under section 65 of the Factories Act, to capitalize on the pandemic to bring workers into the chains of servitude is not permissible under law. Likewise workers cannot be denied overtime except at the rate permissible under the Factories Act.

Coming to the exercise of power by the State Government in regard to relaxation in working hours and rate of payment of overtime under section 5 of the Factories Act , as per the decision of the Supreme Court in *Gujarat Mazdoor Sabha & Anr.v. The State of Gujarat,* [35]is not permissible. Thus in such a situation besides being not in accordance with law it may also violate the ILO Convention.

III. Conclusions

Our analysis shows that several states have amended labour legislation after relaxation was made in the lockdown either by suspending them or by amending the then existing labour legislation to boost economic activities after lockdown and generate employment in post-lockdown period", to meet the shortage of labour after the departure of migrant labour and among others to limit the movement of people from work to home and back during the day. Thus the Uttar Pradesh Temporary

35 Supra note 29.

Exemption from certain Labour Legislation Ordinance, 2020 retained only three labour legislation and some provisions of two other legislation out of thirty five central labour legislation. Such suspension of labour law denies several rights of workers provided under the Constitution and labour legislation. Like Uttar Pradesh, but not with same intensity, Madhya Pradesh also exempted new establishments from all labour laws except the Minimum Wages Act, Employees' Compensation Act and Industrial Safety Rules pending the approval of the President of India. Like Madhya Pradesh the States of Gujarat, Himachal Pradesh ,Haryana and Karnataka have also amended some labour legislation which is not in conformity with the Central labour legislation. Here it may be mentioned that labour is included in the concurrent list and hence both Union and state governments are competent to enact legislations pertaining to labour welfare. But under Article 254(1) of the Constitution the law enacted by the State shall be void to the extent it is repugnant to Parliament law. However under Article 254(2) of the Constitution, amendment through Ordinance would prevail, if it has been reserved for the consideration of the President and has received his assent. Needless to mention that in the aforesaid situation Article 254(2) of the Constitution is often adopted by state on subjects that fall in the concurrent list.

The survey also highlighted that relaxation in hours of work was made in some States to meet the shortage of labour after the exodus of migrant labour, to boost economic activities after lockdown and to limit the movement of people from work to home and back during the day. Further such relaxation was made for three months and in some cases for two months only. For making relaxation in hours of work the State Government exercised the power under section 65 of the Factories Act, 1948. Even though strictly speaking violates the ILO Hours of Work (Industry) Convention (No. 1) of 1919 but it may added that thus it is not an

amendment in the existing labour legislation but it is an exercise of administrative discretion vested in it under the Factories Act which is in operation since 1948. However the exercise of the power by the State of Gujarat, Karnataka, Himachal Pradesh, Madhya Pradesh and Uttarakhand under section 5 of the Factories Act ,1948 as held by the Supreme Court in *Gujarat Mazdoor Sabha & Anr.v. The State of Gujarat*[36] was not permissible particularly in case denial of statutory payment for overtime.

Our analysis also shows that UP Ordinance is not in conformity with ILO Convention No.81 -Labour Inspection Convention which has been ratified by India. Further many States including Madhya Pradesh has replaced inspections with self-certification schemes. Moreover even the Industrial Relations Code ,2020, Code on Wages, 2019, Code on Social Security, 2020 and the Code on Occupational Safety, Health and Working Conditions, 2020 all the four proposed labour Code has replaced Inspector by Inspector-cum –Facilitator. According to trade unions these changes amounts to dilution in Labour inspection which is not in accordance with the ILO Convention No.81 -Labour Inspection Convention. This issue was also raised in ILO Conference in Geneva last year. Needless to add that India is committed to comply the ILO standards ratified by it. However it has been asserted by the Government that this is necessary to prevent Inspector Raj and to bring better enforcement.

Lastly it may be mentioned that on 21 November, 2020 the labour ministry, in a draft notification, has notified draft on Occupational Safety, Health and Working Conditions (OSH & WC) which says that daily working hours can extend up to 12 hours. However, like Factories Act, 1948 these draft rules say no worker should be required or allowed to work in an establishment

36 Ibid.

for more than 48 hours in any week. "The period of work of a worker shall be so arranged that inclusive of his intervals for rest, shall not spread over for more than twelve hours in a day," This draft rules has been criticised on the ground that it is not in conformity with the Supreme Court decision in *Gujarat Mazdoor Sabha & Anr.v. The State of Gujarat,supra.* It is also contended that the draft rules are not in conformity with ILO Hours of Work (Industry) Convention, 1919 (No.1) which was ratified by India on 14 June, 1921. Be that as it may it is felt that long work hours may increase the risk of injuries and accidents and can contribute to poor health and worker fatigue. Studies show that long work hours can result in increased levels of stress, poor eating habits, lack of physical activity and illness.

Before we conclude it may be mentioned that a blanket notification of exemption to all factories, even under section 65 of the Factories Act, 1948, should not be used with the intention to capitalize on the pandemic to force workers into the chains of servitude. Moreover workers should be denied overtime rate other than those permissible under the Factories Act.

Standard Essential Patents and Frand Terms: Contemporary Development

Dr. V K Ahuja [1]

ABSTRACT

Standards are essential for consistency, interoperability and conformity of products/parts from various producers.The standard compliant devices may play an important role in the domain of telecommunication, entertainment, education, medical, business and other sectors. From consumers' perspectives, standards play an important role by ensuring to them ―the quality and safety of products and services‖. Interoperability results into more utility and brings down the prices of the products. The standards are set by Standard Setting Organisations (SSOs). In cases, where the invention made as a part of an ―essential standard‖ is patented, that patent becomes Standard Essential Patent (SEP).The holders of SEPs are required to give an undertaking to the SSOs that they will grant licence to the users of their SEPs on ―fair, reasonable and non-discriminatory terms‖ popularly known as FRAND terms. The SEP holders enjoy dominant position and sometimes misuse that position. They are expected to ensure fair access to SEPs by the users so that the benefit goes to the consumers in terms of standard compliant devices at competitive prices. The courts in various jurisdictions have given pronouncements on FRAND terms as well as on anti-competitive practices adopted by the SEP holders.

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I. INTRODUCTION

The fast changing technology has transformed our lives in many ways. Everyday new products are launched in the market which conform to certain standards. The standards are essential for the consistency, interoperability and conformity of products/parts from various producers. Some standards are adopted aiming at the protection of ‒human safety, health or the environment‖.[1]

The standard compliant devices may play an important role in the domain of telecommunication, entertainment, education, medical, business and other sectors. Standards developed by Standard Setting Organisations are used in inventions for which the patents are granted. These patents, which are known as standard essential patents, make the devices and machines interact among themselves in a co-ordinated manner.[2] It is noteworthy that a few most important innovations in the today‘s world have been made by corporates to set standards. These standards define specification which are essential for different devices to work together/or to be compatible to each other.[3] For the benefits of consumers, products like Wi-Fi connector to chargers require standardization. Products like smart phones, smart televisions, computers, tablets, musical devices, etc. have many components which are based on standards. From consumers‘ perspectives, standards play an important role by ensuring to them ‒the quality and safety of products and services‖. Interoperability results into

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1 WIPO Secretariat, *Standards and Patents*, (18 February 2009), https://www.wipo.int/edocs/mdocs/scp/en/scp_13/scp_13_2.pdf, last accessed on 10 December 2020.

2 See also European Commission, *Standard Essential Patents*, https://www.eesc.europa.eu/sites/default/files/files/factsheet_-_standard_essential_patents_1.pdf**,** last accessed on 9 December 2020**.**

3 *ChitraIyer*, *Protecting the Innovators*,(21 May 2019), https://law.asia/standard-essential-patents-to-protect-innovators/ last accessed on 14 December 2020.

more utility and brings down the prices of the products. The governments are acknowledging standardization ―as a tool that supports various national public policies, such as public safety and health policy, industry policy and trade policy‖.

The standardization processes will be beneficial only when such processes encourage competition and innovation and not restrict them. The SEP holders should ensure fair access to SEPs by the users so that the benefit goes to the consumers in terms of standard compliant devices at competitive prices.The present article among other things, discusses the meaning of standards, standard essential patents, their necessity in the modern products, licences on FRAND terms and conditions, anti-competitive practices adopted by the SEP holders, and judgements of courts in various jurisdictions.

II. MEANING OF STANDARD AND STANDARD ESSENTIAL PATENTS (SEP)

–Standards‖ define the specifications which are –necessary to enable products developed by different companies to be compatible with one another‖.[4]A formal standard is defined by the International Organization for Standardization (ISO)as *"a document*, established by a consensus of subject matter experts and approved by a recognized body that provides guidance on the design, use or performance of materials, products, processes, services, systems or persons‖. The standards therefore, can be said to ensure minimum quality or performance of a particular product. Standards generally have lot of benefits such as encouraging compatibility, promoting interoperability, and making user to obtain maximum benefit of their devices.[5]The interoperability

[4] *Ibid.*

[5] AnkitaTyagi and Sheetal Chopra, *Standard Essential Patents (SEPs) – Issues and Challenges in Developing Economies*, 22 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 121-135 (May 2017).

which comes due to standards between devices, ―ensures safer, more reliable products, and more choices for consumers‖.[6] Standards are of two types –(i) *de jure standards* which are statutory standards; and (ii) *defacto* standards, which are non-statutory and assume the shape of standards by popular use and market penetration.[7]

In *Micromax Informatics Limited* v. *Informant and Telefonaktiebolaget LM Ericsson (Publ)*,[8] the Competition Commission of India explained the meaning of the terms ―standardisation‖ and ―SEP‖ in the following manner:

―Standardisation is a voluntary process wherein a number of market players reach a consensus for setting *common technology standards* under the support of a Standard Setting organization. In simple terms, standardisation is the process of developing and implementing technical standards. Such technological standards are termed as Standard Essential Patent, when they are patented and for which there are no non-infringing alternatives. Once a patent is declared as Standard Essential Patent, it faces no competition from other patents until that patent becomes obsolete due to new technology/inventions‖.[9]

In *Telefonaktiebolaget LM Ericsson (Publ)* v. *Competition Commission of India*,[10] the Delhi High Court stated that ―the use

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[6] *ChitraIyer*, *Protecting the Innovators*,(21 May 2019), https://law.asia/standard-essential-patents-to-protect-innovators/ last accessed on 14 December 2020.

[7] M.R. Sreenivasa Murthy, *Standard Essential Patents on Fair, Reasonable and Non-Discrimination Terms*, in INTELLECTUAL PROPERTY RIGHTS: CONTEMPORARY DEVELOPMENTS,293 (V.K. Ahuja and ArchaVashishtha, ed., 2020).

[8] Case No. 50/2013 decided by CCI on 12/11/2013.

[9] *Id*., para 11.

[10] W.P.(C) Nos. 464/2014 & 1006/2014, decided by Delhi High Court on 30 March 2016.

of a standard technology ensures that there is a uniformity and compatibility in communications network across various countries. Thus, any technology accepted as a standard would have to be mandatorily followed by all enterprises involved in the particular industry. In cases where the technology adopted as a part of an essential standard is patented, the technology/patent is referred to as a Standard Essential Patent. The implication of accepting a patented technology as a standard is that all devices/equipments compliant with the established standard would require to use the patented technology and its manufacture would necessarily require a license from the patentee holding the SEP‖.[11]

SEP is considered as an important asset to its owner for the reason that it brings good returns on the investments made by the owner in developing the patented technology. The owner of SEP enjoys monopoly rights to manufacture, use or license the SEP related invention. The owner enjoys a dominant position in the market due to the reason that the technology used in SEP is essential for the competitors to have access to the market.[12]The importance of these patents can be inferred from the fact that ―more than 23,500 patents have been declared essential to the GSM and 3G standards‖.[13]

Realising the importance of SEPs, every company wishes that its new invention should be declared as standard for the industry. The issues which arise, for example, are - who should declare a technology as a standard, essential for other devices?

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11 *Id*., para 9.

12 M.R. Sreenivasa Murthy, *Standard Essential Patents on Fair, Reasonable and Non-Discrimination Terms*, in INTELLECTUAL PROPERTY RIGHTS: CONTEMPORARY DEVELOPMENTS,290 (V.K. Ahuja and ArchaVashishtha, ed., 2020).

13 See also European Commission, *Standard Essential Patents*, https://www.eesc.europa.eu/sites/default/files/files/factsheet_-_standard_essential_patents_1.pdf last accessed on 9 December 2020.

Further, on what terms and conditions, the standards setting patents should be made available to other stakeholders? The issues related to laying down terms and conditions of licensing of SEPs is very crucial as the patent holder enjoys a dominant position over all other rival firms and in all circumstances capable of abusing such position. The aforesaid issues led to the establishment of certain standard setting organisations.

III. STANDARD SETTING ORGANISATIONS (SSOS)

Standard setting is basically a process which determines―a common set of characteristics‖ which are essential for products to follow. The main object of the process of standardization is to facilitate market access. Standard Setting Organisation (SSOs) or Standard Development Organisations (SDOs) are the organisations which are entrusted with the task of determining the standards. Industry representatives join together under SSOs/SDOs to discuss and develop the ‒technical specification of a standard‖. These organisations, which are private, governmental, or quasi-governmental may be international, regional or national in character.[14]

The need to set up SSOs was realized since long. The three largest international SSOs are International Telecommunication Union (ITU); the International Electro-technical Commission (IEC); and the International Organization for Standardization (ISO). The oldest SSO ITU was founded in 1865 whereas the IEC and ISO were founded in 1906 and 1947 respectively.

In addition to international SSOs, there are many regional SSOs, such as European Committee for Standardization (CEN),

[14] M.R. Sreenivasa Murthy, *Standard Essential Patents on Fair, Reasonable and Non-Discrimination Terms*, in INTELLECTUAL PROPERTY RIGHTS: CONTEMPORARY DEVELOPMENTS,293 (V.K. Ahuja and ArchaVashishtha, ed., 2020).

Pan American Standards Commission (COPANT),European Telecommunications Standards Institute (ETSI),the African Organization for Standardization (ARSO), etc.[15] Formed in 1988, the ETSI which is a French association and governed by French law, adopted an ‒IPR policy and contractual framework‖. It has more than 800 members from as many as 66 countries from all parts of the world. One of its purposes is ‒to contribute to world-wide standardization‖ in the field of telecommunications.[16]It is noteworthy that ‒patents declared at the ETSI represent 70% of worldwide SEPs‖. As far as economics of these standards is concerned, it is interesting to note that the royalty income is quite amazing for the standards made for 2G, 3G and 4G which comes to approximately ‒€18 billion per year‖. In the domain of key standardised technologies, Europe has emerged as the major player.[17]

In India also, there are certain SSOs/SDOs, such as Bureau of Indian Standards, Telecom Standards Development Society of India (TSDI),Telecommunication Engineering Center (TEC), etc. Apart from governmental SSOs, there are many SSOs developed by private entities to lay down interoperability standards. The major private SSO in India is the Global ICT Standardization Forum of India (GISFI). The SSOs compete with each other to

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[15] There are many more SSOs in the world. See Mark A. Lemley and Timothy Simcoe, *How Essential are Standard-Essential Patents*?, 104CORNELL LAW REVIEW, 607, 618 (2019).

[16] *Unwired Planet International Ltd. and Anotherv.Huawei Technologies (UK) Co. Ltd. and Another*; *Huawei Technologies Co. Ltd. and Another v.Conversant Wireless Licensing SÀRL*; *ZTE Corporation and Anotherv.Conversant Wireless Licensing SÀRL*, [2020] UKSC 37 dated 26 August 2020, para 5.

[17] See also European Commission, *Standard Essential Patents*, https://www.eesc.europa.eu/sites/default/files/files/factsheet_-_standard_essential_patents_1.pdf**,** last accessed on 9 December 2020.

develop standards. The importance of these organisations in promoting competition cannot be negated.[18]

It is essential for the committee members of the SSOs to disclose patents which are owned by them and which relate to the subject matter being discussed at SSOs to decide standards. They have also to agree to licence those SEPs on the FRAND terms and conditions.[19]Therefore, manufacturers of various products which are standard-compliant, may use SEP(s). For this purpose, they are required to negotiate the terms of the licence to use those SEP(s) with their holders. The SEP holders will issue licence on FRAND terms as they have committed at SSOs at the time of developing the standards which have been incorporated in the SEPs.

IV. FRAND TERMS

Intellectual property laws have been made keeping in view the balance between societal good and individual interest. This balance is essential for promoting research and development as well as for the economic development for the country. The SEPs are important not only to the companies who developed them as they need return on their investment but also to all other stakeholders as the technology has been declared standard. The SEP holder owing to its dominant position has all the authority to stifle competition. Therefore, a cautious approach becomes essential to prevent abuse of dominance by holder of SEP. The SEP holders are required to provide an undertaking that they will

[18] See also M.R. Sreenivasa Murthy, *Standard Essential Patents on Fair, Reasonable and Non-Discrimination Terms*, in INTELLECTUAL PROPERTY RIGHTS: CONTEMPORARY DEVELOPMENTS,293-294 (V.K. Ahuja and ArchaVashishtha, ed., 2020).

[19] Ankita Tyagi and Sheetal Chopra, *Standard Essential Patents (SEPs) – Issues and Challenges in Developing Economies*, 22 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 121, 124 (May 2017).

grant licence to users on ‒fair, reasonable and non-discriminatory terms‖ popularly known as FRAND terms.

In *Micromax Informatics Limited* v. *Informant and Telefonaktiebolaget LM Ericsson (Publ),*[20] the Competition Commission of India stated that as per the IPR policy of ETSI, it is required for every IPR holder to give a written undertaking which is irrevocable in nature that that it was willing ‒to grant irrevocable licences on FRAND Terms, to be applied fairly and uniformly to similarly placed players‖. The irrevocable licences based on FRAND terms are to be granted by the patent holder to the extent of at least - (i) ‒manufacture‖; (ii) ‒sell, lease, or otherwise dispose of‖ manufactured equipment; (iii) ‒repair, use, or operate equipment‖; and (iv) ‒use methods‖.[21]

Article 31 of the TRIPs Agreement, which provides the patent use without the authorization of patent owner, also provides that authorization should be granted on reasonable commercial terms. It enables Member States to correct the practices adopted by the owner of patent which are anti-competitive in nature. It provides that ―the need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases‖. Further, Member States may ‒refuse termination of authorization if and when the conditions which led to such authorization are likely to recur‖.

‒Patent pools‖ among SEP holders is also an issue which poses serious challenges. Since SEP holders are already in dominant position, they join together to form a cartel. They form a package and license their SEPs not individually but collectively. They share the amount of royalty in pre-planned manner. This

[20] Case No. 50/2013 decided by CCI on 12/11/2013.

[21] Clause 6, IPR policy of ETSI, available at https://www.etsi.org/images/files/IPR/etsi-ipr- policy.pdf, last accessed on 18 December 2020.

behavior of SEP holders is anti-competitive in nature and open to challenge under competition law.

As SSOs set standards that all other rival stakeholders are required to follow and the SEP holder enjoys a dominant position over all other rivals, it is therefore required that any person holding an SEP should license these technology on FRAND terms. The FRAND commitment made at the time of standard setting is contractual in nature. Its legal effect is not clear sometimes, and this non-clarity becomes problematic particularly in those cases where the ‒dispute is international in nature because jurisdictions may view these commitments very differently‖.[22] Therefore, there have been lot of ambiguities as to what constitutes FRAND terms? This has led to many litigations between the SEP holders and other stakeholders. Issues have been raised with respect to the terms and conditions of the licences being not FRAND compliant. FRAND terms must ensure that the technology in question is reasonably priced and available to all.

The concept of FRAND is not as new as SEPs. Since World War II, courts throughout the world have issued directions on numerous occasions that the patent holder should license the patented technology on terms and conditions which are reasonable. The orders are issued generally in antitrust cases involving the abuse of patents. A formal policy to make available the standard patents on reasonable terms was laid down by American Standard Association (ASA) in 1959.[23]The ASA required that ‒standards should not include items whose production is covered by patents unless the patent holder agrees to

[22] Jay P. Kesan and Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 INDIANA LAW JOURNAL, 231, 233 (2014).

[23] Jorge L. Contreras, *A Brief History of Frand: Analyzing Current Debates in Standard Setting and Antitrust Through A Historical Lens*, 80 ANTITRUST LAW JOURNAL, 39 (2015).

and does make available to any interested and qualified party a license on reasonable term‖.[24]

In *Micromax Informatics Limited* v. *Informant and Telefonaktiebolaget LM Ericsson (Publ),*[25] the CCI stated that SEP licensing on FRAND terms intends to prevent ―Patent Hold-up‖ and ―Royalty Stacking‖. The CCI further stated that when there is protection of standard technologies in the form of SEPs, there is a likelihood of ―patent hold-up‖ by the owner of SEP. The ―patent hold-up‖ may be in terms of a ―demand for higher royalties or more costly or burdensome licensing terms than could have been obtained before the standard was chosen‖. The option to choose among technologies gets subverted by ―hold-up‖ which ultimately results in undermining ―the integrity of standard-setting activities‖. The similar is the case with ―royalty stacking‖. Royalty stacking takes place when many patents either of the same licensor or many licensors are used in one product. In such a situation, the royalty claims of these licensors are ―added or stacked together‖. This is how the total burden of royalty of the manufacturer is determined.[26]

The threat of patent hold up[27] and patent hold out[28] has led many SSOs to develop formal policies to ensure that the ―patent

[24] 11.6, ASA 1959. For more information see Jorge L. Contreras, ed., *Essentiality and Standards-Essential Patents*, CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW – ANTITRUST, COMPETITION AND PATENT LAW (Cambridge Univ. Press, 2017).

[25] Case No. 50/2013 decided by CCI on 12/11/2013.

[26] *Id*., para 13.

[27] Patent hold up is ―a situation where the patent holder after adoption of the standard uses the possible high switching costs‖ to extract extra ―royalty fees‖ or settle ―cross license terms‖ which the licensee otherwise would not have agreed to. See AnkitaTyagi and Sheetal Chopra, *Standard Essential Patents*, 22 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (2017).

[28] In patent hold out, a company engaged in the use of SEPs rejects negotiating on FRAND terms and misuses it.*Ibid*. See also See also Anne Layne-Farrar and Koren W. Wong-Ervin, *Methodologies for Calculating FRAND Damages: An Economic and Comparative Analysis of the Case Law from China, the European Union, India, and the United States*, JINDAL GLOBAL LAW REVIEW3-4 (2017), http://www.crai.co.nz/sites/default/files/publications/Methodologies-for-calculating-FRAND-damages.pdf, last accessed on 10 December 2020.

essential to the standard‖ is disclosed and is made available by the patent holder on FRAND terms.[29]

In absence of any specific standards as to what all should be included in FRAND Terms, the term remained opened for interpretations by various stakeholders. The courts interpreted FRAND terms and laid down certain guidelines to prevent its misuse.

In *Samsung* v. *Apple*,[30] the Court in Japan held that ―FRAND declaration is not a proposal of a license agreement‖. Further, it was ―an abuse of right to claim compensation for damage that is more than the equivalent of the royalty under the FRAND terms, but it is not an abuse of right to claim compensation for damage that is less than equivalent of the royalty under the FRAND terms‖.[31] The Court further stated that the ―amount of the royalty under the FRAND terms should be determined by calculating the product of sales of the products, (i) contribution ratio to the sales, and (ii) the royalty rate cap in condition that the accumulated royalty should not be excessive, and then dividing by (iii) numbers of essential patent of UMTS standards‖.[32]

In *Huawei Technologies Co. Ltd.*v. *ZTE Corp*,[33] the European Court of Justice stated that before bringing an infringement suit or the

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[29] Jorge L. Contreras, *A Brief History of Frand: Analyzing Current Debates in Standard Setting and Antitrust Through A Historical Lens*, 80 ANTITRUST LAW JOURNAL, 39, 42(2015).

[30] IP High Court, en banc Case H25 (Ne) 10043, Judgment on May 16, 2014 (H26).

[31] https://www.jpaa.or.jp/en/img/ip-information/court-decisions/5_SAMSUNGversusAPPLECase.pdf, at 1.

[32] *Id*., p. 3.

