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FOREWORD

I am pleased to present before you Volume V, Issue I of Nirma University Law Journal (NULJ) – Peer Reviewed Law Journal. The journal is dedicated to highlighting the concurrence of the latest developments in law and society at large. I am happy to share with you that now the articles published in this Journal are now also available on ***Manupatra and SCC online.***

The overwhelming response that we received from across the country for contributing research articles to the current volume is a testimony to the intellectual capital in the legal arena and the potential of new jurisprudential insights from the country. Selected research articles published in this issue display that novel and critical ideas go a long way in highlighting the essential character of challenges that are cerebral to an evolving legal system thereby enshrining justice as the ultimate goal.

Both academicians and practitioners emphasize the need to embody all disciplines in one spectrum in order to analyze problems with creative zeal. Education, in the real sense is the spirit of enquiry resulting in new knowledge and path breaking insights on mundane ideas and ways of living. The Nirma University Law Journal (NULJ) aims to encourage writings that are inter-disciplinary in nature, expounding contemporary issues across discipline. It showcases contemporary issues and challenges specific to law; with an interdisciplinary approach towards knowledge. NULJ aims to serve as a forum where scholars and distinguished legal practitioners alike can share ideas, views and trajectory of thought process on relevant legal themes. NULJ aims to stand up to the highest standards of integrity and professional quality. The choice of articles in this issue reflects this. The articles in this issue are innovative, diverse and present debatable viewpoints. It is the endeavor of the Institute to become the beacon of legal education by encouraging synthesis of knowledge and best practices cutting across academia and research fraternity.

The veritable hallmark of the contributions is indicative of the efforts and ingenuity of the authors. The academic and practical impact on the reader must be credited to the qualitative and insightful writings of the authors. On behalf of University and Institute, I congratulate the authors for maintaining highest standards in academic honesty and purity in thought. We feel pride in being a medium of expression in broadcasting novel ideas being a crucial platform for contemporary legal discourse.

Prof. (Dr.) Purvi Pokhariyal
Chief Executive, Nirma University Law Journal
Director, Institute of Law, Nirma University

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DEFINING MISBEHAVIOUR FOR REMOVAL OF JUDGES: THE LOGICAL FALLACY AND NECESSARY POLITICISATION

Rangin Pallav Tripathy*

Abstract

The notion of judicial accountability in modern constitutional democracies is based on a premise that a judge cannot be removed from office unless he is found to have been guilty of some misbehaviour or misconduct. This requirement of an established ground of misbehaviour is seen as a protective measure against the possibility of the judge being arbitrarily removed from office. This article focuses on the proposition that it is logically fallacious to legally define the concept of misbehaviour.

Firstly the author covers the entrenched practice of removal of a judge being based on established grounds and prescribed procedures across different countries. Secondly, the author establishes the challenge in having a consistent understanding of the concept of misbehaviour. Thirdly, the author discusses the different conceptual perspectives (narrow and broad) which have been adopted is seeking to understand misbehaviour. Then the author discusses the different interpretations of the concept of misbehaviour which have been suggested or followed in the context of the Indian Legal Framework.

Then the author argues that the problem in having a proper and consistent definition of misbehaviour lies in the fact that that it is not a concept

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amenable to a legal definition. The author argues that removal of a judge being a political process and not a legal process; it is logically untenable to seek a legal definition of misbehaviour. The author discusses the possibility of judicial review of the removal proceedings if there were to be a legal definition and argues that such a possibility would be at counter-purpose to the very essence of judicial accountability. The author clarifies that such an understanding of the concept of misbehaviour is not antithetical to the idea of judicial independence. The author contends that the limitations on the power of the legislature to remove a judge ought to be political in nature and not legal.

Keywords: *Judiciary, Removal proceedings, judicial review, judicial independence*

Independence of the judicial organ is fundamental to the protection of the rights of the people[1] and for upholding the principle of 'rule of law'.[2] A precarious tenure substantially diminishes the independence of the judges and makes the judicial process prone to manipulations.[3] Thus in contrast to the earlier practice of judges holding office at the pleasure of the executive

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[1] J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why,* 58 N.Y.U. ANNUAL SURVEY OF AMERICAN LAW 241 (2001-2003) ("An equal and independent judiciary provides us the best hope to protect our fundamental values as expressed in the Constitution.")

[2] Gretchen Carpenter, *Judiciaries in The Spotlight,* 39:3 THE COMP. & INT'L . J. OF SOU. AFR. 361 (2006) ("It is generally agreed that an independent judiciary is a prerequisite for constitutionality (or the rule of law, the preferred term in Britain and most of the states whose constitutional systems owe their origins to British concepts)."); David Pimentel, *Reframing the Independence v Accountability Debate: Defining Judicial Structure in light of Judge's Courage and Integrity*' 7 CLEV. ST. L. REV 1 (2009) ("Judicial independence is a bulwark of the Rule of Law." If the law is to be enforced even handedly, the judges must be free to act independently in applying the law and rendering judicial decisions. If ours is to be a government of laws and not men, we must have a court system that respects law more than it respects the power of any individual(s)."); Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction,* 86 DEN. UNI. L. REV. 1 (2008-2009) (A judicial authority which is independent is fundamental to the upholding of the Rule of Law).

[3] F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?* 94:3 THE AMER. ECO. REV. 712 (2004) (The author explains how the immunity of a judge to be punished by other power holders empowers the judicial organ to enforce the constitutional scheme. In similar vein, a judge who is likely to subject the control of such power holders will possibly be more amenable to the wishes of such power holders.); Shimon Shetreet, *Judicial Independence and Accountability in Israel,* 33 (4) THE INT'L AND COMP. L. QUAR. 979 (1984) (The author notes that the without adequate safeguards, the judiciary would not capable of discharging its functions in an unbiased and independent manner.)

authority,[4] modern constitutional norms usually prescribe that members of the higher judiciary can be removed from office only upon the proof of some tangible grounds.[5] Judges of the High Court of Australia,[6] just like judges of the Supreme Court and High Courts in India,[7] can be removed from office only on the ground of proved misbehaviour or incapacity.[8] The grounds on which a judge of the Constitutional Court[9] can be removed from office in South Africa are incapacity, gross misconduct or gross incompetence.[10] In United States, judges of the federal Supreme Court[11] can be removed from

[4] This practice is most glaringly evident in the history of England. Penny J. White, *An America Without Judicial Independence* 80 JUDICATURE 174 (1996-1997) ("There, judges were originally appointed to serve at the king's pleasure. When their actions or decisions displeased the king, they were removed."); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence,* 35:1 LAW AND CONTEMPORARY PROBLEMS 108(1970)(The author notes that prior to the Norman Conquest, the judicial offices in England had a communal character. Subsequently the grant of judicial office became similar as the grant of land in terms of coming under the writs of the King. These judicial offices were subject to the pleasure of the King and the judges could be removed by the King at any time for any reason.); For a more detailed description on the matter see David P. Currie, *Separating Judicial Power Law and Contemporary Problems*, 61:3 JUDICIAL INDEPENDENCE AND ACCOUNTABILITY 7 (Summer, 1998).

[5] Hon. Justice Sir Moti Tikaram, *Public Accountability- Who Judges the Judges?,* 19 COMMW. L. BULL. 1231 (1993) (In most the democratic countries, judges are provided with a secured tenure wherein they cannot be removed without specified grounds of misconduct being proved and they retire upon reaching a definite age. Such provisions are crucial in furthering the independence of the judges.)

[6] Established under Section 71, The Commonwealth of Australia Constitution Act, 1900, the High Court of Australia is the highest judicial authority in Australia. In addition to its regular federal jurisdiction, the High Court also hears appeals from the decisions of the State Supreme Courts under Section 73 of The Commonwealth of Australia Constitution Act. For more on the High Court, see TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS (5th Ed., 2010, The Federation Press)

[7] The Constitution of India, 1950, Arts. 124, 217.

[8] The Commonwealth of Australia Constitution Act 1900, Section 72 (ii)

[9] Established under Section 167, The Constitution of the Republic of South Africa, 1996, the Constitutional Court is apex judicial institution in South Africa with jurisdiction over constitutional matters and other matters of general public importance. It is the only judicial authority in the country having the authority to adjudicate disputes involving governmental organs and the power to determine the constitutionality of legislations. For more on the Constitutional Court see HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA A CONTEXTUAL ANALYSIS (Hart Publishing, 2010).

[10] The Constitution of the Republic of South Africa 1996, Section 177

[11] The Federal Supreme Court is established under Article 3, The Constitution of the United States 1788. Though its jurisdiction compared to the High Court of Australia and the Supreme Court of India is limited as it has jurisdiction only over federal matters, it is regarded as one of the most powerful and influential judicial institutions in the world due to its stature. For more on the position and authority of the Federal Supreme Court of USA, see OTIS H. STEPHENS JR. AND JOHN M. SCHEB, II, AMERICAN CONSTITUTIONAL LAW (Thomson Learning, 3rd Ed., 2003), RALPH A. ROSSUM AND G. 1 ALAN TARR, AMERICAN CONSTITUTIONAL LAW (Thomson Learning 2003).

office on the grounds of treason, bribery or other high crimes and misdemeanours.[12] In England, judges of the Supreme Court[13] hold office during good behaviour and as long as they do not violate the terms of good behaviour, i.e. until they are not guilty of misbehaviour; they cannot be removed from their office.[14] In addition to the requirement of there being clear grounds of removal, the constitutional protection to judges also extends to certain procedural safeguards as regards the manner of removal. In Australia[15] and in England,[16] a judge can be removed from office only upon an address of both the Houses of the Parliament in the same session. In United State, a judge needs to be impeached by a majority vote the Houses of Representatives and then convicted by trial in the Senate with at least a two-third majority.[17] In South Africa, removing a judge from office requires a resolution in the National Assembly supported by a two-third majority.[18]

Thus, judges no longer hold office as per the arbitrary whims of any authority and can be removed from office only on prescribed grounds after adherence to the constitutionally or statutorily mandated procedure.[19] This protection against arbitrary removal greatly enhances the capacity of the judicial organ to adjudicate disputes freely and independently without any kind of pressure, influence or allurement. This entrenched norm of modern

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[12] Constitution of the United States, 1788, Article 2

[13] The Supreme Court in England is of recent origin (2009) which replaced the erstwhile Appellate Committee of the House of Lords. Along with the powers and jurisdictions of the Appellate Committee, the Supreme Court also exercises jurisdiction over devolution issues which were earlier decided by the judicial committee of the Privy Council. It is established under Section 23 of the Constitutional Reforms Act 2005. Though it does not have the power of judicial review, it is the highest judicial authority in the country. For more on the authority and position of the Supreme Court see PETER LEYLAND, THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS (Hart Publishing, 2012

[14] Constitutional Reforms Act 2005, Section 33

[15] The Commonwealth of Australia Constitution Act 1900,Section 72 (ii)

[16] Constitutional Reforms Act 2005, Section 33

[17] OTIS H. STEPHENS JR. AND JOHN M. SCHEB II, AMERICAN CONSTITUTIONAL LAW 56 (3d ed., 2003 Thomson Learning).

[18] The Constitution of the Republic of South Africa 1996, Section 177 (1) (b)

[19] The process through which the grounds of accountability are to be proved in relation to a judge are usually regulated by a statutory mechanism. In India, the matter is regulated by the Judges Inquiry Act 1968. In Australia, the applicable framework has been provided in the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012. In South Africa, the entire process is regulated by the Judicial Service Commission Act of 1994.

constitutional governments minimises the possibility of the integrity of the judicial process being compromised by the authorities exercising arbitrary power over the judges.

The other side of this protection extended to the judges has been the near impossibility of removing judges from the office. For example, in the constitutional history of United States, England, India, Australia and South Africa taken together, not a single judge of the highest judicial authority in these countries have been removed from office. Even when proceedings have been initiated for removing a judge, all such initiatives have either failed or have remained unresolved.[20]

The Challenge of Understanding the Concept of Misbehaviour

Apart from the challenge of ensuring a fair and robust inquiry mechanism to determine the veracity of allegations against a judge, one of the most contentious issues concerning the removal of judges has been in settling upon a fair and consistent understanding of the import and ambit of the grounds on which a judge can be removed from his office. Terms like misbehaviour, gross misconduct, gross incompetence, high crimes and misdemeanours have no settled meaning. These terms have no established constitutional or statutory definitions in the respective jurisdictions.[21] Thus

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[20] In Australia, J. Lionel Murphy has been the only judge of the High Court in relation to whom removal from office was contemplated. However, despite hearing by two select committees, one trial and another parliamentary commission of inquiry, the matter remained unresolved due to the demise of J. Murphy before the parliamentary commission could complete its inquiry. J. Samuel Chase of the federal Supreme Court of United States was impeached by the House of Representatives and was also convicted by the Senate. However, he could not be removed from office because the conviction by the Senate did not have the requisite two-third majority. In India, removal proceedings have been initiated against one supreme court judge and two high court judges. Even though he was found to be guilty of financial impropriety, the motion of removal in relation J. V. Ramaswami failed as the ruling party, Congress, abstained from voting on the motion. J. Soumitra Sen was found guilty of misappropriation and the motion to remove him from office was passed in the Council of States. However, he resigned from office before the motion was to be tabled in the House of the People and escaped the ignominity of being removed from office. J. P.D. Dinakaran resigned from office before the inquiry committee constituted in relation to the allegations against him could commence hearing. In England and in South Africa, removal proceedings have not been initiated against a single judge of the Supreme Court and the Constitutional Court respectively.

determining whether a particular conduct on the part of a judge falls under the ambit of these terms is one of the most delicate and contested aspects of the removal process.

It needs to be noted that in comparison to the ground of incapacity, understanding the meaning of grounds like misbehaviour and misconduct presents a much greater challenge.[22] Though it may be equally difficult to prove, the ground of incapacity is clearly designed to cover such situations where the concerned judge no longer retains the physical or mental capacity to discharge his functions.[23] On the other hand, the nature of situations supposed to be covered by the grounds of misbehaviour or misconduct has been the subject of contrasting perspectives.

The Narrow View of Misbehaviour

In a narrower sense, the term misbehaviour has been interpreted as being confined in its ambit to misconduct in the discharge of judicial functions and commission of any criminal offence. This view was favoured by Gavan Griffith, the Commonwealth Solicitor-General of Australia, when his opinion was sought by the then Attorney-General, Gareth Evans regarding the implications of 'proved misbehaviour' in order to decide the course of action pertaining to J. Lionel Murphy.[24] Mr. Evans insisted that the term 'misbehaviour' must be construed as being limited to matters pertaining to the judicial office (wilful refusal to perform duties, negligence) and to the commission of such offences which suggest the incapacity of the concerned to continue to hold office. According to this view, any conduct on the part of

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[21] The grounds of accountability have not been defined in the legal framework of any of the countries mentioned above; South Africa, Australia, England and United States.

[22] LJ King, *Removal of Judges,* 6 FLINDERS J. L. REFORM 169 (2002-2003) ("Incapacity for this purpose has not been judicially defined but it may be taken, I think, to mean such infirmity of mind or body as renders a judge unable to effectively perform the duties of his or her office. Misbehaviour is a more difficult concept.")

[23] *Supra n.* 22

[24] AR Blackshield, *The Murphy Affair*, in JOCELYNNE SCUTT (ED), LIONEL MUPRHY: A RADICAL JUDGE 254 (McCulloch Publishing, 1987

a judge outside his official capacity, unless a criminal of the above mentioned nature, would not fall under the ambit of misbehaviour. It needs to be noted that as per this perspective, all criminal conduct would not qualify as misbehaviour and only such criminal conduct would constitute misbehaviour which disputes the capacity and fitness of the judge to continue in office. At one point of time, a similar understanding of misbehaviour was also advocated in England wherein misbehaviour on the part of judge was confined to misconduct in the office[25] and conviction on an offence which would make the judge unfit to hold judicial office.[26]

The Broader View of Misbehaviour

The broader view of the term 'misbehaviour' significantly expands the range of conduct which may expose the judge to the possibility of removal. This view was preferred by the Parliamentary Commission of Inquiry constituted to inquire into the allegations against J. Murphy. The commission emphasised that in order to constitute misbehaviour, the alleged conduct of the judge need not necessarily be in relation to his judicial functions or criminal in nature.[27] In describing the ambit of misbehaviour, the commission placed greater stress on the impact the alleged conduct has had on the dignity of the judicial office. The commission insisted that any conduct of a judge whether in his official or personal capacity, which establishes the unfitness of the judge to continue in judicial office would

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[25] Henry v. Barkley, (1596) 79 E.R. 1223, 1224 (K.B.) (Sir Edward Coke described misbehaviour which would require forfeiture of office as involving misuse or non-use of office and a refusal to exercise office.); For more on this point see Saikrishna Prakash and Steven D. Smith, *How to Remove a Federal Judge*, 116:1YALE LJ, 72 (Oct., 2006).

[26] 2 WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 204 (2nd Ed., 1892,Oxford, Clarendon Press).

[27] Vince Morabito, *Are Australian Judges Accountable?,* 1994 (1) CANB. L. REV. 73("The three members of the Parliamentary Commission of Inquiry, that was established by the Federal Government to advise Parliament whether any conduct of Justice Murphy had been such as to amount to "misbehaviour", were of the view that this ground for the removal of judges was not restricted to misconduct in office or to misconduct of a criminal nature.")

constitute misbehaviour.[28] The commission placed substantial reliance on the impact of any conduct on the part of a judge on the faith of the public in the judicial system. Thus, any conduct of a judge which reflects his moral unfitness to hold judicial office or unfavourably affects the public confidence in the judicial system was held to constitutive of misbehaviour.[29]

Understanding Misbehaviour in the Indian Context

As noted earlier, though 'misbehaviour' is a ground under Article 124 (4) and Article 217 of the Constitution of India for removal of the judges of the Supreme Court and the High Court respectively, the term has not been defined or explained either in the constitution or in any statutory enactment.

Supreme Court of India on Misbehaviour

Though never in response to any issue in question, the Supreme Court has made certain observations on the meaning and import of the term misbehaviour as used in the constitutional framework. In the case of Krishna Swami v Union of India,[30] the court deliberated upon the meaning of the term and held that every misconduct or negligent act by a judge would not constitute misbehaviour.[31] The court asserted that only wilful abuse of office, wilful misconduct in relation to official functions, corruption or any other offence which involves moral turpitude would constitute misbehaviour.[32] The court asserted that the ambit of misbehaviour would extend beyond the

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[28] Julie-Anne Kennedy and Anthony Ashton Tarr, *The Judiciary in Contemporary Society: Australia* 1993 (25) Case W. Res. J. Int'l L. 25 ("In the context of the lengthy proceedings against Justice Murphy of the High Court, the Parliamentary Commission of Inquiry took the view that the words "proved misbehavior or incapacity" were not restricted to serious criminal offenses or misconduct in office but extended to any conduct which, judged by the standards of the time, was so serious as to demonstrate the judge's unfitness to hold office.")

[29] *Supra n. 27at 80* ("Very prominent in their opinions is the idea that a judge must be "morally fit" and that the public must have full confidence in a judge's integrity. Anything which shows that he or she is morally unfit and/or prejudices the confidence of the public in his or her integrity constitutes a prima facie case removal from office.")

[30] A.I.R. 1993 S.C.1407 ¶71.

[31] *Id.*

[32] *Id.*

functions of the judicial office and include the conduct of a judge in his administrative capacity.[33] This particular understanding was reaffirmed by the court in the case of C. Ravichandran Iyer v. Justice A.M. Bhattacharjee.[34]

P.B. Sawant Committee on Misbehaviour

The Sawant Committee was the inquiry committee consisting of Justice P. B. Sawant of the Supreme Court, Chief Justice P. D. Desai of the Bombay High Court and Justice O. Chinnappa Reddy, retired judge of the Supreme Court which was constituted under the provisions of the Judges Inquiry Act[35] to inquire into the allegations of financial impropriety made against J. V. Ramaswami[36] in the motion submitted to the speaker of the House of the People on 27.02.1991.[37]

In its report, the committee reflected upon the implications of the term 'misbehaviour' in the constitutional framework of judicial accountability. It laid down the following propositions in terms of the meaning and ambit of misbehaviour;

1. To constitute misbehaviour, the alleged conduct need not be criminal in nature. It also need not pertain to acts prohibited by law or acts which are contrary to law.[38]

2. Any conduct of a judge which is likely to adversely affect the reputation of the judiciary in manner which would corrode the confidence of the

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[33] *Id.*
[34] (1995) 5 S.C.C. 457.
[35] Judges Inquiry Act 1968, S. 3(2) (It stipulates that when a notice for the motion of the removal of a judge is admitted in the House of the People or in the Council of States, the Speaker or the Chairman, as the case may be, is required to constitute an inquiry committee consisting of three members (one member from amongst the CJI and other judges of the Supreme Court, one member from amongst the CJs of the High Courts and one member being a distinguished jurist) to determine the veracity of the allegations against a concerned judge.)
[36] Prashant Bhushan 'A Historic Non-Impact: An All Round System Failure', Frontline June 4 1993
[37] *Id.*
[38] Law Commission of India, *Judges Inquiry Bill 2005* (Law Commission No. 195, 2006) 110

public in the judicial institution would fall under the ambit of misbehaviour.[39]

3. Conduct which can be classified as misbehaviour need not only be in relation to the official functions of a judge and may also be in relation to the private affairs of the judge.[40]

4. Only wilful act/omission can be classified as misbehaviour. Wilfulness in conduct may be reflected in the recklessness, negligence or deliberate violations of rules and established code of conduct.[41]

5. The alleged conduct in question need not necessarily pertain to the existing judicial office held by a judge and may also be in relation to any prior judicial office if the nature of the conduct is such that it makes the judge unworthy of continuing to hold the existing judicial office.[42]

Suggested Definitions of Misbehaviours in Legislative Bills

Definitions of 'misbehaviour' have been included in two legislative bills drafted in the last decade. Both these bills sought to replace the existing framework under the Judges Inquiry Act and also sought to reform the scheme of judicial accountability. However, both these bills were aborted and the chances of their revival seem unlikely.

Judges Inquiry Bill 2006

This bill, which was a refined after the comments of the Law Commission on the Judges Inquiry Bill 2005 incorporated exhaustive and conclusive definitions of both misbehaviour and incapacity. Section 2 (j) provided a definition of misbehaviour as including wilful or persistent misconduct

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[39] *Id* at 111.
[40] *Id.*
[41] *Id.*
[42] *Id.*

which results in dishonour or disrepute of the judiciary, wilful or persistent failure to perform his duties as a judge and wilful abuse of judicial office. It also included in its ambit corruption or lack of integrity on the part of a judge, commission of an offence involving moral turpitude or violations of the Code of Conduct which were supposed to framed by the National Judicial Council purported to be established under the new framework.[43]

Judicial Standard and Accountability Bill 2010

The definition of 'misbehaviour' adopted in this bill[44] was in essence similar to the one incorporated in the Judges Inquiry Bill 2006 with the addition of some greater detail. It was categorically clarified that the terms 'corruption' or 'lack of integrity' included in their ambit the delivery of judicial decision for extraneous reasons and also the demand for any kind of consideration in exchange of giving judgements.[45] Any conduct of the judge which subverted the administration of justice was also included in the ambit of 'corruption' or 'lack of integrity'.[46] A judge's failure to furnish declaration of assets and liabilities in accordance with the provisions of the bill or giving false information wilfully in the declaration of assets was also categorised as misbehaviour.[47] The bill proposed certain standards of judicial conduct expected to be followed by the judges[48] which was primarily a reiteration of the principles endorsed in the Restatement of Values of Judicial Life adopted in a Full Court Meeting of the Supreme Court in 1997.[49] These judicial standards were supposed to binding on the judges and any wilful breach of these standards was also categorised as misbehaviour.[50] It is important to

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[43] Section 36 (1) of the Bill mandated the National Judicial Council to frame Code of Conduct for the judges which would operate as a behavioural guideline for the judges.

[44] Judicial Accountability and Standards Bill 2010, S. 2 (j).

[45] *Id*, S. 2 (j) (iv).

[46] *Id*, S. 2 (j) (iv).

[47] *Id*, S. 2 (j) (vi) and (vii).

[48] *Id*, S. 3.

[49] *Supra n*. 38 at 340

[50] *Supra n*. 43, Section 2 (j) (ix)

note that the Law Commission of India has recommended that that till the adoption of a statutory code of conduct for the judges, the Restatement should be deemed as a binding code of conduct and any violation thereof ought to be considered as misbehaviour.[51]

It needs to be noted that both of the above definitions are expansive in nature and are worded in a manner which covers the conduct of the judge both in his official capacity and also his personal life. These definitions cover any conduct of the judge which would strike at the confidence and faith of the people in the judicial institution.

Implications of the Matter concerning J. Soumitra Sen

As has been noted,[52] J. Soumitra Sen was found guilty of misbehaviour and the motion for his removal was also passed in the Council of States but the constitutional process of removal could not be completed as he resigned before motion was to be tabled in the House of the People. J. Soumitra Sen remains the only judge in relation to whom a motion for removal has been passed in any of the Houses of the Parliament. Thus the incontrovertibility of the proof of misbehaviour on the part of J. Soumitra can be said to be of a reasonably high standard. It is thus interesting to note that the primary allegation against J. Sen did not pertain to his conduct while he was a judge.[53] The misbehaviour of which he was found guilty pertained to misappropriation of funds by him while acting as a court-appointed receiver when he was still an advocate.[54] Though the inquiry committee[55] did not elaborate on the conceptual aspects of 'misbehaviour' as was done by the P.B. Sawant Committee which enquired into the allegations against J. V.

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[51] *Supra n.* 38 at 339

[52] *Supra n.* 20

[53] *Motion For Removal Of Mr. Justice Soumitra Sen, Judge, Calcutta High Court, Rajya Sabha, available at:* <http://rajyasabha.nic.in/rsnew/Soumitra_Sen_Judge.pdf>, (accessed on 25.04.2015)

[54] *Id.*

[55] *Id.* (The inquiry committee consisted of B. Sudarshan Reddy, J. Mukul Mudgal and Mr. Fali S. Nariman).

Ramaswami;[56] it is instructive that the conduct on J. Sen prior assuming judicial office was found to be within the ambit of 'misbehaviour'. The implicit and underlying rationale of this finding on the part of the inquiry committee and the subsequent approval of such finding by the Council of States significantly expands the range of behaviour which could fall under the meaning of misbehaviour. Under this rationale, the conduct of a judge even prior to him assuming judicial office can be a ground for his removal.

The Logical Fallacy in Trying to Define Misbehaviour

As is evident from the discussion so far, there have been different perspectives on how to properly define the term misbehaviour in the context of the same being a ground upon which a judge could be removed from his office. However, the preliminary issue which seems to have been overlooked is whether there is a need to define misbehaviour in the first place!

Removal of Judges as a Political Process

It needs to be noted that removing a judge from office is a political sanction and not a legal one. In case of legal sanctions, once the wrongdoing of a person is proved, the sanction is inevitable unless the culpability of the wrongdoer is excused or justified under law. The same is however not the case in relation to the provisions regarding the removal of a judge. Even if a judge is found guilty of misbehaviour, it is definitely possible that he may not be removed from office. The requirement of misbehaviour serves as a preliminary justification for the legislative authority to consider whether to remove the concerned judge from office. The requirement of the proof of misbehaviour or of any of other ground only functions as a limitation on the power of the legislature to remove a judge from office. The proof of such grounds does not make it mandatory for the legislative authority to remove a

[56] *Supra n.* 38 to 42

judge.[57] Thus, the decision by the legislature to remove a judge is a fundamentally political decision. In light of this, it should be left to the legislature to decide whether the conduct of a judge in a particular case constitutes misbehaviour or not. This proposition was supported by C.W. Pincus during the hearing of the first Select Committee which inquired into the allegations against J. Murphy of the High Court of Australia.[58] He asserted that there should be no technical meaning of the term misbehaviour and that the Parliament should be the exclusive authority to decide whether a particular conduct of any judge qualifies as misbehaviour.[59]

The Anomalous Possibility of Judicial Review

Apart from the logical justification in not having a legal definition of misbehaviour, there is a greater principle at stake when misbehaviour is sought to be invested with a definitive legal meaning. The existence of a legal definition of misbehaviour makes the process of removal prone to the possibility of judicial review.[60] If there is a definition of misbehaviour and a judge is sought to be removed from office, whether the conduct of the judge falls under the ambit of the definition or not becomes a judicial question.[61] Judicial review of the removal process of judges becomes a paradox of purposes as it defeats the idea of inter-branch accountability which is the foundation of constitutional separation of powers. If the judiciary can review the process by which judges are removed by the legislature, there is no real accountability of the judicial organ which can be enforced by the legislature.

This need to exclude the removal process of judges from the purview of judicial review has been expressly and categorically recognised in United

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[57] This is evident from the case of J. V. Ramaswami where the legislature did not remove him even though financial impropriety on his part was proved beyond reasonable doubt.

[58] H.P. Lee, *Appointment, Discipline and Removal of Judges in Australia* in H.P. LEE (ED), JUDICIARIES IN COMPARATIVE PERSPECTIVE 37 (Cambridge University Press 2011).

[59] *Id.* Also see AR Blackshield, 'The Murphy Affair'(*Supra n.* 24)

[60] *Supra n.* 24.

[61] *Id.*

States. Deciding upon a case filed by J. Walter Nixon, a judge of the federal district court, the Supreme Court categorically refused to interfere with the exclusive jurisdiction of the Senate.[62] J. Nixon had objected to the Senate forming a committee to try his case and then deciding to remove him on the basis of the committee's report. J. Nixon insisted that he had a right to be tried by the Senate under the provisions of Article 2 of the US Constitution. The court asserted that the Senate had the exclusive authority to try all impeachments and it would defeat the purpose behind the constitutional framework if the judiciary was to interfere in such matters. It emphasised that for the judiciary to review the functioning of the accountability mechanism concerning the judiciary itself would be a contradiction of purposes.

The Nature of Removal Process in India

The Supreme Court in India has recognised the political nature of the removal process though unlike United States where it is a purely political process, the removal process in India has been held to be blend of statutory and political elements.[63] The court held that the political process begins only when any of the Houses of the Parliament considers a motion to remove a judge based on the positive findings by an inquiry committee constituted under the Judges Inquiry Act 1968. Thus according to the court, the process of presenting a notice of the motion of removal in any of the Houses of the Parliament, the constitution of the inquiry committee and the proceedings before the inquiry committee are judicial in nature and thus amenable to the purview of judicial review.

It needs to be noted that even this observation of the Supreme Court of India does not detract from the political nature of the concept of misbehaviour. The inquiry committee contemplated under the Judges Inquiry Act 1968 is a

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[62] *Nixon v United States*, 506 U.S. 224 (1993)
[63] *Sub Committee on Judicial Accountability v UOI,* [1992] A.I.R. 320 (SC)

fact finding body which is supposed to determine if the alleged facts in relation to a judge are proved or not. It is not the function of the inquiry committee to determine if the facts proved amount to misbehaviour or not. The committee is mandated by the statutory framework to submits its findings in relation to the charges against the judge[64] and has not been required to record its determination as to whether the charges proved amount to misbehaviour or not. Thus, whether the findings of the committee are legally valid or not can obviously be reviewed by the judiciary but whether the findings establish misbehaviour or not ought to be beyond the scope of judicial scrutiny.

That misbehaviour is essentially a political concept is best underscored in the case of J. Soumitra Sen. As has been noted,[65] a judge being liable to be removed for his conduct prior to assuming judicial office had not been contemplated in a single description of the concept of misbehaviour.[66] However, J. Soumitra Sen was found to have been guilty of misbehaviour by the Council of States. This incident underlines the exclusive discretion of the legislative authority in determining whether a particular conduct of a judge constitutes misbehaviour or not.

The Misplaced Concerns Regarding Judicial Independence

This non-technical understanding of the concept of misbehaviour on the face of it seems to vest the legislature with unlimited power in relation to removing a judge from office. However the power of the legislature is limited; just that the limitations are not legal in nature but are primarily political. A sanction which is fundamentally political in nature ought not in the name of safeguard, be provided a judicial texture. Concerns of such expansive discretion with the legislature eroding the ideal of judicial

[64] Judges Inquiry Act 1968, S.4 (2)
[65] *Supra n.* 53 to 56
[66] *Supra n.* 34 to 51

independence are conceptually flawed. It needs to be realised that the principle of independence is not an absolutist pursuit[67] and must be balanced with the requirement of holding the judges accountable for their actions.[68] Preserving the idea of judicial independence does not mandate that judges should have no accountability. Lack of judicial accountability is as dangerous a proposition as lack of judicial independence. Just like any other organ of the state, holding the judiciary accountable for its action is a fundamental requirement as the idea of unaccountable power is anathema to the essence of any constitutional democracy and any scheme of judicial accountability is going to be merely a superfluous design if there is the slightest possibility of the judiciary itself being able to control the functioning of such a mechanism.

Conclusion

Thus, the primary problem in determining a proper definition of 'misbehaviour' is in trying to define the concept in the first place. Removal of judges from the office is essentially a political sanction and it is for the legislative authority to determine whether a particular conduct on the part of a judge can be classified as misbehaviour. This discretion of the legislature ought not to be curtailed by the technical restrictions of a legal definition. The existence of a legal definition of misbehaviour makes it at least theoretically possible for the judiciary to review the validity of the removal process. As has been discussed, allowing for such a possibility defeats the very idea of judicial accountability. Power to remove judges from office being a political power, the limitations on such power should also be political in nature. In the garb of removing the possibility of arbitrary removal of judges

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[67] Thomas Tinkham, *Applying a Rational Approach to Judicial Independence and Accountability on Contemporary Issues,* 37 WM. MITCHELL L. REV. 1633 (2010-2011); (Tinkham asserts that the ideal of judicial independence was never meant to be absolute. The ideal of judicial interest has to be balanced along with other competing ideals and does not require and absolutist adherence.)

[68] David P. Currie, *Separating Judicial Power*' 61:3 LAW AND CONTEMPORARY PROBLEMS 7; (The need to ensure that judges enjoy the requisite independence for the discharge of functions must be pursued along with the need to ensure that judges are also under some kind of control mechanism.)

by the legislature, the political power of the legislature cannot be painted with a judicial texture. The means of methods of controlling the discretion of the legislature need to be devised from within the political spectrum only.

LAW AND POLITICAL SCIENCE EXPLORING RELATIONSHIP

Dr Binod K Das*

Abstract

Law and political science are related to each other. State, a subject of political science, is considered as a legal association. State is considered as protector of law. Law studies the principles of the state, organisation and citizens. The relationship of law and political science has been established by political thinkers such as Plato, Aristotle, Locke, Rousseau, Bentham, John Austin, Duguit and MacIver.

The relationship between law and political science has been explored by analysing political theory, juridical theory, legal sovereignty, legal rights, justice, liberty and equality. Some of the subjects such as international law, constitutional law and administrative law are discussed in political science and public administration. Contrarily, constitutional law, political jurisprudence of state and authority are discussed in law. Many thinkers viewed sovereignty as is the source of law. Legislature, comprises of political representatives, is the chief source of law. This article has explored the relationship between law and political science and concluded that the study of law is incomplete without political science.

Kewwords: *Law, Political Science, Political Jurisprudence, Legal Sovereignty, Juridical Theory*

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1.0 THE CONTEXT

Why do law students study political science? Does political science relate to law and justice? These are the intriguing questions often faced by law students. In general terms it may be said that law is a subject of study of political science. The concept of state is central in the study of political science, which primarily deals with state and government. The state is a legal association. The state is distinguished from society and nation because the state has coercive power manifested in the form of law. The function of the state is to enforce law in a just manner. In the period after Second World War, Harold Lasswell defined Politics as the science of study of power because state is a structure of power. Twenty years later, a school of thinking argued state regulates the life of the community through policies. Modern writers termed Political Science as policy making science.[1] Similarly, law is also considered as policy science and lawyers are social engineers.

Political science is the science of state, study of organization of man as civilized beings and their relationship with government. Political science studies the political behavior of the state where as law studies the constitutional function of the state. Law studies the rules or principles of the state, organization and citizens. The structure, form and characteristics of law are dependent on their political counterparts.[2] India is a secular country. Thus, India has secular laws where as Pakistan being a theocratic country has theocratic laws. In a good governed state, law cannot ignore politics and vice versa. The topic of processes and systems of law are part of political science. Technical process and agencies though which laws are enacted, administered, enforced and adjudicated are part of political science.

While political science studies state and government, law deals with the legality of behavior of individuals and groups. Unlike political science, which

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[1] See L. S. RATHORE & S. A. H. HAQQI, POLITICAL THEORY AND ORGANISATION (2012).

[2] See S. R. MYNENI, SOCIOLOGY FOR LAW STUDENTS (2012).

studies only the conscious activities of man, law studies both conscious and unconscious activities of individuals and groups. Political science is concerned only with the political association of citizens. Law studies the legality of both associations and citizens. Law is concerned with the study of legal principles. Law controls and regulates citizen. A lawyer is concerned with the rules that men ought to obey. A political scientist on the other hand is interested to know law as a political phenomenon. Law is the body of rules recognized and applied by the state in the administration of justice. Law means justice, morality, reason, writ etc. These are also political concepts. The knowledge of jurisprudence and political science help each other to study political and legal aspects of individuals.

Political science studies the acquisition and exercise of power and different forms of government. Political science deals with the political behavior of the state; while law studies the constitutional validity of the functions of the state. Thus the validity of the Constitution was questioned in the case of Keshvanand Bharati[3] *versus* State of Kerala.[4] Supreme Court upheld that the Constitution cannot be altered or destroyed by invoking the power of amendment under article 368[5]. The forms of government, nature of governmental organization and sphere of government are determined by laws. Liberalism, a political philosophy, advocates new legislation for changing the structure of the society. Modern liberalism laid the foundation of constitutional laws.

As in other social sciences, political science has both theoretical and applied dimensions. Law has relationship with both the dimensions of political

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[3] Kesavananda Bharati case is a landmark decision of the Supreme Court of India that outlined the basic structure doctrine of the Constitution. The basic structure doctrine forms the basis of a limited power of the judiciary to review amendments to the Constitution of India. Supreme Court held that while the Parliament has wide powers, it has no power to alter the fundamental features of the Constitution.

[4] See M. PAL. SINGH, V.N SHUKLA'S CONSTITUTION OF INDIA (12th ed., 2013).

[5] Article 368 of part XX of the constitution of India grants power to parliament to amend the Constitution.

science. Philosophy of general jurisprudence and law making processes are discussed in theories of legislation. Constitutional law, jurisprudence of state, courts of justice, judicial precedents and authority are discussed in applied politics.[6] Matters relating to the organization, jurisprudence and independence of judicial institutions are concerns of political scientists.

Law and Constitution have direct relationship. The Constitution is regarded as the fundamental law of the land. Constitutional law is an overlapping area of law and political science. It basically deals with laws which regulates the structure and organs of the government and determines their functions. Political science deals with powers and functions of various institutions of government including judiciary. Political science viewed state as protector of law and order.

Politics has two basic functions in relation to law. They are politics as a means or an obstacle. As a means, politics can comprehend law as a means for the fulfilment of political interests. As an obstacle, state can create laws for curtailment of freedom to bring discipline in the society. In brief, politics can interpret law as an obstacle for the realization of political goals.

The objective of the article is to explore the relationship between law and political science. The article has attempted to explore the importance of law in juridical theory, legal sovereignty, legal rights, and political jurisprudence. The political obligations such as justice, liberty and equality have been discussed to measure the importance of law in these concepts. The article is based on the assumption that law is an integral aspect of political science. Thus, the study of political science is essential for students of law.

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[6] See C.C. RODEE, T. J. ANDERSON & C. Q. CHRISTOL, INTRODUCTION TO POLITICAL SCIENCE (4th ed., 1985).

2.0 LAW AND POLITICAL THEORIES

A study on the political theory should begin with a discussion of law. The formal aspects of government such as Constitution, laws and the organs of government have been the subject of study since the days of Plato and Aristotle. In his treatise 'The Republic', Plato raised the question whether state should be governed by men or law. Later Plato gave emphasis to law. It was quest for justice that inspired Plato to view 'Ideal State'. Plato spoke about natural law in the book 'The Republic'. Plato's book 'The Laws' views laws are necessary for keeping the state stable and thus they must be obeyed. The laws were sort of Constitution.

Aristotle, the father of political science, cited the relationship between rule of law and constitutionalism. Law is supreme in Aristotle's 'Ideal State'. There should not be personal and despotic rule of law. There should be the impersonal rule of law which is the embodiment of wisdom.

Hobbes discussed 'laws of nature' in all the books namely *Leviathan*, *De Cive*[7] and *De Corpore*. The 'laws of nature' are nothing but dictates of reason or dictates of common superior power. Locke wrote law in the state is made by the king-in-parliament.[8] Rousseau, while defending sovereignty of the 'General Will' viewed sovereignty is the source of all law.[9] Thus source of all law is community as a body politic. No state is legitimate to Rousseau unless they are ruled by such laws. For Rousseau, 'General Will' alone constitutes the basis of political obligation. It is the source of law, justice and power.

According to Bentham, state is the only source of law. State has to frame laws which cater to the greatest happiness of greatest number. Law is the

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[7] De Cive is the first of a trilogy of works written by Hobbes dealing with human knowledge. The other two works in the trilogy are De Corpore (on the body), and De Homine (on man). De Cive work comprises three parts. In the first part, he describes man's natural condition is dealing with the natural laws.

[8] See H. J. LASKI, LIBERTY IN THE MODERN STATE (1930).

[9] See G. H. SABINE, HISTORY OF POLITICAL THEORY (1948).

command of the sovereign and binding on the subjects. Bentham's political philosophy was unique in the sphere of jurisprudence and reforms in criminal law and prisons. Law is the only source of all rights of the individuals. Bentham borrowed the concept of human equality from the system of natural law. He viewed all laws are evil because they are infringement on liberty, a political obligation of state.[10]

Léon Duguit viewed state is an organ for the creation of law and protection of legal rights. He perceived law is essentially a social fact.[11] It suggests two points which has relation with politics. Law is a legal order and represents application of force in an organized society. Law denotes the official control. These two inferences suggest law operates in a politically organized society.

Thomas Aquinas' theory of law and justice constitutes the important part of his political philosophy. Aquinas believed that the legality of the government is to be determined by the law. He defined law as an ordinance of reason for the common good in the book 'Summa Theological'. It implies law is the command of sovereign.

Barker viewed, state is a living body of rules and in that sense state is law. As the state is a legal association or a juridical organized nation, a study of political theory should begin with a discussion on idea of law.[12] Barker is justified in observation that political philosophy of Greeks is not only theory of state but also theory of law. The political philosophy of Montesquieu is based on theory of law. A fundamental law is prevailed in the society which he identified with reason.

Marsilo of Pauda, French political philosopher, viewed Constitution is necessary for the organisation of state. Fundamental in this consideration is

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[10] See ANDREW HEYWOOD, POLITICAL THEORY: AN INTRODUCTION (2004).

[11] See HOVEYDA ABBAS & RANAJAY KUMAR, POLITICAL THEORY (2012).

[12] See URMILA SHARMA & S. K. SHARMA, PRINCIPLES AND THEORY OF POLITICAL SCIENCE (2007).

the conception of law. Law for him is essentially a judgement as to what is just for the community. Marsilo's law is thus the expression of 'General Will'. His views resembles very closely with that of Rousseau. Marsilo talked of two types of laws such as divine law and human law. T. H. Green, an idealist viewed every citizen of the state should obey natural law irrespective of enforcement of law by state.

John Austin viewed idea of sovereignty in juristic form. The sovereign power of the state manifests itself in the form of law. Law is regulator of the behaviour and sovereign is the enforcer of law. He viewed sovereign is the source of positive law or manmade law. Austin's sovereignty was supreme only in case of positive law. Dicey advocated supremacy of law through rule of law.[13] Rule of law is now an accepted maxim of democratic governance, a concept of political science. He distinguished a polity governed by laws from a political system unrestrained by laws.

John Rawls, a political thinker of recent years, in the book 'Law of Peoples' viewed laws to govern the relations between liberal and non-liberal people of the world.[14] The law acknowledges people's independence, equality, right to self defence and observe treaties. All these are aspects of political science.

Political thinkers have distinguished between natural and positive law. Positive law is manmade law, a law framed by legislation. There is higher law above positive law, which determines right and wrong, is natural law. In the middle ages, the common law of the church carried forward the tradition of natural law. In the feudal era, different laws existed for different classes of people in the economic and social fields.[15] From the beginning, political thinkers have attempted to establish relationship between law and state.

[13] See A.V. Dicey, Introduction to the Study of the Law of the Constitution, available at www.constitution.org/cmt/avd/law_con.htm (Last accessed on Aug. 13, 2014).
[14] See CATRIONA MCKINNON, ISSUES IN POLITICAL THEORY (2nd ed., 2012).
[15] See EDDY ASHIRVATHAM & K. K. MISHRA, POLITICAL THEORY PHILOSOPHY IDEOLOGY SCIENCE (2006).

2.1 Juridical Theory

The juridical theory views state is a legal person and it is the maker and enforcer of law. It can sue others and be sued by others. In nineteenth century, German writers notably Max Weber[16] Gierke[17] and Treitschke[18] conceived state as a legal personality.[19] The state is similar to a person in many respects empowered to own and dispose of its property. The state reserves the right to sue others and vice versa. It regards the state as a legal person existing for the creation and enforcement of law. The jurists developed the concept of legal personality of the state and contributed to the study of constitutional law, administrative law and international law. The analytical jurists like Bentham and Austin hold that the term law refers to the command of the sovereign.[20] Nothing can be enforced as law without the enactment by state. Jurists regard state as a legal person thus it amounts to juridical personification.

3.0 LEGAL SOVEREIGNTY

Many political scientists believe state has legal sovereignty. The legal sovereignty is the authority within a government which has the power to issue commands in forms of law. In every state, laws are obeyed by citizens and state power issues and enforce the laws. Law is merely the will of the sovereign. A judge can enforce a law, if it is passed in parliament or state legislature. Parliament is the supreme law making authority. Legal sovereignty is recognized by law of the state.

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[16] Max Weber (1864-1920) was a German sociologist, philosopher and political economist. Weber defined state as an entity which claims legitimate use of political force within a given territory.

[17] Otto Gierke was a German jurist. His influence was felt in France in the liberal-socialist thought of Leon Duguit and Hugo Krabbe. Gierke was taken up by the nationalist and by the liberal constitutionalist in Germany.

[18] Heinrich von Treitschke (1834-1896) was a German historian and political writer. He propagated authoritarian power politics. Treitschke believed that state should be headed by authoritarian rulers without the check of parliament.

[19] See ANDREAS ANTER, MAX WEBER'S THEORY OF MODERN STATE, ORIGIN, STRUCTURE & SIGNIFICANCE (2014).

[20] See J.W. GARNER, POLITICAL SCIENCE AND GOVERNMENT (1952).