[33] ECLI:EU:C:2015:477 decided on 16 July 2015,http://curia.europa.eu/juris/document/document.jsf;jsessionid=2611115F4B08DFECEE3CE836B87A3EBC?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=17945433.

action for ―recall of products‖ manufactured by using SEP, the SEP holder is required to alert –the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed‖. Further, once –the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms‖, the SEP holder is to present such infringer ―a specific, written offer for a license on such terms, specifying, in particular, the royalty and the way in which it is to be calculated‖.[34]

The Court made important observations which can be taken as guidelines with respect to FRAND. In addition to above, the Court stated that willingness must have been expressed by the alleged infringer to conclude a FRAND compliant licence agreement. Thereafter, specific written FRAND compliant licence offer is to be made by the holder of SEP which will indicate not only the amount of royalty but also the method of its calculation.[35]

The infringer is to reply to the aforesaid offer diligently –in accordance with recognised commercial practices in the field and in good faith‖. There should be no –delaying tactics‖.[36]If the offer of SEP is not accepted by the alleged infringer, it will make a written FRAND compliant counter offer to the holder of SEP on prompt basis.[37] If before the finalization of a licence agreement, the alleged infringer uses SEP, then it is required to provide adequate security regarding its SEP use for the past and future. The security can be provided e.g. through –a bank guarantee or by placing the amounts necessary on deposit‖.[38]

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34 *Id*., para 71.

35 *Id*., para 63.

36 *Id*., para 65.

37 *Id*., para 66.

38 *Id*., para 67.

In a situation where counter offer was made by the alleged infringer but the license agreement could not be finalised on FRAND terms, a request can be made to an ‒independent third party‖ for the determination of royalty amount. [39]

When negotiations for grant of license agreement is going on between the parties, the alleged infringer is free to challenge either the SEP validity or its ‒essential nature‖. This position comes in contrast to the judgment of German court in *Orange Book Standard* case [40] which ‒required an *unconditional offer* to license‖ from the alleged infringer. This means such infringer is not ‒to challenge the alleged infringement or the validity of the patent‖. [41]

In *Unwired Planet International Ltd. and Another* v. *Huawei Technologies (UK) Co. Ltd. and Another*; *Huawei Technologies Co. Ltd. and Another* v. *Conversant Wireless Licensing SÀRL*; *ZTE Corporation and Another* v. *Conversant Wireless Licensing SÀRL*,[42] the UK Supreme Court agreed with the parties on the fact that the obligation of FRAND as laid down in the ‒IPR Policy‖ of SSO ETSI extended to the ‒fairness of the process by which the parties negotiate a license‖.

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39 *Id*., para 68.

40 KZR 39/06, *Orange-Book Standard*, Judgment of 6 May 2009.

41 See Mark Simpson and Seiko Hidaka, *The EU Court of Justice Judgment in Huawei v ZTE – important confirmation of practical steps to be taken by Standard Essential Patent holders before seeking injunctions*, (August 2015), https://www.nortonrosefulbright.com/en/knowledge/publications/8f90efbd/the-eu-court-of-justice-judgment-in-huawei-v-zte---important-confirmation-of-practical-steps-to-be-taken-by-standard-essential-patent-holders-before-seeking-injunctions, last accessed on 13 December 2020.

42 [2020] UKSC 37 dated 26 August 2020, para 64.

The Court referred and upheld the judgement of Birss J at first instance[43] which was also approved by Court of Appeal that ‒the nondiscrimination element in the FRAND undertaking was *general* in nature rather than *hard-edged*. The undertaking did not require that royalty rates in the license on offer to Huawei should be fixed by reference to the royalty rates in the Samsung licence. On this basis, the judge found that the worldwide licence on offer to Huawei was on non-discriminatory terms‖.[44]The Court thus, stated that different prices cannot be said to be discriminatory in case of licensing on FRAND terms in general.

Another important issue in this case was whether UK court had jurisdiction to try this suit in absence of any agreement between both the parties and ‒grant an injunction to restrain the infringement of UK Patent where the patented invention is an essential component‖ of a device. In this case the Court observed that ‒questions as to the validity and infringement of a national patent are within the exclusive jurisdiction of the courts of the state which has granted the patent and … that in the absence of the IPR Policy an English court could not determine a FRAND licence of a portfolio of patents which included foreign patents. It is the contractual arrangement which ETSI has created in its IPR Policy which gives the court jurisdiction to determine a FRAND licence and which lies at the heart of these appeals‖.[45]

According to the aforesaid judgment of UK Supreme Court, the courts in UK have the power to ‒determine the terms of global FRAND licenses for SEPs‖. The judgment also provided

[43] [2017] EWHC 2988 (Pat); [2017] RPC 19.

[44] *Unwired Planet International Ltd. and Another* v. *Huawei Technologies (UK) Co. Ltd. and Another*; *Huawei Technologies Co. Ltd. and Another* v. *Conversant Wireless Licensing SÀRL*; *ZTE Corporation and Another* v. *Conversant Wireless Licensing SÀRL*, [2020] UKSC 37 dated 26 August 2020, paras 110, 112.

[45] *Id*., para 58.

clarity with respect to jurisdiction of UK Courts. It is expected that the national courts of other countries may also start assuming jurisdiction over similar disputes.[46]

In *CSIRO* v. *Cisco*, in the lower court, Judge Davis stated ―that basing a royalty solely on chip price is like valuing a copyrighted book based only on the costs of the binding, paper, and ink needed to actually produce the physical product. While such a calculation captures the cost of the physical product, it provides no indication of its actual value‖.[47]

In *Lucent Technologies* v *Gateway*,[48]the United States Court of Appeals held that "even when the patented invention is a small component of a much larger commercial product, awarding a reasonable royalty based on either sale price or number of units sold can be economically justified‖.[49]

The litigations relating to SEPs in different parts of the world had shown how important SEPs are for companies in terms of their economic worth. The courts throughout the world have given divergent decisions with respect to FRAND terms. However, following common principles can be deduced – (i) ―FRAND royalties must provide the patent holder with reasonable compensation‖; (ii) ―in determining a FRAND royalty rate, courts should consider comparable licenses, including licenses calculated based on the end-user device‖; and (iii) ―concerns about patent holdup must be symmetrical, i.e., if courts consider holdup by

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46 See Rachel Jones,*The Supreme Court's Decision in Unwired Planet – What Comes Next?*,(14 September 2020),https://www.blackstonechambers.com/news/supreme-courts-decision-unwired-planet-what-comes-next/ last accessed on 12 December 2020.

47 E.D.Tex. July 23, 2014.

48 580 F.3d 1301 (Fed. Cir. 2009), decided on September 11, 2009.

49 *Id.*, p. 1339.

patent holders, then they should also consider holdup and holdout by implementers‖.[50]

Various theories with respect to interpretations of FRAND have been proposed by Pat Treacy and Sophie Lawrance. These theories include – (i) ‒FRAND should be assessed on the basis of industry comparators‖ (either in the same market or in ‒comparable markets‖); (ii) ‒FRAND should be assessed by reference to the available share of profit‖ (overall profit is to be allocated in such a manner that some portion going to the owner of technology and some to the manufacturer of products); (iii) ‒FRAND should take into account the total royalty burden‖ which is likely to be incurred by the manufacturer who wishes to manufacture products which will comply with the standards; (iv) ‒FRAND should be based on the number of patents held by the licensor, by comparison with the total number of patents in the standard (i.e. a share of a notional suitable maximum royalty level)‖; (v) ‒FRAND should take into account the pre-standardization value of the technology‖ (meaning thereby that SEP holder doesn‘t get a windfall merely because its technology became a part of the standard, rather reimbursement should be made to it on the basis of ‒objective quality‖ of the technology and its ‒centrality to the standard‖); (vi) ‒FRAND should take into account the level of the licensor‘s R&D expenditure in developing the relevant technologies‖.[51]

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[50] See also Anne Layne-Farrar and Koren W. Wong-Ervin, *Methodologies for Calculating FRAND Damages: An Economic and Comparative Analysis of the Case Law from China, the European Union, India, and the United States*,JINDAL GLOBAL LAW REVIEW, 3 (2017), http://www.crai.co.nz/sites/default/files/ publications/ Methodologies-for-calculating-FRAND-damages.pdf.

[51] Pat Treacy and Sophie Lawrance, *FRANDlyFire: Are Industry Standards Doing More Harm than Good?*, 3(1) JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE, 22, 24(2008).

The courts in some jurisdictions may agree to some of the aforesaid theories, whereas courts in other jurisdictions may not. There may be some element of conflict in these theories. In absence of any international treaty or convention laying down specific provisions in this regard, it will be open to courts to apply one or the other theory depending upon the merit of the case.

V. SEPs IN INDIA

The jurisprudence on SEP as well as on FRAND terms is still at an early stage in India and is based more on competition law rather than patents. The Indian Patents Act, 1970 does not stipulate any specific criteria or term and conditions to be followed by the holder of patent while licensing a technology. The patent holder is ordinarily free to license the technology on such terms and conditions as he deems fit subject to the provisions of Patents Act. However, this is not the case with the licensing of SEPs. It is not because of any specific provision of the Patents Act, as the Act does not distinguish between an ordinary patent and the SEP. It may be because of two reasons. Firstly, the SEP holder might have given an undertaking to the SSO that it would licence the SEP at FRAND terms and conditions. Secondly, unreasonable terms and conditions can of course be challenged in court on the ground of being anti-competitive or misuse of dominant position or abuse of power, etc. under Indian Competition Act, 2002.

It is therefore, the competition law that is dealing with the abuse of dominant position, and thus most of the FRAND disputes are decided by the CCI. As already stated, there is no mention of SEPs in the Indian Patents Act though the National Telecom Policy of 2012 has given a great importance to standardization in order to avoid anti-competitive practices.

In *Koninklijke Philips Electronics* v. *Rajesh Bansal*,[52] the plaintiff filed a suit alleging that its SEP relating to DVD video player was infringed by the defendant. There were lot of issues in this case, particularly issue with respect to essentiality of plaintiff's patents; jurisdiction of the CCI; and rate of royalty to be paid by the defendant. The court, without any independent investigation and solely on the basis of the reports of the patent offices of other countries, held that the plaintiff's patent is essential in nature. Regarding royalty rates, the court stated that ―reasonable royalties for standard essential patents are not only in terms of FRAND but also the incremental benefit derived from the invention.‖[53]

In *Telefonaktiebolaget LM Ericsson (Publ)* v. *Competition Commission of India*,[54] Ericsson held several SEPs *inter alia* in respect of ―2G, 3G and 4G networks as well as mobile phones, tablets, data cards and dongles‖. The Delhi High Court rejected the contention of Ericsson that CCI jurisdiction was ousted in patents related matters.[55] The Court further stated that ―seeking injunctive reliefs by an SEP holder in certain circumstances may amount to abuse of its dominant position. The rationale for this is that the risk of suffering injunctions would in certain circumstances, clearly exert undue pressure on an implementer and thus, place him in a disadvantageous bargaining position vis-a-vis an SEP holder. A patent holder has a statutory right to file a suit for infringement; but as stated earlier, the Competition Act is not concerned with rights of a person or an enterprise but the exercise of such rights. The position of a proprietor of an SEP

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52 *Koninklijke Philips Electronics N.V.v.Rajesh Bansal* and *Koninklijke Philips N.V.v. Bhagirathi Electronics and Ors*., CS (COMM) 24/2016, Delhi High Court, decided on 12th July, 2018.

53 *Id*., para 13.10.

54 W.P.(C) Nos. 464/2014 & 1006/2014, decided by Delhi High Court on 30 March 2016.

55 *Id.*, para 178.

cannot be equated with a proprietor of a patent which is not essential to an industry standard.‖[56] The Court further stated that it was essential to protect and preserve the bargaining power of a user of SEP.

The Court further stated that Ericsson not only instituted infringement suits against Intex and Micromax, but also ―threatened Micromax with complaints to SEBI‖ at such a crucial time when it was coming out with public offer of its shares. The Court was of the opinion that ―such threats were, undoubtedly, made with the object of influencing Micromax to conclude a licensing agreement. [I]n certain cases, such threats by a proprietor of a SEP, who is found to be in a dominant position, could be held to be an abuse of dominance. Clearly, in certain cases, such conduct, if it is found, was directed in pressuring an implementer to accept non-FRAND terms, would amount to an abuse of dominance.‖[57] The Court stated that a potential licensee is free to ―challenge the validity‖ of SEPs. Not only that, ―any person, notwithstanding that he has entered into a licence agreement for a patent, would have a right to challenge the validity of the patents‖.[58]

In the case of *Telefonktiebolaget LM Ericsson* v. *Lava International Ltd*.,[59] the plaintiff's main allegation was that the defendant company Lava was using its SEPs without any licensing agreement. The Delhi High Court stated that ―in view of duty cast upon the patent holder who may have standard essential patents and it is he who has to choose to make a FRAND undertaking to a SSO such as ETSI. Such FRAND undertaking entails a commitment that the patent holder is willing to license out its

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56 *Id.*, para 199.

57 *Id.*, para 200.

58 *Id.*, para 205.

59 I.A. Nos.5768/2015 & 16011/2015 in CS(OS) No.764/2015, Delhi High Court, decided on 10 June, 2016.

patents under Fair, Reasonable and Non-Discriminatory terms.‖[60] The Court observed that in this case, the defendant was using delaying tactics for the determination of royalty on FRAND rates.

The Court out rightly rejected the contention of defendant that the patents of plaintiffs were just algorithms and therefore, not patentable according to section 3(k) of the Patents Act, 1970.[61] The Court stated that ―the term *algorithm* is being misunderstood and misinterpreted by the defendant inasmuch as the bar of Section 3(k) applies to algorithms which are theoretical in nature and/or abstract formulae. This bar of Section 3(k) does not apply when in a patent involving modern day technology, algorithms are employed in order to perform certain calculations or selections which are thereafter utilized by various hardware components or elements to produce/improve a technology and create a practical effect or result in a physical realization‖.[62]Deciding the matter in favour of plaintiff, the Court prohibited the defendant from dealing in mobile phones using plaintiff's patented technology.

In *Interdigital Technology Corporation & Ors.*v. *Xiaomi Corporation & Ors.*,[63] the Delhi High Court was dealing with a jurisdictional issue related to a matter of ―SEP royalty rate-setting suit‖. The Wuhan Court of China negated the jurisdiction of Delhi High Court in an anti-suit injunction.[64] The Court observed that the Wuhan court's order ―would violate public policy in this country‖.[65] The Court further stated that the order of the Wuhan

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60 *Id.*, para 35.

61 ―3. The following are not inventions within the meaning of this Act:-
(k) a mathematical or business method or a computer programme per se or Algorithms‖.

62 I.A. Nos.5768/2015 & 16011/2015 in CS(OS) No.764/2015, Delhi High Court, decided on 10 June, 2016, para 87.

63 I.A. 8772/2020 in CS(COMM) 295/2020, Delhi High Court, decided on 9 October, 2020.

64 An anti-suit injunction ―is a judicial order restraining one party from prosecuting a case in another court outside its jurisdiction‖. *Id.*, para 60 (v).

65 *Id.*, para 75.

Court directly negates the jurisdiction of this Court, and infringes the authority of this Court to exercise jurisdiction in accordance with the laws of this country. It is not open to any Court to pass an order, prohibiting a court, in another country, to exercise jurisdiction lawfully vested in it. Any such decision would amount to a negation of jurisdiction, which cannot be countenanced.[66] The Delhi High Court found it to be a fit case for the grant of ―ad interim injunction‖.

VI. CONCLUSION

Protection of SEPs is important to incentivize SEP holders. It ensures returns on their investment which they made in developing the standard related inventions. It is however important to note that SEP holders are in a dominant position and may indulge in anti-competitive practices. Patent hold up and formation of cartels of the SEPs holders are some practices which are likely to bring adverse impact on the users of SEPs and defeat the very purpose for which the SEPs are granted. The ultimate impact of these practices will come down to consumers.

It is noteworthy that most important objective of IPR is to promote science, literature and arts in the society. IPR protection whether in the form of patent or otherwise is not intended to promote monopoly to the detriments of the society. A fine balance in the patent laws is therefore*sine qua non* for the orderly development of the society. It is really good that SEP holders are required to give undertakings to SSOs/ SDOs at the time of developing standards that they will grant licences of their SEPs on FRAND terms to all the users. The criteria to determine FRAND is not very clear and open to different interpretations by SEP holders and users. That is why a number of cases have gone to courts in many jurisdictions. The courts in India have rightly pointed out that any anti-competitive practice adopted by the SEP

66 *Id.*, para 76.

holder may be dealt with by Competition Commission of India under the Competition Act, 2002.

Standard related inventions will grow in future with the advent of new technologies. The role of SSOs/ SDOs will be more crucial. It is however, important that there should be more transparency at the time of discussion of standards as well for determining FRAND terms. Some standard guidelines are required in this regard as courts in some jurisdictions are liberal in favour of SEP holders whereas they are liberal in favour of users in other jurisdictions. Once guidelines are formed by consensus for the determination of FRAND, the anti-competitive practices will be prevented more effectively and the problem of patent hold up and patents hold out will come to an end.

International Crimes Against Humanity: International Human Rights In Fight Against Covid-19

Dr. K. L. Bhatia [1]

Reminiscence:

A mighty creature is the germ,
Though smaller than the pachyderm.
His customary dwelling place,
Is deep within the human race.
His childish pride he often pleases
By giving people strange diseases.
Do you, my poppet, feel infirm?
You probably contain a germ.

--- Ogden Nash[2]

Prelude

Writings are on the wall while lettering about Corona virus (COVID-19) alleged to have emerged from invisible hands of invisible State which has an ulterior design to become only a world super power. This seems to be altogether a different war syndrome than World Wars I and II. This new syndrome of strange disease has engulfed the entire human race the world over and hence within the fold of international crime against humanity subject to being proven and done with an ulterior motive. The whole world populace suffers in health and purse; the entire human community has come to stand still position; the Nation States have become the victims of the unprecedented pandemic's consequential lockdown and quarantine bringing the fall of economic growth, infrastructure growth and regression around.

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[1] DAAD and Max-Planck Fellow and Alumni, Former Head and Dean Faculty of Law and Founder Director- The Law School, University of Jammu; Professor National Law University, Jodhpur

[2] Ogden Nash an American poet of eminence. Ogden Nash poems, Poemhunter.com- The World's Poetry Archive, publication date 2004.

The whole world is in the grip of Corona Virus alias allegedly called Chinese Corona Virus (CCV). It has brought invisible as well as unspeakable miseries to the human beings since alleged CCV happens to affect the human beings by penetrating the human body impalpably and unnoticeably. It has brought horrifying results of shattering experiences. It's impetus may prove to be worse than the *"Decline and Fall of Roman Empire"*[1] (Gibbon) that succumbed to barbarian invasions in large part due to gradual loss of civic virtue, falling prey of three Ws and overexpansion as well as military overspending; and, *"Rise and Fall of Third Reich"*[2] (William L. Shirer) –a wave of amnesia that has overtaken the humanity"[3] and seems, instead, the "beginning of a kind of willed forgetfulness of the horror"[4] of alleged CCV. The alleged CCV seems to be a war exponentially more horrific not merely in degree and quantity --- in death toll and geographic reach --- but also in consequences as it appears the new mode of mass murder. Should the alleged CCV be considered as genocidal? The answer to it is a matter of contention. Be that as it may, the answer shall always be the first rough draft of future history and shall survive as storyteller as well as magnum opus of 21st century.

International Human Rights in Fight against Noval Corona virus COVID- 19: Challenges Today and Diagnosis Tomorrow Progeny & Posterity:

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[1] Esward Gibbon, The History of the Decline and Fall of the Roman Empire, Vols. I-VI (1776-88), (Penguin Classics).

[2] William L. Shirer, The Rise and Fall of the Third Reich, A History of Nazi Germany, (One of the most important works of history of our time), With a New Introduction by Rosenbaum, Simon & Schuster, New York, 2011 Ed.

[3] *Id.* p. ix.

[4] *Ibid.*

In the backdrop of the above, it is apt to revisit the International Bill of Human Rights, namely, United Nations Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Additional Protocols, Vienna Declaration, which are the basis for the evolution of human rights and their promotion, observance, preservation and adherence so that humanity sustains posterity for ages. Those are, therefore, the most beautiful works of the literature of the world, , the cradle of humanity, and a law of life for blissful statecraft that shall be in the advancement of life, liberty, and human dignity.

While discussing the human rights scenario vis-à-vis CCV one may recall that ‗man is born free, but everywhere he is in chains'[5] --- quarantine and containment --- because the alleged State represses the physical freedom that is his birthright and does nothing to secure his civil freedom. Situationally, the alleged CCV has brought repression to the human civilized societies by the syndrome of invisible germ or insect in as much as the chemical and atomic weapons brought miseries to the human life during world wars. And, to mitigate, tone down, alleviate, ease and diminish the repeat or revival of such like syndrome in future, the member States of the United Nations solemnly pledged entrenched in the Preamble, Articles 1, 55, 56, 13 and 62: ―We the peoples of the United Nations, determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small have resolved to combine our efforts to accomplish these aims‖[6]. In order to have permanent peace and security, the purpose of the

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5 Jean-Jacques Rousseau, The Social Contract or Principles of Political Rights, 1895.

6 United Nations Charter, 1945; Brownlie & Goodwin-Gill, Basic Documents on Human Rights, Fourth Edition, Oxford, pp.2-12

United Nations Charter is to ‒achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all. The United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion. As such, all members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes.‖[7]

The apparent message of the UN Charter, the constitution of the United Nations Organisation, is the emphasis of the provisions on the importance of social justice and human rights as the foundational fundamentals for the stable international order to the development of standards concerning human rights, fundamental freedoms and basic rights. The philosophy applied to the problem of human rights is inherent in the aim of all political association to the conservation of the natural, inalienable and imprescriptible rights of man in pursuit of human happiness. People of the world all over are a free people claiming their rights as derived from the laws of nature and not as the gift of political will, namely, all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, dignity and the pursuit of happiness. Should such rich concept and perception of human rights be victim of any political whims and frenzy? Should men, women, children and posterity be a play thing in the hands of such mischievous design as of CCV? The future alone shall determine the accountability of Why and what of such questions!

[7] *Ibid.* ; A. H. Robertson and J. G. Merrills, Human Rights In The World An introduction to the study of the international protection of human rights, Fourth Edition, First Indian Reprint, 2005, pp. 1-76.

After the horrors of the Second World War, human rights found expression in the Universal Declaration of Human Rights, 1948, which was accepted, as it was, without a dissentient vote, by all Member States of the United Nations. UDHR is a clear expression of the concept of human rights which evolved from the political and philosophical thinking of the time. The significance of the Universal Declaration of Human Rights, 1948 is to strengthen, on the one hand, the aims and purposes of UN Charter, 1945, and, on the other hand, to establish goals for Member States to work positively towards the promotion and observance of Human Rights to make it the Magna Carta of all mankind. Universal Declaration of Human Rights is a common standard of achieving for all peoples and all nations, to the end that every individual and every organ of society shall strive to promote respect for these rights and freedoms and by progressive measures to secure their universal and effective recognition and observance, both among the peoples of Member States themselves on the genesis to live and let live at the touch stone of rule of law to serve the rule of life. Both UN Charter and UDHR are to follow unequivocally that ‒all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood‖[8]. The unambiguous message is that no Nation State shall take singularly or unilateral and/or collectively any action that may be declared or undeclared war like syndrome jeopardizing or paralyzing the life, liberty and dignity of human beings affecting the fraternity amongst Nation States/Member States. Should the naughty and mischievous act of CCV that has confounded and confused the whole mankind, be pardoned? The answer is inasmuch confused as a single page that may outweigh libraries!

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[8] Universal Declaration of Human Rights, 1948; Ian Brownile and Guy S. Goodwin-Gill, *op. cit., pp. 18-23;* A. H. Robertson and J. G. Merrills, *op. cit., pp. 27-30.*

It seems that the protection of human rights through international action is a revolutionary idea since it recognizes man as the subject of international law[9] superseding the traditional idea that held that the ‗so called rights of man not only do not but cannot enjoy any protection under international law, because that law is concerned solely with the relations between States and cannot confer rights on individuals'[10]. In this perspective, it appears that CCV still lives in traditional idea of international law and cunningly experimented the CCV to avoid future course of collective legal action at international level!