Behind legal sovereignty political sovereignty exists which is unknown to law. The power of the mass or electorate is known as political sovereign. In direct democracy, legal and political sovereigns practically coincide, because the people are directly concerned with making laws. The legal sovereign cannot ignore the will of political sovereign. In India, parliament is sovereign and supreme. The authority of the legal sovereign is absolute and law is simply the will of the sovereign. Only the legal sovereign has the power to declare the will of the state.

4.0 LEGAL RIGHTS

Individual rights are the political obligation of the state. The state is the source of rights according to legal theory of rights. Bentham advocated legal rights. It means a faculty of action sanctioned by the will of law maker in a political society. The state makes laws to uphold rights and set up institutions to enforce laws. The state can change rights as it can change laws. As legal right is recognized by the state through its law and it can be enforced in a court of law. For instance, since the passage of Hindu Succession Act[21] daughter is legally entitled to have a share in her parents' property. The political rights are under the purview of legal rights. Right to petition is a political right. Similarly, liberty of individual, a political obligation of the state, is secured by the courts and extended by Habeas Corpus act.[22]

5.0 POLITICAL JURISPRUDENCE

Political jurisprudence is an overlapping area of political science and law. Political jurisprudence, a legal theory, believes some judicial decisions are

[21] Hindu Succession Act (1956) was enacted to amend and codify the law relating to intestate or unwilled succession. The act laid down a system of inheritance and abolished Hindu women's limited estate. Any property possessed by Hindu female is to be held by her as absolute property. Part of this act was amended in 2005 by the Hindu Succession (Amendment) Act, 2005.

[22] Habeas Corpus means you may have the body. The writ is issued to summon a person by whom another person is detained to bring that person before the court. Let the court know by what authority he has detained that person.

motivated by politics rather than judgment. Political jurisprudence believes courts are political agencies and judges are political actors.[23] It advocates that judges are influenced by the political system and personal beliefs of interpretation of law. Often the judgments are based on political, legal and personal beliefs of lawyers. The decision of the judge is a form of politics and judgment modifies politics and process of law making. In recent case, Supreme Court judgment on illegal coal mining allocation by successive governments established new political agenda for political parties. Since independence, judgments of Supreme Court and high courts have created new political discourse.

6.0 POLITICAL OBLIGATION AND LAW

Membership of the state is compulsory. Is the individual under obligation to endorse every action of the state? Is the individual justified in resisting the law? This is the problem of political obligation. Legally viewed, a citizen is obliged to obey every will of the state. The state is the repository of sovereign power and exclusive source from which law emanates. Thus the supremacy of state binds the citizen to its legal norms. Realistically viewed, state is administrative machinery and not an abstract entity. Law of the state has no prior sanctity. So when law departs from individual's values, he has every right to resist. Now, we turn to our focus on exploring the relationship between law and various political obligations.

6.1 Justice and Politics

Justice is the bond that connects political obligations like rights, liberty, equality and fraternity. There can be no liberty without equality and no equality without justice. Similarly, there can be no liberty without rights and no rights without law. Thus, justice is the synthesizer of political obligation. Justice has established the rule of law.

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[23] See Martin Shapiro, *Political Jurisprudence,* KY. L.J., 52, 294 (1964).

Justice is a product of politics and judicial organs belong to the state authority. The structure of the judicial system is designed to meet political needs. The judicial system cannot defy political needs. Judiciary is a link in the political process. The government authority is exercised through links such as legislative, executive and judicial powers. There is a mutual influence between judiciary and politics. Political forces determine the composition of judicial organs. The present practice of selection of judges by collegiums proves judiciary is only recommending authority for selection of judges. Government is the final authority to accept or reject the recommendations. Judiciary performs important political functions. The political will of the state is exercised through exercise of judicial power. Courts form public policies by giving verdicts on disputes. They impact social activities by adjudicating the issues of public importance. Courts safeguard the constitutional system by judging the constitutionality of a political act. Courts undertake political activities by standardizing the exercise of political power. Various political ideologies actually affect judicial operations. Judges are also influenced by political ideologies. Recently, a high court judge in Gujarat advocated imparting value education in schools. The judge recommended teaching of Hindu scriptures in schools. This recommendation is close to ideology of rightists groups.

Justice has legal and political dimension. Legal dimension of justice is related to law making process and the judicial system of the society. On the contrary, political dimensions of justice, implies that people should be sovereign political masters. The people's power should be exercised by the representative of the people. The political justice involves participation of the people in political sphere, universal adult franchise and non-discrimination in matters of public services. Political justice protects rights of the individuals. So that individual develops personality as a citizen and contributes to the welfare of society.

The judicial system carries out the political will of the people by strict implementation of law. The judicial system settles political disputes through the settlement of political cases. Settlement of Kaveri water disputes between Karnataka and Tamil Nadu is a case in the point. The judicial system can produce a reaction to the political system, government authority or certain political forces. In sum, judicial system is not totally independent of politics. Therefore, political forces try to influence the actions of the judicial system. Sometimes, they use legislature to form judicial policies regarding appointment and dismissal of judges. Now, the parliament has passed the judicial appointment bill to ensure judicial accountability.

6.2 Law and Liberty

Political theorists have deeply studied the relationship between law and liberty. The protection of liberty is an important obligation of state. Law protects the individual liberty. The individual has to be protected from the state which is dangerous to his civil liberty. The anarchists[24] and *syndicalists*[25] view state as an instrument of exploitation. They desire a classless and stateless society in which there is no law to destroy the liberty of the individual. Herbert Spencer views law as a sin and legislators are sinners who destroy the liberty of the individual by imposing law on it.[26] In other words, such thinkers support minimum law to allow maximum liberty to the individuals. The socialists treat law and liberty as complementary terms. Law imposes restraints for the sake of social welfare and enjoyment of liberty. Laski views law is close to liberty that demands observance of common rules that binds the men. Law protects liberty of the individual by imposing restrictions. Law imposes restrictions on the behavior of man so

[24] Anarchists believe in a political philosophy that advocates stateless societies often defined as self governed voluntary institutions. Anarchism holds that the state to be undesirable or harmful.

[25] Syndicalists believe in an economic system where industries are organised into confederation of industry and industries are owned and managed by workers. It is a form of socialism aims to replace capitalism.

[26] See J. C. JOHARI, PRINCIPLES OF MODERN POLITICAL SCIENCE (2009).

that one will not be detrimental to the liberty of others. On the other hand law destroys liberty in a totalitarian state. Both situations are possible.

6.3 Law and Equality

Like liberty, equality is also a political obligation of state. It is equality before the law for some people. Individuals shall be equal before the law; when the general law confers rights or imposes duties, these rights and duties shall extend to all. Conversely, law shall not confer special privileges on particular individuals or groups. Equality is essential for social justice. The constitution upholds equality before the law. In modern democracies, equality before the law is practiced.

6.4 Political Law and Morality

Political law is a legal practice area encompasses the intersections of politics and law. In general terms, law is subject of political science, while morality is study of ethics. Yet there is considerable overlapping between the two subjects. Gilchrist observed ethics view man as a moral agent in society. Law and morality differ from each other in content, sanction and specification. Political law is concerned with the outward acts of man but not with his inner voice. Law can prescribe external acts but cannot prescribe morality. Public prohibition is behind morality while physical punishment is behind law. Law is universal and specific where ethics has some sort of vagueness. MacIver writes the sphere of morality can never be coincident with the sphere of political law. Political law is objective, while morality is subjective. Political law deals with permission while ethical law deals with denial of act by law of the land.

7.0 LAW AND LEGISLATURE

Law reflects the will of the states. Law is enacted through public legislative process. The agencies through which laws are enacted, administered,

enforced and adjudicated are related to law. In democratic countries, laws are made by elected representatives. The members in the legislature perform some judicial functions as well. The house in the legislature adjudicates the matter regarding proceedings. It can take action against a person who commits contempt of the house. The legislature becomes a court when it tries cases of impeachment. In such cases judgment of the legislature cannot be challenged in the court of law.

This is true politics has strong influence over judiciary. Even the most autonomous judiciary is always determined by some sort of political influence. In a recent development, the central government did not approve the candidature of Gopal Subramanian for the post of Supreme Court judge citing his alleged links with the accused of 2G spectrum allocation case. Thus, the primacy of the government over judiciary is still maintained. Judiciary should be independent of legislature but should not be empowered to override the will of legislature.

8.0 OTHER AREAS

There are many other sub-disciplines which are discussed both in law and political science. International law is a case in the point. After the Cold War, many realized the political role of international law. International legal scholars acknowledged the relations between international law and international politics. The 1990s and early 21st century witnessed engagement of international law with the concepts of political science such as global governance, compliance theory, hegemony, imperialism etc.

The Constitution, the fundamental law of the country, is a political document. The constitutional law and administrative law are overlapping areas of law and political science. Constitutional law has direct relationship with the state and government. Constitutional law regulates the powers of the government, the rights of governed and the relations between those who

govern and governed. Similarly, administrative law has strong relationship with the executive branch of the government. It is concerned, with the composition of powers, duties, rights and liabilities of the various organs of the Government. Unlike other countries, administrative tribunals are operational in India. The administrative law has brought harmony between the state power and law. All the discussion above clearly indicates law has relationship with political science.

9.0 CONCLUSION

It is fact that law and political science has close relationship. Earlier, understanding the polity and the Constitution was the prime exercise for many political scientists. Later the interdisciplinary relationship of various subjects was explored. Law is a political concept while state is legal institution. Political science studies the state and government, law studies the rules of the state, organisation and citizens. The structure form and characteristics of law are dependent on the political structure and institution. Political science studies the political behavior of the state where as law studies the constitutional function of the state. Justice is assigned a key place in the preamble of the Constitution. From the very beginning, political thinkers have attempted to discover the significance of law to state and society.

Most of the political philosophers have viewed law as is an essential component of state. Aristotle explored the relationship between rule of law and constitutionalism. Montesquieu discussed theory of law in his political ideas. Aquinas believed law will determine the legality of the government. Rousseau viewed sovereignty is the source of all laws. Bentham viewed state is the only source of law and law is the source of all rights of the individuals.

Legal sovereignty is an overlapping area of political science and law. It denotes authority within a government which has the power to issue

commands in forms of law. Laws are obeyed by citizens and state power enforces the laws. Law is the will of the sovereign. Similarly, political jurisprudence is discussed both in political science and law. It believes that judicial decisions are products of politics. Legal policy believes laws are politics because politicians create them. Most important, the political obligation of the state cannot be studied without a discussion on law. Thus, liberty, equality and justice are part of legal studies. The relation between politics and law has both a progressive and safeguarding function. They both act as 'check and balance' mechanism. For instance, though parliament is sovereign in India, Supreme Court has every right to check the constitutionality of law passed in parliament.

As social practices, politics and law are both independent and interdependent. They are independent because of incompatibility. They are interdependent because polity creates laws and laws validate politics. Thus, submit a political controversy to legal solution is to remove it from the political domain; whereas, submit a legal controversy to political resolution is to undermine the law. The legal approach to politics assumes that law prescribes action in certain situation and forbids the same in other situation. It believes that law provides basis for political behaviour of the people.

Law and politics create their own pictures of reality. Sometimes those pictures overlap or differ. The law shapes politics and society in various ways and serves as a mediator of relations between the people. The relationship between judiciary and politics is an objective reality. Judicial power is a component of political power. The political power of the state is composed of legislative, executive and judicial powers. Moreover, the law professionals should understand the functioning of political institutions and the Constitution in order to insulate judiciary from political interferences. Viewing the relationship between political science and law, it is correct to say the study of law shall be incomplete without political science.

A SOCIO-LEGAL ANALYSIS OF RELIGION, SECULARISM AND THE ANTI CONVERSION LAWS

Siddharth Badkul* and Urvashi Yadav*

Abstract

As defined by the Oxford dictionary, secularism is the morality which should be based on the ground of the wellbeing of mankind in the present life to the exclusion from all consideration drawn in the belief of God. It deals with the individual as a citizen irrespective of his or her religion. It is also not constitutionally connected with any particular religion nor does it seek to promote interference with religion and guarantees the individual freedom in this regard. The modern notion of secularism is based upon a twofold understanding of the concept. Firstly, the state must be equidistant from all religions and it should adopt a neutral attitude with respect to any religion. Secondly, the state must not have any relation with any religion, i.e. state must not have a religion of its own. Secularism is one among the fundamental aspects of the Constitution of India. However, being secular does not mean irreligious, as illuminated by the great statesman and philosopher Dr. Radhakrishnan. The concept of secularism advocated in the Constitution of India is based upon the idea of justice, liberty, equality and dignity of the individual as well as their groups.

The paper presents a socio-legal analysis of the constitutional framework and judicial approach in post-colonial era vis-à-vis religion, secularism

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and anti-conversion laws of different states. The paper focuses upon the unique relationship governing religion and state, thereby balancing the Constitutional mandate of secularism. Further, the paper critically analyses the anti-conversion laws of India and the Indian model of secularism.

***Keywords**: India, religion, state, law, constitution, judiciary.*

1. INTRODUCTION

The term religion has no compact or exact definition. In any case, when it comes to acknowledgement of religion as a conviction or belief, it needs legitimate justification to qualify as knowledge or as the number same of religious masters and religious writings articulate as a way of living. While religion is difficult to define, one standard model of religion, used in religious studies courses, was proposed by Clifford Geertz, who simply called it a "cultural system".[1] In a critique of Geertz's model, Talal Asad characterized religion as "an anthropological category".[2]

When all is said in general terms, religion is an organised accumulation of belief systems, social and cultural systems, and worldviews that relates mankind to most profound sense of being and, now and again, to good values.[3]

In terms of associating law and religion in the context of India, state, i.e. government plays an extremely critical character as it is the state that structures laws about the country.

With states adopting a commitment to secular democracy, the scope that religious freedom guarantees is determined by the constitutional ordering of state-religion relations.[4] This remains a debatable topic in both the areas of constitutional law and human rights regime. Typically, religious freedom rights are classified in terms of rights belonging to the *forum internam*

(conscience-based rights to hold or not to hold a religious belief) and *forum externzan*, (the external manifestation of religious beliefs, including publishing, teaching, preaching and proselytism). Under a secular Constitutional regime, religious freedom is grounded in voluntarist beliefs of religious identity as an absolute freedom and simultaneously religious actions are categorised by referring to social goods.[5]

Constitutionally, India is a secular nation and in this manner has no State religion. Notwithstanding, it has created throughout the years its interesting idea of secularism that is on a very basic level not the same as the parallel American idea of secularism obliging complete partition of chapel and state, as additionally from the French ideal of *laïcit*.[6] The French concept of *laïcité* has been described as an essential compromise whereby religion is relegated entirely to the private sphere and has no place in public life whatsoever.[7]

Regardless of the acceptable amalgamation of all the fundamental principle of secularism into different provisions of the Constitution when initially enacted, its preamble did not then incorporated Secularism, and the statement in the short description of the nation called India as a "Sovereign Democratic Republic". This was, obviously, not an unintentional oversight however a decently figured choice intended to maintain a strategic distance from any hesitation that India was to receive any of the western thoughts of a mainstream secular state. Twenty-five years after the fact - by which time India's unconventional idea of secularism had been completely settled

[1] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 87-25 (Basic Books Inc. Publishers New York 1966).
[2] TALAL ASAD, THE CONSTRUCTION OF RELIGION AS AN ANTHROPOLOGICAL CATEGORY (Johns Hopkins Univ. Press 1982).
[3] *Id.*
[4] Li-Ann Thio, *Caesar, Conscience and Conversion: Constitutional Secularism and the Regulation of Religious Profession and Propagation in Asian States,* [2011] FIDES ET LIBERTAS THE J. OF THE INT'L RELIGIOUS LIBERTY ASS'N 127, 127-128 (2011).
[5] *Id.*
[6] Rachael F. Goldfarb, *Taking the "Pulpit" Out of the "Bully Pulpit": The Establishment Clause and Presidential Appeals to Divine Authority*, 24 PENN ST. INT'L L. REV 209, 209-16 (2005).
[7] *Id.*

through its legal choices and state practices, the preamble to the Constitution was altered to incorporate the saying "Secular" (alongside "Socialist") to pronounce India to be a "Sovereign Socialist Secular Democratic Republic".[8] The motivation behind this Amendment was planned simply to define clearly the idea of "secularism" in the Constitution. Indian Secularism does not consider a secular state as irreligious or atheistic State. India has antiquated the doctrine that state ensures all religion yet meddles with none.[9]

2. SECULARISM IN INDIA – A PROGRESSIVE GROWTH

The development of secularism started in Western Europe in nineteenth century. At first, it began with the plans splitting far from religion. Secularism entered Indian Politics without precedent and for a large portion of the nineteenth century when English educated people, people of distinctive religious group created The Indian National Congress. The Congress in its session in Karachi in 1931 determined that the state ought to display non-partisanship as to all religion. The creators of our Constitution dodged the expression of "secular". Prof. K.T. Shah made two endeavours to present the saying by recommending an amendment. However, he failed on both instances for the reason of resistance from Dr. Ambedkar.[10]

Maybe Dr. Ambedkar felt that the utilization of the interpretation "liberty of faith, religion, belief or worship and equality of status and opportunity" in the Preamble and provisions of fundamental rights are expressive of the idea that India is a Secular State. On the other hand, 42nd amendment of the Constitution included the statement "Secular" into the Preamble of Constitution for further illumination.[11] Secularism is a basic feature in Indian

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[8] INDIA CONST. Preamble amended by the Constitution (Forty-Second Amendment) Act, 1976 (enforced since Jan. 3, 1977).

[9] *Vasudev v. Vamanji*, ILR 1881 Bom 80.

[10] Pan Faiz, *Inter-Relationship Between State And Religion In India,* LAW, RELIGION & ST. (Aug. 21, 2007), *avaliable at* http://panmohamadfaiz.com/2007/08/21/law-religion-and-state/, last accessed on July 12, 2015 (22:58).

[11] *Id.*

Constitution as was held in the cases of *Kesavananda Bharati v State of Kerala*,[12] and *S.R. Bommai v. Union of India*.[13] The Court further held that religion can't be blended with the secular activity of state. The general test with which the members of Constituent Assembly in 1946 were faced with was, above all else, how to suit India's assorted qualities in a current, secular state which could guarantee equivalent rights and equivalent chances to its natives. The result was a state which most researchers have portrayed as a secular state, in spite of the fact that the notion "secular" itself was just included with the Forty-Second Amendment Act approved in 1976.

2.1. LEGAL AND CONSTITUTIONAL FOUNDATIONS

Constitutionally, India is a secular country, however any "wall of separation" between religion and state exists not in law or in practice – the two can, and regularly do, interface and intercede in one another's affairs inside the lawfully prescribed and judicially settled parameters. Indian secularism does not oblige an aggregate expatriation of religion from the societal or even state affairs. The main demand of secularism, as commanded by the Indian Constitution, is that the state must treat all religious ideologies and their followers totally equal and without any discrimination in all matters under its direct or indirect control.[14]

The Constitution of India holds in its part on Fundamental Rights a few provisions that stress complete and legitimate equality of its citizens and restrict any sort of religion-based discrimination between them. Among these procurements is the accompanying:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.[15]

[12] AIR 1973 SC 1461.
[13] AIR 1994 SC 1918.
[14] Tahir Mahmood, *Religion, Law, and Judiciary in Modern India*, 3 BYU L. Rev. 755, 757-76 (2006).
[15] INDIA CONST. Art. 14.

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.[16]

"No citizen shall, on grounds only of religion . . . be subjected to any disability, liability, restriction or condition with regard to access to or use of various public places."[17]

"No citizen shall, on grounds only of religion . . . be ineligible for, or discriminated against, in respect of any employment or office under the State."[18]

Furthermore, Article 25 to 29 of the Constitution of India additionally manages individuals' right to religious freedom. Moreover there is an extensive corpus of legislative enactments in India managing matters relating to various religious communities. These enactments, and in addition to the state practice, are fully in-tune to the Constitutional mandates related to secularism and parameters of religious freedoms.

While piece(s) of enactment exists for each religious communities in India, Chapter 15 of the Indian Penal Code[19] is exclusively committed altogether to punishments for offenses related to religion. In various cases, the punishments for these offenses are quite rigorous.

In context of civil law, the Representation of the People Act of 1951 restricts the utilization of religion and religious images/symbols with a perspective of underwriting one's candidature for elections or for contrarily influencing the election of other candidate.[20] Making an appeal to vote or refraining any individual from voting on the ground of his religion, race, caste, community,

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[16] *Id.* Art. 15(1).
[17] *Id.* Art. 15(2).
[18] *Id.* Art. 16(2).
[19] INDIAN PENAL CODE, §§ 295–98 (1860).
[20] *See,* Representation of the People Act, No. 43 of 1951, § 123(3), *available at* http://indiacode.nic.in/fullact1.asp?tfnm=195143, last accessed on July 12, 2015 (23:03).

or dialect, and additionally the utilization of religious images for the advancement of the possibilities of one's own election, or for preferentially influencing the decision of any contestant, is a corrupt practice.

3. DIMENSIONS OF INDIAN SECULARISM- THE ROLE OF STATE AND LAW

So far it is discussed that the Indian Constitution proposes not just to give the Indian citizen an opportunity of freedom of conscience and choice of religion, but also to keep their religion and religious undertakings out of the affairs of the state. Further how, the provisions in the Constitution and other legislative enactments, has kept the state out of matters of religion (in reference to provisions specified in the Representation of People Act) is explored.

After introduction of the Constitutional provisions with regard to secularism in India, it is the opportune time to discuss about the nature of secularism adopted in India. But before exchanging over to it, just have a speedy recap of what the great(s) need said in regards to secularism in Indian context. Dr. Radhakirshna clarifies that secularism doesn't mean irreligious. It implies regard to all faith and religion. A secular state does not distinguish itself with any specific religion. In Indian context, Dr. Henry Austin says that: secularism implies tolerance, generosity and understanding of majority community.

In India, the presence of profound religious variation has guaranteed a conceptual reaction to issues within as well as between religions. Without taking it as a blueprint, we can look at it and gain from it, about peace between communities, community-specific rights, the rights of minorities, the permeable separation between the advanced/modern state and religion, and the abilities to oblige or accommodate the last. This is pretty much a

positive connection (secularism) between religion and state as discussed earlier.

In *Manohar Joshi's* case,[21] Justice J.S. Verma gave dubious meaning to the term of "Hindutava" by expressing that it implies a "way of life". Even at an earlier instance, the Supreme Court in the case of *Sastri Yagnapurushadji v. Muldas Brudardas Vaishya*[22] and in *Sridharan's* case[23] Hinduism was called as a way of life.

However, way of life is a broad term. It also encompasses not merely religion but other factors related to region like language, customs, food habits, literary and cultural aspects of life which may not have to do anything with Religion. Religion cannot be the sole component of the phrase way of life.[24]

In *Swamiar's case,*[25] for the very first time Supreme Court relied upon Art. 24 and Art. 26 to invalidate the provision of state legislation. In *Saifuddin's* case, the court expressed that the fundamental rights of Art. 25 and 26 are not limited to matters of doctrine or belief; they also extend to acts done in pursuance of religion.

Going to the contention of preambular separation between religion and state, the judgment of the Supreme Court in *Bhuri Nath v. State of Jammu and Kashmir*[26] is of great vitality where the Hon'ble Supreme Court held that the appointment of the head priest of the Vesno Devi Shrine could not be directly controlled or done by the State. Hence, by virtue of this judgment, it could be gathered that there exists an agreeable boundary or demarcation between

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[21] *Manohar Joshi v. Nitin Bhaurao Patel & Anr.,* 1996 SCC (1) 169.

[22] 1966 SCR (3) 242.