The influence of the Universal Declaration of Human Rights has been profound not only as a common standard of achievement for all peoples and all nations, but also as a statement of principles which all States should observe to live in synergy. International Covenant on Civil and Political Rights, 1966[11], International Covenant on Economic, Social, and Cultural Rights, 1966[12], Two Additional Protocols[13], and Vienna Declaration (World Conference on Human Rights), 1993[14] are directives to all civilized nation States to live in harmony, common brotherhood

[9] See Shigeru Oda, The Individual in International Law, in Max Sorensen, Manual of Public International Law, Macmillan, 1968, pp. 498-530; Ian Brownile, The Place of The Individual In International Law, Virginia Law Review, 1964, 435-462; Nagendra Singh, R. S. Pathak, Ramaa Prasad Dhokalia, International Law in Transition: Essays in Memory of Judge Nagendra Singh, Martinus Nijhoff Publishers, 1992; C. W. Jenks, The Common Law of Mankind, Stevens London, 1958, pp. 1-442.

[10] See Lauterpacht, H, International Law and Human Rights, Stevens London, 1950; Nkambo Mugerwa, Subjects of International Law, in Max Sorensen, *op. cit.*, pp. 262-310.

[11] See Ian Brownlie & Guy S. Goodwin-Gill, *op. cit.,* pp. 182-198; A. H. Robertson and J. G. Merrills, *op. cit.,* pp. 25-76.

[12] See Ian Brownlie & Guy S. Goodwin-Gill, *op. cit.* , pp. 172-181; A. H. Robertson and J. G. Merrills, *op. cit.,* pp. 25-76.

[13] See Ian Brownlie & Guy S. Goodwin-Gill, *op. cit.,* pp. 199-205.

[14] See A. H. Robertson and J. G. Merrills, *op. cit.,* pp. 13-15.

and synergetic relationship. These directives are obligations cast upon the member States as to not to take any action that may be war like syndrome by inventing invisible germs or secretive insects which may be more dangerous than chemical, atomic and biological weapons affecting secretively and enigmatically the human as well as humane survival, because CCV seems to be a riddle wrapped in mystery inside an enigma.

Both Covenants on Civil and Political Rights and Economic, Social and Cultural Rights begin in identical terms. They contain an understanding to respect, or to take steps to secure progressively, the substantive rights and provide that each Nation State party undertakes to respect and to ensure to all individuals within its jurisdiction the rights recognized in the Covenants. It imposes on Nation States an obligation of immediate implementation[15]. It inter alia imposes an obligation on Nation States not to take any pandemic steps that may be virulent disease endemic as well as injurious to humane survival. This unequivocally seems to be the realistic message of the Covenants to make available an effective remedy to anyone individually and/or collectively whose rights set out in the Covenants are violated in terms of imminent threat to the life of the nation States eventually affecting the survival of human life.

The Covenant on Civil and Political Rights sets out the rights which the Covenant is designed to protect[16]:

- The right to life
- Freedom from torture and inhuman treatment
- Freedom from slavery and forced labour

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15 See first paragraph of Article 2 of the International Covenant on Civil and Political Rights, 1966.

16 See Articles 2-5 of the ICCPR, 1966 and Part III comprising Articles 6-27 of the ICCPR, 1966.

- The right to liberty and security
- The right of detained persons to be treated with humanity
- Freedom from imprisonment for debt
- Freedom of movement and of choice of residence
- Freedom of aliens from arbitrary expulsion
- The right to a fair trial
- Protection against retroactivity of the criminal law
- The right to recognition as a person before the law
- The right to privacy
- Freedom of thought, conscience and religion
- Freedom of opinion and expression
- Prohbition of propoganda for war and of incitement to national, racial or religious hatred
- The right of peaceful assembly
- Freedom of association
- The right to marry and found a family
- The rights of the child
- Political rights
- Equality before the law
- The rights of minorities

Thus, it seems that all persons shall be treated humanely and with mutual respect and an *esprit de corps* which augur well for the posterity for ages to come for the inherent dignity of the human persons. Therefore, this appears to be a positive obligation going well beyond the mere prohibition of inhuman treatment. In the backdrop of this, the alleged CCV act apparently shall be conceded as departing and going away of positive obligation consequently with negative narrative resulting in inhuman treatment of affected peoples globally across the CCV boundaries. The time alone shall be the healing answer!

All human rights are universal, indivisible and interdependent and interrelated, in an ocean within a tear, is the inherent message of Economic, Social and Cultural Rights Covenant. The Economic, Social and Cultural Rights protected by the Covenant are as follows[17]:

- The right to work
- The right to just and favourable conditions of work including fair wages, equal pay for equal work and holidays with pay
- The right to form and joint rade unions, including the right to strike
- The right to social security
- Protection of the family, including special assistance for mothers and children
- The right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions
- The right to the highest attainable standrad of physical and mental health
- The right to education, primary education being compulsory and free for all, and secondary and higher education generally accessible to all
- The right to participate in cultural life and enjoy the benefits of scientific progress.

The present syndrome created by the alleged CCV indisputably, indubitably, undeniably, incontrovertibly, irrefutably, and without a straw of doubt is palpable about the

[17] Part II comprising Articles 2-5 and Part III comprising Articles 6-15 of ICESCR, 1966.

denial of all the above delineated economic, social and cultural rights of all categories of peoples the world over and particularly the plight of inter-state, intra-state and intra-country migrant workers who have been the victims of forced loss of home and hearth and in search of resettlement.

The Vienna World Conference on Human Rights, 1993[18] has unequivocally and explicitly reaffirmed ‗the solemn commitment of all sovereign Nation States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law'. This declaration is not a mere political as well as lip services philosophy. This declaration is endowed with integrated humane approach to the cause of humanity and her sustenance so that humans flourish. Therefore, the Vienna Declaration undoubtedly and indisputably has a great deal to say about the need for development and decidedly as well as unequivocally stated that ‗Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. The international community should support the strengthening and promoting of democracy, development and respect for human rights in the entire world'[19]. Does the action of alleged CCV degenerate human flourishing and sustenance? Why and how alleged CCV shall be held to be accountable to world community for the international crimes against humanity?

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18 See the Vienna Declaration and Programme of Action, 25 June 1993

19 See E. Kamenka and A. E-S. Tay (eds) for a more detailed account of the liberal democratic tradition, Human Rights, London, 1978, Chapters 1 & 2; J. J. Shestack, ‗The Hurisprudence of Human Rights', in T. Meron (ed.), Human Rights and International Relations, Cambridge, 1986, Chapter 2.

Does the alleged CCV act give rise to the notion or perception of undeclared war or civil strife and the application of the rules of humanitarian law? Especially in the present context international conflicts can and do take place without the declaration of war between two or more Nation States and the alleged CCV is in that direction when its mighty creature is the secretive germ that is deep within the human race. Does alleged CCV act speak of regressive movement of the society contra to ‗there has hitherto been progressive movement of the societies from status to contract'? An incisive and insightful look at Article 2 of the Geneva Convention of 1949 makes it clear that all the provisions of the Geneva Convention of 1949 apply to all cases of declared war or of any other armed conflict, namely, undeclared war[20]. Thus, situations arouse of alleged CCV lead to strong feeling of disintegration and can lead to appalling atrocities; such situations may lead to animosity affecting peace, amity and amiable relations amongst Nation States. Consequently, the result of such undeclared war may lead to the conclusion that the conflict arouse of CCV is in some respects international, even though the armed forces of two or more countries are not directly involved *hors de combat.* Therefore, persons affected by undeclared war arouse of CCV have to be treated, as per the language of Article 3 of the four Geneva Conventions of 1949, humanely, without any distinction founded on nationality, race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. Does the atrocities arouse of the alleged CCV violence to life and person? Does it outrage upon personal dignity in particular and humiliating and degrading treatment? Does CCV act another form of colonialism? Therefore, it is pertinent to mention that the Geneva

[20] See ICRC, Basic Rules of the Geneva Conventions and Their Additional Protocols, Geneva, 1983; A. H. Robertson and J. G. Merrills, *op. cit.*, pp. 302-324.

Conventions of 1949 have marked an important advance in international humanitarian law that has been described as an audacious provision which aims at applying international humanitarian law to international crimes against humanity. In the backdrop of this, this seems to be a convenient narrative which is the heart of the matter: the relationship between human rights and humanitarian law. M. Jean Pictet, an international authority on international human rights and humanitarian law, has vividly and neatly explained that has been acknowledged an authoritative view globally: ‗Humanitarian law comprises two branches: the law of the war and the law human rights'[21]. It, therefore, discerns that humanitarian law is one branch of the law of human rights, and the human rights provide the basis and underlying rationale for humanitarian law. Thus, the International Bill of Human Rights is all based on the principle that human rights are so fundamental that they must be respected at all times, namely, peace times and in periods of conflict --- declared war and/or undeclared war.

Many scholars have been arguing and presenting a case against the present political dispensation of the People's Republic of China in light of the outbreak of the coronavirus pandemic. The civil liability of the Chinese government is being discussed and debated in the intellectual circles with lawsuits being filed in USA and Italy seeking damages. There is also the prospect of dragging China to the International Court of Justice and seek reparations.

[21] See Jean Pictet, Development and Principles of International Humanitarian Law, Henery Dunant Institute, Geneva, 1985. He defined humanitarian law within the prism of humane law: ‗Humane law comprises the totality of the international legal provisions which ensure for the human person respect and fulfillment'. See also Joana Kyriakakis, ‗Development in International Criminal Law and the Case of business involvement in International Crimes', ICRC, International Review of the Red Cross, Vol. 94 Number 887, Autumn 2012; Katharine Fortin, ‗Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948-1968', in ICRC International Review of the Red Cross, Humanitarian Debate: Law, Policy, Action, Vol. 94 Number 888 Winter 2012.

But is the question just about monetary compensation? Surely, the death of over 1,19,000 people can't be just brought to justice by paying compensation of billions of dollars by China. If the act done by the Chinese dispensation falls within the contours of a criminal act under the International Criminal Law, then the all the culprits in the Chinese regime need to face trial or at least efforts should be made by nation-states in that direction.

The cardinal principle of any criminal law is that an act must be made criminal before its commission. International criminal law recognises certain acts by individuals that would be considered ‗international crime'. International crime does not mean crime between nationals of two or more different, independent and sovereign citizens. It means a crime which is proscribed by international legal order, of which international criminal law is an important component. International legal order recognises only certain acts, which will be considered as an international crime, and consequently, it would entail individual criminal responsibility. The current framework of the International Criminal Law flows from the Rome Statute under which the International Criminal Court (ICC) has been set up. The Rome Statute identifies 4 crimes under Article 5 within the jurisdiction of the ICC (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression.[22] The Chinese political dispensation, headed by its President, should be held criminally liable for committing international crimes against humanity and the crime of aggression.

[22] Rome Statute of the International Criminal Court is the treaty that established International Criminal Court. It was adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and it entered into force on 1 July 2002. As of November 2019, 123 Nation-States are party to the Rome Statute. The Rome Statute empowers the ICC to prosecute individual Nation-State(s) and/or individuals responsible for the most serious crimes under international law, such as genocide, war crimes --- declared or undeclared --- and crimes against humanity.

The Crime against humanity which is defined in Article 7 of the Rome Statute as widespread or systematic attack with the connivance of governmental apparatus against the civilian population is a violation of the current international criminal law under which the Chinese regime can be held to be culpable. The widespread nature of the attack of the novel coronavirus is beyond doubt as it has spread to about 209 countries and territories and has infected more than 9 million people. The systematic attack of the virus can be understood from the actions of the Chinese regime in handling the COVID-19 virus. Chinese political architecture is highly centralised. It is infamous for hiding the truth and does not have an independent free press. The criminality of the Chinese regime emanates from the fact that the administration downplayed the catastrophic nature of the COVID-19 till February 2020 and also maliciously misguided and misinformed the WHO about the spread of the virus from human to human until January 2020.

As a result of which, WHO issued its advisory to the international community at a very belated stage and induced the damage to be done. The Chinese political dispensation, under President Xi, allegedly knew the nature and lethality of the virus and yet they let lose it on the international community. When a whistleblower tried to communicate it to Chinese people and the international community about the novel coronavirus, he was silenced and he perished in mysterious circumstances while treating the patients of virus. The act of silencing the whistleblower was aiding and abetting the crime and contribution in the commission of the crime.

Article 8 of the Rome Statute provides for definition the crime of aggression as planning by a person in control of affairs of a country which would constitute a violation of the UN Charter. An international crime of aggression is nothing but a violation of

Article 2(4) of the UN Charter which proscribes the use of force by States in their in international relations. Use of force for the purpose of the international crime of aggression is the use of armed force as resolved by general Assembly Resolution 3314 which was adopted by Review Conference of Rome Statute on June 11, 2010. The question is how a spread of the deadly virus by the name of COVID-19 is aggression? In other words, could a virus be considered as use of armed force? Use of armed force would mean the use of violence those results in the death of humans and/or loss of property.

The number of death that COVID-19 has caused, over a period of three months, has crossed half a million. The means and methods of warfare or belligerency in the modern day is not restricted to merely mechanised weapons, it has transformed to war from space and war from biological weapons. COVID-19 certainly qualifies to be a biological weapon. The means and methods of warfare are governed by the Additional Protocol 1 of 1977 of the Geneva Conventions of 1949 and it renders the use of biological weapons as illegal. The unleashing of this virus could have been intentional or criminal neglect, it could also have been with the knowledge of the highest political authority in China. There is little doubt that the use of coronavirus is certainly use of force, and therefore, aggression.

As China is not a party to the Rome Statute, the only way in which Chinese regime responsible for this crime can be brought to the ICC is when it voluntarily submits to the jurisdiction of the ICC or the matter is referred to the ICC by the United Nations Security Council by invoking its power under Art.13 of the Rome Statute. The People‘s Republic of China being a global power, submitting itself to the ICC is an absolute impossibility and with it being a permanent member of the Security Council the matter

being referred to the ICC is also ruled out due to the veto power it enjoys.[23] In that case, the resort could be taken to United Nations General Assembly Resolution 377A, the ‒Uniting for Peace‖ resolution which states that in case the UN Security Council due to lack of unanimity amongst its five members is not able to act to maintain international peace and security, the General Assembly may issue necessary recommendations.

The Chinese regime must be held accountable and the rule of law should prevail, so as to affirm faith of the nation-states in the rule-based international world order. It is about time that the international legal order in general and international criminal order, in particular, should assert itself to bring criminals of the Chinese regime to justice.

Epilogue --- Unified International Action against the Nation-Person to the restitution of Synergetic International Relations of Peace and Amity:

In the backdrop of the above, it certainly emanates that the International Charters of Human Rights, born out of two despotic, tyrannical, dictatorial, high-handed, repressive and oppressive World Wars, is an authoritative gospel of human rights. This gospel sets forth the rights which are politically and legally universal; they are of international obligations. The conception of these expressions is that every person has legitimate claim upon his society for such enlisted or enumerated or defined rights and entitlements. Securing and promoting these rights is assuring not only the respect for these rights but for the development of stable political systems in the societies that shall be a commitment to

[23] Chinese dispensation did not become party to The Rome Statute because it may have had in its kitty some ulterior design for the future to play with the humane law like CCV and escape from the international liability of international crime against humanity as *Et to Brut*, which was, and is, a question to a good friend‘s loyalty.

constitutional culture and constitutionalism. The Charter of the United Nations, 1945 makes the policy statement affirming the faith in the observation, preservation, advancement and promotion of human rights. It expresses principal articulation of human rights which has been prescribed in details in the Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, International Covenant on Economic, Social and Cultural Rights, 1966, Two Additional Protocols, and Vienna Declaration, 1993.

Be that as it may, the Covid19 emanating from the alleged CCV has outraged the conscience of mankind. The alleged CCV is unquestionably an act of undeclared war born out of the autocratic and despotic mind-set. This outrageous, disgraceful, contemptible, and despicable act is an act of man-made disaster, which may have unique impact on human psychology as well as sociology. The man-made disaster has been combated by a unique disaster management approach by following the diagnostic approach of lockdown, quarantine and self-confinement in the absence of any pathological medicine.

What to do against this man-made disaster? Answer is inasmuch difficult as the question itself. However, a multipronged approach may have to be taken simultaneously universally. First, let there be some concrete action against the alleged CCV at the United Nations Organisation. The UNO may take a suo moto initiative by condemning CCV action or some other stringent measures that may bring a ray of hope to smile, smile and keep on smiling till it makes the entire global community to smile. Second, a practical approach should be at United Nations Security Council level resolving the withdrawal of veto power that may be a warning signal to other members of UNSC. Third, the International Commission of Human Rights may have to take a

suo moto action against the alleged Perpetrator State, which may develop a progressive step in the directions of confidence building of the deprived victims of this uninvited disastrous calamity of pandemic of international strife. Fourth, the offence of this pandemic is a heinous international crime against humanity, and as such *a proprio vigore* the doors of International Criminal Tribunal may have to be unlocked for appropriate remedy. Fifth, the jurisdiction of International Court of Justice at Hague may also be another forum appertain to *affairs de CCV* to invoke human right to fair trial to meet the ends of justice by fair means.[24] Man is born free but everywhere he is in chains.[25] Why? Man is born Brutus, he lives like a Brutus and behaves like a Brutus making the angels to weep. It may be recalled:

> ―But man,proud man,
> Drest in a little brief authority,
> Most ignorant of what he‘s most assur‘d,
> His glassy essence, like an angry ape,
> Plays such fantastic tricks before high heaven
> As to make the angels weep; who with our apleens,
> Would all themselves laugh mortals.‖

This makes me to say on Some Reflections on Human Rights between history and politics by Michael Ignatieff: ―*Human rights language exists to remind us that there are some abuses that are genuinely intolerable, and some excuses for these abuses that are genuinely unbearable*‖.

[24] See David Weissbrodt and Rudiger Wolfrum (eds), The Right to a Fair Trial, Springer, Heidelberg; K. L. Bhatia, , ‗Fair Trial in Criminal Proceedings in India‘, in David Weissbrodt and Ruduger Wolfrum, *op. cit.,* pp. 372-401: Fairness of justice in theory as well as practice is the core of fair trial in criminal justice process inasmuch as it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong and it should respond to the society‘s cry for justice against the criminal‖.

[25] *Op. cit.*

The genesis is Spiritual sensitivity and moral certitude to promoting, preserving, conserving, developing and sustaining human rights on the touchstone: ―When there is a goose on the trial there ought not to be a fox on the jury.‖ To achieve it there ought to be holistic approach with socio-legal-moral maturity with humane creative intellectual activism, namely, ―Society is the humane home, Law its discipline and Justice its perennial pursuit‖.[26]

Sixth, humanistiques efforts are desirable to create International Tribunals on the lines of Nuremberg Trial and Tokoyo Trial to have befitting approach to the preservance of majestic human rights against the unprecedent undeclared war against humanity.

If the above is ever done, the expected results shall not be mere dream, but shall be regaining of the concept of liberty as freedom to do anything which is not harmful to others. It shall be like revisiting poet Wordsworth to rewrite the following lines that shall re-strengthen the faith in humane values in pursuit of humane law to achieving the ends of human happiness :

Bliss was it in that dawn to be alive,
But to be young were very heaven.

In an epilogue, it may be submitted that there shall arouse the reincarnation of a new *Kamayani*, which shall reinvogorate new world order which will determine the future of human rights and human values to be humane.

[26] Justice V. R. Krishna Iyer: The Juristic Manifesto of Human Person, In Law & Justice, Soli Sorabjee, 2003.

The Approach of The Supreme Court In Confirming Sustainable Development As Fundamental Right – An Analysis

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Abstract

India attempts to internalize the environmental laws into the domestic system either by amending the Constitution or through legislative enactments. In spite of that there is a persisting gap between the evolving global laws and the existing laws. Global laws are far head of the national laws. In this context this research work attempts to analyze the role of the Supreme Court in confirming the rights as fundamental which are not conferred by the Constitution or through various legislative enactments.

(**Key words**: Sustainable development, conferred fundamental rights, confirmed fundamental rights, innovative procedural technique and Law of the land)

Introduction

The concept _Sustainable development‘ owes its genesis to the Declaration of the Stockholm Conference in 1972.[2] It concentrates on the natural system on which all life depends and the rights of the future generation. In 1987, the UN Commission on Environment and Development popularly called as Brundtland Commission, headed by *Gro Harlem Brundtland* of Norway

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2 Principle 1 of the Stockholm Declaration states that: –a solemn responsibility to protect and improve the environment for present and future generations.‘ This Principle is come to be known as _Sustainable development.‖

published a report entitled ‗*Our Common Future'*. It provided several guidelines for improving the development not to conflict with healthy environment. It defined the word ‗Sustainable development' as *–development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs*.‖ It is a balancing concept between ecology and development and has been accepted as customary international law.[1] In 1992, UN Conference on Environment and Development (UNCED) was held in Rio de Janerio popularly called as ‗*Earth Summit'* charting out the blue print for the survival of planet.[2]It becomes a guiding principle for the states to

[1] It is interesting to note that India, as a developing country made attempts to integrate environmental factors into planning even during the formulation of its Fourth Plan (1969-74), three year ahead of the United Nations Conference on Human Environment at Stockholm. The Fourth plan document says that –[P]lanning for harmonious development recognizes the unity of nature and man. Such planning is possible only on the basis of a comprehensive appraisal of environmental issues. There are instances in which timely, specialized advice on environmental aspects could have helped in project design and in averting subsequent adverse effect on the environment leading to loss of invested resources. It is necessary, therefore, to introduce the environmental aspects into our planning and development‖ For further details see the Fourth Plan Document. Subsequently, the Government of India constituted the National Committee on Environment Planning and Co-ordination (NCEPC) to appraise the development projects, human settlements, planning, and survey of natural eco-systems like wet lands and spread of environmental awareness.

[2] The Principle 1 of the UN Conference on Environment and Development (UNCED), 1992 states that ―Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.‖
Principle 2 of the conference requires that –States to act on adverse effects on the environment beyond their own borders. It links development and ecology. It also stressed that the social and economic factors like poverty, excessive consumption had an impact on environment.‖

Principle 3 of the conference requires that –the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.‖

Principle 4 stressed that –in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.‖

maintain the balance between development and environmental protection.

In 1997, UNESCO Declaration on the ‗Responsibilities of the Present Generation towards Future Generations' ensures that the needs and interests of present and future generations are fully safeguarded. It reaffirmed the principle of inter-generational equity. It introduced two Articles specifically related to the protection of the environment and the preservation of life on earth.[3] In 2002, the UN Conference on Sustainable Development held at Johannesburg popularly known as ‗World Summit' resulted in the release of Agenda 21. It reiterated the international community's collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development, namely economic and social development as well as environmental protection at all levels- local, regional and international. It also upheld the importance of human dignity and the fact that human dignity implies the right to a healthy environment.[4] It reaffirmed the world's commitment to sustainable

Principle 5 requires ―all states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.‖

[3] Article 5 refers to the idea that present generations ‗should strive for sustainable development and preserve living conditions' in order to ensure that future generations have the necessary natural resources for sustaining human life and its development.In this Article 5 includes Section 1 and 3 on Declaration on the Responsibilities of the Present Generations towards Future Generations, adopted on 12th November, 1997 by the General Conference of UNESCO, 29th Session, Article 1, available at http://www.unesco.org/ccp/uk/declarations/generations.pdf. (Lastly visited on 24/10/2013)

[4] Johannesburg Declaration on Sustainable Development, para.2, adopted at the 17th Plenary Meeting of the World Summit on Sustainable Development, 4th September, 2002, available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm. *(*Lastly retrieved on 24/9/2013)

development and expanded the scope of sustainable development to encompass issues of social justice as key principles of sustainable development, expressing the commitment of world leaders _to build a humane, equitable and caring global society, cognizant of the need for human dignity for all.'[5]

The decennial global environment summits put pressure on nation states to update their laws. These developments ensure that a developing country like India updates her laws. The Indian Government is a pioneer among the developing nations to incorporate the resolutions and declarations of the international instruments in the domestic law. Based on the decision the Parliament made an amendment in the Constitution and inserted Article 48A which provides that the –*State shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country*.‖Unfortunately the environmental laws in India were developed in a piecemeal manner. The Central and State administrative machineries were constituted to implement the spirit of environmental laws.[6] But they were unableto implement the environmental laws effectively due to various reasons. Therefore the burden of implementing these laws fell on the judiciary which had to conserve resources and alsoprevent pollution.

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5 *ibid.*

6 Tackling and preventing environmental pollution is a great task, which can be done only when there is a co-ordination between the different agencies of the government. In a number of cases, the Court pulled up the enforcement machineries for its ineffectiveness and the Government for not giving enough power to these bodies. In *Tharun Bharat Singh v. Union of India*, AIR 1992 SC514, the Court charged with the delegation of implementing the laws of the land the executive is yet failing to do its duty by law and by people, when faced with the might of money, respect for law is dissolved into respect for mammon. See: *M.C. Mehta v. Union of India*, AIR 1988 SC 1037 and also in M.C. Mehta v. Union of India, (1987) 4 SCC 463.

Conferred fundamental rights:

_Conferred Fundamental Rights‘ refers to the rights which are bestowed or granted by the Constitution to the people as fundamental. The _Confirmed Fundamental Rights‘ denote _validity‘ or _support‘ the conferred rights of the Constitution by passing legislative enactments being enforced by the judiciary. In enforcing such rights, the Court establishes a long standing procedure. For instance under Article 13(2) of the Constitution prescribes that:

> *—the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."* .

Further Article 32 of the Constitution provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part that is guaranteed against the state. However, under Article 226, the writ jurisdiction of the High Court can be invoked not only for the enforcement of fundamental rights conferred by the Constitution, but also for any other purpose against any person or authority. The Directive Principles of State Policy of the Constitution *endeavour* the State to secure the principles. Based on that the State enacts the laws that which confer such which makes them enforceable by Court. Such rights connotes the conferred rights confirmed by the Court based on legislation. Hence as per the Constitution, the scope of Article 226 is wider in confirming the conferred rights than Article 32.

Protection and Improvement of the environment:

The Stockholm Conference had a wider ramification in India. It led to Constitutional sanction being given to environmental concerns, through the 42nd Amendment Act, 1976

which incorporates Article 48A into the Directive Principles of State Policy and Article 51-A (g) in the Fundamental Duties of our Constitution. Further the subject related to environment was included in the concurrent list of the seventh schedule of the Constitution. According to Article 48A of the Directive Principles of State Policy, the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. It imposes responsibility on the state to take efforts in conferring this right through law. It can be processed through legislations only.

List III (Concurrent List)

Entries	Subjects
17A	Forests
17 B	Protection of wild animals and birds
20 A	Population Control and Family Planning

To protect and improve the environment and safeguard the forests and wildlife, the Parliament enacted the following legislations like Wild Life Protection Act, 1972, Water (Prevention and Control) Act, 1974, Forest Conservation Act, 1980, Air (Prevention and Control) Act, 1981 and Environmental Protection Act, 1986 and other regulations.[7] Environmental

[7] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973 is incorporated in the Wild Life (Protection) Act, 1972, the Import/Export Policy of Government of India and the Customs Act, 1962 through the process of amendment. Montreal Protocol on Substances that deplete the Ozone layer (to the Vienna Convention for the Protection of the Ozone Layer), 1987 was ratified by the government of India and notified in the gazette of India on 2000 called Ozone Depleting Substances (Regulation and Control) Rules, 2000 and subsequently incorporated in the Environmental Protection Act, 1986. Similarly India ratified the Brussels Convention on Trans-boundary Movement of Hazardous Wastes, 1989 in 1992 and enacted Hazardous Wastes Management Rules Act, 1989.

machineries were created by these legislations to protect and prevent environmental pollution. The Central and State level machineries are the administrative agencies vested with wide powers to implement the above said laws relating to prevention of environmental pollution. In 1992, 73rd and 74th Constitutional Amendments dealing with Panchayat Raj and Municipal Administration were introduced. These local bodies are vested with powers to administer items related to environment as found in the eleventh and twelfth schedules of the Constitution respectively. From the above analysis it is clear that the rights related to the protection and improvement of environment is conferred rights. Such rights are safeguarded by the judiciary as confirmed rights by interpreting the above said laws.

Trend Analysis:

In 1950‘s the approach of the judiciary stopped with applying the laws. It consistently adopted self-restraint approach. It is relevant to point out the work of *S.P.Sathe* regarding the style of functioning of the Supreme Court during 1950‘s and 1960‘s. He observed that during the period the judiciary did not question the legislative enactments and the Courts were projected as conservative and status quoist branch of the State.[8] From 1966 to 1970 the judiciary started taking coercive measures to establish a just economic, political and moral order in the interest of the country. An inefficient legislature and ineffective executive helped to transform the judiciary from an instrument of the state to an institution of governance through its judicial activism. Between 1971 and 1976, the edifice built by the judiciary over the last two

[8] S.P.Sathe, Judicial Activism in India, (Oxford: Oxford University Press, 2002)

decades was dismantled through the constitutional amendments passed in 1973 after *Kesavananda Bharathi* case.[9]

It was a testing time for the Indian democracy, As Granville Austin rightly observed that, the judiciary proved its worth and withstood the onslaught of legislative as well as executive system‘s dominance over the regulatory power of the judiciary. In the annals of the young democracy, this period proved to be crisis ridden as internal emergency was proclaimed under the heading ‗internal disturbance‘. Rights and liberties of people in India were in limbo. Excesses of authoritarian Government resulted in total defeat of Indira Gandhi and her party after the emergency. The post-emergency era witnessed a change in the approach of the Supreme Court. It began to interpret and bring out implicit fundamental rights, broadly clubbed under second and third generation human rights.

Events at the international level also had a bearing on the changing attitude of the Supreme Court. The decennial international environmental summits from 1972 onwards and other such periodical summits strengthened the Supreme Court of India. The apexCourt often began to derive its sources directly from international conventions and interpreted and construed the provisions of law. In this background, it is relevant to understand the constitutional provisions that facilitate the Supreme Court to become the most powerful court in the world and its metamorphosis from Supreme Court of India to the Supreme Court of Indians. In the Indian Constitution, Articles 53(1),[10] 253,[11] 73,[12] 51(c),[13] and Entry 14 of the Union List[14] are important

[9] AIR 1973 SC 1461.

[10] Article 53(1) says that ―the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinates to him in accordance with this Constitution.‖

[11] Article 253 says ―Notwithstanding anything in the forgoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.‖

provisions in this regard. Article 53 makes the executive power of the Union shall to vested in the President. Article 73 is about the executive power of the Union in the matters where Parliament has power to make laws. Article 253 read with entry 14 of the Union List gives Parliament the power to make laws for the implementation of any treaty convention. Article 51(c) enjoins all organs of the State including the judiciary to direct its actions towards promoting international peace and security and to that end, foster respect for international law and India‘s treaty obligations. Thus the State‘s attitude towards both customary and conventional international law is clearly articulated through this specific constitutional provision and in several cases judiciary has emphasized the obligation cast by this provision to construe domestic law in accordance with international norms and treaty obligations. According to Justice V.R. Krishna Iyer:

> *―Article 51(c) of the Constitution obligates the States to foster respect for international law and treaty obligation in the dealings of organized peoples with one another. Even so until the municipal law is charged to accommodate the government, what binds the court is the international law. International law*

[12] Article 73 says that ―subject to the provisions of this Constitution, the executive power of the Union shall extend-

(a) To the matter with respect to which Parliament has power to make laws; and

(b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty and agreement;
Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State also power to make laws.‖

[13] Article 51(c) says ―foster respect for international law and treaty obligations in the dealings of organized peoples with one another.‖

[14] Entry 14 of Union List of the Seventh Schedule of the Constitution says that ―entering into treaties and agreements with foreign countries and implementing of treaties agreements and conventions with foreign countries.‖

> *must go through the process of transformation into municipal law before the international treaty can become an internal law.*‖

India adopted the common law legacy of transformation of international law into national legislation as adopted and followed by the English Courts as theory of dualism. In this theory the international norms need to be specifically adopted or transformed through national legislation, in order to become part of the law of the land. This theory of transformed legislation considerably influenced the framers of the Indian Constitution. However this view gradually started to lose ground and Indian Courts began to increasingly accept the international law even in the absence of specific legislation, so long as it was not inconsistent with the domestic law and rely on it as an integral aid in decision making. It is by now a well-established procedure where the international norms are taken by the domestic courts to aid its decision making process.

According to Justice Chinnappa Reddy:

―*the comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with the Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. Comity of nations or not, municipal law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law, but not if conflicts with national law. National Courts being organs of the national State and not organs of international law must per force apply national law if*

international law conflicts with it. But the Courts are under obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict is inevitable the latter must yield.‖[15]

So the statute is not supposed to contradict with the International law. In case of ambiguity, Courts would always interpret the domestic law as to harmonious with International law and apply them on the basis of harmonious construction.

From 1980, Public Interest Litigation (PIL) also brought in more revolutionary changes in the judicial process. The Court relaxed its rule of standing and simplified the procedures, where even a post card sent to the court highlighting human rights violations could be converted into a petition as a means of asserting the Court's relevance in the human rights arena. During this period the international law was used as a tool of interpretation, but after the enactment of Protection of Human Rights Act in 1993, the Supreme Court has heralded a new trend in the use of international law as a source of law by itself. From then onwards, the jurisdiction of the Supreme Court is being invoked under Article 32(1) for confirming the fundamental rights by interpreting Article 21 of the Constitution under human rights,[16] irrespective of the fact whether such rights are conferred by Part III of the Constitution and enforceable under Article 32(1).[17] Article 32(1) could be invoked for the ‒*remedies for enforcement of rights conferred by this part*‖, but it is invoked for

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15 The Court quoted with approval the statement of law in *Xavier v. Canara Bank Limited*, 1969 KLJ 933.

16 Article 21 says that, ‒No person shall be deprived of his life or personal liberty except according to procedure established by law.

17 Article 32 (1) says that‒the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part guaranteed.‖

doing *complete justice* under Article 142(1) of the Constitution.[18] The Indian judicial system is structured on the common law tradition. Accordingly, in the process of adjudication, the Court can derive sources from the Constitution or from the statutes or from judicial precedents or even from customs. Such an approach is considered as the *wednesbury's approach*. It is pertinent to note that the Indian Constitution empowers the Supreme Court to render complete justice under Article 142(1). In furtherance of this task, the Court, many a times deliberately drifted far away from the *wednesbury's* approach to invoke various international conventions, treaties, declarations, reports etc. At times, the judgements of foreign courts have also been quoted in its judgement and the Court independently confirmed the rights unilaterally under Article 32. The changing attitude of the Court initially extends from Civil and Political Rights then on Economic, Social and Cultural Rights, finally on the principle of Sustainable Development and declares such rights as confirmed rights under Article 21 without any source at the domestic level.

New techniques:

In environmental cases, the Court often directs the concerned public officials to furnish facts related to the case by way of affidavits. Sometimes for speedy and impartial assessment of the fact the Court appoints special commission to gather facts and data. The power to appoint commission is an inherent power of the Supreme Court under Article 32 of the Constitution. In Dehradun Quarrying case[19], the Oleum Gas Leak Case[20], the

[18] Article 142(1) says that,‖the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may ne prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may be order prescribe.‖

[19] M.C. Mehta *v*. Union of India, AIR 1987 SC 1026.

Ganga Water Pollution case[21], the Forest Conservation case[22]to mention a few, the Court appointed various expert committees to collect facts and to suggest measures to reduce environmental pollution. The Court also frequently relies on the National Environmental Engineering Research Institute, Nagpur (NEERI) and directs it to inspect the affected locality and submit its field report. The Court also adopts the other methods to collect and present facts related to environmental cases. Instead of filing pleadings in the Court, industries are asked to file them in the Pollution Control Boards, *amicus curiae* are appointed to pursue, analysis and collate the facts related to the case; commissions are appointed to inspect the actual situation; committee of experts are appointed to probe scientific questions and advice the Court, and resort to a judicial notice of the _facts' to ease the evidentiary burden of the petitioner. These innovative methods of collecting facts and allowing them to be presented before the Courts as admissible evidences by persons and institutions who are not parties to the cases are identical to the _*Briesdon Brief*' method adopted in western countries.

Occasionally, the Court has even created its own crude and administrative machinery to remove a public hardship. Prof.Baxi described this type of power of the Court as _*Creeping Jurisdiction*'.[23]Explaining the concept, _Creeping Jurisdiction' U.Baxi and Shyam and Armin Rosencranz cited the*Dehradun Quarrying case* where, –the Supreme Court considered, balanced

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20 M.C. Mehta *v*. Shriram Fertilizers Corporation, AIR 1987 SC 965.

21 M.C. Mehta *v*. Union of India, AIR 1988 SC 1037.

22 T.N. GodavarmanThirumulpad*v*. Union of India, JT 2005, 8, SC p.588.

23 U.Baxi, –Taking Suffering Seriously: Social Action Litigation in the Supreme Court,‖ 29, The Review (International Commission of Jurists), 37, 42 (December, 1982)

and resolved competing policies… in directing to close a number of limestone quarries… in rendering this judgement the Court reviewed the highly technical reports of various geological experts and gave varying weight to the expert opinions.‖ The Court adopted this technique in *Ganga Water Pollution case*, *BandhuMuktiMorcha case*[24] and other subsequent cases wherever necessary in order to protect the environment. In its endeavour to conserve the environment in general and forest in particular, the apex Court is more activistic in its approach and innovated new methods and techniques which were unknown to the traditional procedures and were not in consonance with the principle of separation of powers. This activist approach is clearly found in *Rural Litigation and Entitlement Kendra*[25], the earliest case and *T.N. GodavarmanTrimulkpad case*, the latest leading case dealing with conservation of forest.[26]

Confirming as 'Law of the Land'

The global awareness of environment and Right to development including ‗Sustainable Development' gained momentum from post-Stockholm Declaration, 1972. Various environmental laws came into being only after that. Up to 1993, the Supreme Court did not have an occasion to apply Sustainable development concept and its off-shoots in India. The United Nations Conference on Environment and Development, 1992 (UNCED) was held in Rio de Janerio, construed the terms ‗Sustainable development' ‗Right to Development'. According to the declaration ―*the human beings are at the centre of concerns*

[24] BandhuaMukthiMorchav.Union of India, (1997)10 SCC 549.

[25] Rural Litigation and Entitlement Kendra *v.* State of U.P. AIR 1988 SC 2187.

[26] See *Supra*, p.9.

for sustainable development. They are entitled to a healthy and productive life in harmony with nature.‖

After 1992, the Supreme Court considered the _Sustainable Development' principle as a balancing concept between ecology and development and accepted it as a customary international law, though its salient features are yet to be finalized by the international law jurists. So without waiting, the Court scanned the Brundtland documents to cull out all the salient principles or off-shoots emanating from the mother of all concepts – _Sustainable development' They are _precautionary principles', _polluter pays principle', _public trust doctrine' etc as confirmed rights. Commenting on this aspect, Cardozo says, *–no doubt the limit of the judge is narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proposition that comes with years of habitude in the practice of an act … the law which is the resulting product is not found but made. The process being legislative demands the legislative wisdom.*‖[27]

A strong Indian judiciary started emerging parallel to the emergence of international laws on environment at the global level. The Supreme Court very wisely inducted those evolving hazy and fresh international norms and doctrines into the Indian setting. They became well-entrenched in Indian judiciary through the Supreme Court's interpretation of Article 21. From this Article, the Court has discovered various fundamental rights. One set of fundamental rights are related to human rights. The other set

[27] Benjamin N. Cardozo, The Nature of the Judicial Process, (Delhi: Universal Law Publishing Co., 2002), pp103-104.

of fundamental rights are related to environment. In the environmental rights _Sustainable development' and its off-shoots are confirmed by the court as fundamental human rights and law of the land in India. Such cases are highlighted in this research work for the purpose of understanding the approach of the Supreme Court of India in confirming the rights without any other source of law.

In *N.D. Dayal v. Union of India*,[28] the Supreme Court confirmed that –the right to development cannot be treated as a mere right to economic betterment or cannot be limited to as misnomer. The right to development encompasses much more than economic well-being and includes within its definition the *guarantee of the fundamental human rights* … the adherence of sustainable development principles is a sine quo non for the maintenance of symbiotic balance between the right to environment and development. *Rights to environment are a fundamental right* on the other hand right to development is also one. Here the right to _sustainable development' cannot be singled out. Therefore the *concept of _sustainable development is to be treated as integral part of _life' under Article 21*.‖

In *A.P. Pollution Control Board (II) v. Prof. M.V. Nayudu (Retd*),[29] the Court confirmed that –need of healthy environment as part of *fundamental right to life* embodied in Article 21 of the Constitution…. Water is the basic need for the survival of human being and is *part of right to life and human rights as enshrined in Article 21 of the Constitution of India* and can be served only by providing source of water where there is none.‖ In *Span resort case*,[30] the Court confirmed that –State is a trustee of the public

28 AIR 2004 SC 867.

29 (2001) SCC 2 P.69.

30 M.C. Mehta *v*. Kamal Nath, (1999) SCC 388.

and can be disposed off only in a manner that is consistent with the nature of such a trust. This doctrine in its present form is incorporated *as part of Indian law*.‖ In *M.A. Builders Pvt Ltd* case, the Court confirmed that public trust doctrine is a part of the *law of the land*.[31] In *Vellore Citizen Welfare Forum v. Union of India,*[32] the Court confirmed that ―the precautionary principle and the polluter pays principle have been accepted as part of the law of the land.‖ Further it considers the principle as customary international law and it is stated: ―even otherwise once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of customary international law which is not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of law.‖

After elaborately referring the *Vellore Citizen Welfare Forum* case, the Court in *Bombay Dyeing* case[33] confirmed that ―Sustainable development, simply put, is a process in which development can be sustained over generation. Indian judiciary has time and again recognized this principle as being a fundamental concept of Indian law.‖ In *Taj Trapezium case,*[34]this Court has applied ‗polluter pays principle' and ‗precautionary principle' of international law as *law of the land of this country*, India, being part to the UN Conference and signatory to international declarations and agreements.

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31 AIR 1999 SC 2468

32 AIR 1996 SC 2715.

33 Bombay Dyeing and Mfg. Co. Ltd *v*. Bombay Environmental Action Group and Ors, AIR 2006 SC 2038.

34 M.C. Mehta *v*. Union of India, AIR 1997 SC 734.

Conclusion

The genesis of sustainable development was at the global level and as it grew, it began evolving as a customary international law. Such types of international laws are not binding on any State. But the Supreme Court which was able to gauge the potentiality of Sustainable Development and its other related concepts plucked them from the international arena and placed them in an Indian environment. With dexterity, it shaped and crystallized those concepts to suit the Indian setting before it was crystallized in the world stage. The doctrine *equal but differential responsibility* was introduced so as to allow developing countries to have comparatively lesser burden on environmental protection than developed countries. The Supreme Court did not seriously mind about this differentiation and insisted on ‗Sustainable Development' in almost all environmental related judgements though India is still a developing country. It is surprising to note that many developed countries which are advocating it are still hesitant to adopt this concept and it's off shoots. The Supreme Court through its harmonization has set high norms for other countries to follow – be it a developed or developing country.

A Supreme Court filled with activist judges, who are fired by imaginative ideas and reformist zeal made the east and the west meet to form a wonderful and wholesome union. It made Article 21 as the mainstay and depending on case added international human rights instruments or an offshoot of sustainable development to that and laid down path breaking judgements for posterity. By combining Article 21 with international concepts, and instruments of human rights, the Supreme Court came out with meaningful yet out of box judgements, which still remain etched in the annals of jurisprudence. Harmonization of cases relating to human rights, stands as testimony to the uncanny wisdom and farsightedness of the judiciary on the whole, taking the Supreme Court to heights hitherto unknown and unimagined.

Artificial Intelligence as a Legal Person – Future Perspectives

Dr R Haritha Devi [1]

The last decade has seen huge advancements in the field of computer science. A giant leap is seen in this field with computers occupying every walk of human life. One of the significant achievements in this field is the application of artificial intelligence for human developments in almost all fields. Now we have reached a situation where artificial intelligence cannot be avoided. The expert systems created by AI have become part of commercial world moving from just being part of research laboratories.[2]

AI – Definition

Artificial intelligence is a branch of computer science dealing with the simulation of intelligent behavior in computers and it is also the capability of a machine to imitate intelligent human behavior.[3]The word artificial intelligence refers to all computer applications which normally requires human intelligence but done by a computer. In fact, the word intelligence applies to situations that require the ability to acquire and apply knowledge and skills to the best of one‘s ability. But when this is done by a computer it is referred to as artificial intelligence. Research is taking place to analyse the various components of intelligence like

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1 Associate Professor The Tamil Nadu Dr Ambedkar Law University, Chennai

2 George S. Cole, Tort Liability for Artificial Intelligence and Expert Systems, 10 COMPUTER/L.J. 127 (1990).

3 https://www.merriam-webster.com/dictionary/artificial%20intelligence accessed on 15 09 2020.

reasoning, learning, problem solving, using language and interacting with others.[1]

Despite the advancements of AI there are equally concerns about its possible risks involved. The important question is about the liability issue that may arise in case of damages being caused by the use of AI. This is a very specific issue when AI is used in automated systems.

AI in the future

It is expected that machines would occupy the world along with humans with the help of AI in the near future.[2] The globe is marching towards a situation where AI is becoming inevitable. A group of experts led by Eric Horvitz, Managing Director of Microsoft Research's Lab, former President of the Association for the Advancement of Artificial Intelligence, says that the following changes are anticipated by 2030:[3]

- The field of transport - unmanned vehicles, driverless trucks, nuclear shipping drones (unmanned air units)
- Households - robotic cleaners will become more common;
- Health care - the long and complicated process of keeping patient records and mastering the scientific literature will be automated, the digital assistance will allow physicians to focus on the human aspects of patient care.

[1] B.J. Copeland, Professor of Philosophy and Director of the Turing Archive for the History of Computing, University of Canterbury, Christchurch, New Zealand. Author of *Artificial Intelligence* and others available in https://www.britannica.com/technology/artificial-intelligence.

[2] In the modern world, robots are treated most favorably in Japan, where they can be seen more frequently compared to other countries. Robots are used in health and elderly care. The intention to engage robots in the police service has been announced **by** the media service of the Dubai Police Force.

[3] O. E. Radutniy, Criminal Liability of the Artificial Intelligence, 138 Probs. LEGALITY 132 (2017).

- Education - the difference between group and individual tuition can be eliminated, massive online courses will allow personalizing the learning process to any extent.
- Disadvantaged communities and individuals - predictive analytics will allow government agents to better allocate limited resources, foresee environmental threats, etc.
- Public safety - cities will largely depend on Al technologies to detect and prevent crime, automatic processing of video surveillance and recording using drones will allow to quickly detect illegal behavior, analysis of language and movements can help to identify suspicious behavior.

AI developed now has started operating independently and it is seen that they behave more like a human than a machine. Humans accept this process for the simple reason of the convenient situations and the easy way of life that is created by machines. It is because of the acceptability of machines by man like the example of robots helping in taking care of household activities that leads to the question of recognizing the status of AI.

But the truth remains that AI brings in a sense of fear in the minds of the people when put to use. For example, one of the important issues that crops up is the privacy of individuals when it comes to the storage and handling of personal information by a machine.[4] As our Honourable Supreme court has recognized privacy rights as fundamental right[5], it is important to analyse whether it is possible to recognize privacy rights in terms of AI.

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4 Ingrid Ileana Nicolau, Human Rights and Artificial Intelligence, 12 J.L. & ADMIN. Sci. 64 (2019).

5 Justice K.S.Puttaswamy (Retd) ... vs Union Of India And Ors 2017 10 SCC

AI as a Legal Person

The important legal question that revolves around AI is its status. Whether it can be given the status of a person remains the discussion topic in many legal forums. Legal person means a person recognized by law as a person unlike a natural person. The rights and obligations of a legal person arises from the day a personhood is granted by law. The most popular example is that of a company which acquires a status of an artificial person from the day it is incorporated under the law it is to be registered.[6] A natural person has intelligence and the capability of taking decisions out of one‘s free will. But when artificial personality is granted to an entity by law it acquires rights and obligations through the law which recognizes it. The fact remains that the rights and obligations are exercised by these entities through natural persons.

So, the question is not only about the granting of status as a person but also the liability part. The possession of intelligence by beings other than man and consequently giving a special status is not a new phenomenon. For example, in India, the "Non-Human Person" status has been normatively given to aquatic mammal representatives known as dolphins. Also, any activities in dolphinariums, aquariums, oceanariums, etc. involving dolphins are prohibited. The decision, which was announced by India's Minister of the Environment and Forests, emphasizes that dolphins are highly intellectual mammals with highly developed social organization, they share humanoid consciousness and engagement in a complex communication system, and therefore they must have their own special rights.[7] The same can be seen in the case of

[6] In India it Companies Act 2013 presently.