[23] 1976 (4) SCC 489.

[24] B.A. Desai, *Indian Constitution and Hindutva,* THE MILLI GAZETTE (Mar. 23, 2011), *available at* http://www.milligazette.com/news/708-indian-constitution-and-hindutva, (last accessed on July 12, 2015 23:06).

[25] *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar Of Sri Shirur Mutt*, 1954 SCR 1005.

[26] AIR 1997 SC 1711.

the law or state and religion. Further, the freedom of conscience is not meant merely for followers of one particular religion but extends to all.[27] Therefore, secularism takes out God from the matters of the State and guarantees that nobody can be discriminated on the ground of religion.[28] The issues among and religious groups were/are satisfactorily managed by the government in Indian. For instance, anti-conversion laws were enacted to check the unethical conversion of people from one religion to the other. Some of the Princely States in India already implemented anti-conversion laws as early as 1930s.[29] Orissa and Madhya Pradesh were the first two states to enact anti conversion laws in post-colonial era.[30] Some states enforced anti-conversion laws mainly against Muslims in early of 1980s.[31]

4. CRITICAL ANALYSIS OF ANTI CONVERSION LAWS

Presently Orissa, Madhya Pradesh, Chhattisgarh, Arunachal Pradesh, Gujarat Himachal Pradesh and Rajasthan have all enacted anti-conversion laws. The enactments are patently similar. They all disallow religious conversion by the use of force or allurement or by fraudulent means.[32] An analysis of these enactments is essential as India keeps on battling with its Constitutional obligation of secularism amid religious tension.[33]

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[27] Krishnadas Rajagopal, *Propagation Without Proselytisation: What the Law Says,* THE HINDU, Dec. 21, 2014 at 15, *available at* http://www.thehindu.com/sunday-anchor/propagation-without-proselytisation-what-the-law-says/article6711440.ece, (last accessed on July 12, 2015 23:07).

[28] *St. Xavier's College v. State of Gujarat*, AIR 1974 SC 19.

[29] Faisal Mohammad Ali, *Christian Anger at Conversion Law, BBC NEWS (CENTRAL INDIA)* (Aug. 4, 2006), *available at* http://news.bbc.co.uk/2/hi/south_asia/5246328.stm, (last accessed on July 12, 2015 23:08).

[30] The Orissa Freedom of Religion Act,1967 and Madhya Pradesh Dharma Swantantraya Adhiniyam,1968.

[31] Arpita Anant, *Anti-Conversion Laws*, THE HINDU, Dec. 17, 2002 at 13, *available at* http://www.thehindu.com/thehindu/op/2002/12/17/stories/2002121700110200.htm, (last accessed on July 12, 2015 23:08).

[32] Shanoor Seervai, *The Arguments for and Against a National Anti-Conversion Law,* WALL ST. J. INDIA EDN. (Jan. 9, 2015), *available a*t http://blogs.wsj.com/indiarealtime/2015/01/09/the-arguments-for-and-against-a-national-anti-conversion-law/, (last accesed on July 12, 2015 23:09).

[33] S. Asia Human Rights Documentation Ctr., *Anti-Conversion Laws: Challenges to Secularism and Fundamental Rights,* 2008 ECON. & POL. WKLY. 63-73 (2008) (hereinafter SAHRDC).

Supporters contend that these laws are proposed to deny conversions or attempted conversions that are effectuated by fraud, force and inducement. They contend that these laws are intended to criminalize such exercises.[34] Such laws therefore present an essential shield for guaranteeing religious freedom, a right ensured both intrinsically by Constitution and in international human rights instruments.[35]

Critics on the other hand argue that laws are spurred by an insecure pro Hindu patriotism that is hostile to religious minorities. Especially objectionable is the wide dialect utilized by the laws, which creates uncertainty about which exercises are denied thereby fostering concern that administration authorities may exploit the vague terminologies of the enactment to oppress religious minorities.[36]

The meaning of terms like conversion, force, inducement or allurement and fraud are sufficiently wide to be abused. The excessively wide meaning of force outlandishly encroaches on interaction between potential converts and those looking to voluntarily convert themselves. The latter are rendered unable to inform the former of what their religion educates about non-followers, restricting the data that can be made accessible to the potential proselyte and subsequently impinging on his or her freedom to change religion.[37] As to inducement or allurement such definitions leave much instability, in a manner, as to which activities are permissible and which are denied. Similarly, for fraud or misrepresentation, the enactments provide no direction in respect to how such a term ought to be interpreted.[38]

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[34] *See,* Dr Justice P. Venugopal, *Why Anti-Conversion Law Needed,* ORGANISER (May 11, 2003), *available at* http://www.hindunet.org/hvk/articles/0503/135.html, (last accessed on July 12, 2015 23:11).

[35] SAHRDC, *supra* note, at 33.

[36] *Id.*

[37] *Id.*

[38] *Id.*

Recently, there has been targeted religiously motivated violence against the Christian community. Activists among the Indian Christian community in India and civil society groups have contended that there is a need to safeguard the Constitutional right to practice, profess and propagate one's own religion in order to prevent further erosion of the doctrine of basic structure.

There is undoubtedly no ground to justify conversions brought about by violence or other equally illegitimate means of coercion. These violate the principle of freedom of conscience guaranteed by the Indian Constitution and prescribed in international human rights norms. However, the language adopted by the anti-conversion legislations goes far beyond the protection of this right, and indeed, in no way appears to be motivated by the desire to protect the freedom of conscience. Instead, the danger of "discriminatory abuse in their application" is very real.[39] The terminology used by these legislations transforms them from their purported role as protectors of constitutional rights into violators of these very guarantees.

Yet the settled fact remains the Supreme Court ruling in the case of *Stanislaus v. State of Madhya Pradesh*,[40] wherein the Constitutional validity of the Madhya Pradesh and Orissa anti-conversion legislations were upheld and has continued to be the fundamental verdict on validity of such laws. It was contended in the Supreme Court that these Acts are hindrance in the 'propagation' of one's religion as they pertains to the prohibition of conversions.[41]

In upholding these laws, Chief Justice A.N. Ray, Justice Ray interpreted the word "propagate" to mean "to transmit or spread one's religion by an

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[39] Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law,* [1999(1)] BYU L. REV. 251, 256 (1999).

[40] AIR 1975 MP 163.

[41] Faizan Mustafa, *Constitutionality of Anti-conversion Laws,* THE STATESMAN, Jan. 15, 2015 at 12, *available at* http://119.82.71.49/statesmandemo/mobi/news/law/constitutionality-of-anti-conversion-laws/44674.html, (last accessed on July 12, 2015 23:14).

exposition of its tenets," but to not include the right to convert another person to one's own religion. It was stated: "*It has to be remembered that Article 25(1) guarantees 'freedom of conscience' to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike.*"[42]

H.M. Seervai,[43] criticized the decision in *Stanislaus*, as stated: "*to propagate religion is not to impart knowledge and to spread it more widely, but to produce intellectual and moral conviction leading to action, namely, the adoption of that religion. Successful propagation of religion would result in conversion.*"[44]

The judgment was labelled as "productive of greatest public mischief". The Supreme Court has denied freedom of conscience and this needs reconsideration. Further all contemplation pertinent to the right to freedom of speech and expression under Article 19(1) (a) must be associated with the right to propagate one's own religion. This is because the right to spread one's thought is characteristic feature of right to speech and expression. Recent occurrences of forced conversions must be utilized as an opportunity to re-look at the prospects of the decision thereby expanding the meaning provided religious freedom as has been done with regard to Article 21. [45]

In a contextually related issue of 'conversion as a religious practice', the Supreme Court, in *Commissioner v. Lakshmindra Swamiar*,[46] stated that,

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[42] *Id.*
[43] H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 1289 (4th ed. Tripathi 1991).
[44] *Id.*
[45] Mustafa, *supra* note 41.
[46] AIR 1954 SC 282.

"what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself". The interpretation was done in reference to Article 25 and 26 (in the absence of a Constitutional definition of the term" religion").[47]

Simultaneously, it must be remembered that undoubtedly such exercises convey/hold a huge potential to instigate viciousness and disdain between religious groups and are capable of creating dire consequences. To that end, we should unquestionably force obligation on the state to check the making of a significantly more broke society.[48] The Supreme Court in *Arun Ghosh v. State of West Bengal*[49] held that an endeavour to raise communal passions through forcible conversions would be a breach of public order and it would be deemed to affect the community at large. Therefore, it held that the States under Entry 1 of List II of the Seventh Schedule of the Constitution are empowered to exercise its civil power to curb the menace.[50]

5. INDIAN PROTOTYPE OF SECULARISM

In any case over recent years, despite of possessing such affirmative qualities, secular states, for all intents and purpose all around, have gone under an apprehensive strain. Scarcely surprising, political secularism, the principle that protects them, has hardly been subjected to extreme feedback. A few scholars have presumed that this study is morally and ethically so profound and supported that it is the time to forsake political secularism. In Indian context, it could be explained by tracing back from the communal violence after the demolition of Babri Masjid in modern day Ayodhya controversy, burning train comprising of Hindu passengers and the uproars

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[47] *Id.*

[48] Suhrith Parthasarathy, *Conversion and Freedom of Religion,* THE HINDU, Dec. 23, 2014 at 12, *available at* http://www.thehindu.com/todays-paper/tp-opinion/conversion-and-freedom-of-religion/article6717565.ece, (last accessed on July 12, 2015 23:15).

[49] AIR 1970 SC 1228.

[50] Krishnadas, *supra* note 27.

tailing it, to the example of communal strains, in Assam that caught the headlines.

This is so because, the entire evolution of humanity has been from ignorance and weakness, before natural and social powers for understanding of these forces clutched them. The basis of religion is obliviousness of the genuine nature of these powers, powerlessness before them the fear of the invisible almighty. Consequently, for instance, a large portion of the Vedic God, say, Agni, Surya, Indra and so on was believed as representation/personification of such natural or social powers. These powers could either profit man or damage him. For example timely rains could benefit agriculture, but failure or delay in rain could ruin the crops and whether there would be timely rain or not, is entirely beyond man's control. Therefore, rain was seen as the representation of Indra. Since man feels defenceless before these strengths, which can antagonistically influence his life, he needs religion as a mental support.[51] When people feel unsecure about this psychological support their emotions burst and result is Babri mosque demolition, Godhara incident or yatras of different political parties which are organised to support the feelings of the people.

We see that our Constitution secular and pragmatic. Then again, the certainty remains that despite our Constitution being pragmatic in its approach, our social order is still backward and semi-feudal, and this dichotomy give rise to a host of problems. Since in a feudal or semi-feudal society religion had influential hang on men's personalities and mind, the vested interests seek to exploit this situation by perpetuating and accentuating caste and communal divisions and by sowing the seeds of discord, among the people. This activity has been stepped up in recent times.[52]

[51] Justice Markandey Katju*, Law, Religion and Politics*, 1(2) J.T.R.I. 1, 1-7 (1995).
[52] *Id.*

Religion and caste have separated people. What is it that will unite us? Sciences can be the uniting factor. Since does not mean material science, however, the whole logical standpoint, the exploratory investigation of our issues, and the experimental answer for those problems.[53] Therefore with the proper way of time, we have likely adjusted or attuned to secularism. This is the reason the very doctrine of secularism, regardless of "number" of positives has been seriously criticized in most part of the world including India.

Notwithstanding to such criticism, the feedback for secularism looks unanswerable because critics have focused on mainstream conceptions developed in largely religiously homogenous societies. It is high time for us to shift our focus and check our tendency to compare Indian virtue of secularism to that of the remaining world; instead one must start believing in it. We need a Xenophanian approach, a pre Socrates philosopher and consider that even though the Indian rule may not be absolutely true however one must be, at least, ready to accept it to be true. Consequently, we will start perceiving secularism in different light, i.e. in ethical and moral perspective, not in absolutely religious sense as such, but in context homogenization and institutional domination.

Justice Katju[54] again opines that, in the forthcoming days the judiciary (if considered as state) shall have to assume a vital part in ensuring individuals' walk towards all-round progress. This is on essentially due to the fact that, higher judiciary is objectively so placed in our Constitutional scheme that it is in a position to give correct guidance to the people. Because of their autonomous Constitutional status the Judges can take a more panoramic and long term view than other authorities. Hence, they are in a position to valiantly put to forward progressive and dynamic thoughts which will be of

[53] *Id.*
[54] *Id.*

incredible help to the people in their battle for social and economic upliftment.

6. CONCLUSION

In light of the aforesaid it can be concluded that in an ideal secular state admires all religions and state's interference should to be least in the matter of religion with the except when public order, morality or health is in question. Secularism has been one of the fundamentals of the Constitution and accordingly citizens are equal and free, irrespective of their caste colour, sex, language, religion, or status. However, the circumstances have changed after independence and many times the secular status of India was subjected to tough challenges; for example Godhara riot in Gujarat. No uniform consensus has been formed with regard to implementation of Uniform Civil Code and Anti-conversion for they are taken as a threat to the identities of minorities. However, despite of foregoing issues Indian Constitution possesses a unique capacity to adjust the multiculturalism and withhold its secular character. While in numerous nations particularly from the third world, has seen a secular authority crumbling due to conflicting traditions, India on the other hand has managed to uphold unity in diversity. For this purpose, judiciary has played a role of sheet anchor. Also, the national of India ought not to overlook the fantasy of Constitutional framers of "Sarva Dharma Sambhavah".

The interpretation and practice of secularism in India has since inception been, and stay, delicate to and accommodated with the ground realities. This equation makes India's religion-state relations both special and interesting. An analysis of India's model of secularism and religious freedom uncovers a calculable parity of religious and secular interests.

A STUDY OF THE BIOSIMILAR REGULATIONS

Richa Sharma*

Abstract

The article in brief discusses the position of the market authorization of Biosimilar products by analyzing the position of law in three different jurisdictions including United States, European Union and India. An analysis has been carried out with respect to difference in position in these jurisdictions. Further study and analysis has also been done in relation to the case of Sandoz v. Amgen, which is the first case brought before the US courts with relation to the Biologics Price Competition and Innovation Act, 2009 of United States and with respect to the Biosimilar industry in any court around the world. The last part of the paper discusses the policy considerations required from the Legislators to ensure that the health sector and the public in general is benefitted to the maximum by biosimilar product industry and at the same time it is ensured that the pioneer product manufacturers have the inventive to innovate.

Keywords: *Biosimilar, Regulation, Authorization, Drugs, Exclusivity.*

INTRODUCTION

Biosimilars are first generation blockbuster biologic drugs, which as opposed to the small molecule chemical drugs, wherein exact generic copies of the

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drugs can be produced, are similar copies of the large-molecule biologic drugs, exactly replicating such large molecule drugs, is impossible and hence are called the biosimilars of their blockbuster counterparts.[1] It is very important at this juncture to define Biologics (large-molecule drugs), which are therapeutic products derived from a biological source, including blood products, proteins and monoclonal antibodies.[2] Essentially, a Biosimilar is the subsequent version of a biologic product[3], which has the same action mechanism in the body and used in the same manner clinically, but is not identical to the original product.

As according to the world Health Organization, biosimilars are[4]:

> *"A bio therapeutic product which is similar in terms of quality, safety and efficacy to an already licensed reference bio therapeutic product"*

The research, development and manufacturing costs for biological products or biologics, is generally very high, leaving very little scope for competition to lower prices.[5] As a result the access to such medicines is limited to a few. The need for separate legislations have been felt throughout the world to ensure a proper market authorization procedure for the biosimilar products, so that the patent related and market related issues can be taken care of and the biologics could be made accessible to the public at large.

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[1] Carl J.MinnitiIII, *Sandoz v. Amgen: Why Current Interpretation of the Biologic Price Competition and Innovation Act of 2009 is Flawed and Jeopardizes Future Competition*, 97 J. PAT. & TRADEMARK OFF. SOC'Y 172 (2015).

[2] Thomas Morrow & Linda Hull Felcone, *Defining the difference: What Makes Biologics Unique,* NAT'L CTR. FOR BIOTECHNOLOGY INFO. (May 15, 2015), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3564302/.

[3] Elizabeth Richardson, *Health Policy Brief: Biosimilars*, HEALTH AFFAIRS (2013), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_100.pdf.

[4] Rep. 60th WHO EXPERT COMM. ON BIOLOGICAL STANDARDIZATION, Tech. Rep. Series No. 977 (Oct. 19-23, 2009).

[5] Joseph A. DiMasia, & Henry G. Grabowski, *The Cost of Biopharmaceutical R&D: Is Biotech Different?,* 28 MANAGE. DECIS. ECON. 469–479 (2007).

Difference between Generics and Biosimilars

Generics are in fact bioequivalent of chemically manufactured small molecule drugs, containing the same quantity of active substance as the reference medicine, which has already been authorized to be used. The dosage for both a generic and a reference medicine is the same, and they are equally effective. Generics as such are not required to carry out the same type of clinical tests as the original drug, but only equivalence tests.[6]As opposed to the generic drugs, biosimilars have to establish a *pharmacovigilance* system and a plan for risk management, when filing the application for the market authorization[7]. The reason for such strict requirements for biosimilars is due to the very nature of such drugs, of cell-based production, having a much larger and complex structure than the reference drugs for the generics. It is also to be noted that the immune response to such biosimilars is a very important test for the biosimilar drugs.

American Regime for Biosimilar drugs

As defined under Section 351 of the Public Health Service Act, Biosimilarity of one product to another has been understood to mean, *"The biological product is highly similar to the reference product notwithstanding minor differences in clinically inactive components"* and Biosimilars are also referred to as Follow-on-Biologics. In this part of the paper a general study has been made with reference to the Hatch- Waxmann Act on market authorization for the Generic Drugs, and the provisions of the BPCIA have also been dealt in detail for the purpose of understanding regulations of the follow-on Biologics. Subsequently, the case *Snadoz v. Amgen* has been dealt with in detail. In last section of this part, the way forward with the implementation of the BPCIA has been discussed.

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[6] Rovira, J., Espín, J., García, L., Olry de Labry, A., *The Impact of Biosimilars' Entry in the EU Market*, 2011 ANDALUSIAN SCH. PUB. HEALTH, *available at* http://link.springer.com/article/10.1007/s10198-013-0538-4/fulltext.html (last visited May 19, 2015).

[7] Adam Sierakowiak and Tanya Syed, *Key decision makers' characterization and analysis of their attitudes towards the authorization process and market of biosimilars in Sweden and Denmark,(*Karolinska Institute Working Paper, 2009).

- **Hatch-Waxman Act**

The Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, was enacted with an aim to balance the interests of the pioneer drug industries & the generic drug industries and also to ensure public access to medicines.[8]

The core aspects of the approval process for the abbreviated new drug application or ANDA, by the FDA under the Act can be understood in three steps, namely;

a) The drug manufacturer has to show bioequivalence to the pioneer drugs, based on comparative study[9], rather than carrying out comprehensive clinical trials to establish safety and efficacy of the drug;

b) For the pioneer drugs, the data exclusivity period and the patent term restoration have been laid down.[10]

c) The process under the act allows the generic drug manufacture to assert the invalidity of the pioneer drug, and the first of such successful assertion, in a patent certification, receives a 180 days market exclusivity period during which the FDA does not approve another such generic drug.[11]

Some of the novel provisions introduced by the act include the patent term restoration, wherein the innovator is allowed to 'reclaim' a portion of the patent term that is lost as a result of seeking FDA approval of the new drug, this provision is also known as Patent Term Extension, wherein an extension of patent term, for certain products and methods, including human drug products can be granted, based on an approval by the FDA[12]. Such extension

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[8] Sarah Eurek, *Hatch-Waxman Reform and Accelerated Market Entry of Generic Drugs: Is Faster Necessarily Better?,* 2 DUKE L. & TECH. R. (2003).

[9] 21 U.S.C. § 355(j).

[10] 21 U.S.C. § 355.

[11] 21 U.S.C. § 355(j)(5)(B)(iii)-(iv).(

[12] 35 U.S.C. § 156.

can be for a period extending from five to fourteen years of the effective patent life.

Another important provision in the act is related to 'Data exclusivity', which is the time during which FDA grants patent to an approved drug, protection from the competing generic applications by limiting FDA's use of the innovator's proprietary safety and efficacy information.[13] The length of such exclusive period is dependent on whether the drug is a New Chemical Entity (NCE), which is an approved drug consisting of such active ingredients, including the ester or salt of an active ingredient, none of which has been approved in any other full NDA, and if the approved drug is not an NCE, the FDA may not approve an ANDA for a generic version of the approved drug until three years after the approval date of the pioneer NDA.[14] If the drug is in fact an NCE, ANDA cannot be submitted for a period of five years.

Among the many impacts that the legislation had on the pharmaceutical industry, one very unexpected result has been the filing of patent applications by the generic companies, leading to increase in generic research[15], leading to development of an environment even within the generic industry, conducive for innovation. Also, with the coming of the Act, there has been a reduction in the average delay between the patent expiration, and the entry of the generic into the market[16], leading to an early access to public, of various drugs at a lower cost.

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[13] Wendy H. Schacht and John R Thomas, *The Hatch-Waxman Act: A Quarter Century Later*, CONG. RESEARCH. SERV. (2013), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R41114_03132013.pdf.

[14] 21 U.S.C. § 355(j)(4)(D)(iii).

[15] Martha M. Rumore, *The Hatch-Waxman Act—25 Years Later: Keeping the Pharmaceutical Scales Balanced*, PHARMACY TIMES (Aug. 15, 2009), http://www.pharmacytimes.com/publications/supplement/2009/genericsupplement0809/generic-hatchwaxman-0809.

[16] David A. Holdford and Bryan A. Liang, *The Growing Influence of Generic Drugs: What it Means to Pharmacists and Physicians*, POWER-PAK C.E. (Dec. 2006), http://www.centad.org/seminar/4.%20Generics/GrowingInfluencePowewrPak2006.pdf.

- **Biologics Price Competition and Innovation Act**

The aim with which the 'Biologics Price Competition and Innovation Act', was enacted in the year 2010, was to ensure a better generic drug approval system for the biologics, and to provide the manufacturers of such drugs incentives to bring such biological products to the market.[17] Another concern, which was aimed to be addressed by the act, was the high cost associated with the biologics.

- **Procedure for Biologics License Application**

As under the Act, the biosimilar drug manufacturer has to establish two levels of biosimilarity for approval by the FDA. Firstly, the product must be "highly similar", so much so that "there are no clinically meaningful differences between the biological product and such reference product in terms of safety, purity and potency." Secondly, the two are examined, for if they are similar enough to be considered interchangeable, to the extent that the biosimilar may be substituted without the intervention of the doctor. The application filed for the approval, known as the Biologic License Application (BLA), also known as the section 351 (k) application, must include the analytical studies, animal studies and a clinical study, to ensure that the drug has the same mechanism of action for condition(s) of use that have been approved for the reference drug, and must have the same route of administration, dosage form and strength.[18] Also, if the biosimilar seeks to be classified as an interchangeable product, the BLA, along with the aforementioned, has to demonstrate an expectation to provide the same clinical result as the reference product on any given patient.[19] Here, the application also has to demonstrate that the risk of such substitution, is no

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[17] Jordan Paradise, *The Devil Is In The Details: Health-, Biosimilars, And Implementation Challenges For The(Food And Drug Administration*, 51 JURIMETRICS J. 279–292 (2011).
[18] 42 U.S.C. § 262(k)(2)(A).
[19] 42 U.S.C. § 262(k)(4)(B).

greater than the risk of using the reference product without such alteration or substitution.