[7] The movement to recognize whale and dolphins as individuals with self-awareness and a set of rights gained momentum three years ago in Helsinki, Finland when scientists and ethicists drafted a Declaration of Rights for Cetaceans. Available in https://www.dw.com/en/dolphins-gain-unprecedented-protection-in-india/a-16834519 accessed on 17 10 2020

Nonhuman Rights Project, Inc. v Stanley,[8] the legal personhood of chimpanzees had to be considered by NewYork Court. In this case an NGO filed a writ of Habeas Corpus to release two chimps confined in a lab. But the question raised was whether habeas corpus can be filed as they are not persons. The Court refused to recognize the chimps as humans as they cannot take decisions of their own and they may not be able to take responsibilities for their actions. It was also pointed out in this case that just for the sake of any resemblance of human species, personhood cannot be granted, but it is the capability of bearing rights and obligations that recognizes a legal personality.

A very popular example of recognition of personhood to machines is the case of _Harmony and Sophia‘. NextOS started the development of Harmony AI in a venture with Realbotix with the purpose to create a virtual persona with improved conversational skills and other features aiming to simulate a friend.[9]The idea behind Sophia's creation is that potential interested Al developers would be able to utilize the robot for various applications, such as a marketing tool, personal assistance, social media strategist, and the like, all of which may require interactions with human beings.[10] Sophia has garnered international fame; from being appointed at the United Nations Development Program (UNDP) as the first, nonhuman innovation champion, to being granted Saudi Arabia citizenship in the Middle East.

A legal person or an artificial person is recognition accorded by law. Jurisprudentially person can be divided into two categories- natural and legal or artificial. A person created or

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8 2015 NY Slip Op 25257 [49 Misc 3d 746]

9 https://connect.unity.com/p/harmony-ai

10 Pin Lean Lau, The Extension of Legal Personhood in Artificial Intelligence, 46 REV. BIOETICA & DERECHO 47 (2019).

recognized by law is an artificial person. For example, a company is an artificial person recognized from the date it is incorporated under the Companies Act.[11]

Effects of granting status of legal person to AI

Person natural or artificial is a separate identity. All humans are identified and are distinguishable. Artificial persons created by law also are distinguishable and has separate identity. The company for instance has a separate number often protected legally in its various forms like that of name, objects, etc. Similarly if AI is granted person status, the question is what identity is given to it. When Sophia was granted citizenship status, the question is whether it was granted to her hardware that makes her function. If it‘s the hardware that distinguishes each robot or the machine that uses AI then the truth is hardware is designed by the manufacturer and it is the particular hardware that gives its thinking or reasoning ability and so AI are functioning through humans only.

AI generally refers to characteristics like that of knowing oneself, ability to communicate, creativity to some extent, reacting to situations and the like. But all these are responses which it does based on the program which is already done by humans. Hence granting legal personhood to AI needs a thorough understanding of rights and obligations of personhood. Granting the status of artificial person to a company is based on the analogy that there are humans behind the working of a human. The courts have many times ignored the corporate personality and made individuals liable behind the screen. This is the popular theory of _Lifting the Corporate veil‘. Both judiciary as well as the legislature may lift the corporate veil to make natural persons liable for the acts of the

[11] Section 8 Companies Act 2013.

company. The reason why animals are considered within that tag of rights is not because they can think of their own and be responsible, but because they can feel pain, joy and attachment.[12] In case of AI even these feelings are absent. Therefore, the legal rights that an AI can have is a question to be answered in terms of its liability.

Recognition of AI as a legal person also needs social recognition. In some countries environment is given social recognition as a person for the purpose of protection.[13] In New Zealand Maori people have recognized national parks and rivers as persons.[14] Many indigenous cultures recognize environment as a part of their life and consider them as person.[15] In India the Courts have accepted the same idea in some environmental disputes.[16] The Court declared Ganga, Yamuna and its tributaries as juristic persons. There are examples of temple idols given a separate status and are able to hold property in its name.

Another debatable aspect is the issue of legal liability. If AI is granted person and granted legal rights and duties then the question is who is granted the rights? Whether it is the machine or the manufacturer of the machine? This leads to the question of liability of AI as a person.

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12 Legal personality and artificial intelligence - newtech.law2nd July 2018.

13 Athens, A.K., (2018). An indivisible and living whole: Do we value nature enough to grant it personhood? Ecology Law Quarterly, 45(2), pp. 187-226.

14 Ibid.

15 Fraundorfer, M. (2018). The Rediscovery of Indigenous Thought in the Modern Legal System: The Case of the Great Apes. Global Policy. 9(1), pp. 17-25.

16 The State Of Uttarakhand vs Mohd. Salim, available at (indiankanoon.org)

Liability of AI as person

The attribution of liability to AI is a highly controversial subject. If a machine operating through AI causes injury to a person or property granting liability is a very difficult question to answer. Courts have often attributed such liability to the manufacturer or the user and not the machine.[17] But these decisions are to be evaluated and it is time to give a rethinking to these decisions. Today AI has grown to such an extent that they are thinking independently. So, when a manufacturer has given the freedom to the machine to think and take decisions, making him liable for the wrongdoings of the machine is not justifiable.

Liability in legal terms can be divided into strict liability[18] and negligent liability.[19] Generally a person is made liable to another for his fault. But according to these two principles a person can be made liable even without his fault. This is also know as no-fault liability. In the case of artificial intelligence, if no fault liability is applied then the manufacturer is to be made liable for the faults of the machine in which AI is applied. But

[17] Brouse v. United States, 83 F. Supp. 373, 374 (N.D. Ohio 1949) (attributing error to the pilot rather than the design of the autopilot feature of the plane, with the judge opining that, "[t]he obligation of those in charge of a plane under robot control to keep a proper and constant lookout is unavoidable."); *see also* Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004) (holding Verio liable for breach of contract because of the actions of the search robot); *see also* State Farm Mut. Auto. Ins. v. Bockhorst, 453 F.2d 533, 536-37 (10th Cir. 1972) (ruling that the insurance company was bound by the mistaken actions of its computer).

[18] The principle of strict liability evolved in the case of *Rylands v Fletcher*. In the year 1868, the principle of strict liability states that any person who keeps hazardous substances on his premises will be held responsible if such substances escape the premises and causes any damage.

[19] The rule of absolute liability, in simple words, can be defined as the rule of strict liability minus the exceptions. In India, the rule of absolute liability evolved in the case of *MC Mehta v Union of India*. This is one of the most landmark judgment which relates to the concept of absolute liability.

today AI has reached a level of thinking independently.[20] So it would be injustice to make the manufacturer liable.

There are many countries which are trying to frame laws in such a way to fix liability for the wrongs caused by the AI. For example, the UK proposes to introduce rules under which the insurer will generally bear primary liability in the case of accidents caused by autonomous vehicles.[21] On February 16, 2017 the European Parliament adopted a Resolution on Civil Law Rules on Robotics with recommendations to the Commission. This proposed a range of legislative and non-legislative initiatives for robotics and AI.[22]The European Union Liability for Artificial Intelligence and other emerging digital technologies have laid down rules on how liability regimes should be designed, and where necessary, changed, in order to rise to the challenges emerging digital technologies bring with them. In 2018, the EU Commission released ‒Artificial Intelligence: a European approach to boost investment and set ethical guidelines‖[23]This document mentions that AI is already part of everyday life and it is not a mere fiction. Hence ethical and legal questions would arise if personhood is granted. Another document which finds mention about legal personhood in Europe is ‒Artificial Intelligence, Robotics and ‗Autonomous' System developed by European Group on Ethics in Science and New Technologies‖.[24] In this statement it is mentioned only persons and not machines can be

[20] Emad Abdel Rahim Dahiyat, Artificial Intelligence and Law: Do We Need a Thoughtful Reconsideration?, 18 COLO. TECH. L.J. 351 (2020).

[21] https://www.analyticsinsight.net/considering-liabilities-of-artificial-intelligence-while-technology-adoption/

[22] Ibid.

[23] (Doc. IP/18/3362)

[24] Statement on «Artificial Intelligence, Robotics and ‗Autonomous' Systems», http://ec.europa.eu/research/ege/pdf/ege_ai_statement_2018.pdf accessed on 22.12.2020

given personhood as they are not subject to responsibility. But in EU the idea is to fix civil and not criminal liability on AI.[25]

In United States –Law of War Manual of the United States Department of Defence‖ propounds the idea that the Law of war does not expect that a weapon to make legal determinations even if it is operated through computers.[26]Another report issued by the NSTC Committee on Technology –National Artificial Intelligence Research and Development Strategic Plan‖ and published by the Executive Office of the President defines key measures to maximize the benefits of AI technology. Both in US and EU the idea is fixing liability on weapons is practically impossible and presently it is officers in the warfare who are held responsible for the weapons.

Companies across the world need to think of the liability issue before designing machines which work solely on AI. They have to make sure that if the algorithms fail or do not react as planned then there needs to be a remedy to the parties affected by the harm caused. A clear and coherent civil liability regime for AI has the potential to reduce risks and increase safety, decrease legal uncertainty and related legal and litigation costs, and enhance consumer rights and trust. Those elements together could facilitate the faster and arguably safer uptake and diffusion of AI.[27]The German Federal Supreme Court's Robodoc‘s decision shows how

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25 Roman Dremliuga, et.al., Criteria for Recognition of AI as a Legal Person, Journal of Politics and Law; Vol. 12, No. 3; 2019, Published by Canadian Center of Science and Education, https://doi.org/10.5539/jpl.v12n3p105.

26 U.S. Department of Defense, Law of War Manual, 6.5.9.3 (2015), http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf

27 https://www.europarl.europa.eu/thinktank/en/document.html?reference= EPRS_STU(2020)654178

existing rules can often be applied to new technologies.[28] In this case the issue was whether the doctors can be made liable for surgeries done with the help of AI. The court declared that ‒to sufficiently protect the private autonomy of patients, new medical techniques may only be applied to a patient if the patient was unequivocally informed that the use of the new method may bear unknown risks.‖[29] On February 17, 2017, the German Federal Network Agency banned a doll called Cayla from being sold and ordered the destruction of all devices which had already been sold.[30] The reson was that the doll was AI enabled and it was used to monitor all the activities of the child. These types of devices are easily hackable and it may lead to crimes against children for which the liability is not fixed.

So a rethinking is always necessary before concluding AI as part of human lives. It is high time IP laws are revamped, keeping in mind that humans are not the only source of innovation and creation. Though IP laws are for humans, we can try to bring in changes to accommodate AI generated works in order to recognise the need for recognising AI owners to encourage future development and investment in AI works.

Conclusion:

Granting legal personhood to AI needs to be examined and it is valid only if does not conflict with already existing legal norms. An introduction of a new legal person will definitely create

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28 Bundesgerichtschof [BGH] [Federal Court of Justice] June 13, 2006, case no. VI ZR 323/04, NJW 2006, 2477 (Ger.); confirmed by decision March 27, 2007, case no. VI ZR 55/05, NJW 2007, 2767, 2769 (Ger.).

29 Ibid.

30 Press Release, Bundesnetzagentur Removes Children's Doll "Cayla" From the Market, Bundesnetzagentur [BNetzA] [German Federal Network Agency], (Feb. 2, 2017).

more discussions and clarifications to be answered. It is also necessary to examine the benefits if any by granting such a status to AI. There is a necessity for a better and separate Act for AI generated works as the future is going to be in the hands of technology where machine learning and deep learning are going to instruct the AI in every part of human life.[31] Just as how Intellectual Property Rights are for humans AIPR for non-humans that is Artificial Intelligence‘s Property Rights (AIPR) with diversification of fields of AI. The AIPR Where legal status, rights and liabilities over the property can be categorized based on the work created by AI with human interference and work created by AI without human interference, like examination that is done for giving patents for inventions. The AI programs can also be examined by expert committee to check what has been given as input to the AI to avoid AI doing illegal activities or acts against public order or morality. Policy-makers can choose from a broad range of regulatory measures that enable them to determine a fine-tuned Al governance regime taking into account the particularities and possible impacts of Al and autonomous systems.

[31] Axel Walz & Kay Firth-Butterfield, Implementing Ethics into Artificial Intelligence: A Contribution, from a Legal Perspective, to the Development of an AI Governance Regime, 17 DUKE L. & TECH. REV. i (2018-2019).

Right to Legal Representation in Administrative Adjudications

Dr. P. Balamurugan [1]

Many people who are affected by administrative actions do not have training or ability to put their case in its most convincing form. This is true whether the ‗hearing' is oral, or in the form of written submissions.[2]Ordinarily the right of representation in administrative proceeding is not considered to be indispensable part of natural justice as oral hearing is not included in the *minima* of fair hearing.[3]Hence, no person can claim right to legal representation as a matter of right. In fact, one view was to keep lawyers away from administration of justice.[4]One of the important aspects of a fair hearing, strongly asserted by the courts, is that each side should have an equal capacity to present its case.[5] Though, legal representation is an acknowledged aspect of a fair procedure, at the same time absence of legal representation does not, of itself, invalidate a hearing.[6]A fair hearing will not of necessity include the right to legal representation. Indeed, many administrative tribunals were established to provide speedy and relatively informal mechanisms for dispute resolution.[7] The

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[2] Peter Cane, Administrative Law (New York: Clarendon Press. Oxford) 1986 edn, p.117.

[3] Dr. J.J.R. Upadhyaya, ―Administrative Law‖ (Allahabad: Central Law Agency) 2016 edn, p.195.

[4] C.K.Thakker, ―Administrative Law‖ (Lucknow: Eastern Book company) 2012 edn, p.336.

[5] Peter Leyland & Terry Woods, Administrative Law (London: Blackstone Press Limited) 1997 edn,264.

[6] Michael T Molan, (London:Old Bailey Press) 2001 edn, p.156.

[7] David Stott & Alexandra Felix, ―Principles of Administrative law‖ (London : Cavendish Publishing Limited) 1997 edn, p.136.

judiciary, in a number of cases, have emphasised the importance of a right to legal representation. This article seeks to analyse developments on this aspect and the circumstances where the judiciary has extended the right to legal representation in administrative adjudications.

Reasons for the Denial of Legal representation

Lawyers can definitely protect the rights of a party, prevent untrained adjudicators committing errors and assist the tribunal with its findings of fact and interpretation and application of law. They are undoubtedly of great benefit. Yet the same skills by which lawyers serve can be a disservice when they lead to excessive technicality, obfuscation of issues, expense and delay.[1]There are several reasons for the denial of legal representation in administrative adjudications. The reasons are as follows:

i) To avoid the formality and protracted nature of court proceedings.[2]

ii) The presence of lawyers tends to make proceedings more formal, long-winded, and legalistic.[3]

iii) In administrative adjudication denial of legal representation to the concerned party is justified on the ground that it saves expenses and thus protects the poor against rich, reduces delay, and prevents

1 Christopher Enright, ―Judicial Review of Administrative Action‖, (Branxton Press: Sydney) 1985 edn, p.526.

2 *Supra* note 4, at 264.

3 *Supra* note 1, at 117.

the proceedings from becoming too formal and technical.[4]

iv) Legal representation may be counterproductive, unnecessary or overly cumbersome in cases where matter must be speedily resolved, and the courts have resisted claims that there should be a right to such representation.[5]

v) The courts have, however, emphasised that tribunals possess discretion as to whether to allow such representation, and are willing to review the matter in the manner in which the discretion is exercised. A tribunal controls it own procedure, and this provides the foundation from which it can permit such representation.

Right to be Represented by Lawyer in England

In England the right to be represented by lawyer is not considered to be a part of natural justice and cannot be claimed as of right unless conferred by statute[6] except in exceptional cases. The Franks Committee opined that the right to legal representation should be curtailed only in the most exceptional circumstances, where it is clear that the interests of applicants generally would be better served by restriction.[7]According to De Smith a person who is entitled to appear before a statutory tribunal is also usually

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4 M.P. Jain & S.N. Jain, ―Principles of Administrative Law‖ (Nagpur: Wadhwa and Company) 2007 edn, p.460.

5 Paul Craig, ―Administrative Law‖ (London: Sweet & Maxwell) 2011(South Asian) edn,400.

6 *Supra* note 3, at 337.

7 First Report of the Council of Tribunals, para 87, as quoted in C.K.Thakker, ―Administrative Law‖ (Lucknow: Eastern Book company) 2012 edn, p.337.

entitled, in the absence of express or implied provision to the contrary, to be represented by a lawyer. C.K. Allen stated that to deny persons who are unable to express themselves the services of a competent spokesperson is a very mistaken kindness. The European Convention on Human Rights, 1950, (Article 6) which is incorporated as a part of English Law under the Human Rights Act, 1998, also recognises a right to legal assistance and representation.[8]

The leading English case in this regard is ***Pett* v. *greyhound Racing Assn. Ltd. (No. 2)***.[9] In that case, an enquiry was ordered against Mr Pett inquiring into an allegation whether drugs had been administered to the dog. The trainer was having a licence from the club entitling him to race dogs on tracks and result of the inquiry might involve the revocation of licenses affecting his reputation as well as livelihood. The trainer applied for legal representation but it was refused. Allowing an appeal against the interlocutory order Lord Denning observed that, when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he has also a right to speak by counsel or solicitor.

Further, the Supreme Court of England recently in ***R*.v. *Governors of X School***,[10]allowed representation by a delinquent teacher in disciplinary proceedings in the light of human right. In ***Fraser* v.*Mudge***,[11] the Court of Appeal held that there was no right to legal representation in a disciplinary hearing before a Board of Visitor, although the Board could allow representation.

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8 Narender Kumar, ―Nature & Concepts of Administrative Law‖ (Faridabad: Allahabad Law Agency) 2018 edn, p.280.

9 (1970) 1 QB 46: (1969) 2 WLR 1228.

10 (2011) 3 WLR 237 (SC).

11 [1975] 1 WLR 1132.

However, in ***R.* v. *Secretary of State for the Home Department ex parte Tarrant***,[12] the divisional Court held that in certain circumstances the Board must allow representation. Webster J identified the circumstances to be considered as being:

- The seriousness of the charge and of the potential penalty;
- Whether any points of law are likely to arise;
- The capacity of the prisoner to represent his own case;
- Procedural difficulties such as the difficulty some prisoners might have in cross-examining a witness, particularly one giving expert evidence, without previously having seen that witness's evidence.

The right to representation by a lawyer may prove to be a part of natural justice in suitable cases, but this is not yet clearly established. It may exist in the case of a formal tribunal or investigation if there is no provision to the contrary, but regulations excluding it have been upheld.[13]

It is clear that right to legal representation is never considered as an integral part of natural justice unless oral hearing is afforded to other party,[14] or where the matter involves technical questions of fact or law involved or goes against an adequate

[12] [1985] QB 251.

[13] H.W.R. Wade & C.F. Forsyth, ―Administrative Law‖ (Oxford:Oxford University press) 2009 edn. P.439. See also R. v. Assesment Committee, St Mary Abbots, Kensington (1891) 1 QB 378, R. v. Commissioner of Police ex p Edwards (1977) 32 FLR 183, Maynard v.Osmond (1977) QB 240.

[14] Local Govt. Board v. Arlidge, (1915) A.C. 120.

opportunity to represent one's case.[15]Franks Committee has, therefore, recommended that the right of legal representation should not be curtailed save in exceptional circumstances. But it has not so far been implemented by any legislation.[16]

POSITION IN U.S.A

In U.S.A., the right of legal representation is guaranteed, for many purposes, by the combined effect of the ‒due process‖ clause of the U.S. Constitution and Section 555(b) of the Administrative Procedures Act, 1946.[17]Where the case is not covered by the provisions of the Administrative Procedures Act, 1946, the right of legal representation can be allowed only if it is required as an ingredient of ‒fair hearing‖, and ‒due process‖ clause.[18]Except in criminal proceedings, where such right can be claimed, in other inquiries, assistance of lawyer can be allowed considering the nature of proceedings, questions involved and the consequences likely to ensue.[19]

POSITION IN INDIA

In India, the right to representation by a lawyer has been never considered as an inevitable part of natural justice and as such, is not claimable as matter of right. The right is regarded more as an exception rather than a general rule.[20]But, in cases of

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15 Durga Das Basu, ―Administrative Law‖ (Kolkata:Kamal House) 2006 edn, p.280.

16 *Ibid*, at 280.

17 *Supra* note 10, at 461.

18 Golberg v. Kelly, 25 L Ed 2d 287: 397 US 254 (1969) as quoted in C.K.Thakker, ―Administrative Law‖ (Lucknow: Eastern Book company) 2012 edn, p.368.

19 Powell v.Alabama, 77 L Ed 158: 287 US 45 (1932)C.K.Thakker, ―Administrative Law‖ (Lucknow: Eastern Book company) 2012 edn, p.368.

20 Prof. Narendra Kumar, Nature & Concepts of Administrative Law (Faridabad: Allahabad Law Agency) 2011 edn, p.260.

preventive detention if the Department is represented by a lawyer,[21] in domestic enquiry if the charge is serious or complex nature,[22]or the law specifically confesses right to legal representation then the right to be defended by a legal practitioner may be afforded.[23]

In the case of ***G.R Venkateshwara Reddy* v. *Karnataka State Transport Corporation***,[24] the High Court of Karnataka enumerated the following principles in regard to the employee's right to be defended by a legal practitioner in a domestic enquiry after taking stock of the relevant case law on the subject:

a) The right to be represented by their legal practitioner is not an element of principles of natural justice.

b) A delinquent employee will have a right to claim to be defended by the legal practitioner, where the rules or regulations permit the employee to be represented by the legal practitioner;

c) Where the rules or regulations are silent about representation by a lawyer or vest discretion in the disciplinary authority or the inquiring authority, to permit the employee to be represented by the legal practitioner or other agent of his choice, denial of such permission on a request made by the employee, would violate the principles of natural justice, i) If the presenting officer is a legal practitioner or a person legally trained or experienced ; or ii) If the charges are serious and complex nature;

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21 A.K. Roy v. Union of India, A. 1982 S.C. 710.

22 Crescent D.C. v Ram, (1993) 2 S.C.C. 115 (paras. 12, 17).

23 State Bank of Bikaner v. ProbuDayal, (1995) 6 S.C.C. 279.

24 1995 I LLJ 1011.

d) Where the rules or regulations specifically, prohibit the employee from engaging from the services of a legal practitioner, such rules or regulation will be read down as vesting a discretion in the disciplinary authority to permit the employee to engage a legal practitioner, where (i) the presenting officer is a legal practitioner or a legally trained person; or (ii) the charges are of a serious or complex nature. If it is not so read down, the rule itself may have to be held to be invalid as violating the Article 14 of the Constitution.

In cases of a disciplinary inquiry proceedings against a civil servant, the Apex Court has ruled that refusal of lawyer's aid to the employee would not constitute an infirmity in the context of the factual situation.[25] The Supreme Court in ***Krishna Chandra Tandon* v. *Union of India***, explained the following reasons for the proposition, viz :

- Under the rules, he was not allowed to the assistance of an advocate during the enquiry;
- There was no oral evidence to be recorded at the inquiry and there was no need of a lawyer to cross-examine witness;
- There was no complexity in the case and absence of a lawyer did not deprive the appellant of a reasonable opportunity to defend himself.

GROUNDS UNDER WHICH RIGHT TO LEGAL REPRESENTATION BE ALLOWED

Defending oneself by arguing ones's own case is an ability that is not possessed by all men. He cannot bring out the points in

[25] *Supra* note 14, at 283.

his own favour of the weakness in the other side. Many people will be tongue-tied, nervous, confused or wanting in intelligence. They cannot examine or cross-examine witnesses.[26]In many cases, the right to be heard would be of little avail if counsel were not allowed to represent the affected party before the decision- maker. A lawyer can help in delineating the relevant issues, present factual contentions in proper manner, cross-examine witnesses and otherwise safeguard the interests of the concerned party.[27]The question whether legal representation shall be permitted or not must be decided on the basis of facts and circumstances of the each and every individual cases.

Where the decision maker is not a tribunal but an official then the principle seems to be that whether legal representation is allowed or not depends on the circumstances.[28] In ***Anandramjiandraivaswani* v. U*nion of India***,[29] a division bench of Calcutta High Court considered the following grounds as reasonable for asking permission for engaging a legal practitioner in the enquiry in that case:

a) Two main and important witnesses against the delinquent who were to be cross-examined were senior officers and he being subordinate to them could not do so properly;

b) No employee from the department dared to volunteer his services to represent him as two senior officers were to be cross-examined;

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26 Lord Denning in Pett v. Greyhound Racing Assn. Ltd. (No.2), (1970) 1 QB 46: (1969) 2 WLR 1228.

27 *Supra* note 10, at 461.

28 *Supra* note 7, at 526.