- **Dispute Resolution**

Along with the aforementioned provisions, the act also lays down a unique method for resolution of patent related disputes. It is a private patent disclosure and resolution process, where the BLA applicant must disclose to reference product manufacturer a detailed product and manufacturing information about his product, at the time of making the application before the FDA.[20] This is followed by lengthy communication between the pioneer and the biosimilar drug manufacturer for the purpose of determination of patent status for litigation assessment. The applicant has to also provide an access to the pioneer product manufacturer, directly, all appropriate confidential product information, as opposed to the process of public listing of patents to provide information to the industry, for the generic drugs, done by the Orange Book.[21] Once the confidential information is provided by the biosimilar manufacturer, the reference product sponsor has to hand over a list of patents that are potentially infringed and what rights will eventually be asserted against such manufacturer.[22] As under the act itself the parties are then required to determine what patents will be litigated[23], and the FDA would then proceed with the review and the approval process unless the reference product manufacturer obtains an injunction.[24]

[20] 42 U.S.C. § 262(1).
[21] *Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book)*, FDA.GOV, http://www.fda.gov/Drugs/InformationOnDrugs/ucm129662 (last visited Oct. 31, 2012).
[22] 42 U.S.C. § 262(l)(3).
[23] 42 U.S.C. § 262(l)(3)-(8).
[24] 42 U.S.C. § 262(1)(8)(B).(

- **Provisions with respect to exclusivity**

The act also provides for incentives, by means of exclusivity, here a period of exclusivity of 12 years is granted for the innovation of the reference product[25] and a one-year period of exclusivity is granted to an interchangeable biologic[26], while no such exclusive period is granted to a mere biosimilar product. As interpreted by the FDA, this 12 year period refers to market exclusivity, measured from the date on which the approval to the pioneer drug was granted by the FDA.[27]

A very relevant debate at this juncture is whether such 12 year period of exclusivity is with reference to both market as well as data exclusivity. This debate is of particular relevance because if it is with reference to market exclusivity, no other product can enter the market unless the period of 12 year expires, keeping all competitors out of the market. As opposed to this, in case the exclusivity period is with reference to data, the FDA will not review another application that makes reference to the pioneer product manufacturer's data, but it can still approve such applications which are based on biosimilar sponsor's own data.[28]

- **Sandoz v. Amgen[29]**

The case under consideration is the first case before the US courts with reference to the biosimilar industry and the BPCIA, which regulates the approvals for the industry.

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[25] 42 U.S.C. § 262(k)(7)(A).

[26] 42 U.S.C. § 262(k)(6)(A).(

[27] Derrick Gingery, *Biosimilars Exclusivity Tug-of-War Brewing in the Mail; Can a Letter Add Eight Years to Reviews?,*THE PINK SHEET 9 (Jan. 31, 2011).

[28] Kurt R. Karst, *Tussle over BPCIA "Market" Versus "Data" Exclusivity Continues; This Time the Generic Supporters Chime In*, FDA L. BLOG (Jan. 21, 2011), http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2011/01/tussle-over-bpcia-market-versus-data-exclusivity-continues-this-time-the-generics-side-chimes-in.html.

[29] Sandoz Inc. v. Amgen Inc., No. 2014-1693, WL 6845165 (Fed. Cir. Dec. 5, 2014).

As according to the facts of the case, Sandoz Inc., brought a declaratory judgment (DJ) action against Amgen and Hoffmann-La Roche, requesting a judgment declaring the invalidity and non-infringement of two patents covering Amgen's biologics product Enbrel®, covering the biologic protein known as Etanercept, the said biologic was approved by FDA in the year 1998, for the treatment of inflammatory conditions. As under BPCIA, the Amgen's exclusivity over the said biologic expired in 2010, and Amgen's patents covering the same expired in year 2012 and 2014.[30]

In the year 2010, Sandoz began its consultations with the FDA regarding the development of a biosimilar for Etanercept and had completed the first two phases of testing, i.e. on animal models and the phase I clinical trial on healthy human volunteers, with the II phase of clinical trials ongoing, which according to Sandoz was for the mere confirmation that its product was essentially identical to Enbrel.

But in the year 2011, Amgen announced the issuance of US patents, 8,063,182 and 8,163,522[31], wherein the claim is on the 'fusion protein that is Etanercept' as alleged by Sandoz, these new patents are submarine patents aimed only at extending Amgen's exclusivity over the said biologic. It was in response to these newly acquired patents of Amgen, that Snadoz filed an action for DJ in the United States District Court for the Northern District of California, in 2013, before submitting the BLA. The District Court[32], dismissed the DJ action on two grounds namely, (a) failure to comply with the BPICA provisions and (b) failure to establish any case or controversy. According to the Court, no lawsuit can be filed either by the pioneer product or biosimilar product sponsor, unless and until the series of statutorily mandated exchange of information is not carried on. Before the Federal

[30] U.S. Patent No. 5,395,760 (filed May 10, 1990); U.S. Patent No. 5,605,690 (filed Feb. 8, 1995).
[31] U.S. Patent No. 8,063,182 (filed May 19, 1995) and 8,163,522 (filed May 19, 1995).
[32] Sandoz Inc. v. Amgen Inc., No, WL 6000069 (N.D. Cal. Nov. 12, 2013), *aff'd,* No. 2014-1693, WL 6845165 (Fed. Cir. Dec. 5, 2014).

Court, in its oral arguments[33], Sandoz contended that the Enbrel's exclusivity had expired and therefore a speedy adjudication of the new patents should be done in order to ensure access to the public the biosimilar version. Sandoz made a further contention against the DJ limitations, by asserting that the BLA had not been filed, therefore it was not a 'subsequent (k) application'. The Federal Court in its decision did not address the district court's interpretation of the BPICA, thus leaving "unless and until" interpretation with respect to the mandatory exchange of information wholly intact. Furthermore, the Federal Circuit affirmed the district court's decision, with a finding that Sandoz had failed to prove an injury of sufficient immediacy and reality to create subject matter jurisdiction for declaratory judgment. The court was of the opinion that the patent dispute between the parties was subject to significant uncertainties and therefore not sufficiently immediate or real under the totality of circumstances standard required to pass a DJ.

In another case between the same parties of *Amgen v. Sandoz Inc*[34], the District Court Judge of Northern District of California was of the view that disclosure and the notice provisions under the BPCIA were not mandatory. The case was brought before the Court by Amgen, against the BLA filed by Sandoz for obtaining market approval for the biosimilar version of Amgen's NEUPOGEN®, Sandoz, in this case despite following the FDA approval procedure under BPCIA, refused to participate in the disclosure and information exchange process, alleging it to be non-mandatory. This contention of Sandoz was upheld by the District Court, rejecting Amgen's motion for preliminary injunction. Against this, Amgen filed a motion before the Federal Circuit, contending that by converting the provisions of the BPCIA from mandatory to optional, the District Court "toppled the statutory

[33] Oral Argument, Sandoz Inc. v. Amgen Inc., No. 2014-1693, WL 6845165 (Fed. Cir. Dec. 5, 2014).

[34] Aron Fischer & Nathan Monroe-Yavneh, *Amgen v. Sandoz BPCIA Dispute Heads to the Federal Circuit,* BIOLOGICS BLOG (Apr. 24, 2015), http://www.biologicsblog.com/blog/amgen-v-sandoz-bpcia-dispute-heads-to-the-federal-circuit/.

balance in favor of the Applicant and allowed Applicants to game the system." As on the date of writing the paper, the appeal is still pending before the court, for oral arguments, though a preliminary injunction has been granted by the court to keep Sandoz's biosimilar off the market, until a final decision is arrived upon.

European Union Regime for Biosimilar drugs

Amendment brought about to Annexure I of the Directive 2001/83/EC[35], in the year 2003 introduced the legal regime for market authorization of the 'Similar Biological Medicinal Products'. In the directive, biosimilars have been defined as a biological medicine with proven similarity to another biological medicine previously licensed within the EU.[36] Other regulatory directives and guidelines for the biosimilar drugs in EU include, Directive 2003/63/EC[37], Directive 2004/27/EC[38], Guideline on Similar Biological Medicinal Products (EMEA/CHMP/437/04)[39], similar biological medicinal products containing biotechnology derived proteins as active substance, quality issues (EMEA/CHMP/BWP/49348/2005)[40] and similar biological medicinal products containing biotechnology derived proteins as active

[35] 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 2001, O.J. (L 311) 67-128, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0083.

[36] Roger, S.D., *Biosimilars: how similar or dissimilar are they?*, J PHARM PHARMACEUT SCI. 341-46 (2006), https://www.ualberta.ca/~csps/JPPS10_3/ReviewArticle_1308/MS1308_Format_final.pdf.

[37] Commission Directive 2003/63/EC, of the European Parliament and of the Council of 25 June 2003 on the Community code relating to medicinal products for human use amending Commission Directive 2001/83/EC, Official Journal of European Union, 2003 O.J. (L 159/46), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:159:0046:0094:en:PDF.

[38] DIRECTIVE 2004/27/EC Of The European Parliament And Of The Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, 2004 O.J. (L 136/34), http://ec.europa.eu/health/files/eudralex/vol-1/dir_2004_27/dir_2004_27_en.pdf.

[39] *Guideline on Similar Biological Medicinal Products*, EURO. MEDICINES AGENCY (Oct. 30, 2005), http://www.ema.europa.eu/docs/en_GB/document_library/Scientific_guideline/2009/09/WC500003517.pdf.

[40] *Guideline On Similar Biological Medicinal Products Containing Biotechnology-Derived Proteins As Active Substance*: EURO. MEDICINES AGENCY (Feb. 22, 2006), http://www.ema.europa.eu/docs/en_GB/document_library/Scientific_guideline/2009/09/WC500003953.pdf.

substance, non clinical and clinical issues (EMEA/CHMP/BMWP/ 42832/2005)[41]. Each guideline so issued, lays down the requirements, which the biosimilar drug producing company has to address before the market authorization is given to such drugs. For instance the guideline on non-clinical and clinical issue, requires the company to carry out pharmaco-toxicological assessment or non-clinical studies, along with studying the pharmacokinetics and pharmacodynamics to understand its efficaciousness and ensure the safety with respect to use of such drugs.

In EU, the terms, substitutability and interchangeability, of biosimilar drugs with the reference drugs have been given two different meanings and cannot be used synonymously. As according to the European Generic Medicines Association, interchangeability refers to the *"doctor's ability to prescribe a biosimilar in place of the reference product"*and in case of substitutability, it is to allow *"pharmacists to dispense a biosimilar rather than the reference drug"*. Therefore, the term substitutability raises more contentious issues, as the decision in this case is upon the pharmacist, once the doctor gives a prescription.[42] Another very notable feature of the regulatory guidelines is that the clinical data that is required by the European Authorities is very limited; this is especially significant in case of biosimilars as it appreciably reduces the development cost and hence reducing the cost of the final product, making the business of manufacturing itself viable.[43]Furthermore as according to EMA, if the biosimilar shows sufficient comparability to one indication of the reference product, it becomes reasonable to extend the approval of the biosimilar to other indications as well.[44] Here it becomes relevant to therefore select the most sensitive indicator for the comparison.

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[41] *Guideline On Similar Biological Medicinal Products Containing Biotechnology-Derived Proteins As Active Substance: Non-Clinical And Clinical Issues*, EURO. MEDICINES AGENCY (Feb. 26, 2006), http://www.ema.europa.eu/docs/en_GB/document_library/Scientific_guideline/2009/09/WC500003920.pdf.

[42] Mansell P., *New Dynamics and Challenges in the Generics Market*, SCRIP REPORTS (2007).

[43] Guillermina Forno and Eduardo Orti, *Biosimilars: Current situation and future expectations,* 3 EUR. J. RISK REGULATION 213 (2012).

Comparison between the US and the EU regimes

Europe is ahead of the United States when it comes to the biosimilar adoption and regulation, and the EMA approved the first biosimilar way back in 2006.[45] Furthermore in Europe the follow-on biologics have to adhere to the same post-marketing adverse-event vigilance and reporting requirements as the pioneer.[46] In US, some biological products, including insulin, glucagon and other low molecular weight heparins (LMWHs), are regulated under the 'Federal Food, Drug, and Cosmetic (FD&C) Act' and therefore the approval process for them is to be carried out as under the Hatch-Waxman Act which lays down the generic drug pathway for approval.[47]As opposed to this, in EU no classes of biologics are to be considered for the classical generics application.[48] The effect of this is that for such biologics studies in US, the studies relating to evaluation of non-clinical and clinical safety and purity are omitted and only bioequivalence to the reference drug has to be established. Another very relevant difference is with regard to the naming and labeling requirements for the biosimilars, in EU, with the coming into force of the EC Directive 2012/52/EU, a consensus had been arrived upon that the naming of the biologics has to be done on the basis of brand name and not by International Nonproprietary Names (INN), because if the INN procedure is to be followed, the name for both the reference product as well as the biosimilar would be the same, but with the labeling as according to the brand name, differentiation between the two

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[44] *Scientific Discussion: marketing authorisation for Omni- trope (Sandoz GmbH)*, EURO. MEDICINES AGENCY (2006), http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-_Scientific_Discussion/human/000607/WC500043692.pdf.

[45] FENWICK & WEST LLP, https://www.fenwick.com/FenwickDocuments/01-06 12_Comparison_US_EU_Biosimilars_Regimes.pdf (last visited May 18, 2015).

[46] *Id.*

[47] *Biosimilars: Additional Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009*, FOOD AND DRUG ADMINISTRATION (May, 2015), http://www.fda.gov/downloads/Drugs/Guidances/UCM273001.pdf.

[48] Mark McCamish & Gillian Woollett, *Worldwide experience with biosimilar development*, 3 mAbs J. 209–217 (March-Apr. 2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3092622/.

becomes possible. As opposed to this in US, no such precise requirement has been laid down.[49]

Apart from the aforementioned differences, the overall requirements with respect to clinical testing for safety and the pharmacovigilance requirements in the two jurisdictions are similar, though the language vastly differs, making it difficult to identify the difference as such.

India and Biosimilar Drugs management

In India, the Central Drugs Standard Control Organization (CDSCO) and the Department of Biotechnology (DBT), laid down the 'Guidelines on Similar Biologics'.[50] The guidelines address the issue regarding the manufacturing process and quality aspects for the biosimlar drugs and the pre-market requirement for the pre clinical and clinical studies and the post market regulatory requirements. India has undertaken an 'stepwise approach' to market biosimilar products[51], in almost the same way as in U.S. and EU. As according to the aforementioned regulations, a similar biologic can be developed not only for a reference biologic licensed in India but also such biologic, which has been licensed and marketed for at least four years with significant safety and efficacy in a country with an established regulatory framework.[52] Furthermore, in India the approval process is a multi-step process involving various regulatory bodies including Department of Biotechnology (DBT) under the Ministry of Science and Technology through

[49] Tobias Blank, Tilo Netzer, Wolfram Hildebrandt*, Angela Vogt-Eisele & Marietta Kaszkin-Bettag Safety and Toxicity of Biosimilars- EU versus US regulations,* 2 GENERICS & BIOSIMILARS INITIATIVE J. (July 29, 2013), *available at* http://gabi-journal.net/safety-and-toxicity-of-biosimilars-eu-versus-us-regulation.html.

[50] *Guidelines on Similar Biologics: Regulatory Requirements for marketing authorization in India*, DEPARTMENT OF BIOTECHNOLOGY & CENTRAL DRUGS STANDARD CONTROL ORGANIZATION (2012), http://dbtbiosafety.nic.in/Files%5CCDSCO-DBTSimilarBiologicsfinal.pdf.

[51] Anurag S. Rathore, Development and Commercialization of Biosimilars in India, 24 BIO PHARM INT'L (Nov. 1, 2011), *available at* http://www.biopharminternational.com/development-and-commercialization-biosimilars-india?rel=canonical.

its Review Committee on Genetic Manipulation (RCGM), the Central Drugs Standard Control Organization (CDSCO) under the Ministry of Health and Family Welfare, the Genetic Engineering Advisory Committee (GEAC), the Food & Drugs Control Administration (FDCA) and the Institutional Animal Ethics Committee (IAEC).

The first case with relation to biosimilar products and its introduction in the India markets was filed by a Swiss pharmaceutical company Roche, against Bangalore based Biocon and the US based Mylan, for the production of a biosimilar version of Roche's biologic product Herceptin.[53] An ex-parte injunction was issued by the Delhi High Court, with an order that the two companies were "not entitled to introduce or launch the drug" until they had persuaded the court that their product had undergone sufficient testing.[54]

A specific stance of the government and of the regulators is of particular relevance for the Indian pharmaceutical industry since there are about 100 companies actively involved in the research and development, marketing and manufacturing of biosimilars, with huge potential of growth.[55]

The way Forward: Policy Considerations

With the growth of the biosimilar industry, a very crucial issue is ensuring the safety of the patients, since no two biologics are the same, the automatic substitution of a biosimilar to the reference drug could not only impact the effectiveness but could also be a major concern to the safety of the patient,

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[52] Ivmuller, *An Overview of Biosimilas and Biosimilar Pathway in India*, BRIC WALL BLOG (May 21, 2014), https://bricwallblog.wordpress.com/2014/05/21/an-overview-of-biosimilars-and-the-biosimilar-pathway-in-india/.

[53] Soma Das, *Roche Sues Biocoin, Mylan, DCGI over breast cancer drug,* THE ECON. TIMES (Feb. 7, 2014), *available at* http://articles.economictimes.indiatimes.com/2014-02-07/news/47126682_1_trastuzumab-breast-cancer-drug-herceptin.

[54] Latha Jishnu, *Fight for Biosimilars,* DOWN TO EARTH (Mar. 15, 2014), http://www.downtoearth.org.in/content/fight-biosimilars.

[55] Narayan, *Biosimilars Guidelines: A step in the right direction for India,* BIOSPECTRUM (Aug. 16, 2012), http://www.biospectrumasia.com/biospectrum/analysis/3021/biosimilars-guidelines-a-step-direction-india#.UehBf6DRiSo.

thus making such substitution rather inappropriate, therefore it is required that the legislations should in clear terms lay down the required baseline scientific evaluation standards, as has been done in Europe. Therefore there is a requirement that the legislators define proper required standards for interchangeability, even so as to ensure stability of the industry. The legislations should clearly identify the required clinical data for the evaluation of the biosimilars. At the same time there is a requirement for the establishment of proper standards for the post marketing safety evaluation, to monitor and to ensure the safety and efficacy of such approved biologics. Another very important issues that is required to be dealt by all the jurisdictions analyzed is the practice of 'reverse payment' or 'pay for delay', here the generic company or in this case the biosimilar manufacturing company receives payment from the pioneer product manufacturer to delay its market entry, and those avoiding potential competition. In USA, this has been specially a point of criticism of the BPCIA legislation as unlike under the Hatch-Waxman Act, the companies here are not mandatorily required to report such settlements to the Federal Trade Commission and hence are not subject to anti trust litigation.

CONCLUSION

Countries around the world are encouraging its biosimilar industry and taking steps to ensure their development, most of the states have drafted their regulations to evaluate the comparability between the reference product and its biosimilar, based on biological activity, clinical trials and pharmacokinetics parameters. As has been reflected throughout the paper the position taken by most jurisdiction on the regulations is similar, apart from a few minor changes. But the ongoing patent protection, data exclusivity and market exclusivity term of most reference biologics makes it very difficult to analyze how in practice these regulations will be implemented by the authorities, but at the same time it cannot be denied

that the industry possesses considerable potential, not only for ensuring public access to cheaper treatment but also for the development of the health care sector.

GOOGLE'S ADWORDS SCHEME – WHETHER AN INFRINGEMENT OF TRADEMARK?

Aditya Prakash Arora* and Naman Jain**

Abstract

Google, as is known, allows for preferential treatment in order to benefit the advertisers who are using services of Google and are associated with it, in which the net users get to see theadvertisement of that particular advertiser on the first page of Google search. However the confusion which appears does raise several issues which have been discussed in this paper. There are both pros and cons of such type of advertisements which needs to be settled as these web advertisements are the future of ads sector which cannot be ignored. The Indian position needs to be clarified and an advanced step allowing such advertisements with minimal restrictions should be allowed by the Indian Courts. This paper examines the whole lot of issues surrounding preferential treatment of Ads and seeks some substantial solution by analyzing Judgments from various Courts around the world.

Keywords: *Google, Trade-Mark, Advertisements, Restrictions, Confusion*

Google allows users to buy words online as a mode of advertisement. This scheme allows the concerned advertiser in getting a preferential treatment

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and his web links/website is shown on the first page of the Google search result. But it also causes a reasonable confusion in the mind of consumer as to which website/weblink he/she was actually looking for, which is prohibited by the Trademarks Act, 1999. Google's advertising policy protects Google from cases of infringement of intellectual property and allows users to complain to Google if the same has been infringed. As far as Indian position is concerned, the Madras High Court in *Consim India Pvt Ltd v.*[1] *Google India Pvt Ltd,* fully recognised the advertisement contract but directed Google to protect, if an *'Adword'* infringes any third parties trademark.

To attract liability under Section 29 of the Trademarks Act, 1999, the use must be "in the course of Trade" and "as a trade mark" such as "likely to cause confusion on part of the public". Wherein the Search Engine sold the plaintiff's Trademarks as Keywords, the "use" "in the Course of Trade" or "in commerce" could be attributed to the contracting parties trading on the value of third parties marks by accepting bids from plaintiff's competitors; ranking its paid advertisers by their bids before providing any "natural" listings, thus, "injecting itself into the marketplace, acting as a conduit to steer potential customers away from the plaintiff to its competitors; suggesting ones marks to prospective advertisers as search terms and marketing them to their competitors".[2] For instance, in the case of an advertiser who acquired 'Rescuecom's' exact trademark through Google Adword generated a sponsored link, and a customer (net user) used the keyword as a part of his search query, the Court held that such use of Rescuecom's mark constitute utilization that fits in the category of "displaying, offering, and selling" for Google with respect to Rescuecom's mark when selling its advertising services in commerce.[3] Moreover, the keywords sold by Google if were identical to the trademark of the third party, the relief of injunction can be awarded as a lower degree of consumer care is

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[1] Consim India Pvt Ltd. v. Google India Pvt Ltd., 2013 (54) PTC 578 (Mad).
[2] 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273 (D.N.J. 2006).
[3] Rescuecom v. Google, 83 U.S.P.Q.2d 1208 (N.D.N.Y. 2006), *aff'd,* 562 F.3d 123 (2d Cir. 2009).

expected of Internet consumers; plus, Google uses it "with the intent to maximize its own profit".[4]

Wherein the plaintiff could not provide proof of actual deceit, confusion, the proof of temporary diversion[5] of prospective customers off the plaintiff's website; or when the survey indicating that significant people were misled was flawed[6] along with the striking similarity of the marks and long-use by the plaintiff were "arguably indicative" of a likelihood of confusion.[7] When well-known trademarks are employed by a person other than the registered proprietor, the Courts have reasoned that it creates a probability that the Petitioner was the source of origin of the Defendants's goods and services and petitioner promoted, endorsed or authenticated the use of such goods and services.[8] Therefore, any resulting ads that contained plaintiff's marks either in the title or in the text were held to be likely to cause confusion.[9]

Google can also be made liable for contributory trademark infringement, which is a judge-made law derived from the common law of torts, in which liability may be brought into effect for facilitation or encouragement of infringement of trademark.[10] To prove liability under the doctine of contributory infingement, the petitioner must exhibit direct infringement.[11]

The Supreme Court explained in *Inwood Laboratories*[12] that:

"*If a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm*

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[4] Google v. American Blind Wallpaper Factory, 74 U.S.P.Q.2d 1385 (N.D. Cal. 2007).
[5] *Supra* note 2.
[6] Playboy v. Netscape, U.S. Dist. LEXIS 13418 (C.D. Cal. Sept. 14, 2000).
[7] *Supra* note 2.
[8] Playboy Interprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).
[9] GEICO v. Google, Inc., 330 F. Supp. 2d 700 (E.D. Va. 2004).
[10] J. THOMAS MCCARTHY, TRADEMARK AND UNFAIR COMPETITION 464 (4th ed. 2001).
[11] DAVID I. BAINBRIDGE, INTELLECTUAL PROPERTY 73 (9th ed. 2012).
[12] Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982).

done as a result of the deceit."

This principle was further expanded to service-providers in *Lockheed Martin Corp*. v. *Network Solutions, Inc.*[13] In the *Lockheed Martin*[14] Court created a "Control Prerequisite" expounding that, direct control and monitoring of the instrumentality used by a third party to infringe the plaintiff's mark permits the expansion of *Inwood Lab's*[15] 'supplies a product' required for contributory infringement. Explaining the doctrine in the case of *Tiffany Inc*. v. *eBay Inc*[16]*.,* the court held that the E-commerce giant eBay supervised over the business of third-party sellers on its web platform through following ways: the website superintends the listings software and "facilities transactions between" customers and seller, its web platform encouraged the sale and purchase of 'Tiffany' articles and promoted 'Tiffany' as keyword; the company amassed enormous profits through the sale of such commodities from its web platform; and eBay is more of a classified service and therefore, 'innocent infringement' defence is not applicable.

The Second Prong of the Contributory Infringement claim enforces liability on the service-provider for the loss caused as a result of the continued supply of such a service. Therefore, to claim contributory infringement, the court held those advertisements, which disguise the indentity of the advertiser to such extent that the customer is confused as to the source of its origination, even if initially, must be held liable.[17] In a case wherein it was established that a seller by purchasing keyword of another seller's registered trademark constituted infringement of his right, such action of the search engine would constitue contributory infringement.[18] The most significant evidence in this

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[13] Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949 (C.D. Cal. 1997).
[14] *Id.*
[15] *Supra* note 12.
[16] Tiffany Inc. v. eBay Inc, 600 F.3d 93 (2d Cir. 2010).
[17] Benjamin Aitken, *Keyword-linked advertising, Trademark Infringement and Google's Contributory Liability*, 4 DUKE L. & TECH. REV. 1-13 (2005).
[18] Google v. American Blind, 74 U.S.P.Q.2d 1385 (N.D. Cal. 2007).

regard was reverberated by Google in intentionally allowing the well-known spurious and infringers to proffer on the Petitioner Trademark as keywords.[19] Similarly, in the case of *Playboy* v. *Netscape*, wherein the court garnered information about the defendant's intent to cause confusion by perpetually doing 'nothing to reduce such confusion' such as requiring the advertisers to recognize themselves with their advertisement. Additionally, the defendants also declined the plaintiff request to remove the 'Playboy' and 'Playmate' as keywords as it was associated with the business of the Plaintiff. While, in the case of *Hard Rock*[20], the court held that it was not affirmative duty of the Petitioner to ensure certain safeguards against such infringers, however, once information of such practice is attained, a duty to take appropriate legal remedy arises.

The liability of Google and other search engine results from the well-known fact that by dealing in similar keywords, it might create a possibility of potential anti-competitive behaviour, wherein the defendant company may acquire the keyword of the petitioner, thereby channeling the search inquiry of net-user interested in the petitioner's goods and services to the website of the defendant.[21] The court of appeal held that culpability of such wrongful act didn't accrue from the selection of keywords made by the seller but by the Google's policy of making available such keywords based on the request of the seller.[22]

When Google took action based on the information that confusion or deceit was likely to occur from its sale of trademarked-keywords, its intention to cause confusion could be made out.[23] Moreover, where the defendant registered internet addresses using top-level domain names with a motive to

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[19] Rosetta Stone Ltd. v. Google, Inc., 730 F. Supp. 2d 531, 537 (E.D. Va. 2010).

[20] Hard Rock Café Licensing Corp. v. Concessions Services, Inc., 955 F.2d 1143 (7th Cir. 1992).

[21] Estee Lauder Inc. v. Fragrance Counter, Inc., 189 F.R.D. 269 (S.D.N.Y. 1999).

[22] Cour d'appel [CA] [regional court of appeal] Paris, Feb. 1, 2008, Gifam and others v Google Inc, Google Ireland and Google France.

[23] *Supra* note 19; *see also* Jurin v. Google Inc., WL 572300 (E.D. Cal., 2011).

appropriate the goodwill of well-known British companies and threaten them to sell the name of the website to another companies who may manipulate it for passing off purposes so as to obtain money from the parent companies, was held to be actionable.[24]

While some cases also reflect the other side, i.e. Google should not be made liable. A search engine or a website used for reference purposes, engaged in commercial activity when it allows the advertisers to use signs as marks doesn't itself use those signs and therefore, Doesn't fall within the meaning of infringement.[25] The court held that the offer by Google whereby third party advertisement comes up is in response to the concerned keyword was not use of a mark "in relation to goods or services" and therefore, could not be a trade mark infringement.[26] Moreover, a company's internal utilization of a trademark in a way that does not communicate it to the public has been held to be no infringement of the trademark.[27] Also, in a case where, Google was not in the same business as that of the third-party enterprises advertising over it, but it merely operated as a search engine, then its selling of trademarked-keywords was not considered as "use" of the trademark.[28] Moreover, subject to the provisions of Section 15 of the 1999 Act, the proprietor of the trademark is entitled to register parts of the trademark separately and exercise exclusive use of such words.The owner of a trademark may only restrict the usage of such mark with identical mark in relation to similar goods and services, if it is likely to have detrimental effect on the application of such a mark which mainly include the source and advertising function. The purpose of indentifying source will be unfavourably affected if an ordinary net user will not be able, without hassle, to indentify

[24] British Telecommunication v. One in a Million, (1999) FSR 1 CA.

[25] Google v. LVMH (C-236/08), Viaticum and Luteciel (C-237/08) and CNRRH, Tiger, Thone and Raboin (C-238/08), [2010] ECR I-2417.

[26] Wilson v. Yahoo! UK Ltd. & Anor (2008) Overture Services Ltd., [2008] EWHC 361 (Ch); DAVID I. BAINBRIDGE, INTELLECTUAL PROPERTY (9th ed., 2012).

[27] Wells Fargo & Co. v. WhenU.Com, Inc., 293 F. Supp. 2d 734 (E.D. Mich. 2003); *see also* U-Haul Int'l, Inc. v. WhenU.com, Inc., 279 F. Supp. 2d 723, 728 (E.D. Va. 2003); 1-800 Contacts, Inc. v. WhenU.com, Inc., 414 F.3d 400 (2d Cir. 2005).

[28] Consim Info Pvt. Ltd v. Google India Pvt., 2010 OSA 406-407 (Mad).

from the ads if the goods or services originated from the proprietor or somebody economocially attached thereto. Nevertheless, it was established that the employment of keyword by third person is not likely to have an unfavourable impact on the proprietor trademark because the proprietor website/webpage will anyhow appear in the general list inspite of the fact that the proprietor is successful in purchasing a high position 'sponsored link'.[29]

Wherein, the banner advertisement clearly recognised the source of the advertiser's name, or the search clearly demarcates the banner of advertisement source, or the seller or defendants overtly compared to the petitoner's product to that of defendant's, there was no likelihood of confusion.[30] Further, the search engine rather than directing the customer to the defendant, may display several independent and separate links from which a customer may make a suitable choice.[31] Moreover, Google and other search engine are covered with the scope of an 'intermediary' as defined under Section 2(1)(w) of the Information Technology (IT) Act, 2000, where a facilitator of information between 'originator' and 'addressee' is one that includes a referential website, ISP's, online auction websites etc.

Section 79 of the IT (Amendment) Act, 2008 provides in detail the immunity of intermediaries, which is sometimes even considered to be 'safe harbour'. Under it the intermediaries are merely considered as a forum and not liable for the activities of the user. However, these websites must immediately respond to the notice about such violation. In the instant matter, Google is protected under Section 79 of the IT Act since it merely provides access to third party information, plays a passive role and follows all the principles of due diligence[32]. Further, it has neither abetted nor aided the commission of

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[29] Google v. LVMH, (2010) C-236 (ECJ); Google Inc. v. Viaticum SA, Luteciel, (2010) C-237/08 (ECJ); *see also* Google v. CNRRH, Tiger, Thone & Raboin, (2010) C-238/08 (ECJ).

[30] Playboy Enterprises Ltd. v. Netscape Communications Ltd., 354 F.3d 1020 (9th Cir. 2004).

[31] J.G. Wentworth v. Settlement Funding, LLC, 2007 U.S. Dist. LEXIS 288 (E.D. Pa. Jan. 4, 2007).

[32] Chander Kanta Bansal v. Rajinder Singh Anand, A.I.R. 2008 S.C. 2234 (India).

any wrongful act. Thus, it enjoys clear immunity under the provisions of the Act.

Having discussed all the pros and cons of such advertisements, i would like to add that such sort of ads have a huge possibility of benefiting the Advertisers, the need of the hour is to regulate their activities in a better way.

DISPLACEMENT OF PEOPLE DUE TO CONSTRUCTION OF DEVELOPMENT PROJECTS: WHO PAYS THE PRICE?”

Ms. Tanvi Gadkari*

Abstract

The construction of development projects of a large infrastructure base and undertaking such projects is not desirable because they lead to a large scale displacement of a large number of original land owners, especially the tribal people who have minimal gains from building of such projects. The projects usually benefit people like the upper crest businessmen and industrialists, rich farmers and urban electricity and water consumers. So the question that we’re faced with is, on the viability of these projects in light of the benefits accrued by those losing their lands. It is felt that the land after being used for construction of dams etc is then used up for the betterment of a whole other section of the society, while the price for it is paid by a completely different class of people. This paper attempts to look into the issue of displacement of people after construction of dams and the process of land acquisitions and the compensation provided.

Keywords: *Tribal, Displacement, Land acquisition, Compensation, Public purpose, Development.*

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1. INTRODUCTION

There is no doubt about the fact there has been a wholesale displacement of human beings due to the construction of large dams and various other such development projects in India. The problem of processes and procedures of land acquisitions from the original owners, the rehabilitation of the tribal people of the remote areas and the controversy attached with the compensation amount are all issues that need to be thoroughly addressed.

A large dam is defined by the Government of India as one with a command area of more than 10,000 ha, while medium dam is one with the command area of more than 2,000 ha but less than 10,000 ha, and a minor dam has a command area of less than 2,000 ha[1]. The controversy itself lies in the issue whether a large dam is to be built or not because the dams once built will most certainly change the natural course of our rivers and streams. On one hand, instead of local people, the outsiders like those residing in urban areas or pursuing industrial-commercial operations or potential energy consumers elsewhere are more interested in the building of dams in the name of modernisation and development. In India as per one estimate about 4.4 crore persons have been displaced by dams over several decades after independence.[2]

There is an increased pressure on the land as a result of the urbanization, increasing infrastructure developments and rapid economic developments which have drastically increased the level of acquisition by the government. A large number of Villages are being acquired under the doctrine of Eminent Domain for Greater Good and 'development' purposes, as a result of which, millions of people have been displaced from their homes.[3]

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[1] BHARAT DOGRA, *The Indian Experience with Large Dams*, *in* 2 THE SOCIAL AND ENVIRONMENTAL EFFECTS OF LARGE DAMS 203 (Edward Goldsmith and Nicholas Hildyard eds., 1999).

[2] Subhash Sharma, *Development for whom and at whose cost: Displacement due to Dams in India*, 60 INDIAN J. PUB.ADMIN (2014).

[3] *India: large numbers of IDPs are unassisted and in need of protection,* INTERNAL-DISPLACEMENT.ORG, http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/IDMC2India40.pdf (last visited Jan. 04, 2015) (According to available reports, more than 21 million people have been displaced due to development projects in India. See the report on India by Internal Displacement Monitoring Centre of U.N. Office of High Commissioner on Human Rights).

India has witnessed a large number of protests aimed at discontinuation of the acquisition of land for the construction of manufacturing units. Example of Tata Nano car in Singur under which 997 acres of agricultural land was used up in order to set a factory or the Nandigram Special Economic Zone or the construction of large dam like Sardar Sarovar Dam on the Narmada river, which famously led to a cancellation of grant by World Bank due to protests under the argument that the tribal population was getting displaced under unfair conditions among other reasons such as bad environmental impact of the project.[4]

The displacement caused by construction of dams is both the greatest and most discussed form in the literature on development induced displacement. As pointed out by A. Oliver-Smith, the non-dam-related causes of DIDR have not been fully analysed and documented[5]. Analysis of the problem is based on the perception of development-caused displacement as reflected in World Bank policies on involuntary resettlement.[6]

An increase in coming up of those projects and the further and blatant expansion of those existing have triggered displacement of people at large. Natural areas have been expressly protected in order to represent an attempt made in order to minimize the unpleasant and unfavourable impact of the development in the economic zones and in order to preserve the environment for the coming generations.

However, people who are accountable to develop the principles of nature conservation do not always recognize the requirement of having to maintain a balance between the indigenous people and the environment protection.[7]

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[4] INDEPENDENT EVALUATION GROUP (Feb. 2, 2015), http://lnweb90.worldbank.org/oed/oeddoclib.nsf.

[5] A. OLIVER-SMITH, *Applied Anthropology and Development-Induced Displacement and Resettlement*, *in* APPLIED ANTHROPOLOGY. DOMAINS OF APPLICATION 189-220 (S. Kedia & J. van Willigen eds., 2005).

[6] *Id.*

[7] A Rew, E Fisher, B. Pandey, *Addressing policy constraints and improving the outcomes in development induced displacement and resettlement projects,* 15 FORCED MIGR. REV. 6-9 (Feb. 2000).

2.0 IMPACT OF LAND ACQUISITION FOR PUBLIC DEVELOPMENT

The Human Development Reports look at "Development" as ,increasing people's choices. There have also been certain basic needs or basic capabilities that all people are entitled to, for a society to ensure development in true sense.[8]

It is claimed that the projects of dam building are taking place in order to bring about development to the society at large. However there seems to be something fundamentally wrong with the idea of having development at the cost of some person's well-being. But this development is leading to large scale displacement of people.

Displacement of people from their homes to create an entity that is allegedly for the development of another set of people is an unthinkable act. There needs to be a certain level of balance when such actions are put forth.

Development-induced displacement can be defined as *the forcing of communities and individuals out of their homes, often also their homelands, for the purposes of economic development.*[9]

Moreover it is also viewed as a major violation of human rights by international standards.

ALTERNATIVE APPROACHES

Sharing of benefits is an approach that could enable the people affected and displaced by the projects to revive themselves and have a benefit being derived out of the entire transaction. This is based on the principle that those who are paying the highest price of the development project should be the

[8] *About Human Development,* HUMAN DEVELOPMENT REPORTS (Jan. 4, 2015), http://hdr.undp.org/en/humandev/. (Argued by Development Economists such as Prof. Amartya Sen & Prof. Martha Nussbaum).

[9] Pablo Bose, *Development Induced Displacement and Participation*, (Feb. 10, 2015), http://www.yorku.ca/crs/EDID/EDID%20Documents/EDID%20WP%202.pdf.

ones to get its first benefits which may be in the form of employment opportunities or allowing for a certain portion of the production of small industries being run under them. The concern also extends to the rural communities who are unable to keep up with the technological development of the new project. The alternative thus also focuses on making them literate so that they are technically equipped to make use of the job opportunities that are being provided to them.[10]

Another alternative approach is the obvious rehabilitation model which insists that the displaced people have the right to total rehabilitation. It doesn't merely extend to the economic benefits but also emphasizes on help provided to the affected population who are under the process of transition.[11] The idea thus is to not just to focus on the process of rehabilitation but to ensure rehabilitation in a way that manages to make the cultural and social systems good that existed in the previous living conditions before undertaking the development project.

Development induced displacement largely affects the economically, politically and socially vulnerable groups. The issues that need urgent attention and should be focused on include the following:

1. **Analysis of the consequences and the causes of displaced people:** The reasons could be development induced yet may not be sufficient enough for the large chunk of population to be displaced without being given a chance to be able to adequately rehabilitate themselves. This may be one of the underlying factors that could be looked into while deciding upon the cause of those displaced.[12]

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[10] ASHIRBANI DUTTA, DEVELOPMENT INDUCED DISPLACEMENT AND HUMAN RIGHT (2007) .

[11] *Supra* note 7.

[12] BOGUMILTERMINSKI, DEVELOPMENT INDUCED DISPLACEMENT AND RESETTLEMENT: THEORETICAL FRAMEWORKS AND CURRENT CHALLENGES (2013).

2. **Analysis of ways to minimize negative consequences of displacement along with humanitarian assistance:** In order to minimize the negative consequences measures that are most fit to deal with those displaced can be taken up, for example restoring the conditions that are similar if not identical to those which were prevalent in their original habitat. Another option as discussed is an NGO alternative which would ensure that those displaced get jobs in the industry for which the development program is being undertaken. That would lead to the displaced people who were the most affected ones to be able to reap out of the benefits of the industry without any difficulties.[13]

3. **Analysis of the several categories of actors involved in the displacement:** The actors involved in the reasons for the displacement like the government authorizing the development program, the people who are displaced, the private players if any, involved in the development program etc. are the actors which are constantly raising or lowering stakes in a development induced displacement[14].

HOW DOES DISPLACEMENT IMPACT THE DISPLACED POPULATION?

- It causes landlessness and that results in the removal of the main foundation upon which the livelihoods of all are dependent. Natural and human made, both capital is lost due to this. At the same time it causes joblessness, as unemployment is a common problem for re-settlers due to the perils of physical relocation.

- The families lose economic power which causes rampant marginalization. It is hard for individuals to use their previously

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[13] *Supra* note 9.
[14] R. CHAKRABORTY, LAW OF LAND ACQUISITIONS AND COMPENSATIONS (2d ed. 2012).

acquired skills on a new platform which renders human resource capital obsolete. Food security is again in danger when displacement occurs because the measures and levels of intake changes abruptly.

- Social stress and trauma leads to increased vulnerability especially amongst the weaker sections of the society. Moreover changed living conditions lead to certain unhygienic habits which in the wider demographic spectrum, leading to increased mortality rate.
- Common property of the dwellers is inevitably lost which may also lead to reduced incomes of the poor, long established residential colonies get disrupted and patterns of a certain social organization are scattered and dismantled which causes the social and trade linkages to become non-functional. Moreover, community services like the medical service, educational facilities are also lost.
- Most importantly, the displacement of people carries the risk of state authorities causing a human right violation since arbitrary displacement can lead to violations of civil and political rights and the loss of one's political voice.[15]

3.0 ISSUES UNDER THE LEGISLATION

'Compensation' was earlier not defined in the Land Acquisition Act and that rendered it to be a very vague term. The development objective is even more marred by the complexities while defining the word "compensation" and other important issues like rehabilitation, resettlement and participation in negotiation. [16]

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[15] Nalin Singh Negi & Sujata Ganguly, *Development Projects V. Internally displaced populations in India: A literature based appraisal,* (Ctr. On Migration, Citizenship and Dev., Working Paper No. 103, 2011).

[16] Kelly A Dhru, *Acquisition of land for "development" projects in India: the Road ahead*, RESEARCH FOUNDATION FOR GOVERNANCE IN INDIA, http://www.rfgindia.org/publications/landacquisition.pdf.

The land acquisition Act, 1894 has a lot many issues that need to be addressed urgently:

1. It gives a definition of 'public purpose' too wide for ease.
2. It always assumes that the seller has the intent to sell the particular piece of land.
3. The compensation provided falls short, is arbitrary and only in monetary form. The Act does not consider the fact that while having to rehabilitate to some place else, the people displaced have to go through a lot of mental trauma.
4. There are no provisions for Social Impact Assessment and for making the same compulsory.
5. Indigenous rights are not recognized.

The definition under Section 3(f) is inclusive and is often interpreted very liberally to include a variety of uses such as housing schemes, roads, play grounds, offices and factories, benefiting only a portion of the society, making the Collector and State Government taking advantage of the wide definition.[17]

The current Indian Legal Framework also goes on to assume the status of a displaced person to be that of a willing seller of his land, and that further goes on to assume that the monetary compensation would thus be enough to cover the costs undergone. The biggest loophole with this assumption is that it does not amount to a case of sale of land but it actually is a blatant case of displacement. It is not a solution to address this arrangement as a short term or a long term effect of compulsory acquisitions of land. Under this Act,

[17] Tannu Sharma, *Public Purpose in Land Acquisition Act under SC Scrutiny,* INDIAN EXPRESS, May 11, 2007, *available at* http://archive.indianexpress.com/news/public-purpose-in-land-acquisition-act-under-sc-scrutiny/31142/. (Recently, the Supreme Court has taken up the issue of testing the Constitutional validity of the definition of "Public Purpose").

common property of village for example wells, grazing lands can be acquired. Those persons who are indirectly to be benefitted by way of traditional rights are however not recognized under the Act.[18]

Another improvement in the new Land Acquisition Bill is that Section – 3(i) (b) (ii) of the Act includes contravention of traditional rights of the forest-dwellers that could be violated due to acquisition of land. It is unclear as to how they are being compensated, because here, a monetary compensation may not have the same value as much as measures to preserve their culture and livelihoods.[19]

The next question which arises is that of monetary compensation and how it is to be fixed. The method of arriving at a fixed amount of monetary compensation by averaging of sale deed prices is considered to be unfair since it has considerately been undervalued by reason of stamp duty and income tax.[20] As per the Section 23(3) (c) [21]of the existing Act, the compensation based on increase in value from the use of acquisition is disallowed. Therefore the compensation is to be decided by the collector.[22] However, if there is to be any objections on the same, then it would be the collector and the government that would act as the Quasi-Adjudicatory Body and the suits to a civil court are specifically barred. This makes the process of calculation of monetary compensation an arbitrary one. Hence, there is a need for an independent judicial body to review the amount of compensation calculated and also to hear the objections taken by the aggrieved party.[23]

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[18] *Special Article: Land Acquisition in India*, THE STATESMAN (Kolkata), Jan. 20, 2007.

[19] Pablo Bose, *Development Induced Displacement and Participation*,YORK UNIVERSITY (Feb. 07, 2015), http://www.yorku.ca/crs/EDID/EDID%20Documents/EDID%20WP%202.pdf.

[20] *Supra* note 18.

[21] "(c) If any person, without the permission of the Trust required by clause (b) of sub-section (1) of section 32 or by sub-section (3) of section 33 or by sub-section (4) of section 35 of the Nagpur Improvement Trust Act, 1936, has erected, re-erected, added to or altered any building or wall so as to make the same project beyond the street alignment prescribed under the said section 32 of the street alignment or building line shown in any plan finally adopted by the Trust under the said section 33, or within the area specified in sub-section (4) of the said section 35, as the case may be, then any increase in the market value resulting from such erection, re-erection, addition or alteration shall be disregarded check".

[22] Smt. KakoBai v. The Land Acquisition Collector, A.I.R. 1956 (Ch.) 231.

[23] Dhru, *supra* note 16, at 10.

4.0 CONCLUSION

After conducting wide and ample research and looking across at various documents and articles, as well as having read various books on the issue at hand I've tried to answer my research questions and to come up with a legible conclusion.

Firstly, there is no denial of the fact that for the overall development and upliftment of a country, it is expedient for a county's government to organize development programs and projects that lead to the development of a mass of population and uplift the country into the league of developed nations. However, as the term development induced displacement makes it clear, the problem with the development projects are that they cause a large percentage of population to be displaced ruthlessly and they are left with no place to live. Their lives get completely disrupted and they face major difficulties in resettling anywhere. Thus, the fact that unfavourable circumstances definitely ensue from every large scale, infrastructure based development project is undeniable.