29 1983 Lab IC 624 (Cal DB) : 1983 II LLJ 122.

c) A police inspector experienced in handling such cases was representing the department;

d) There were factual and legal complexities, and legal issues involved in the case;

e) Suspension for more than 17 months had affected the delinquent employee‘s health brain and mind;

f) Due to advanced age and mental stress he was unable to cope single handed with the demands of the defence;

g) The enquiry officer was biased due to the delinquent officer being unavailable as he was not released by the concerned department.

The advocates shall be allowed to appear before administrative adjudications in the following grounds:

1) Where the right to legal representation is conferred by the statute;

2) If the oral evidence produced at the enquiry requires the services of a lawyer for cross-examination of witnesses;

3) Where Charges are complex;

4) Where complicated questions of fact and law arise;

5) Where the evidence is voluminous and the party concerned may not be in a position to meet the situation effectively;

6) Where he is pitted against a trained prosecutor;

7) Where an individual‘s reputation or livelihood is at stake there maybe a much stronger argument in favour of legal representation; and

8) When it involves serious nature of the charge and the possible consequences; and

9) Where the delinquent is an illiterate.

1) Where the right to legal representation is conferred by the statute

In India certain statutes recognise appearance of advocates in administrative adjudications with the consent of the other parties to the proceedings and with the permission of the tribunal concerned, e.g. Industrial Disputes Act, 1947,[30]Income Tax Act,1961,recognises the right to legal representation before the income tax authorities and Family Courts Act, 1984. At the same time there are also certain statutes that specifically bar legal representations from appearing before the administrative adjudicative bodies.

Section 30 of the Advocates Act, 1961 confers an absolute right on every advocate to practice in all courts including the Supreme Court, before any tribunal or person legally authorised to take evidence and before any authority or person before whom such advocate is by or under any law for the time being in force.

At the same time there are also certain statutes that specifically bar legal representations from appearing before the administrative adjudicative bodies. In case of preventive detention, a combined reading of Article reading Article 22(1) and Article 22(3)(b) of the Constitution makes it clear.Its express intent is that a detenu in preventive detention has no right to claim to consult, and be defended by a lawyer of his choice.[31]This means that a detenu is not entitled to claim as of right legal representation before an advisory board. Since the Constitution itself contemplates that such should not be made available to a detenu, –it cannot be said that the denial of the said right is unfair, unjust

[30] See Section 36(2)(a) and (b) of the Industrial Disputes Act, 1947.

[31] Jain, Indian Constitutional Law, 602-609, as quoted in the M.P.Jain& S.N. Jain, –Principles of Administrative Law‖, (Wadhwa and Company: Nagpur) 2007 edn, vol I, p.463.

and unreasonable‖.[32] But the advisory board may permit legal representation. The detenu is entitled to make such a request to the board and is bound to consider such a request when so made.[33]

Similarly, Section 8(e) of the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974, does not permit legal representation.[34]In ***Hemalatha* v. *State of Maharastra,*[35]** the Supreme Court was called upon to consider the question of legal representation before the advisory board in the context of preventive detention under the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 (COFEPOSA). The husband of the petitioner was detained under Section 3(1). The main question to consider was whether the detenu could claim legal representation before the advisory board. The board had said that in view of section 8(e), the detenu was ―not entitled to appear‖ before it –by any legal practitioner. The Court pointed that the section does not bar legal representation of a detenu by a lawyer. Only a detenu cannot claim representation by a lawyer as matter of right. Further, Section 11(4) of the National Security Act also does not provide right to legal representation before the detention advisory board.

2) If the oral evidence produced at the enquiry requires the services of a lawyer for cross-examination of witnesses

The question of whether natural justice demands that a person be represented generally arises only in an oral hearing

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32 M.P. Jain & S.N. Jain, –Principles of Administrative Law‖ (Gurgaon: Lexis Nexis) 2013 edn,Vol, 1 p.512.

33 *Ibid*.

34 Section 8(e) reads: –A person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practioner in any matter connected with the reference Advisory Board‖.

35 AIR 1982 SC 8.

because where a hearing is by written submissions a person can seek assistance from any quarter he thinks fit in preparing submissions.[36]When there is no oral evidence to be recorded at the enquiry there is no need of a lawyer to cross-examine witness.[37]

3) Where charges are complex

Whether legal representation should be allowed should depend on the degree of technicality of the mater in dispute.[38]The mere fact that the charge-sheet containing the charges and imputations is lengthy or a major punishment may be awarded if the charges are proved will not make the charge serious and complex. All charges are not serious and complex charges. Whether a charge is serious and complex, depends on the nature of the charge and the consequence of the charge being proved.[39]The charges will be complex where the delinquent is stranger to the subject matter and procedure involved in the charge and where the charges involve intricate and complicated questions of facts and law.

In ***Giriraj Kishore* v. *Indian Institute of Technology***,[40] divisional Bench of the Allahabad High Court held that Factual charges relating to matters within the knowledge of the employee pertaining to the period when he was occupying his post were not considered to be complex.

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36 *Supra* note 7, at 525.

37 Krishna Chandra Tandon v. Union of India, AIR 1974 SC 1589.

38 *Supra* note 1, at 118.

39 G.M. Kothari, –How to Conduct & Defend Disciplinary inquiries & Cases (Gurgaon:Lexix Nexis) 2014 edn, p.322.

40 1983 Lab IC 1089 (1094) (All DB).

In ***S.D. Sharma* v. *Trade Fair Authority of India***,[41] it was held that where the charges of holding demonstration in office premises in which inflammatory speeches were made and defamatory slogans were shouted, the charge was a straight one and not of such complex nature as would warrant an absolute necessity to engage legal practitioner.

In ***S.Y. Venkateswaralu* v. *Director General of Ordinance Factories***,[42] where the charges were serious, the number of charges was 19, there were 8 co-delinquents, two very highly placed superior officers were witnesses at the enquiry and had to be cross-examined, the court felt that in a matter so complicated , the employee who had no legal training could not be expected to put his defence and, therefore, he had a right to be represented by a lawyer.

Similarly in ***G.V. Aswathanarayana* v. *Central Bank of India***,[43] where the charges ran into 25 pages and several hundreds of documents were involved in the case, it was held that in such a case, it was not possible for the employee who was not trained in law, to put forth his defence effectively.

4) Where complicated questions of fact and law arise

The right to legal representation may be given if the facts and the law are complex. When there was no complexity in the case, the absence of a lawyer did not deprive the appellant of a reasonable opportunity to defend himself.[44]***In H.C. Sarin* v. *India***,[45]it was held that when matters are simple no professional

41 1985 II LLJ193 (198) (Del DB).

42 1978 Lab IC 654 : (1978) 1 SLR 309 (Mad).

43 1993 I LLJ 1136 (1138) (Kant DB) : 1993 Lab IC 637.

44 Krishna Chandra Tandon v. Union of India, AIR 1974 SC 1589.

45 (1976) 4 SCC765, AIR 1976 SC 1676.

skills are required to defend and denial of a lawyer‘s help does not amount to violation of principles of natural justice.

5) Where the evidence is voluminous

If the evidence is voluminous, the party concerned may not be in a position to meet the situation effectively and it implies that authority clearly failed to exercise the power conferred on it under the rule. It is not unlikely that the Disciplinary Authority refused to permit the appellant to engage a legal practitioner in the circumstances mentioned earlier had caused serious prejudice to the appellant and had amounted to a denial of reasonable opportunity to defend himself.

6) Where he is pitted against a trained prosecutor

In an enquiry before a domestic tribunal, if the delinquent officer is pitted against a legally trained mind and if he seeks permission to appear through a legally trained practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated.[46] If the employer is not represented at the enquiry by a legal expert, the enquiry officer has a discretion to allow or not to allow legal representation to the employee. The enquiry officer has no such discretion once the employer is represented by a legal expert.[47]In order to be fair and just, the enquiry officer whenever he finds the employer appointing legally trained persons as Presenting-cum- Prosecuting officers must enquire from the delinquent employee before

46 Board of Trustees of the Port of Bombay v. Dilipkumar AIR 1983 SC 109 at para 12.

47 *Supra* note 38, at 515.

commencement of enquiry whether he would like to take the Assistance of a legal practitioner.[48]

In ***Board of Trustees of Port Bombay*, v. *Dilipkumar***,[49] a matter relating to disciplinary proceedings against an employee of a statutory authority on the ground of misconduct, before the enquiry proceedings commenced, the chairman and the port Board, rejected the request of the respondent for being represented by a legal practitioner. Moreover, the appellants appointed two legal advisors to present the case against the respondent before the enquiry officer. As a result of the inquiry, the services of the respondent were terminated. Quashing the order, the Supreme Court held that it will be violation of natural justice if the employer is represented by a presenting officer who is legally trained before the enquiry officer, while the employer denies such a facility to the employee.

Similarly in the case of ***C.L.Subramaniam*v. *Collector of Customs***,[50] in a departmental enquiry, a government servant requested to permit legal assistance which was turned down by the inquiry officer. The case of the department was handled by a trained prosecutor. The petitioner was removed from service. Having failed in the High Court, the petitioner approached the Supreme Court which while upholding the contention of the appellant observed as follows:[51]

–The fact that the case against the appellant was being handled by a trained prosecutor was a good ground for allowing the appellant to engage a legal practitioner to defend him lest the

48 *Supra* note 52, at para 13.

49 AIR 1983 SC 109.

50 AIR 1972 SC 2178.

51 AIR 1972 2178 (para13).

scales should be weighed against him. The Disciplinary authority completely ignored that circumstance. Therefore that authority clearly failed to exercise the power conferred on it under the rule. It is not unlikely that the Disciplinary Authority refused to permit the appellant to engage a legal practitioner in the circumstances mentioned earlier had caused serious prejudice to the appellant and had amounted to a denial of reasonable opportunity to defend himself.‖

Article 22(3) of the Constitution expressly denies the right to counsel to a detenu in preventive detention proceedings. In spite of such constitutional prohibition, the Supreme Court in ***A.K.Roy*v.*Union of India***,[52] held that if the Government or the detaining authority is represented through a legal practitioner before the Advisory Board, the detenu will also have such a right to legal representation forming part of his right secured by Articles 14 and 21.

7) When individual reputation or livelihood is at stake

Where an individual‘s reputation or livelihood is at stake, there may be a much stronger argument in favour of legal representation.[53]In *Pett* v. *Greyhound Racing association*,[54]it has been observed that ―when a man‘s reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he has also a right to speak by council or solicitor‖.

In ***R*v.*Secretary of State for the Home department, ex parte Tarrant***,[55] it was held that, although a prisoner appearing before the board of visitors on a disciplinary charge did not have

[52]. AIR 1982 SC 1548.

[53] *Supra* note 5, at 157.

[54] (1969) 1 QB 125.

[55] (1984) 1 All ER 799.

an automatic right to legal representation, the board did have a discretion to permit it. In that case it had been a breach of natural justice to deny the prisoner legal representation, given the gravity of the charge, and the consequences for the prisoner of his being found guilty.

In ***Antanio B. Furtado* v. *Chairman & Managing Director, Bank of India***,[56] where a Bank employee was charged for misappropriation, fraud, etc., the court felt that the charges being of serious nature, the employee would be visited with evil consequences, most probably his reputation and livelihood would be affected and further that offences of misappropriation and fraud were not so simple in nature and involved serious questions of law, and therefore, the employee should have been permitted to be represented in the enquiry by a lawyer.

8) When charges are serious

The existence of a right to representation whether legal or otherwise should depend upon whether the proceedings under review is adversarial in nature or not. Whether it is serious or not the applicant would be disadvantaged by not being represented.[57]In ***R* v. *Secretary of State for the Home Department, ex parte Tarrant***,[58]the applicants in this case had been charged with mutiny under the prison rules. They were found guilty at a hearing of the Board of Visitors during which they were unrepresented. The sentence involved loss of a considerably amount of remission. Here, although it was held by the court that there was no legal representation, the board did not have discretion to provide for legal representation. Because of the serious nature

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56 1986 Lab IC 613 (617) (Bom DB) : 1986 I LLN 743.

57 *Supra* note 1, at 118.

58 (1984) 1 All ER 799.

of the charge, and the possible consequences caused by the denial of legal assistance, it was held that there had been a breach of natural justice.

9) Where the delinquent is illiterate

In ***Kavitha Movie house* v. *P.M.Mary***,[59] if an uneducated female sweeper, who says she is not a member of any union, is not allowed to engage a lawyer, it virtually amounts to denial of reasonable opportunity to defend herself, as the task of cross-examination the witnesses and presenting of the case is beyond her comprehension. The management has to exercise its discretion in a spirit of fairplay and in consonance with the rules and principles of natural Justice.

CONCLUSION

It is concluded that the right to legal representation in administrative adjudication is never considered as an integral part of the principles of natural justice. Whether right to legal representation is to be provided or not depends upon the statute under which administrative adjudicating authority is established. If the statute does not provide the right to legal representation, it depends upon the circumstances of each and every individual case. When the decision maker takes a more active role in the proceedings, then the right to legal representation is allowed. Since the decision making authority is the master of his own procedure, it is the discretion of the authority to allow legal representation. The decision maker should not exercise the discretion arbitrarily by imposing fetters on his decision on rigid grounds. The decision maker has to exercise the discretion based upon the facts and circumstances of each and every individual

[59] 1978 Lab IC 1440 (1445) (Ker) : (1978) 2 LLN 397.

cases. The parties should also request for legal representation to the adjudicating authority early in the proceedings. Therefore, right to legal representation has to be afforded in the interest of justice, when the proceedings are unmistakably judicial or the livelihood of the persons are involved.

Patent Linkage System: It's Impact on the Generic Drug Development Process

Dr. Lucky George [1]

Prior to TRIPS Agreement with respect to pharmaceutical sector invention, India was providing only process patent. The generic drug industry was permitted to do reverse engineering of the patented drug and manufacture the equivalent drug within a short period of time at an affordable cost. But after TRIPS Agreement which replaced the process patent by the product patent in the field of pharmaceutical product, it created a serious challenge to generic industry which developed under the process patent regime. The generic drug industries are not permitted to release the drug during the patent term for 20 years. In order to release the drug after the patent period they should get the approval of the drug by the Drug Regulatory Authority during the term of patent. If not the patentee will be able to enjoy the extended term of protection to curb this practice. The Indian legislature by way of 2002 amendment to the Patent Act 1970 introduced sec 107 A (a) permitting Bolar Exception.

In recent years the practice of patent linkage system in the pharmaceutical sector has become a great danger to the Indian pharmaceutical companies. The scope of the patent linkage system is to introduce a link between the marketing approval of the generic drug and the patent status of the original product. It draws a responsibility on the regulatory authority not to grant market approval of the generic drug during the term of patent or may grant approval only after ensuring that it is not resulting in infringement of patent rights or the patent is invalid. The concept

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of patent linkage has entrusted the additional responsibility on the Director Controller General of India (DCGI). While granting approval should also see that the rights of the patent holder are not infringed which is beyond the scope of Drugs and Cosmetics Act 1940(DCA). Pharmaceutical industries are trying to enforce IP laws by the drug controller through the DCA and preventing the entry of generic drug in the market. Such practice of the patent linkage system extends the monopoly of the patentee beyond the patent term and curb competition in the market. Hence, there is a huge burden on the part of the generic drug manufacturing industries in India to prove that the drug manufactured has not been covered by a valid patent and also they would be forced to focus more on R&D in inventing new drugs which is an expensive task. In this research paper the focus is to evaluate the impact of the patent linkage system in the Indian pharmaceutical companies and access to generic drug.

Key words: **Patent Linkage, new drug, bio-equivalence, TRIPS Plus, Bolar Exception**.

The patent linkage system refers to the practice of linking marketing approval of the generic drug to the status of the patent of the originators product[1]. A pharmaceutical drug can be introduced in the market by the company that invents the new drug, gets patent for the drug, conducts the clinical trial. It has to furnish necessary information as required under Rule 122E[2] for getting approval for the new drug from the Drug Controller

[1] Sandeep K Rathod (2011), Patent Linkage & Data Exclusivity- A Look at Some Developments in India, *Journal of Generic Medicines*, Vol. 8, Issue 3 p. 140-49.

[2] Rule 122 E of DCR. Available in: https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/acts_rules/2016DrugsandCosmeticsAct1940Rules1945.pdf (accessed on 18-11-20)

General India (DCGI) under the Drugs and Cosmetics Rule (DCR) and DCA, or by the generic manufacturers by proving that it is the bio-equivalent of an already approved drug. Marketing approval ensures the safety and efficacy of a pharmaceutical product. The two entities Drug Controller and Patent Officer, are independent bodies set up for different purposes under two different laws. The Patent officer grants patent to new drug by examining whether the new drug complies with the standard requirement of novelty, inventive step and utility and confers patent protection for a period of 20 years. Patent protection confers exclusive rights to patent holder to prevent others from making, selling, using, importing and offering to sell a patented product. During the term of patent protection, generic drug cannot be released in the market by the generic drug manufacturer. The DCGI under the DCA grants marketing approval to the drug once they are satisfied that the drug is safe and fit to be used for medical treatment. There is no responsibility on the DCGI to see that whether the drug for which approval is sought is in violation of patent rights of the originators product. In India the patent linkage system is not followed and it is contrary to the *Bolar* exception granted under the Patent Act. There are no provisions which describe the system of patent linkage in TRIPS Agreement which provided provisions for general enforcement of patent rights providing minimum standards of protection. The system of patent linkage is in fact a U.S. construct, and is effectively prevented in the European Union by the EU medicine directive[3].

Under the TRIPS Agreement, member countries agree to ensure exclusive rights to patent holders for a limited period of time. Article 28.1(a) of the TRIPS Agreement provides for the

[3] Directive 2001/83/EC of the ―European Parliament and of the Council of 6 November 2001 on the *Community Code Relating to Medicinal Products for Human Use*‖. – Official Journal L-311, 28/11/2004, p.67-128

rights of the patentee[4]. Reading Article 28 along with Article 39.3[5] of the TRIPS Agreement, some member states introduced a system of patent linkage essentially requiring that the generic manufacturer proves to the drug regulatory authority that the drug, for which he seeks approval, is not covered by a valid patent. This practice of linking patent registration and drug approval prevents a generic drug manufacturer from obtaining market approval for a generic or equivalent drug while the original version of that drug is still under the patent, unless by the consent or with the acquiescence of the Patent Law.

Patent linkage falls under the regime of the ‗TRIPS Plus' theory. The TRIPS Plus theory strengthens the protection of intellectual property owners by conferring more rights beyond what is provided under the TRIPS Agreement and as a consequence imposes more restrictions on the exemptions conferred under the law.[6] The patent linkage system strengthens the rights of patent holder of the original products and prevent the entry of generic drug industry even after the patent expires by intentionally delaying the market approval by filing patent

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4 Art.28.1(a) TRIPS:

―where the subject matter of a patent is a product, to prevent third parties not having the owner's consent for the acts of making, using, offering for sale, selling, or importing for these purposes that product;‖

5 Art.39.3 TRIPS:

―Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.‖

6 ZoyaNafis&Divya Srinivasan, Validity of Patent Linkage across the globe. Available at: https://www.lexorbis.com/wp-content/uploads/2015/10/Patent-Lawyer-as-published.pdf (accessed on 21-11-20)

litigation. The legal position in regard to patent linkage differs from country to country. The United States provides for specific statutory provisions for patent linkage, whereas India and Europe does not recognize it as an important regulation for the drug marketing approval. At present there is no express provision on patent linkage in India. Pharmaceutical industries are trying to bring the patent linkage system into India, being the second largest country in generic drug manufacturing, it would be a great danger to the Indian pharmaceutical companies and also to other developing and least-developed countries, where Indian pharmaceutical companies stand as the major exporter of generic drugs to them[7].

In case the generic drug manufacturers are not granted marketing approval, they would be forced to focus more on R&D and will seek to invent drugs rather than produce substitutes for originals. Obtaining and maintaining a patent is an expensive task and that is why it is seen that majority of patents are held and maintained by big pharmaceutical companies in developed countries. In the interest of the public of the developing countries, which primarily consists of consumers with hardly any focus on R&D, generic manufacturing of drugs should be allowed. Otherwise majority of the public who are reliant on the cheaper generic drugs will not able to afford to the drugs manufactured by the patent holders thereby depriving the right of access to public health.

Patent Linkage System in US- Hatch Waxman Act 1984

The linkage system can be traced back to 1984 to the enactment of the *Hatch-Waxman* Act in the U.S, formally known

[7] Bouchard R, ―Empirical analysis of drug approval- drug patenting linkage for high value pharmaceuticals‖, North-western Journal of Technology and Intellectual Property, 8(2) (2010) 174-227.

as the Drug Price Competition and Patent Term Restoration Act.[8] The Act was legislatively negotiated to strike, ―*a balance between two potentially competing policy interests inducing pioneering development of pharmaceutical formulations and methods and facilitating efficient transition to a market with low cost, generic copies of those pioneering invention at the close of patent term*‖[9].

Prior to the Act, generic manufacturers were required to submit independent clinical testing data proving the safety and efficacy of the medicinal product in order to gain market approval without looking into the status of patent.[10] But under the Act, the generic manufacturer has to file an ―Abbreviated New Drug Application‖ for approval by the Food and Drug Administration (FDA) stating it‘s not infringing the patent owner‘s rights. The approved drug has been listed by the FDA in the Orange Book as both safe and effective, it is formally known as ―Approved Drug Products with Therapeutic Equivalence Evaluations‖. The Orange Book also plays a vital role in the resolution of patent disputes regarding approval. The Hatch-Waxman Act requires each holder of an approved ANDA to list pertinent patents it believes would be infringed, if a generic drug were marketed before the expiration of these patents[11]. Pharmaceutical companies with patented drug are

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[8] Drug Price Competition& Patent Term Restoration Act 1984 (Hatch – Waxman Act) amended the Federal Food, Drug and Cosmetic Act 1938. Section 505 (j) of the Act, codified as 21 USC § 355 (j) outline the process for pharmaceutical manufactured to file an Abbreviated New Drug Application for approval of a generic drug by the Food & Drug Administration (FDA). Available at:https://www.govinfo.gov/content/pkg/STATUTE-98/pdf/STATUTE-98-Pg1585.pdf (accessed on 12-11-20)

[9] Novo Nordisk A/S, et al. v. Caraco Pharmaceutical Laboratories, Ltd, et al., No. 2010-1001 (Fed. Cir., April 14, 2010) at 2.

[10] Federal Food, Drug and Cosmetics Act, 1938 (enacted by the 75th United States Congress) amended in the year 1962 which added a proof of efficacy requirement to new drug approval. Thus, new drugs must be proven safe and effective prior to the Food and Drug Administration‘s (FDA‘s) approval. Available at: https://www.govinfo.gov/content/pkg/COMPS-973/pdf/COMPS-973.pdf (accessed on 12-11-20)

[11] *Id.*, at 21 U.S.C.§355(c)(2).

using such practice where they associate/connect/link the status of drug marketing approval with the status of the patent of the product, thereby affecting a large number of generic drugs manufacturers from entering into market preceding expiration of patent term, unless consent is acquired from the patent owner. *The generic drug manufacturer has to produce one of the following four certifications*[12]*while submitting ANDA:*

1. *The drug has not been patented;*
2. *The term of patented drug has already been expired;*
3. *To release the generic drug after the patent expire, or*
4. *The patent is not infringed on or the patent is invalid.*[13]

In the case of the 1st and 2nd ground‘s the Federal Drug Administration may grant the approval immediately. In case of ground 3, the approval is likely to be granted after the expiry of the patent term. In case of the 4th ground, when certifying that the patent is not infringed or invalid, the applicant must notify that the patentee of its filing and state the rationale behind these claims.[14] The patentee has to file the infringement suit within 45 days, and if such suit is filed, an automatic 30 months stay of marketing approval is placed on the drug. After the expiration of the 30 months‘ period, the FDA is free to grant marketing approval of the generic firms that are able to prove the invalidity of an existing patent and are awarded 180 days period of exclusive marketing rights. But if the right holder‘s litigation subsequently succeeds that the patent has been infringed, the approval shall be made

12 Sec 505(j) (2) (A) (vii) *Supra* n.1 at 98 Stat.1586.

13 21 U.S.C §355(j) (2) (A) (viii) of Federal Food, Drug and Cosmetic Act 1938, amended by Hatch-Waxman Act 1984.