The question on the capability of the Act in dealing with the various anomalies that arise over time is still unanswered. The previous Land acquisition policy was unfair and arbitrary. It was largely based on loose planning that didn't come into effect and violated the democratic fabric of the Indian Constitution. However, the new Act brings with itself a hope for a stringent and effective procedure to deal with the issues of displacement of large scale of people and bring it all under one solid roof.

A strong need is felt to put legal thought into issues concerning the land acquirers as well as to thoroughly investigate issues regarding removing the imbalances from the system.

Another area that needs work is the process of deciding compensation that is to be paid to the displaced people. There have been very valid arguments that

there is no price that can be put to a place which one used to call their home. However, leaving aside the emotional quotient, there are still various such issues that need to be addressed such as the value of the land on the basis of which compensation must be calculated. The arbitrary part of the appeal to a decision about the amount of compensation as mentioned in Chapter 3 is a big spot on the decision of the final amount.

Scope needs to be widened of the Act in question as well as the law relating to it. Displacement even though for the purpose of development is a brutal phenomenon that scars some communities and families for a life time.

The Gandhian approach of inclusive developments may also be considered at this point, which is a less anthropocentric approach. By internalizing happiness through moral obligations, it becomes more decentralized a process to achieve the goal. Creation of duties of the State, those in power and people themselves is another way out.

All in all, the very idea of having development at the cost of the well-being of a class of people and displacing them out of their habitat is an outrageous one and it needs to be put on hold until a solution is designed that promotes an approach that adequately compensates a victim of displacement to an extent that “he is restored to the same position as he was in before he was displaced”.

MATRIMONIAL PROPERTY LAWS IN INDIA: NEED OF THE HOUR

Isha Kabra*

Abstract

In the present era of increasing awareness among people about granting equal status to women and taking steps for their empowerment, a lot is happening. But the question we need to ask is whether all of these steps address the grave issues which have a major impact over women? The answer to this cannot be affirmative. In India, we grant certain property rights to women such as absolute rights over what we call as stridhan. When a woman decides to opt out of a marital relationship, she faces major sustenance issues. In order to help such women sustain themselves, various legislations have been put in place such as maintenance laws, Protection of Women from Domestic Violence Act, 2005 etc. But even these legislations hardly suffice in providing the required resources to a woman. In India, there is no law which regulates the division of marital property after divorce. As a result, we see a prevalence of separate marital property regime in India which means that the person who has the title to the property (mostly the one who made the major financial contribution and in Indian scenario, the man) takes the property after divorce. This regime creates huge problems in India because the contribution of the homemaker (the woman in Indian scenario) gets completely ignored and she is left with

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nothing in case the marital tie breaks down. The major purpose of this paper is to bring out this problem and argue for a legislation regulating the division of marital property after divorce and based on community of property regime, as it is followed under various other jurisdictions.

Keywords: *Marriage, Property, Divorce, Family Law, Maintenance*

INTRODUCTION

'Women empowerment' has become a buzzword these days. While I am not denying the fact that a lot of steps are being taken in this direction and the level of general awareness among people on this issue has gone up, still there are a lot of issues which form the crux of the problem of women having lesser rights and yet these issues are constantly ignored. Women these days are getting property rights in the family of their birth. Women are also increasingly exercising their will and getting out of marital relationships which they think are to their detriment by opting for divorce. But the question to be asked is- are we really doing anything to improve the lives of the women after they have made such choices? The answer seems to be no. All we have done is given them a choice and have not really made the social conditions favourable to them after they have exercised such choices. One such important issue that we need to worry about is the issue of matrimonial property. While divorce might have become relatively easier now, what happens to a woman, who was a housewife, after she has divorced her husband? Are the provisions made by law for such women helpful enough to help such women sustain? In this paper, we will largely be looking at these questions and try to analyze the state of marital property rights for women in India and see where we stand and what needs to be done to improve the situation in future.

OVERVIEW OF THE PERSONAL LAW REGIME IN INDIA

During the colonization of British over India, many English innovations in India were influenced by the novel ideas of utilitarianism and legal

positivism. This experiment led to a violent double disruption of the organic relationship between the legal system and the society. The legal system that developed in India was actually not in response to our own society but in response to a very different English society. While England itself has abandoned or modified these legal concepts, India still upholds them. Scholars claim that the concept of religious personal laws is one of those ideas. Before the colonization took place, Hindus and Muslims used to follow their own respective laws. The complex colonization of India due to varied geographical conditions led to the gradual introduction of British laws in India, however, they selectively left the "personal" matters to be governed by the respective religious laws which the communities were following. But the random successive charters and regulations started determining what these personal laws will contain. Legislative and judicial actions further modified the substantive elements of these laws.[1]

The application of religious laws over personal matters was conceptualized as the "saving" of these religious laws. The identification of the various communities was done on the basis of the religion followed by them and though the laws which the English had decided to save were community customs rather than scriptural rules, yet they were also understood as religious laws. As a result of this, the personal laws and the religious laws became interchangeable and the aspect that before the advent of British rule in India, all the laws governing Hindus and Muslims were religious was ignored. The determination of what falls under the category of a personal matter was also done by the British policies. All of this upheaval largely led to the modification of the religious laws.[2]

A dominant theme in the religious personal laws is that they give much lesser rights to women as compared to men. Even the history of legislative reforms

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[1] Archana Parashar, *Gender Inequality and Religious Personal Laws in India,* (2008) 14(2) BROWN JOURNAL OF WORLD AFFAIRS , http://dl4a.org/uploads/pdf/bjwa_gender inequalityreligiouspersonallaws_india.pdf (last accessed 20th January, 2015).

[2] *Id.*

in this area is a testimony to the fact that often political considerations overpower the issue of gender equality. Whenever this happens, the state tries to hide behind the veil of the argument of religious sanctity of these laws. An instance can be taken as an illustration. In 2005, a reform came to up to modify the Hindu Succession Act, 2005 in order to make the daughters equal coparceners with the sons. However, the rights of men and women can still not be considered to be equal. Women are still at a disadvantaged position then men in terms of rights given by the personal laws. It is in this context of unequal treatment of men and women in the personal laws that we are to discuss the issue of matrimonial property rights in India.[3]

EXISTING PROPERTY RIGHTS OF WOMEN IN A MARITAL RELATIONSHIP

Stridhan

Literally, stridhan refers to woman's property over which she can exercise absolute control. Women, as such, do not have any legal right to receive stridhan. However, there are obligations placed by the customary rules on the family of the woman to provide her with some property on her marriage. In Vedic literature, we can see that stridhan is classified as 'saudayika' and 'asaudayika'. 'Saudayika' property is the one over which a woman can exercise absolute rights and no one can restrain her in the disposal of this kind of property. However, 'asaudayika' property is one where a woman is required to take the consent of her husband before its disposal. However, in the case of Pratibha Rani v Suraj Kumar, it was held by the Supreme Court that it is only the woman who had absolute property rights over stridhan and the husband or the relatives are not allowed to exercise any rights over it. Also, if stridhan is ever placed in their hands, the only status they will be deemed to have is of the trustees. The concept of stridhan is very much affected by the notion of protection of women during hard times.

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[3] Parashar *, supra* note 1.

Traditionally, stridhan would provide a woman with a socially acceptable access to a share in the property of her family so that she can utilize it when she experiences social insecurity. Apart from the property given to her by her family, gifts given to a woman by her husband are also normally considered as stridhan. On the question of the rights of the woman over these gifts, the courts have said that it depends on the nature of the property. If the gift is a family property, then the wife might have only limited ownership over it. But where the words are sufficient, the woman has absolute rights over the property in question.[4]

Maintenance

Whenever there is a divorce, the woman is entitled to some monetary relief in the form of 'maintenance' so that they are able to sustain themselves and maintain a basic standard of living. However, the problem with the laws relating to maintenance is that mostly, they prove to the disadvantage of the woman. In order to avail the relief the maintenance, a woman is required to satisfy the court that she, on her own, is incapable of maintaining herself. She also has to prove before the court any assertions she makes with regard to the property of her husband. In order to combat these problems, various guidelines have been laid by many courts including the Supreme Court. For example, the Delhi High Court said that the while granting maintenance, it should be kept in mind that the amount is sufficient enough for the wife and the children to maintain a standard of living which they had before the marriage broke down. Unfortunately, this principle is mostly ignored and the amount granted as maintenance is very minimal and barely enough for the wife to sustain herself. Another problematic feature of the maintenance laws is that only when a wife is not at 'fault', maintenance can be granted to her. According to Section 125 of the Code of Criminal Procedure, which deals

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[4] Jhuma Sen, *Matrimonial Property Rights: Is India Ready for a Law* (2009) 1 JILS, *available at* http://jils.ac.in/wp-content/uploads/2011/12/jhuma-sen1.pdf (last accessed on 20th January, 2015).

with maintenance for all women expect Muslim women, maintenance will not be given to her if she is living in adultery or if she has refused to live with her husband or if the husband and the wife are living apart with mutual consent.[5] This shows that the maintenance laws are biased against women and do very little good to provide economic protection and social security to the women. Other acts such as the Protection of Women from Domestic Violence Act, 2005 which provide the right to residence etc to the women, are based on the same premise of no fault.[6]

THE CONCEPT OF MATRIMONIAL PROPERTY

The concept of matrimonial property is not that straightforward a concept as it might appear at once. Infact, it is the area where lies the major differentiation in exercising property rights between men and women. The exercise and ownership of rights depends on the type of marital property regime. Marital property regime refers to the set of rules that govern the management and rights over the property during the marital relationship and the distribution of the property when the relationship is terminated i.e. on divorce.[7] Each marital property regime has a different set of characteristics which are described below-

1. **Separate property regime-** In the separate property regime of marital property, the property which is acquired by the spouses before their marriage and also during their marriage is considered to be the separate property of the spouse who acquired it. Another name which is given for this kind of regime is 'out of community property'. At the time of divorce, each spouse takes whatever is his/her own property.[8]

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[5] Kirti Singh, *Matrimonial Property Rights,* COMBAT LAW (23rd July 2010), *available at* http://www.combatlaw.org/matrimonial-property-rights/ (last accessed on 20th January, 2015).
[6] *Id.*
[7] WORLD BANK, WOMEN, BUSINESS AND THE LAW 52 (Illustrated, A&C Black 2014).
[8] *Id.*

2. **Full community of property-** The full community of property regime is diametrically opposite to the separate property regime. In this type of matrimonial property regime, all the property which is brought into the marital relationship and all the property which is acquired during the marital relationship is considered as the joint property of both the spouses. It implies that when divorce takes place, the property gets equally divided between the husband and the wife and each spouse takes half share.[9]

3. **Partial community of property-** This type of property regime is a hybrid between the separate property regime and the full community of property regime. In this, the property acquired by the spouse before the marriage is considered as the separate property of the spouse who acquired it but the property which is acquired during the marriage, with a few exceptions created by law, is considered as the joint property of the spouses. At the time of divorce, the joint property gets equally divided among the spouses.[10]

4. **Deferred full or partial community of property-** As the name suggests, in this kind of property regime, the rules of full or partial community of property come into operation only on the termination of the marital relationship. Until then, the separate property regime operates.

These are the major types of matrimonial property regimes.[11] However, matrimonial property regimes which do not fit into any of the above categories also exist. But for the purposes of this paper, this understanding is sufficient.

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[9] *Id.*
[10] *Id.*
[11] *Supra* note 7.

CURRENT STATE OF MATRIMONIAL PROPERTY RIGHTS IN INDIA AND ITS IMPLICATIONS

In India, the silence of the laws over the issue of matrimonial property shows the supremacy of the separate property regime prevailing over here. No provisions related to matrimonial property can be found in Hindu Personnel Law. The Court does not have the power to distribute the properties which were acquired before or during the marriage. The law does not acknowledge the financial and the non-financial contribution which the spouse not holding the title might make in acquiring the property.[12] This often leads to discrimination against women who do not hold the title to the matrimonial home or other property and results in hardships for women when they divorce their husbands. In order to cope up with this problem, a provision was made in the Hindu Marriage Act, 1955 in the form of Section 27 which said that the property presented to the spouses at the time of marriage will be considered as their joint property and the court has been granted the power to distribute this property in a manner that it thinks is just and proper. However, this provision does not serve as an effective solution to the issue because the definition is very limited in scope. Use of the expression 'jointly' implies that the property which was given to the spouses either at or about the time of marriage and which was given directly can be included. All of the other property is excluded.[13]

Even the Muslim Personnel Law maintains the separate property regime of matrimonial property among spouses and does not have any concept of communal property which could be put into place when the division of property takes place at the time of divorce. Under Muslim Personnel Law, whenever a divorce happens, the woman has to satisfy herself with the unpaid dower, in case where its remittance was not done earlier, and with

[12] Sen, *supra* note 4.
[13] *Supra* note 7.

maintenance given as a meagre allowance. There is lack of judicial or statutory guidelines with respect to matrimonial property because of absence of conflicting claims, just as the case with Hindu Law. Recent past has given examples of landmark judgements being given in relation to maintenance claims on divorce for Muslim women. But none of them deal with the claims of the divorced Muslim woman over the matrimonial assets. Not even the famous Shah Bano case, where the dissolution of marriage took place after a long period of forty-five years during which the wife toiled at her household, discuss about matrimonial property rights of a woman after divorce. It is pertinent to make a point over here that though the Muslim Law in India does not acknowledge community of property regime, yet we can see that the original texts such as Baillie and Hedaya elaborately and in a detailed manner discuss the duties of the spouses in a case of dispute keeping in view the household effects. This shows that Muslim jurists were aware of the problem of conflicting claims which might come from the spouses and the household effects.[14]

A conclusion from the above discussion necessarily is that the personal laws do not talk much about matrimonial property regime. Using this silence as a ground to deny property to women and let the separate matrimonial property regime prevail is totally unfair. Even the women who do not earn have a substantial role to play in the maintenance and smooth running of the household. Women are often the primary care-givers in the household. The contribution of the women towards the household varies with the class, society and cultural norms but across all of these, women have a substantial role to play. They either directly play a role in the domestic work of the house by cooking, cleaning etc or they might supervise the organisation of the household. The contribution of the women to the household also depends on whether it is in a rural setting or in an urban setting. By choosing to be a homemaker, women actually sacrifice their career opportunities of working,

[14] D. R. SAXENA, LAW, JUSTICE AND SOCIAL CHANGE, 57 (1996).

earning, getting promoted, receiving a pension etc. But it's not the case that the women who work do not have to deal with this aspect. They actually have to bear the burden of dual responsibility. Infact, the earning of the women gets spent in household expenditures whereas the earning of the men is put aside as savings and later invested in procuring assets of which they hold the title. [15]

Considering the scenario, it is only fair that a legislation in India is brought to ensure fairness to women in matters of matrimonial property. A step towards this can be seen as the Marriage Law (Amendment) Bill which seeks to make amendments in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 in this regard. Steps at state level are also taking place in this direction such as in Maharashtra, the State Women's Commission has been asked to draft a bill termed as the Married Women (Property Co-Ownership) Equality Bill. The enactment of the Bill will lead to all the property in a marital relationship getting converted into 'spouse joint property' in cases where the marriage comes to an end.[17] However, all of these are just Bills yet and none of these have actually been enacted. There is an urgent need to put in place a legislation on this issue and fill the void to ensure protection to the divorced women.

PROBLEMS WITH THE LAW PROPOSED

Though the Marriage Law (Amendment) Bill is a step towards improving the current situation, yet we cannot say that it is a perfect solution. It has some inherent flaws. The principle of equality has not been properly reflected in the Bill. There is huge lack of clarity over the definition of property and how exactly division will be carried out. Under this Bill, if a case for divorce is filed under the irretrievable breakdown of marriage section, women will only get a share in the property of the man, except in the "inherited" or "heritable"

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[15] Singh, *supra* note 5.
[17] *Id.*

property. The Bill is based on the “no fault” theory of divorce. The purpose of introducing the irretrievable breakdown of marriage section is to make divorce faster and easier. A woman can oppose divorce under this if she can show that it will create immense financial hardships for her. Another problem is that the Bill does not allow share to a woman in the property which is inherited or heritable. Moreover, even the definition of such property under this Bill is vague. The shortening of time period also reduces the chances of couples getting time to revaluate their decision. The definition of “living separately” as living in different households is also problematic because there are women who live separately, being in the same household, because they lack financial resources to live in a different household. In effect, the Bill does not serve the purpose it is meant to serve.[18]

MATRIMONIAL PROPERTY RIGHTS UNDER DIFFERENT JURISDICTIONS

While examining the issue of matrimonial property, it becomes necessary to look at the matrimonial property regimes existing in other jurisdictions.

Scotland and Wales: Towards Rule Based Discretion in Ancillary Relief

When it comes to English Law, the issue of matrimonial property rights becomes even more complex. Principally, matrimonial property laws do not exist in English law. Property of the spouses is not influenced by the marriage at all. Hence, it has been argued that a separate property regime of matrimonial property exists in these places. In a case before the House of Lords on the issue of matrimonial property, a married woman was not given the right of acquiring family property when she did not directly invest in those assets but financed other expenses. This decision become very

[18] Namita Kohli, *Law with Loopholes,* THE HINDU, (1st October 2013), *available at* http://www.thehindu.com/features/metroplus/society/law-with-loopholes/article5186386.ece (last accessed on 31st January 2015).

controversial and in response to this, the judges were given power by the legislature, from 1970 onwards, to reallocate the property among spouses by giving property adjustment orders at the time of divorce. This enables the court to even grant the property of one spouse to another. While taking decisions in this matter, the Courts have to take into consideration some factors such as the interest of the children, the actual and potential income of the spouses, financial obligations, responsibilities as well as their previous contribution towards the well-being of the family. The trend of decisions in this matter has shown that the reasonable requirements of the spouses have been protected by the interpretation done by courts. This should not be misunderstood as implying that a wealthy spouse will necessarily have to part with half of his assets and give them to the other spouse. The distribution is limited to the extent that the other spouse has the resources to be able to maintain his or her previous standard of living. When applied practically, it amounts approximately to one-third part of the property. However, this was also overruled by a decision of the House of Lords in the case of White v. White which proved to be revolutionary for the decision it gave. In this case, the guiding principle of reasonable requirement was replaced by the principle of equality. If the contribution made by each of the spouses is equal, then the House of Lords did not find it just to make a distinction between who earned the money and who built the assets. The view presented was that the bias in favour of the money-earner and against the homemaker and child care-taker should be done away with. However, a possibility was left by the House of Lords to make a departure from the principle of equality if a valid enough reason existed for doing so, as a result of which, the direct consequences of this decision did not become clear at once.[19]

On seeing the trends of the case laws which came after this, we can observe

[19] KATHARINA BOELE WOELKI, PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 11 (2003).

that focus was placed on the contribution of the spouses and thus, the property adjustments in the form of 60/40 distribution became frequent. But later, clarity came in with the case of Lambert v Lambert where the Court of Appeal explained that this arrangement should not be considered as a general trend and resort to this should be made only in exceptional cases. The Court emphasised on the point it was unjustified to accord a greater value to the contribution made by the breadwinner and place lesser value on the contribution made by the homemaker and hence, using this as a ground to unequally distribute the property among the spouse is not right. All of this seems to give a hint towards the prevalence of deferred community of property regime in the English Laws. [20]

Norway, Sweden and Austria: Deferred Community of Property

In Norway, community of property regime exists which means that on the termination of marriage, the assets will be equally divided between the spouses. The general principal is the rule of unequal distribution but if it is leading to an unfair and unjust result, then it is set aside. The Supreme Court of Norway in 1975 took into account the indirect contribution made by a housewife such as rearing the children, contribution in housework etc. It said that no distinction is to be made between entitlement and quantification. This case came to be famously known as the "Housewife Case" and the Supreme Court in its landmark judgement said that a housewife, who takes care of the children, manages the household etc., could become the co-owner of the house which by the husband with his own income while the marriage was still subsisting. The rule developed by this famous decision of the Supreme Court translated into a legislation called as the Marriage Act of 1991. The determination of co-ownership is done on the basis of the share of the parties in the acquisition of property. The indirect non-financial contributions of the wife such as taking care of the children, organising the household, making payments for household expenditure etc. are considered

[20] *Id.*

as sufficient enough for making the wife a co-owner with the husband who made direct financial contributions towards procuring the assets.[21]

In Germany, there is a prevalence of a statutory regime called as the community of gains. Under this regime, a duty is placed on the spouses to account for whatever increase or addition has happened to his/ her property during the period of the regime. After this, whatever differences which might arise in such amounts are split and the spouse whose increase is lesser than the increase of the other spouse gains a right in personam against the spouse with the higher addition or increase and is then allowed to claim one-half of the portion of increase. The only exception which allows for a deviance form this rule is if the spouse who claims the amount has culpably failed to promote the economic or any other interests of the marriage venture when the marriage was still in existence. In such cases, on the grounds of gross inequality, the claims of the spouse with lesser increase stands defeated. While giving the judgment, weightage might be given to other factors such as adultery or cruelty on the part of the spouses.[22]

While in Australia, in case of failure of the marriage, the spouses are given the right to have a share in each other's wealth. If the spouses are unable to reach an agreement by themselves, then the Court is required to apply the principal of equity and decide how the division of property will take place. The criteria for division of assets are the contributions made by the spouses in the acquisition of assets, contributions made in the upbringing of children, maintenance of the house and other forms of general assistance. In order to achieve an equitable partition of property, the judge is empowered to order the transfer of property or expectant rights, of both moveable property as well as real estate. The general quota for the division of property as determined by the court is 50:50. However, there might be cases where the

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[21] Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law* (2008) 12.3 EJCL, *available at* http://www.ejcl.org/123/art123-4.pdf (last accessed on 31st January, 2015).

[22] *Id.*

division ratio is 1:2 or 1:3 depending on the financial possibilities of the spouses.[23]

SUGGESTIONS

The matrimonial property exists independently of the separate property owned by the spouses. Matrimonial property also does not rest on the religion based personal laws. Keeping this and Article 44 of the Constitution which prescribes a universal civil code, the legislature should take the step of enacting a legislation regulating matrimonial property which would apply to all the couples in India irrespective of their religion, caste, creed etc.[24] While enacting a matrimonial property regime in India by means of a legislation, following basic principals should be incorporated-

1. The Court which grants the divorce decree or the decree of judicial separation should also be the Court which engages in property adjustments between the spouses. The diversion of matrimonial assets should be an integral part of the decree. The fact that the Indian women are still shy in claiming their share by means of a separate court should not be forgotten. Even if there is no application by the spouses for the determination of their respective shares in the matrimonial property, the court should specify the shares of the spouses.[25]

2. The socio-economic conditions and the traditional norms of the Indian society suggest that "community of property" regime of matrimonial property would be the best suited matrimonial property regime in India. This implies that while devising laws for the division of matrimonial property, the general idea behind these laws should be that the all the household assets fall under the category of common property of the spouses and it should only be way of exception that certain property

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[23] *Id.*
[24] SAXENA, *supra* note 14.
[25] *Id.*

should fall under the category of separate property of the spouses.[26]

3. Whenever there is any divorce or legal separation among the spouses, the matrimonial assets should be equally divided among the spouses. In 1971, a Committee was appointed by the Government of India on the Status of Women in India which said that in case of a divorce or legal separation, the wife should get one-third of the matrimonial assets. This recommendation made by the Committee does not have any justification as to why the woman gets only one-third share in the property and not a share equal to that of the husband.[27]

4. The application of "community of property" should only be done when there are proceedings for divorce or separation. During the subsistence period of the marriage, separate matrimonial property regime should prevail with the exception that the disposal of property can only be done with the consent of both the spouses. Gratuitous transfers of a spouse's separate property while the marriage is still in existence can be allowed.[28]

5. Household is a common venture in a marriage. This means that both the spouses should take equal liability of the household. But even if the contribution made by a spouse is lesser in financial terms or the contribution is not material, especially in the case of a housewife who in a lot of cases sacrifices her career to take care of the household, it should not be used as a factor to reduce the share of that particular spouse. The non-financial contributions by the housewife should be equally recognized by the law and should be treated as equivalent to the material or financial contributions made by the husband.[29]

CONCLUSION

[26] *Id.*
[27] *Id.*
[28] *Id.*

As observed, the need to address the issue of matrimonial property rights for women is urgent. If we are talking about women empowerment, then the discussion is definitely incomplete if we leave out the issue of matrimonial property rights. In India, the absence of legislations on this issue has created a problem and this absence proves to be a setback in the lives of many women who took the decision of coming out of their marital relationship, especially those who do not have a job. We have to recognize that claiming ownership by a spouse over some property because they made some concrete financial contribution is unjustified. The contributions and the role played by the homemaker also have to be recognized. Even the English laws and laws in other jurisdictions use this as a basis to grant equal property rights to women. The matrimonial property laws should be brought in and they should be aimed at bringing equality among the rights of men and women unlike the existing personal laws which are already biased against women. It is only then that we can say that a move towards women empowerment is actually being made.