14 Pub. Law 98-417-Sept. 24, 1984, 98 Stat. 1589. Available at https://www.govinfo.gov/content/pkg/STATUTE-98/pdf/STATUTE-98-Pg1585.pdf (Accessed on 12-11-20)

effective on such date as the court order under 35USC§271 (e) (4) (A).[15] Section 271(e)(1) carves out an exception to patent infringement liability, when otherwise-infringing activities are solely for uses reasonably related to obtaining FDA approval.[16] The patent linkage system has been shown to have detrimental effect on access to medicines by delaying generic market entry and allowing the high prices of originator medicines to remain unrestrained by generic competition in the market thereby depriving the right to access medicines by public.

Patent Linkage system has in fact increased the number of patent infringement litigation. When the generic industries submitted the ANDA with paragraph IV certification, It further delays the entry of generic drug in the market with the approval of FDA. The two leading cases in this regard are of *Bristol Myers Squibb Company* v *Royce Laboratories Inc.,*[17] *and Merck & Co Inc.,* v *Kessler*[18]. In both the case, the issue was regarding the approval of generic version of the drug by the FDA application submitted during the patent period to release the drug in the market after the expiry of the patent term. Despite submitting the ANDA with paragraph III certification, there is a delay according to URAA (Uruguay Round Agreement Act), there is extension of term of protection to 20 years, and each of the patent drug in suit

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15 *Id. a*t Sec 505 (j) (3)(K)(4)(B)(iii)(II).See also, Gerald J Mossinghoff (1999), Overview of the Hatch-Waxman Act and Its Impact on the Drug Development Process, *Food Drug LawJ.*54 (2) 187-94.

16 35 U.S.C. § 271(e)(1) ―*It shall not be an act of infringement to make, use, offer for sell, or sell within the United States a patented invention . . . solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products.*‖

17 *Bristol –Myers Squibb Co. and E R Squibb & Sons, Inc.,* v. *Royce Laboratories, Inc.,* 69 F. 3d 1130.

18 –Nos. 96-1068, 96-1105, 96-1107.‖ *Merck Co., Inc.* v. *Kessler,* 80 F.3d 1543, (Fed. Cir. 1996).

received two more years of extension known as delta period. So the generic drug manufacturers are asked to submit the ANDA with paragraph IV certification for challenging the validity of the patent or patent infringement. It amounts to infringement if the action is considered as a defence under safe harbour 35 USC §271(e) for the purpose of submitting information to FDA for approval before the expiry of the patent term. If the suit is filed by the patentee within 45 days, for 30 months the approval of generic drug will be stayed without looking into the merits of the case and automatic stay is granted. In consequence of the litigation prolong the entry of the generic version of the patented drug in the market is prolonged is delayed due to the patent linkage system and thereby the patent owner is able to enjoy the extended term of patent protection even after the expiry of the term. They enjoy the monopoly and sell the drugs at a higher price due to ineffective competition and deprive the public the access to medicines at low cost.

Patent Linkage System in European Union- Directive on Medicinal Product 2004/ 2001.

In contrast to US, the European Union and India do not support patent linkage system on the ground that it is contrary to regulatory law as it undermines the Bolar Provision. The European Medicines Agency (EMEA) is the drug marketing approving authority under the EU law. It does not allow linking marketing authorization to the patent status of the originator reference product. Article 81 of Regulation EC 726/2004[19] and Article 126

[19] Regulation EC no. 726/2004 of the European Parliament & of the Council for Medicinal Product, OJL136, 30-04-2004, p-1. Available at: https://ec.europa.eu/health/sites/health/files/files/eudralex/vol-1/reg_2004_726/reg_2004_726_en.pdf (accessed on 13-11-2020)

of Directive EC 2001/83[20] provide that approval to market a medicinal product shall not be refused, suspended or revoked except on the grounds set out in the Article 116 & Article 117 of the Regulation and the Directive.[21] Since the status of a patent is not included in the grounds set out in the Regulation and the Directive, market approval is not linked to patent status.

The directive[22] also introduced the 8+2+1 formula, wherein an innovator company enjoys a period of 8 years of data exclusivity during which their pre-clinical and clinical trial data may not be referred by the generic company for the same drug substance. Further, an additional period of 2 years of market exclusivity is granted to the innovator company. During this period, generic company may not market an equivalent generic version of the originators pharmaceutical product. After a period of 10 years, from the grant of the innovator company's marketing authorisation, the generic company can market their product unless the innovator product qualifies for a further one year of exclusivity. This additional one year is granted to the innovator company for a significant new indication / chemical entity for the relevant medical product.[23]

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20 Directive 2001/83/EC of the European Parliament and of the Council of 6 Nov, 2001 on the Community Code relating to Medicinal Products for Human Use, OJL – 311, 28/11/2004, p. 67 – 128. Available at: https://www.ema.europa.eu/en/documents/regulatory-procedural-guideline/directive-2001/83/ec-european-parliament-council-6-november-2001-community-code-relating-medicinal-products-human-use_en.pdf (accessed on 13-11-20)

21 *Ibid*, Art 116 and Art 117 of the Directive EC 2001/83 grounds for refusal of market approval but the article is silent about the Patent Linkage system.

22 *Supra* n. 19.

23 Data Exclusivity for Medicinal product in Europe, available at: https://www.taylorwessing.com/synapse/regulatory_dataexclusivity.html (accessed on 13-11-20).

As a consequence, the application for the approval of generic version of the original product can be submitted only after 8 years of data exclusivity and the product can be marketed only after 10/11 years of the authorisation of the original drug. The countries of the European Union adopted this formula and not the patent linkage system as that of US. After 11 years the generic drug company is able to market the product after getting the approval from the EMEA, by showing that their product has the same qualitative and quantitative composition as that of the reference medicinal product and that it is bioequivalent.

Patent Linkage System in India

Before marketing a pharmaceutical drug in India, marketing approval from the Drug Controller General of India (DCGI) is required as per the Drugs and Cosmetics Act 1940[24]. The Drug Controller General basically looks into whether the drug is safe and fit to be introduced in the market or not.[25] In most of the cases before applying for the marketing approval the inventor of the drug goes for patent protection under the Patents Act, 1970. While discussing about the patent linkage system, it can be noted that this system has not been expressly recognized in India by the legislature and the judiciary has rejected the attempt by big pharmaceutical companies to create such linkages. The Patent Office and the Drug Regulatory Office are two separate and independent mechanisms created under different laws with different intent. Drug Controller General while granting the marketing approval need not look into the patent status of the originator drug. They just examine whether the drug is safe and enhance the efficacy. On the other hand, patent office grants patent to pharmaceutical company for the pharmaceutical drugs under the

24 The Drugs and Cosmetics Act, 1940

25 Section 18 of the Drugs and Cosmetics Act- *Prohibition of manufacture and sale of certain drugs and cosmetics.*

Patent Act 1970, if it complies with the requirement of patentability.

After the introduction of product patent for pharmaceutical drugs under the TRIPS Agreement, Indian legislature has made certain amendments in the existing law to ensure the accessibility and affordability of drugs by incorporating the provisions of compulsory licensing,[26] *Bolar* exception[27] and parallel import.[28] The generic drug manufacturers are permitted to submit an application before the Drug Controller General of India for the marketing approval of the equivalent drug of the original patented product during the patent term. To furnish the necessary information to the concerned regulatory authority for approval, they are permitted to manufacture the drug with a condition that they are not permitted to sell the drug during the term of patent. This exemption to the patent right is known as Bolar exception and also known as early working requirement. This clause is introduced to ensure that the generic drug will be released in the market the very next day after the patent expires and thereby reduce the price of the drug. The object of the clause is to prevent the extension of the patent monopoly after the patent expires. [29] Linking the approval of the generic drug to the status of the patent is contrary to the provisions of Bolar exceptions and this will result in unnecessary patent litigation and delay in getting the market approval of the generic drug.

Enforcement of Patent through Drugs and Cosmetics Act 1940

The patent linkage system essentially requires that the generic manufacturer proves to the drug regulatory authority that

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26 Section 84 of Indian Patent Act 1970

27 Section 107 A (1)

28 Section 107 A (2)

29 *Canada-Patent Protection of Pharmaceutical Products*, WT/DS114/R, 17 March 2000. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/114-13.pdf&Open=True (accessed on 17-11-20)

the drug for which he seeks approval is not covered under valid patent. This creates a responsibility in favour of the Drug Controller to ensure that marketing approval is not granted to generic manufacturers in cases where the drug is already covered by an existing patent. The two patent disputes, *Bayer Corporation and Others* v. *Union of India (UOI) and Other*[30] *and Bristol-Myers Squibb Co.* v. *Hetero Drugs Ltd.*[31] before the Delhi High Court have raised the issue of patent linkage between the Indian Patent Office and the Office of the Drug Controller General of India. The pharmaceutical company wants the Drug Controller to enquire whether generic drug infringes patent right of the original product before granting marketing approval. The disputes were an attempt to transform the regulatory authority to a patent enforcement agency.

The debate on patent linkage was ignited in the case of ***Bristol-Myers Squibb (BMS)Co.* v. *Hetero Drugs Ldt.***[32] where the Delhi HC granted ex parte injunction against the Hetro Drugs Ltd.,a Hyderabad based generic manufacturer for its generic version of the BMS cancer Drug ‗Dasatinib‘. BMS has been selling the drug in India since 2006 under the brand name ‗*Sprycel*‘for treating chronic myeloid leukaemia[33]. The injunction

[30] W.P.NO. 7833/2008, [2009 (41) PTC 634 (Del)]. In the writ petition the appellant Bayer sought directions inter alia to restrain the Drug Controller General of India (DCGI), Respondent no. 2, herein, from granting a drug license to Cipla Ltd., Respondent no. 3, (generic drug manufacturer), to manufacture, sell and distribute its drug ―sorafenibtosylate‖, prescribed for the treatment of advanced renal cell carcinoma.

[31] CS (OS) No.2680/2008, Dec 19, 2008

[32] CS (OS) No.2680/2008, Dec 19, 2008

[33] Khomba Singh, Delhi HC Directs DCGI not to permit Generic Drugmakers for drugs already Patented. Available at: https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/delhi-hc-directs-dcgi-not-to-permit-generic-drugmakers-for-drugs-already-patented/articleshow/3948311.cms?from=mdr (accessed on 24-11-20)

was sought for preventing the process of application submitted by Hetero for getting market approval of the generic version of the drug ‗Dasatinib' by the DCGI, the drug regulator on the ground that, while granting approval should have examine the status of the patent. The Court held that ―*it is expected that the DCGI while performing statutory functions will not allow any party to infringe any laws and if the drug for which the approval has been sought by the Hetero Drugs is in breach of the patent of BMS, the approval ought not to be granted to Hetero,*‖ This ruling created a link between the regulatory approval and patent status of a drug that was unprecedented in the Indian IP regime.

The patent linkage system necessarily means that DCGI, who is entrusted for approving drugs in India after ensuring their safety and quality, will also have to look at the status of the drug before granting market approval. The court decided the case by interpreting sec 2 of the DCA. While granting approval for marketing the drug, it held that DCGI should also look into whether by granting a permission it is in derogation of any other law. This decision created fear among the generic manufacturer that this decision will give way for enforcing patent linkage system in India linking the patent status and regulatory approval process[34]. The intent of the legislature while incorporating Bolar exception under patent law by way of 2002 amendment, was clear that the generic manufacturer can submit application during the patent term for market approval from the concerned regulatory authority and it will not amount to infringement. The court indirectly recognising patent linkage system in India has taken a contrary stand to Bolar exception and is trying to enforce IP law through DCA, which do not say marketing approval should be withheld because some other company holds a patent. This

[34] Drug Controller to Analyse Patents while Patent Controller Analyse. Available on: https://duncanbucknell.com/2009/01/15/drug-controllers-to-analyse-patents-while-patent-controllers-analyse-efficacy/ (accessed on 24-11-20)

increases the burden on the Drug Controller Office because assessment of a patent validity is a complex question which only the office of patent or the court can decide. The work of Drug Controller Office, with no special patent expertise but with additional duty of policing patent rights is not prudent.

A subsequent landmark judgment from the Delhi High Court in the ***Bayer Corporation and Ors V. Union of India (UOI) and Ors***[35]finally brought much needed clarity to this issue. The Indian Patent Office had granted the petitioner, patent number 215758 for the drug ―Sorafenibtosylate‖ prescribed for the treatment of advanced renal cell carcinoma on 3-3-2008 for a period of twenty years from 12-1-2000 in accordance with sec 53 of the Patent Act 1970. They came to know in July 2008 that Cipla Company had announced the introduction of a drug ―Soranib‖ which was a substitute for Bayer‘s drug ―Sorafenibtosylate‖. They wrote to DCGI requesting not to grant marketing approval to Cipla for its drug ―Soranib‖ the generic version of ―Sorafenibtosylate‖ for spurious[36] adaptation of its patented drug as the same would be in contravention of the Drugs and Cosmetics Act (DCA). If the approval is granted, it will be in violation of the patent right granted to the patentee under Section 48[37] of the Patent Act.

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35 W.P.NO. 7833/2008, [2009 (41) PTC 634 (Del)]

36 Section 17B of DCA, 1940 define Spurious drugs.

37 Section.48 of Patents Act, 1970: *Subject to the other provisions contained in this Act and the conditions specified in section 47, a patent granted under this Act shall confer upon the patentee—*

(a) where the subject matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;

(b) where the subject matter of the patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India.

Under the Patent Act, the patent is granted to the drug if it is in compliance with the standard requirement for patentability but for the marketing of the patented drug they should get the approval from the DCGI in accordance with Drugs and Cosmetics Act. The provisions of DCA should be in addition to and not in derogation of, any other law for the time being in force.[38] That means DCGI should give due respect to the provision of patent act and not in derogation of it while granting the marketing approval. The pharmaceutical company wanted the DCGI to link the marketing approval of the drug to the status of the patent. (*Emphasis added*).

Rule 122E of Drugs and Cosmetics Rule (DCR), defines ―new drug‖, for the marketing approval of the new drug, the applicant has to submit the following details: (i) marketing information including proposed package, insert/promotional literature and draft specimen of label/cartons (ii) special studies including information in respect of bio availability and bio equivalence and comparative discussion studies for oral dosage.[39] But if the application is for the generic version of a patented drug, in respect of which marketing approval has already been granted to the patent holder the applicant has only to satisfy the DCGI that its drug is bio-available and bio-equivalence of the patented drug. ―*Therefore, the DCA read with the DCR clearly envisages a situation where marketing approval may be sought by a manufacturer of the generic version of a patented drug. The role*

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38 Sec 2 of DCA 1940, ―*Application of other laws not barred.- The provisions of this Act shall be in addition to and not in derogation of, the Dangerous Drugs Act, 1930 (2 of 1930), and any other law for the time being in force.*‖

39 Rule 122 E of DCR. Available in: https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/acts_rules/2016DrugsandCosmeticsAct1940Rules1945.pdf (accessed on 18-11-20)

of the DCGI is clearly cut out under the DCA and the DCR. Therefore, there is no scope for the DCGI to travel beyond the DCA and the DCR and ensure protection of a patent by refusing marketing approval to a generic manufacturer only because the drug in question is patented. Given the above scheme, to suggest that patent linkage is established only because one column of Form 44 asks the applicant to indicate the patent status of the drug, is to misconstrue the provisions as they stand. A form is an appendix to a statutory rule cannot be understood contrary to the scheme of the statute. Patent linkage that is not evident from the reading of the Patent Act and the DCA cannot by a judicial interpretative exercise, howsoever creative, be discerned from one column in Form 44 appended to the DCR‖[40]

The Court further added that patent linkage system has to be introduced by the legislature by way of amendment and not by the judiciary and held that

–*there is merit in the contention that if it was the intention of the Parliament to link the entry of information in respect of patent status with the grant of marketing approval, then the definition of _new drug‘ under Rule 122E DCR ought to have been amended. A patent is valid for 20 years and if such linkage is recognised, then every time a marketing approval is sought by a generic manufacturer of a patented drug, the DCGI will have to perforce reject such application as long as 20 years have not elapsed from the date of grant of the patent. This is contrary to the provisions of the Patent Act. This court cannot possibly read into the statute a provision that plainly does not exist.*‖[41]

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[40] *Supra* n.35.

[41] See also, *Unique Butyle Tube Industries (p) Ltd.* V. *U P Financial Corpn.,* (2003) 2 SCC 455, 462: AIR 2000 SC 2103 and *DadiJagannadham*v. *JammuluRammulu,* (2001) 7 SCC 71, 78: AIR 2001 SC 2699.

Thus, the decision given by the Delhi High Court in this case made a clear stand that it is against the incorporation of the elements of patent linkage in the Indian system. If the requirement to mention the patent application details in form 44[42] in the DCR read with section 2[43] of DCA, in the light of grant of product patent for pharmaceutical products is interpreted by the judges to link the patent with grant of license by the drug controller is an attempt by the legislature in introducing the patent linkage system in India, then the case would be decided in the other way. It has to be seen the court in subsequent cases is going to approach the issue, if there is pressure from the MNC Pharmaceutical Companies in denying market approval of generic drugs and delaying the introduction of drugs in the market. The pharmaceutical industries are trying to bring the patent linkage system in India through Free Trade Agreement with nations who are following the patent linkage system.

Free Trade Agreement and Patent Linkage

Having failed to achieve all they sought in the TRIPS negotiations, developed nations began negotiating for inclusion of Patent- linkage in Free trade agreements (FTAs). FTAs have recently been used as one of the mechanism to implement provisions of IPR by developed countries. India is in the priority watch list of the special 301 report submitted under the US Trade Representative Act 1974 for not extending strong protection for pharmaceutical products after a failed case in India‘s Supreme Court in Novartis Case. India is always under the purview of super

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42 Form 44 of the DCA – Application for grant of permission to import or manufacture of a New Drug or to undertake clinical Trial. Available at: https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/acts_rules/2016DrugsandCosmeticsAct1940Rules1945.pdf (accessed on 20-11-20)

43 *Supra n.* 38.

301 which is targeting the patent regime of the country. One of the means to compel India to adopt the US Standard is by entering in to FTA with US. The Bipartisan Congressional Trade Priorities and Accountability Act of 2015[44] requires the US administration to ensure that trade agreement covering IPR –reflect a standard of protection similar to that found in US Law‖. US follows the patent linkage system in their law so it is clear that country in which enter into FTA should also adopt the same. Indian Government should be very careful enough in entering into FTA with developed nations in Intellectual Property matters, where India is having a strong base of generic drug manufacturers.[45]

Conclusion

Patent linkage system will be favourable for big pharmaceutical companies, who invest huge amount of money for research and development in inventing the original drug and they want to prevent the generic manufacturer from entering the market and make available the generic version of the drug at a cheaper price compared to patented drug. The original inventor of the drug after getting the patent submits an application to the regulatory authority for market approval and it will take another three to four year after the grant of patent to release the drug in the market. This will reduce the number of years of commercial exploitation of the patented drug. The years which have gone in getting market approval should be compensated by extending the monopoly after the patent expires. But this is not possible after the incorporation

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44 Available at: https://www.finance.senate.gov/imo/media/doc/TPA%20Report%20as%20filed.pdf (accessed on 15-11-20).

45 LathaJishnu, Beware of a deal with Trump, *Down to Earth.* Thursday 14, February 2020. Available at: https://www.downtoearth.org.in/blog/governance/beware-of-a-deal-with-trump-69280 (accessed on 15-11-20).

of *Bolar* exception by way of 2002 amendment of the Patent Act, where the generic manufacturers are permitted to manufacture the drug for the purpose of providing necessary information to the concerned regulatory authority for market approval. They can stock and pile it, but should not release the drug during the patent term. As a consequence, the patentee will not be able to enjoy extended monopoly even for a single day. To circumvent it, pharmaceutical industry tries to enforce IP law through Drug Controller authority under the Drugs and Cosmetics Act by extending patent linkage system. After the *Bayer* case, it's clear that patent linkage system is not recognised in India and now the pharmaceutical industry is trying to introduce the system by way of Free Trade Agreement. If the system creeps into Indian Pharmaceutical industry, it will affect the generic drug manufactures efforts in bringing the generic version of the drug at cheaper price and to meet the needs of the people to access medicines at affordable prices.

Larger Projects v. Environment Protection: An Analysis of Judicial Trends in India

Dr. M. Sakthivel [1]

Since 19th century, forest has been considered by the Government as a potential revenue source rather than treating it as an integral and crucial component of the environment.[2] The British Government went to the extent of exporting forest resources back home due to their intrinsic value for a number of activities.[3]Then government's acquisitive policies of extracting the valuable resources for the maximum revenue generation were unmindful of the long term ill effects of such unscientific economic utilisation widely rampant in the country. Of course, gradually the natural protectors of the forest land i.e., tribal people were disassociated from their shelters and were considered as trespassers.[4] This position continued even after the independence for some time.[5]

After Independence, the prime target of the Government was nation's development, especially, agricultural, infrastructural and economic development, which was attained mostly by

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[2] S.C Shastri, *Environmental Law*, V ed., (Eastern Book Company, 2015) p.348.

[3] P. Leelakrishnan, *Environmental Law in India*, III ed., (India: Lexis Nexis, 2008) p.42.

[4] P. Leelakrishnan, *et. al*, _Forest and Tribal People: Law and Practice' in Tribal Welfare: Law and Practice, (Dept. of Law, Cochin University, 1985) p. 263. And also see *Ibid.*, VS Saxena, _Social Forestry in Tribal Development', in DeshBandhu and RK Garg, *Social Forestry and Tribal Development*, 1986, p.38.

[5] Buddhadeb Choudhuri, _Forest and Tribals: A Historical Review of Forest Policy' in Chittaranjan Kumar Paty, *Forest Government and Tribe*, (New Delhi: Concept Publishing Co., 2007), pp 6-13.

undermining environmental aspects.[1] This manifests the British Indian Government's intended inability to see the long term repercussions of playing with the nature and its treasures.[2] Moreover, it failed to employ a methodical approach for exhausting the resources thereby causing deleterious and irreversible changes to the environment.

Introduction of Forest Conservation Act, 1980 gave an indication that the resources would be allowed for extraction after due diligence.[3] Again, the disassociation of tribes[4] from the forest continued.[5] Perhaps, this attitude got somehow diluted due to the efforts of active citizens in exerting pressure on the government as well as by knocking the doors of judiciary and consequently tribal

[1] Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India*, II ed., (Delhi: OUP, 2015) p.23.

[2] So as to overcome from such problems, Forest conservation Act, 1980 was enacted. See for the same type of argument, S.C Shastri, *Environmental Law*V ed., (Eastern Book Company, 2015) p.356.

[3] P. Leelakrishnan, Environmental Law in India, (India: Lexis Nexis, 2008), p.43.

[4] Even the Forest Policy, 1952 did not address the issues of tribals. See for the same argument, M.Soundarapandian, Tribal Development in India: A Case Study, Anmol Publications, Delhi, 2000, p.52.

[5] Till 1980, the tribal people were neglected and undermined in the process of forest conservation. They were treated as a hurdle in the process of development and revenue generation. See for the same argument, D.R Meghe, _Legal Protection to Tribals and Tribal Development: A New Deal for Tribals through Law' in S.G. Deogaonkar, *Problems of development of Tribal Areas*, (Delhi: Leeladevi Publications, 1980) p.31 and also see G.S. Narwani, *Tribal Law in India*, (New Delhi: Rawat Publication,2004) pp.15, 187 &188. Which reads in p.188 as follows: the tribal has suffered the biggest setback on account of big irrigation dams in the name of development of irrigation facilities and preventing floods. Big reservoirs submerged thousands of hectares of tribal lands, in lieu of which they got only cash compensation or a developed housing colony. Without land and wells, tribals became unemployed and had no source of livelihood. Cash was squandered away in liquor and marriages or other social customs. Unfortunately, no project had a rehabilitation package for resettlement of oustees. Hence, we find serious opposition in Narmadha Project or Tehri Garhwal. The net impact has been that many tribals lost their land either in submergenance of irrigation dams or due to meager purchasing power of tribals, they became indebted to moneylenders who have informal rights over lands of tribes.

people are now being considered as a part of the forest land.[6] This shift which took place in the area has resulted not only because of the government's policy but also due to the judicial intervention.[7]

It is impossible for us to undermine the contribution of the Indian Judiciary[8] in the formulation of the environmental jurisprudence either by creating their own concepts[9] or by incorporating international concepts in to the municipal law.[10]At the same time one cannot ignore the fact that the same judiciary has undermined certain aspects of environmental protection at times and has also offered some kind of differential treatment for a number of larger projects. Still the same practice is being continued by the Judiciary. In this context, it is worth to critically examine the socio-economic attitude of the Indian judiciary by examining

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[6] Non –governmental organization like *BanwasiSeva Ashram in BanwasivSeva Ashram* v. *State of U.P.* (1987) 3 SCC 304, (1992) 1 SCC 117 & (1992) 2 SCC 202, Rural Litigation Entitlement Kendra in *RLE Kendra v. State of U.P.* (1985) 2 SCC 431, Natural Lovers Movement in *Natural Lovers Movement* v. *State of Kerala*, AIR 2000 Ker. 131 & (2009) 5 SCC 373.

[7] In addition to above case, an individual who is considered as a flagman i.e., T.N. GodhavarmanThirumulpad has filed numerous petitions before the Apex Court on the forest related issues wherein the rights of the tribal peoples have been recognized while ensuring the forest conservation. However, cases like, *Narmada BachaoAndolan*v. *Union of India*, (2000) 10 SCC 664, where court has undermined the Tribals rights and green signaled the developmental project i.e., on the river Narmada.

[8] See Jamie Cassels, ―Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?‖, 37 (3) The American Journal of Comparative Law (1989), pp. 495- 519.

[9]. In *M.C. Mehta and Anr. v. Union Of India &Ors* AIR 1987 SC 1086, Supreme court has propounded the new doctrine called ―absolute liability‖. It means: *The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.*

[10] In *Vellore Citizens' Welfare Forum v. Union of India and others*, AIR 1996 SC 2715, Supreme Court has incorporated the so called sustainable development concept with its all components including precautionary principle and polluter pays principles.

various cases in which the Courts favored the developmental aspects over the environmental concerns and the accompanying reasons for deciding so.

Protection of Environment through Legislations: An Analysis

Prior to 1970s, India did not have many legislation to address the environmental problems effectively. Only a few legislations pertained to certain aspects of environment. One such legislation was the Indian Forest Act[11] enacted with the sole object of regulating and streamlining the revenue generation from the forest produce rather than checking deforestation. Perhaps the Stockholm Declaration[12] is the first document that provided some insight to Indian Government and this declaration formed the basis of many legislations in the field resulting in multiple enactments i.e., Water Act,[13] Air Act,[14] Forest Conservation Act,[15] Environment Protection Act,[16] Wildlife Act,[17] etc., In addition to these, as per the power conferred under the Environment Protection Act, Central Government through its delegated power has issued many notifications, and rules from time to time to address various aspects[18] of the environmental problems. Though there have been many legislative efforts to tackle the environmental issues, lack of proper planning and corruption

11 Forest Act, 1927.

12 The Declaration of the United Nations Conference on the Human Environment, which is known as Stockholm Declaration, was adopted in 1972.

13 The Water (Prevention and Control of Pollution) Act, 1974.

14 The Air (Prevention and Control of Pollution) Act, 1981.

15 Forest (Conservation) Act, 1980.

16 The Environment (Protection) Act, 1986.

17 The Indian Wildlife (Protection) Act, 1972.

18 Ministry of Evironment and Forest which is the nodal authority to issue various rules and notifications from time to time have issued many of that nature. Costal Regulation, Waste management, E waste, Bio- medical, Noise pollution, etc.,

coupled with a lack of political will to protect the environment for economic factors and non application of scientific principles has resulted in a serious drain on the natural resources .[19]

Rapid depletion of forest cover, exhaustion of natural resources like iron ore, coal, etc., are obvious manifestations of indiscreet policies lacking scientific basis.[20] In addition to these, conversion of forest area for non-forest activity in the name of development has seen a considerable increase.[21] While doing so, even the victims of those developmental activities have not been provided with any alternative for their survival by the State.[22] On the one hand Judiciary has played a pivotal role in providing viable solutions in some cases while it has compromised the environmental good in other cases in the name of treading the path of development for national progress. Let us critically analyze few judgments of the Apex Court where it has taken contradictory views with respect to environmental conservation.

Indian Judiciary & Environment: An Analysis

The Indian Judiciary has contributed immensely in environmental protection and preservation by way of judicial activism in an era marred by the development of public interest litigation and environmental jurisprudence. The voyage of environmental activism of the courts started with the widening of the concept of

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[19] See for the same type of argument for the developing countries, Ruth Greenspan Bell & Clifford Russell, "Environmental Policy for Developing Countries" *available at*: http://issues.org/18-3/greenspan/ (Last visited on 29th June, 2016)

[20] See for the detailed discussion on the issue of over exploitation, ―Natural Resources: Depletion Reasons, Types and their Conservation‖, *Biology Discussion*,avilable at: http://www.biologydiscussion.com/natural-resources/natural-resources-depletion-reasons-types-and-their-conservation/6992 (Last visited on 29th June, 2016)

[21] Mining, laying down roads, power plants, Special Economic Zones, Exclusive economic Zones and dam construction are the main developmental activities in the forest area.

[22] The Narmada Valley Development project which has ultimately affected thousand and thousand tribal families has been displaced from their main without providing any survival prospect.

locus Standi in the late 1970s and the beginning of 1980s.[23] Introduction of public interest litigation (PIL) was also a boon for promoting and achieving environmental justice in a speedy manner.[24] All these changes were brought without amending the legislative provisions. Rather, the judiciary tactically played with the words and then interpreted the provisions in the light of advancing the wider objective of welfare of people which the legislations aimed at so as to protect and improve the environment. Even the directive principles of state policy[25] have been incorporated into part III of the constitution i.e., fundamental rights which can be enforced in the courts through Art. 32[26] or Art. 226[27] of the Indian Constitution thereby bringing the right to

[23] Locus Standi has been widened by the Supreme Court in S.P. Gupta v. President of India and Ors AIR 1982 SC 149. It held: –..it must now be regarded as well settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the Court on account of some disability or it is not practicable for him to move the Court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the Court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go un-redressed and justice is done to him.‖

[24] Even a single post card was treated as writ petition. See Sunil Batra v. Delhi Administration AIR 1980 SC 1579

[25] Directive Principles of State Policy is the part IV of the Indian Constitution. It is the guiding principles for the state to provide/achieve over a period of time.

[26] Constitutional remedies are available against fundamental rights violation before the Supreme Court under Art. 32 which reads: 32. Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

[27] The same remedies can be availed before the High Courts under Art.226 of the Indian Constitution.

environment within the fold of the right to life as indicated by the Supreme Court.

The apex court which already the horizon of Art. 21[28] of the Indian Constitution held that: ―*The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival*‖.[29] The same view was affirmed yet again in this *the right to life guaranteed under this Article is not confined merely to physical existence or to the use of any faculty or limb through which life is enjoyed or the soul communicates with outside world but it also includes within its scope and ambit the right to live with basic human dignity and the State cannotdeprive any one of this precious and invaluable right because no procedure by which such deprivation may be effected can ever be regarded as reasonable, fair and just.*[30]

With these expansions of Article 21, the Apex Court had its first occasion to look into the issue of environment in the light of right to life in *the Rural Litigation and Entitlement Kendra v. State of U.P.*[31]In this case, the writ petition was filed under Art. 32 of the Constitution challenging the mining activities which disturbed the ecological balance in the Himalayan region due to lime stone excavation and crushing units. The Court rightly emphasized for a balanced approach between the human life and the developmental activities and held that the units should be closed down immediately. It was further held:

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[28] Constitution of India, Article 21 reads: Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

[29] *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* AIR 1981 SC 746

[30] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597

[31] (1985) 2 SCC 431

—The consequence of this order made by us would be that the lessees of lime stone quarries which have been directed to be closed down permanently. This would undoubtedly cause hardship to the but It is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment.‖[32]

Though the Court ordered to close down the industries so as to advance the right to live in a healthy environment, it was not expressly decided that the Environment is a part of right to life. The same view was taken in many of the cases of the league *MC Mehta v. Union of India*.[33] However, it was in 1990 only that the Apex Court held that Art. 21 connotes right to life includes right to live in a healthy environment also. In *Chhetriya Pardushan*[34] and *Subash Kumar,*[35] the Court held that,

Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental.[36]

Form the court‘s opinion cited above, it is evident that right to life has been stretched to accommodate right to live in a

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[32] *Ibid.,*

[33] (1992) 1 SCC 358 and subsequent cases too.

[34] *ChhetriyaPardushan Mukti Sangharsh Samiti* v. *State of U.P and Ors.* AIR 1990 SC 2060.

[35] *Subash Kumar* v. *State of Bihar,* AIR 1991 SC 420.

[36] *Emphasis added.*

clean and healthy environment. This has been further expanded and the court has subsequently held that right to get pollution free water,[37] potable drinking water,[38] open space[39] are all part of right to life collateral to right to healthy environment. In many cases, Apex Court and the High Courts have held that protection of environment to facilitate right to live in a pollution free environment is part and parcel of fundamental rights guaranteed to the citizens by the Indian Constitution. By invoking the provisions of part III of the Constitution of India, courts have stalled many developmental activities only for the ecological conservation. However, on the other hand, most of the public funded large scale projects have been green signaled by the Apex Court in the name of public interest, even where they were resulting in huge ecological imbalance.[40] Let us discuss few cases of this nature.

Larger Projects and the Supreme Court: A Critical Analysis

One among the most debated larger projects till date is the category of hydro-electric power projects. It is believed that India is having a potential of producing 2, 00,000 MW electricity from hydro projects alone[41] and half of this has been achieved. By

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37 *Wasim Ahmed Khan v. Govt. of AP*, 2002 (5) ALT 526 (D.B.); *Mukesh Sharma v. Allahabad Nagar Nigam &Ors.*, 2000 ALL. L.J. 3077; *Diwan Singh and another, v. Th e S.D.M. and other* 2000 ALL. L.J. 273; *S.K. Garg v. State of UP*. 1999 ALL. L.J. 332; *Gautam Uzir&Anr. v. Gauhati Municipal Corpn*. 1999 (3) GLT 110. See for the detailed discussion on Right to Water, Videh Upadhyay, "Water Rights and the _New' Water Laws in India: Emerging Issues and Concerns in a Rights Based Perspective", available at: https://www.idfc.com/pdf/report/2011/Chp-5-Water-Rights-And-The-New-Water-Laws-In-India.pdf (Last visited on 29 June, 2016).

38 *AttakoyaThangal*v. *Union of India* 1990 (1) KLT 580

39 *A.P. Pollution Control Board (I)* v. *Prof. M.V.. Nayudu* (1999)(2) SCC 718

40 Konkan Railway projected was allowed in *The Goa Foundation and Another v. The Konkan Railway Corporation*, AIR 1992 Bom. 471.

41 Dr. S.M. Ali, "Potential of Hydro Power Plant in India and its Impact on Environment", 10 (3) *International Journal of Engineering Trends and Technology* (IJETT 2014), p.114

installing these hydro projects inside the forest area, ecological equilibrium of that locality gets completely influenced by alien and unnatural things.[42] In addition to these problems, the human beings who are part of those areas are also affected as a result of their simultaneous displacement and a large population is thereby forced to leave its habitat, means of survival, occupation etc., Whenever some of these hydro projects were challenged before the courts, almost all of them have been allowed with some conditions. However, all of those projects have been functioning in many cases without the examination of fulfillment of those conditions. There can be seen an unbridled violation of the conditions laid down by the Apex Court due to inaction on the part of the executive to contain the violations. Apart from these larger hydro power projects, even the nuclear power projects including Kundakulam Project[43], etc., have also been allowed. Since the courts have allowed them to operate with certain riders, it does not mean that they do not affect the biosphere. The fact that they do result in severe damage to the environment cannot be avoided. As it would be highly impossible to discuss each of them in detail, two of the larger project cases are hereafter discussed here under briefly:

NARMADA BACHAO ANDOLAN CASE:-

Narmada river is one of the largest rivers in India which flows through four states- Madhya Pradesh, Maharashtra, Gujarat and Rajasthan.It was found that this river basin had ‗hydroelectric potential.‖ Therefore, Narmada Hydro Project was initiated under the supervision of Gujarat state government. Since it is an inter-state river, under section 4 of the Inter-State Water Disputes Act, 1956, Narmada Water Disputes Tribunal headed by Honourable

42 RE Grumbine, MK Pandit, "Threats from India's Himalaya dams", 339 *Science*, (2013) p.39

43 Kudankulam Nuclear Power Project is an Indo –Russia Joint Venture which is located in the State of Tamil Nadu.

Mr. Justice V. Ramaswamy was constituted by the Government of India[44] to settle the water dispute that had arisen between the State of Gujarat and the rest other states over sharing of water, rehabilitation of displaced people and the height of the dam and control of the waters of the Inter-State River Narmada. The tribunal after considering submissions of all the states, allowed the project and thus the height of the Sardar Sarovar dam was set to be increased.[45] The Tribunal also directed for the constitution of an inter-State Administrative Authority i.e. Narmada Control Authority for the purpose of securing compliance with and implementation of the decision and directions of the Tribunal.

Against the judgment of the Tribunal, Narmada Bachao Andolan[46] approached Supreme Court[47] and sought appropriate remedy to review the entire project and examine social, financial

[44] It was constituted in the year 1969.

[45] Tribunal gave its award on 7th December, 1979. Relevant part is extracted here: *The Award specified a quantum of utilizable waters at 75% dependability to be shared by the four States of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan. The Tribunal determined that the height of the Sardar Sarovar Dam should be fixed for Full Reservoir Level (FRL) of 138.68 m (455 ft) and also directed the Government of Gujarat (GOG) to take up and complete the construction of the dam accordingly. According to Clause-16 of the final orders of the Tribunal, the parameters of shares of utilizable waters by the States, FRL of the reservoir and Full Supply Level (FSL) of Navagam Canal are made subject to review at any time after a period of 45 years from the date of publication of the Award of the Tribunal in the official gazette. Available at*:

http://www.nih.ernet.in/rbis/india_information/Narmada%20Water%20Dispute%20Tribunal.htm (Last visited on 29th June, 2016)

[46] *–Narmada BachaoAndolan is the most powerful mass movement, started in 1985, against the construction of huge dam on the Narmada River. Narmada is the India's largest west flowing river, which supports a large variety of people with distinguished culture and tradition ranging from the indigenous (tribal) people inhabited in the jungles here to the large number of rural population. The proposed Sardar Sarovar Dam and Narmada Sagar will displace more than 250,000 people. The big fight is over the resettlement or the rehabilitation of these people. The two proposals are already under construction, supported by US$550 million loan by the world bank. There are plans to build over 3000 big and small dams along the river.‖* See for further details, http://www.ecoindia.com/education/narmada-bachao-andolan.html(Last visited on 29th June, 2016)

[47] *Narmada BachaoAndolan*v. *Union of India*, (2000) 10 SCC 664

and environmental costs.[48] Citing latches upon the part of Narmada Bachao Andolan and huge expenditure of public money on the project, the Supreme Court refused to address the pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, Seismicity and other issues, except implementation of relief and rehabilitation work.

The Apex Court allowed the project with a mandate to provide appropriate rehabilitation to the affected tribal population. Not only the issue of tribal displacement, environmental degradation, repercussions on biodiversity due to the submergence of large area under water, were other serious environmental concerns. However, the Apex court did not pay attention to the large scale environmental degradation, rather the developmental activities such as power generation, water supply for irrigation and drinking, etc., predominated the decision. Therefore, this case is a glaring example of the instances of large scale projects been given a go ahead by the Supreme Court in the name of the interest of the larger population.[49]

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[48] *Narmada BachaoAndolan*v. *Union of India*, (2000) 10 SCC 664. The issues before the Court were: *I. Whether the execution of a large project, having diverse and far reaching environmental impact, without the proper study and understanding of its environmental impact and without proper planning of mitigative measures is a violation of fundamental rights of the affected people guaranteed under Article 21 of the Constitution of India ? II. Whether the diverse environmental impacts of the Sardar Sarovar Project have been properly studied and understood ? III. Whether any independent authority has examined the environmental costs and mitigative measures to be undertaken in order to decide whether the environmental costs are acceptable and mitigative measures practical ? IV. Whether the environmental conditions imposed by the Ministry of Environment have been violated and if so, what is the legal effect of the violations ?*

[49] *Narmada BachaoAndolan*v. *Union of India*, (2000) 10 SCC 664. *It is true that large dams cause submergence leading to loss of forest areas. But it cannot be ignored and it is important to note that these large dams also cause conversion of waste land into agricultural land and making the area greener. Large dams can also become instruments in improving the environment, as has been the case in the Western Rajasthan, which transformed into a green area because of Indira Gandhi Canal, which draws water from Bhakhra Nangal Dam. This project not only allows the farmers to grow crops in deserts but also checks the spread of Thar desert in adjoining areas of Punjab and Haryana.*

In disposing off the writ petition, the court was of the opinion that:

(i) displacement of the tribals and other persons would not per se result in violation of their fundamental or other rights;

(ii) on their rehabilitation at new locations they would be better off than what they were;

(iii) at the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets; and

(iv) the gradual assimilation in the mainstream of the society would lead to betterment and progress.

The case initiates a serious rethink on the issue of larger projects vis–a-vis Environment protection. Under the garb of developmental activities, the indigenous people of the country were made to leave their abodes to settle at places unknown and unfamiliar to them. Saying that it is necessary to bring these people into the mainstream and provide them with the modern amenities; we should not forget that these people have a different way of living and therefore they are self-sufficient by themselves. Just because they do not live like the rest of the population, we cannot fix them as backward. How many of us will be ready to leave our homes and go to the forest areas to live the life of tribals. It will be difficult for us and so it is for them too. Article 29[50] of the Indian Constitution calls for conservation of the distinct culture of the citizens. But can we expect a group protect its culture by leaving its indigenous place.

[50] Indian constitution, Art. 29: Protection of interests of minorities: (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them

The court was of the view that it does not want to become the approving authority of policy decisions and impinge upon the jurisdiction of the Parliament.[51] Thereafter, the Bench observed thus:

_Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government.'

It is a known fact that we have a large number of laws in India but the ground reality is that they are not properly implemented. The highest court of the land in paragraph 53 of the judgment has held that:*_The expression "pari passu", therefore, has a direct nexus with raising of the height vis-a-vis implementation of relief and rehabilitation progress both of which must proceed 'equably' or 'ratably' which would mean that relief and rehabilitation measures must be undertaken as and when the height of the dam is further raised. The said expression should be construed in a meaningful manner.'*

Now the important point for consideration in the light of the words of the Supreme Court is whether the executive has been

[51] Relevant part is extracted: *It is now well-settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and peoples fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of latches if the petitioner had the knowledge of such a decision and could have approached the Court at that time.*

able to provide rehabilitation as envisioned by the Apex Court in the judgement by referring to the term ‗pari passu.' If only the executive can gain the will power to properly work on the Supreme Court's directions, the wounds of the oustees may be healed to some extent. So all we can do is to keep our fingers crossed as to the correct, timely and proper implementation of the relief and rehabilitation packages of the government.

KUNDAKULAM NUCLEAR POWER PLANT (KKNPP) CASE:-

In *G. Sundarrajan v. Union of India and others*,[52] the Supreme Court once again allowed a one of the very controversial nuclear power projects. Though the local people opposed the Indo-Russian initiative with the help of an NGO, it was also permitted to commence with a set of guidelines as happened in the cases of other large projects.

India had entered into an inter-governmental agreement with the erstwhile USSR in November 1988 followed by a supplementary agreement on 21.06.1998 signed by India and Russia in respect of the Kundakulam power plant in the state of Tamil Nadu. The case pertains to the wide scale agitation and emotional reaction to the setting up and commissioning of the highly controversial Plant against the jittering and nerve-wracking memories of the horrific industrial disasters events including the Union Carbide, India, Chernobyl, Ukraine Fukoshima, Japan, that the world has witnessed.

The major stance of the court that echo in the large part of the judgment was that a smaller public interest should yield to larger public interest while trying to strike a delicate balance between ecological impact and development. Declaring that it was not in

[52] AIR 2013 SC (Supp) 615

the court's domain to determine whether, a particular policy or a particular decision taken in fulfillment of a policy is fair or not, the court in Paragraph 11 of the judgment distanced itself from commenting on the fairness of the policies of the government. To support its stance it cited Lord Macnaughten's statement in *Vacher and Sons v. London Society of Compositors* (1913) AC 107 (118) HL :

Some people think the policy of the Act unwise and even dangerous to the community. But a Judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty is to expand the language of the Act in accordance with the settled rules of construction.

The argument advanced by the appellant was that the Court sitting is enjoined with the duty to safeguard the life and property of the people residing in and near Kudakulam which is a fundamental right guaranteed to them under Article 21 of the Constitution of India and which was getting violated as a result of the KKNPP. The safety of the people and the environment should form paramount consideration for the court in deciding the case present before it.

Addressing the question of violation of right to life of the people concerned with the environmental costs of the project, the court in Para 175 stated thus:

_While balancing the benefit of establishing KKNPP Units 1 to 6, with right to life and property and the protection of environment including marine life, we have to strike a balance, since the production of nuclear energy is of extreme importance for the economic growth of our country, alleviate poverty, generate employment etc. While setting up a project of this nature,

we have to have an overall view of larger public interest rather than smaller violation of right to life guaranteed under Article 21 of the Constitution.'

The court issued a slew of directions and let the government advance on its endeavour of economic development in the name of the welfare of the larger people of the country at the cost of concerns of comparatively fewer lots. The court stated that NPCIL, AERB, the regulatory authority, should maintain constant vigil and make periodical inspection of the plant as part of its directions to the government. Therefore this highlights that the economic development took a toll on the mind of the court to not advance the right to life of a certain section of the population of the country. This shows that in the case of a large project like this one, the court refrained itself from playing a rather judicially active role. Given the lackadaisical attitude of the implementers of law and in the wake of the infamous Union Carbide episode, the victims of which have not yet received justice till date; it is quivering to even imagine what will happen in case some untoward incident happens. In the case of nuclear projects, the State authorities should keep in mind that radiations know no boundaries. Japan is still reeling under the Fukoshima disaster that caused havoc in the country. Despite the fact that Japan, a developed nation with an innate tendency to recover fast found it tough to deal with the Fukoshima tragedy and India is a developing nation with a low level of preparedness for unwanted disasters and the State has failed bitterly to provide justice to the victims of the infamous Bhopal Gas Tragedy. Keeping all these in mind, the State needs to employ utmost precautions in going ahead with the projects of such nature and also to work upon the directions issued in a time bound manner.

From the above cases, it may be possible to form an initial opinion that even though the Indian Supreme Court has ordered to close down many private industries and units that caused huge environmental pollution,[53]the court allowed many of the public funded projects to proceed further, though they are not only vulnerable to environmental damages but also dangerous to many components of environment. Therefore, it is possible to construe that the Supreme Court has adopted a differential treatment and allowed many public funded projects. The two projects cited above manifest that when it comes to larger projects, the resulting environmental damage and concerns of the citizens takes a total backseat in the name of the larger welfare.

Conclusion

Form the above discussion, one may conclude by saying that the Supreme Court is very right in allowing such larger projects based on the public interest and they are part of sustainable development and thus views of the Court on larger projects is acceptable. In this context, it is pertinent to examine whether the guidelines or the conditions to be fulfilled before implementing those projects that were given by the Court have been strictly complied with or not. In most of the cases, the answer would be in the negative. This is very much obvious from the state of the victims of these projects. Even though, the court had complete knowledge about the implication of the larger projects, they were allowed and the same attitude of the Court continued till 2013. In August 2013, perhaps it was the first time, the court halted a hydroelectric projects that was supposed to be commenced in the Himalayan Region. After realising the Himalayan Tsunami, the Court directed ministry of environment

[53]. *Vellore Citizens' Welfare Forum v. Union of India and others*, AIR 1996 SC 2715 & M.C Mehta v. Union of India 1988.

and forest to reconsider the project to be implemented in this area due to environmental hazard which would affect nearby population severely in *Alaknanda Hydro Power Co. Ltd. v. Anuj Joshi & Others*[54]and the same has been widely appreciated by the environmental activists. While deciding an issue related to environment, the authorities should work cautiously and before allowing the commencement of projects, the Government should ensure that necessary precautions have been taken so as to reduce the future environmental problems which may occur due to those projects. Developmental activities are definitely required for the society in a sustainable manner but not in an unscientific fashion. It is hoped that the Courts in future cases will consider the concerns of the various stake holders of the projects thoroughly and deal adequately before showing a green light even to a private funded project too. After all environment is the greatest blessing for the mankind.

[54] *Alaknanda Hydropower Co. Ltd. v. Anuj Joshi*, (2014) 1 SCC 769

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