[29] *Id.*

FOREST RIGHT AND TRIBAL AFFAIRS IN CONTEMPORARY INDIA

Avinash Singh*

Abstract

Indian cultural diversity is profoundly known around the world and inherits traces of past that could rarely be seen anywhere else in world. Tribes and its inhabitants are nothing more than citizen of the India thus empowered to exercise all rights that anyone else have but due to their vulnerable condition that is nothing but the "state response" to their demands have put them in the shelter house that needs more protection than any other social order of classification. Among several quandaries for tribal population, one of the challenges that was faced was of their livelihood. Their rehabilitation may cause severe social and moral glitches that could even endanger the existence of the tribe. There were several steps that have been proposed to be taken and later were implemented by the government wherein one of the significant legislation that came into existence in 2006 was The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. This paper examines the status of tribal in India vis-à-vis keeping a vigil over the effect of the Forest Rights Act over the issues relating to tribal population in India. The paper will analyze the rights and status of the tribal population viz. constitutional

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and other perspectives in India moving to throw some light upon the significance of forest and rights of tribes associated thereto.

Keywords: *Tribal, rights, rehabilitation, forest, India.*

1. Introduction

Tribal affairs have always been prioritized by the government keeping the issues thereto at the top of list and to make efficient projection for resolution of same but the instances have taken a different direction that proved felonious to the rights of the tribal population. Government, although has been initiating honey-coated measures in paper for past many years, It came up with several policy initiatives that demonstrated debacles rather than assisting the tribal population and thus making the condition worse. One such monstrous debacle was Naxalism. However it took many years to improve the condition even marginally but still the mutilations and scars could be felt in the encyclopedic form in the tribal areas. Among several quandaries for tribal population, one of the challenges that was faced was of the livelihood that has been in picture for past few years airing argument from rights of the tribes of the cultural and livelihood rights to the rights upholding the right to life that is secured by the constitution of India itself. In light of these arguments, place of habitat of tribal people came into picture that is the forest. They have been living there since time immemorial and are native to these places and their rehabilitation may cause severe social and moral glitches that could even endanger the existence of the tribe. There were several steps that have been proposed to be taken and later were implemented by the government wherein one of the significant legislation that came into existence in 2006 was The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

This paper examines the status of tribals in India vis-à-vis keeping a vigil over the effect of the Forest Rights Act over the issues relating to tribal population in India. India, housing a large diversity of tribal population

requires that the government plays an active role while making laws for the tribal population. The paper will analyze the rights and status of the tribal population viz. constitutional and other perspectives in India while trying to throw some light upon the significance of forest and rights of tribes associated thereto. Forests are the habitat of the vast tribal population that consequently presented a question before government discussing the role of state to recognize and protect such rights of the tribal population that later yielded as the Forest Right Act. Present act is not left untouched by the loopholes that are traced in the paper while comparing with several other laws that have been enacted to deal the same subject matter but later trapped and released with the judicial filter. Still there are number of issues that extend as the challenge apparent on the authority and procedure of the forest right act. The paper at the end comes up with several suggestions regarding improvement in the present structure of the said legislation i.e. Forest Right Act and also puts some alternative measure that are need of the present day society. It is also necessary that apart from legal recourse, government must come up with a balanced policy that not only secures national economic interest but also puts tribal affairs on high reverence that remain the ultimate goal in a welfare state doctrine prevalent in our country. It is very apparent that that the tribal population is differently canvassed in the social order that necessitates to bring a right approach while making policy for this vulnerable but inevitable part of society.

2. Tribal and Indigenous Rights in Modern Era

The first and foremost informative piece for realization of intent and nature of the present paper runs through the usage of the word indigenous that bears the same notion as of tribal people. It only in the Asian sub continents that have substituted the name like “tribal peoples” or “hill tribes” instead of the common expression such as indigenous people and even recognizing from their local name as “Adivasi” that is case in India. These tribal or indigenous groups have been subsumed under the classification of the prevailing minority group based on their ethnic or national recognition.[1]

[1] UNITED NATIONS GENERAL ASSEMBLY, THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE (2007).

The forest dwellers and indigenous people were subject to exploitation in the British Era and the condition prevalent in the post-independent India as the forest policy bought by government doesn't serve the ultimate beneficiaries tending to shift them from forest dwellers to "urban dwellers".[2]The situation of tribal people with increasing magnitude of deprivation and exploitation in India was even compared with the condition of Red Indians in U.S.A.[3]In some cases the resettlement of tribal population has resulted in civil and ethnic strife and even the displacement from their original place amounts to violation of their right to life enshrined in Article 21 of Indian Constitution[4] and hence they have a right to social and economic empowerment.[5] The recognition and protection of the indigenous rights over forests have been initiated in past since the Rio Summit, 1992 as decisive step toward combating global environment crisis. Principle 22 of Rio Summit[6] reads as "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

Since then the said process of recognition was slow despite the indigenous activist lobbying governments to partake significant measures towards protection of such forest rights of the indigenous people.[7] Ruling in 2013 of Indonesian Constitutional Court[8] in favor of rights of indigenous people have been seen as a remarkable verdict and an end to the conflict between

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[2] Ali Mehdi, *Forest Dewellers Right under Forest Laws: Recent Developments*, 1 RAM MANOHAR LOHIYA NAT'L L. U. J. 78(94) (2008).

[3] Justice O. Chinappa Reddy, *Regulation of Rular and Urban Property*, 4 SCC J-1(6) (1985).

[4] Prashanth Sabeshan, *The Sarovar Project and its Implications: Developmental Questions and Legal Responses,* 8 SADV 282 (1996).

[5] Justice P.S.Narayana, Safeguards, *Constitutional Provisions, and Legislative measure and their Adequacy*, PL WEBJOUR 15 (2003).

[6] UNITED NATIONS GENERAL ASSEMBLY, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT (1992).

[7] UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, INDIGENOUS PEOPLES PARTICIPATION VITAL TO FOREST PRESERVATION (2011).

indigenous people and companies. The court granted the rights to cultivate and use the forest produce to the indigenous inhabitants of the customary forest providing a relief to 40 million forest dwellers.[9] Similar case that played a noteworthy input in judicial recognition of forest rights can be traced as the case of Orissa Mining Corporation case[10] where court have in-depth analyzed the right of indigenous people with respect to Forest Right Act. The concept of protecting forest rights of the indigenous and tribal people is basically attached to the notion of the collective rights rather than the individual rights and thus there is concept of "bundle rights" that comes in the purview while analyzing the forest related rights. These bundle rights can primarily be defined as follows[11]:

- Access rights: right of a community to enter the forest area
- Withdrawal right: relates to the withdrawal rights regarding Subsistence or for commercial purpose in respect to usage of timber and non-timber product
- Management rights: right of a community to hold and regulate in internal use pattern and transfer the resources.
- Exclusion rights: Right to decide upon the usage permission to other persons.
- Alienation Rights: right of the community to sell, alienate, or even transfer the all above rights

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[8] *Indonesia: Forest Rights Of Indigenous Peoples Affirmed* , THE LIBRARY OF CONGRESS (2013) http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403604_text.

[9] *Indonesia Court Ruling Boosts Indigenous Land Rights*, JAKARTA GLOBAL, http://thejakartaglobe.beritasatu.com/news/indonesia-court-ruling-boosts-indigenous-land-rights/.

[10] Orissa Mining Corporation Limited v. Ministry of Environment and Forest, (2013) 6 SCC 476.

[11] EdellaSchlager & ElinorOstrom, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis,* 68(3) LAND ECON. 249-262 (1992).

One of the successful developments could be traced while the infrastructure project for irrigation where the rehabilitation and relief package for affected tribal population proposed by State government was accepted by State government was accepted by the Central government, assuring to provide them with irrigation facilities.[12] Also recognition of tribal and indigenous people of their ownership right over life forms was a much appreciable step as inception of The Protection of Plant Varieties and Farmers Right Act, 2001 before which no successful recognition of ownership and protection to plant varieties act prevailed neither anywhere in India nor in TRIPS Agreement as well.[13]There was a position in 1982 where the tribals used to be the bonded laborers and were subsisting on grains picked from cow dung whilst suffering from malnutrition in common[14] and therefore the affirmative action demands for such laws that may be criticized in part but must alienate those inherited rights that were supposed to their original property from time immemorial.

3. Forest and tribal affairs

Traditional forest dwellers and indigenous people have a sacrosanct relationship with their land and territories that have emerged as their cultural and spiritual rights as well. In all possible ways, the relation with these rights has an apparent nexus to the international or domestic laws that apart from other rights provide right to profess any religion. Article 2 in general and Article 18 in specific of UDHR[15] proclaims the individual and community rights of worshiping and professing religious activities as liberty. Also the Indian constitution in Article 25 has enunciated such right of freedom to religion that grants a constitutional protection to the indigenous

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[12] K. Vidyullatha Reddy, *Creating Infrastructure for Management of Surface Water: Issues and Challenges Faced by A.P.Government,* 1 RAM MANOHAR LOHIYA NAT'L L. U. J 103 (2008).

[13] Jayne Kuriyakose, Mayank Mishra, *Rhetoric of Plant Variety Protection in India*, PL WebJour 17 (2003).

[14] GobindMukhoty, *Public Interest Litigation: A silent Revolution,* 1 SCC J-3 (1985).

[15] Universal Declaration of Human Rights Art 18, 1948.

people. Therefore it can invariably be concluded that forest as the worship place have a significant role in protecting religious rights of the tribal and indigenous people among others. Indian policy makers were not clear regarding utilization of biological resources but the condition changed with the Uruguay Round of negotiations that marked key changes in Indian biological resource utilization regime and implanted new schemes with the TRIPS development.[16] It was even delineated into observation that the awareness of indigenous people toward the environment protection and its sustainable growth has shared their successful subsistence for generations.[17] Around 60 Million indigenous people are dependent entirely on the forest according to the UN report[18] but the figures may be much higher if we count it practically where partial dependency must also be included.

This is not just in India where indigenous people are suffering with such skirmish act of forest invaders but the condition persists in others part of the world too for instance the reported event in December, 2014 that wherein indigenous people of Peru are struggling for their land rights that being infringed by the activities like illegal mining, poisoning fishes, gold mining etc.[19] The report also discloses the failure of the state machinery in its protective measures leading the indigenous people to live as squatters.

Little has been done for securing forest rights in India and the position is similar in some other parts of the globe specifically the regions that counts around 70% of total forest land cover of world. The rights are mostly related to the exclusion of others in forest area but least recognizes the right to

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[16] Gautam Saha & Abhishek Malhotra, *Biological Diversity Of India As A Resource: A Sui Generis Syetem For Protection Of Plant Variety,* 11 STUD. ADV. 18 (1999).

[17] UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, BACKGROUNDER:INDIGENOUS PEOPLES - LANDS, TERRITORIES AND NATURAL RESOURCES (2007).

[18] *Supra* note 1.

[19] *Indigenous people in Peru fighting for land rights,* THE HINDU, Dec. 5, 2014, http://www.thehindu.com/news/international/indigenous-people-in-peru-fighting-for-land-rights/article6662407.ece.

alienate the resources varying from different regimes. Position around the globe also emphasizes that legislations recognizing tribal affairs corresponding to forest rights doesn't cover the intact occupied forest area that left the beneficiaries skeptical of protection their rights.[20] Although giving greater protection to the ingenious community will reap more benefit to the possibility of achieving sustainable development in light of which it was also traced that the countries giving rights to indigenous community are the same who are approaching towards the sustainable management of their forest resources.[21]

Indian government striding towards notification of more forest areas as protected forest have implanted a threat to the indigenous communities and forest dwellers that have been left with misery due to inadequate compensation and irreparable loss for restoring their normal lifestyle.[22] The new law in India i.e. Forest Rights Act was argued as against the environmental protection as imitated people may also take undue advantage provide to the original forest dwellers and hence a need for resorting a balance between human life surviving on forest and conservation of forest must be considered for prompt resolution of conflicting interests.[23]Economic interest of indigenous community also be served if they are involved in forestry management schemes as they are only the primary users of forest products and inclusion in the rulemaking process at local level significantly affect the forest as whole.[24]

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[20] Fernanda Almeida and Jeffrey Hatcher, *What Rights? Measuring the Depth of Indigenous Peoples and Community Forest Tenure: Preliminary Findings from a Legal Analysis of 33 Forest Tenure Regimes in 15 Countries*, THE RIGHTS AND RESOURCES INITIATIVE , (July, 2011) .http://www.econ.ucsb.edu/~tedb/Courses/UCSBpf/readings/OstromSchlager.pdf (last visited 20 May, 2015).

[21] *ASIA: Indigenous people gain greater forest rights*, IRIN, Jakarta, 12 July, 2011 *available at* http://www.irinnews.org/report/93203/asia-indigenous-people-gain-greater-forest-rights.

[22] Justice D.M.Dharmadhikari, *Human Rights and the Environment*, 1 RAM MANOHAR LOHIYA NAT'L L. U. J. 6(2008).

[23] *Id*. at 6.

[24] Antara Roy, Sroyon Mukherjee, *Forest Rights Act, 2006: Setting Lands unsettling conservationist*, 1 NUJS L Rev 306 (2008).

4. Legal developments in India viz. Forest Rights Act

Indian constitution have regarded the situation in depth of its normative approach relating to the tribal welfare and arranged high standards of legal protections mechanism in hand of government that can have idiosyncratic approach in resolving tribal issues and making them empowered whilst the modern developments. Apart from the constitution, there have been several other laws that have been made on national level that participated in resolving tribal issues and making a accelerative development of the said community. Keeping in view of different line of approach legal authorities for same subject matter, it is appreciable to formulate present part into two major fields dividing them in constitutional approach and legislative approach, although both serve the same purpose of tribal welfare on national level.

Constitutional Approach

Constitution of India provides safeguards that could better be approached under specific parts of the constitution that could be enumerated as in Part III and Part IV of the constitution. Part III deals with fundamental rights wherein enabling provisions of Article 15(3) and 16(4) determine with the sufficient adequacy of the representation of backward class in the services, although the said approach doesn't seem proper in the light of nature of tribal habitat that are vulnerable. It is very apparent that those who are vulnerable and living in forest area will never come into general social life representing them in government services and thus those provisions are only made for self-sufficient tribal population enjoying the inherited name of schedule tribe though capable by all means. Such steps of empowerment is mere a fraud upon the intent of constitution and therefore be reformed in light to provide bona-fide constitutional assistance to the needy. Article 46[25] of Part IV dealing with the promotion of tribal welfare in terms of education

[25] INDIA CONST. art. 46.

and economic empowerment is mere a conventionalism placed in constitutional chapter and nothing substantive to work with the original condition of the tribal population.

Apart from the “state assisted provisions” there are some general administrative structures that are also layering the Tribal importance and even originating the name as “Scheduled Tribe” in constitution. In Part 10 of the Indian constitution, Article 244[26] and 244A are the governing law that make the inception of schedule tribe as they provide that administration and control of scheduled area and scheduled tribes in accordance with Schedule V and Schedule VI of Indian Constitution. Although Article 244A makes special provision for state of Assam for making it as an autonomous state and constitution of a body working as a legislature with the aid of council of ministers. Also a due representation is provided in Article 330 and Article 331 to the people of scheduled Tribe in Parliament and State Assemblies respectively that shows the intention of constitutional maker for securing social justice through representation but the fundamental flaw in the said concept lies to the non-alignment of the common people in the active social life and thus in politics as well. Therefore in name of such schedules tribe, mostly the non-deprived class of people whose ancestors were indigenous but they hold the same name in present manage to park themselves in legislative bodies and with same reasons in state services as well.

Legislative Approach

Policy measures were undertaken under supervision of the respective ministries that came primarily across the National Forest Policy, 1988 which is only comprehensive setup for taking tribal welfare measure in sync with forest areas introducing new initiatives like developing forest villages, area development plan , tribal family welfare schemes, recognition of Intellectual

[26] INDIA CONST. art. 244.

property rights, primitive tribal groups etc.[27] Although several other policy measure were drafted in form of Draft Policy on Tribals and National Policy on Resettlement and Rehabilitation that was notified several times with changes[28] that shows the lack of clear vision of government toward the tribal that exist even today in many of such instances.

Although the path-breaking law came-up as The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 that shifted the tribal population in new era of development. This law was seen as the most suitable and effective legislation ever made for recognizing and protecting the rights of the tribals. The objective of the Act is "An Act to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land."[29] Section 3[30] of the said act includes several rights counting as right to hold and live in forest lands, collective rights vis-à-vis access to collect, right to ownership, use and dispose of minor forest produce, right in or over disputed land, right of conversion of patta. lease or grant, right of conversion of all forest villages, right to protect, regenerate, conserve or manage forest resources, right over biodiversity and intellectual property and traditional knowledge related to biodiversity and cultural knowledge.

There are different levels of authorities that have been vested with power to regulate the prescribed tribal matters where as in some cases these

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[27] Satish C. Shastri, *Indigenous People: A "Historical Mistake rectified" - Myth or Reality?,* 1 RAM MANOHAR LOHIYA NAT'L L. U. J. 26 (2008).

[28] *Id*. at 26.

[29] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (India).

[30] Section 3, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (India).

authorities have to take decision on the developmental programs in the forest program regarding their approval or rejection in accordance with the relevant provisions of the act.

Though the act provides a wide basis of recognizing forest dwellers and indigenous people rights but criticism spoke of the destruction of environment sustainability in regard with wildlife as there will be no area left without any human intervention. Particularly the animal conservation regimes have been left to prejudice by the provisions of the Forest Right Act. The Land Acquisition bill that provides Rehabilitation and Resettlement to the affected families recognized the Community Property Rights (CPR's) including those traditional dwellers protected under Forest Rights Act[31] but the intention of legislature doesn't seem to be clear as Bill is still pending in parliament but it surely affects and comes in conflict with forest rights act in its present position. One other Act named as Panchayats (Extension of scheduled Areas) Act, 1996 was made for realization of group rights of the tribal population as they continue to inherit strong collective rights at hamlet level even after suffering from colonialism and capitalism. Although, Gram Sabha in said PESA is in conflict with one constituted in Forest Right act that need balancing authority to implement both successfully or amalgamate the both as alternative.[32]The act was also confused as the land distribution legislation though it was clear that it protect the already occupied and cultivated land and no new title is created under the said act. Whatever is the justifiability of the situation, the act was taken seriously and appreciably by the forest community activist with several loop holes and criticisms that have been in process of their resolution.

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[31] Nihal Joseph, Shrinidhi Rao, *The Land Acquision Bill, 2011: one step forward and two step back*, 5 NUJS L. Rev. 226 (2012).

[32] Rukmini Sen, *Book Review: Legal Grounds:Natural Resources, Identity and the Law in Jharkhand*, 3 NUJS L. Rev. 128 (2010).

None the less the Indian judiciary has contributed a lot under its power of judicial review wherein one of the remarkable case of Bandhua Mukti Morcha[33] where the drive against the bonded laborers have been initiated by the court and protecting the rights of the tribals as well who were incapable of financial resources to approach to the court and even were unaware about their rights.[34]

5. Suggestions

State has a social conscience that tends them to work for the society as a whole and therefore in the name of social justice one cannot undermine the actual or potential hazard to a particular sect of society reasons clearly stated in the constitution of India that is governing law of land. Forest right act as the major caretaker of indigenous rights in present era needs to be relooked for several reasons and also some additional changes are required in corresponding laws relating to same subject matter. Keeping in view that conflict should not be made an excuse to development or welfare and thus it is the duty of state to resolve the conflict as promptly to secure the notion of social justice.

Some of the key suggestions in abstract to the Forest rights act are:

1. No mechanism to identify the original inhabitants of the forest as in later period any person may enter into the forest area signifying as the bona fide dweller and could take undue advantage of the rights given to the tribal and forest dwellers governed under the forest rights act that will be a gross failure of intent behind making such act.

2. Gram Sabha comes in conflict with the PESA Act and thus the strife must be resolved reason being that Gram Sabha has a significant role to play in decision making under the Forest Rights Act, 2006.

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[33] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161.
[34] Editor, *Recent Developments in Law (1985) I* , 2 SCC J-21(1985).

3. Land Acquisition Bill must ensure that the provision of the Forest Right Act should not come in conflict with the said legislation as the Forest Right Act is meant to serve those purpose that were never touched upon and are more specific in purpose whereas land Acquisition were matter of economic developments that must be kept on lower footing when it comes to life and limb of individual or community as whole.

4. Reclassification of Schedules Tribes and possibly to change the name of the "Tribes" to "Indigenous people" reason for which could be traced in conclusion itself.

Human needs will not serve any practical purpose if taken in general with an abstract view rather than its realization to the specific approach for the particular classes such as tribal will result in a satisfactory outcome.[35] Thus it should be the ultimate approach of the government to make laws that categorically suits the targeted purpose without any malice in intention while legislating them.

6. Conclusion

Indian cultural diversity is profoundly known around the world and inherits traces of past that could rarely be seen anywhere else in world. Tribes and its inhabitants are nothing more than citizen of India thus empowered to exercise all rights that anyone else has but due to their vulnerable condition that is nothing but the "state response" to their demands have put them in the shelter house that needs more protection than any other social order of classification. Tribe as already stated is Asiatic origin and most of the world use the word "indigenous" in place and therefore the word itself have seen a discriminatory approach while classification of same. It is better to classify them with their relation to the time of inheritance rather than grouping them

[35] B.B.Pande, *The Constituionality of Basic Human Needs: An Ignored Area of Legal Discourse*, 4 SCC J- 6 (1989).

on the basis of their “place” or “way of living” that undervalues their capability and importance in society. Indigenous people need protection not because they are incapable or cannot compete with modern word rather they need protection from intrusion of the modern world to which they are susceptible. Moreover it is not their right that is to be given rather than a compelling duty toward the modern day society providing such security for the continuation of societal cultural inheritance in absence of which no society can survive for a longer period. Not an iota of doubt persists that development is necessary and must be kept on same footing as of the tribal protection but need is just to extend the first step towards the welfare of tribal and consequently moving to developmental regime that will be the best possible balanced situation exist.

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