THE YEAR BOOK OF LEGAL STUDIES

Vol. 29

2007

DIRECTORATE OF LEGAL STUDIES,
CHENNAI - 600 035.

VOL 29. 2007

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Published by:
The Director of Legal Studies,
Chennai-35.

Printed at:
ABNA Traders
Chennai-45. Ph: 22410735, 9840016816.

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Justice M. Venugopal*

Domestic violence is the result of physical force culminating in injury/impairment on account of diverse factors. Undoubtedly, psychological violence is to humiliate and embarrass the women. In general, the domestic violence may be physical or psychological or sexual abuse aimed at one's spouse, or family member or partner in a house. The phenomenon of domestic violence is widely prevalent in the society but has remained largely invisible in the public domain. Domestic violence undoubtedly a human right issue and serious deterrent to women development. Keeping in view of the rights guaranteed under Arts. 14, 15 and Art.21 of the Constitution of India, the protection of women from Domestic Violence Act, 2005 was enacted by the Parliament and it has come into force on 26th October, 2006 to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. The Act is also intended to provide relief to victims to violence of any kind that takes place in the family and incidental connected thereto.

The U.N. Convention and Declarations on Domestic Violence

On 18th December, 1979, the Convention of Elimination of Discrimination against Women was adopted by UN General Assembly and as an International Treaty it came into force on 3rd December 1981 which refers to the State parties accord to men and women the same rights with regard to the law relating to movement of persons and freedom to choose their residence and domicile, etc.

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* Judge, High Court of Madras.

Vienna Declaration adopted by the World conference on Human Rights on 25th June, 1993 reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of all human rights and fundamental freedoms for all in accordance with the charter of united nations and other instruments relating to human rights and international law, etc.

According to the U.N. Declaration on the Elimination of Violence Against Women, General Assembly Resolution in December 1993, 'Violence Against Women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women'.

Further, the declaration specifies violence against women as 'Any act of Gender based violence that results in or is likely to result in physical, sexual, psychological harm or suffering to women, including threats of such acts, coercion or arbitrary, deprivation of liberty, whether occurring in public or in private life.

It its 50th Session, in March, 1994, the Special Rapporteur on Violence Against Women was appointed by the Commission of Human Rights by means of Resolution. A preliminary report was presented in November, 1994 by the said rapporteur which referred to the problem of violence against women in all its forms and manifestations.

The Beijing Declaration and Platform for action refers to the special violence against women and the declaration recognises that violence against women is an obstacle to the achievement of equality, development and peace and called upon all nations to recognise and address the problem.

Domestic Violence: International Scenario

In U.K., CAFCASS in its "Domestic Violence Policy" defines domestic violence as "patterns of behaviour characterised by the misuse of power and control by one person over another who are or have been in an intimate relationship. It can occur in mixed gender relationship and same gender relationship and has profound consequences for the life of children, individuals, families and communities. It may be physical, sexual, emotional and/or psychological. The latter may include intimidation, harassment, damage to property, threats and financial abuse".

"Domestic Violence" in the New York State coalition defines as "abusive, behaviour - emotional, psychological, physical or sexual - that one person in an intimate relationship uses in order to control the

other. It takes many different forms and includes behaviour such as threats, name calling, preventing contact with family or friends withholding many or actual threatened physical harm and sexual assault. Stalking can also be a form of domestic violence."

To quote the researcher on Domestic Violence 'such violence is greatest on relationship and communities where the use of violence in many situations in normative, notably when witnessed in childhood, it is substantially a product of gender inequality and the lesser status of women compared with men in society.'[1]

The Protection of Women from Domestic Violence Act, 2005 - A Bird's Eye-view

The Protection of Women from Domestic Violence Act, 2005 is a unique enactment, *inter alia* sought to provide to cover those women who are or have been in a relationship with the abuser where both parties have lived together in a shared house hold,[2] and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. This Act defines the expression "domestic violence"[3] to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic harassment by way of unlawful dowry demands to the women or her relatives would also be covered. This enactment clearly carried out the rights of women to secure housing. It also provides for the right of a women to reside in her matrimonial home or shared house hold, whether or not she has any title or rights in such home or house hold. This right is secured by a residence order[4] which is passed by the Magistrate. This special enactment enables the Magistrate to pass protection orders[5] in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a work place or any other place frequently by the aggrieved person attempting to communicate with her isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or other who provide her assistance from the domestic violence. Further the Act provides for appointment of Protection Officers and registration of non-governmental organisations as service

1. Jewkes R, Editorials presenting Domestic Violence British Journal V.M. 324 (2002) p. 253-254.
2. Section 2(g) of The Protection of Women from Domestic Violence Act, 2005.
3. Ibid Section 2(f).
4. Ibid Section 2(p).
5. Ibid Section 2(o).

provides[6] for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter etc.,

Section 2(a) of the Act, 2005 defines 'aggrieved person' as any woman who is or has been in any domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence as mentioned in the act by the respondent.

Section 7 speaks of providing Medical Aid to the aggrived on request or on her behalf by a Protection Officer/Service Provider Officer from the State Government or members of NGOs, as far as possible giving preference to women.

Section 9 of the Act enjoins the Protection Officers to assist the Magistrate in the discharge of functions under the Act, to make a domestic incident report to the Magistrate, and to present in an application to the Magistrate if the aggrieved person prays for an issuance of a Protection Order. The duties of the Protection Officer are:

1) *Ensuring Legal Aid to the aggrieved under the Legal Services Authorities Act, 1997;*
2) *To maintain a list of service providers;*
3) *To make available a safe shelter home if the aggrived so requires;*
4) *To get the aggrieved medically examined in case of bodily injuries;*
5) *To assist the Court in enforcement of orders in the manner directed by the Magistrate, including the orders in Sections 12, 18, 19, 20, 21 and 234 etc.,*

In fact, the Magistrate can issue directions relating to the general practice for efficacious handling of cases, to the Protection Officers within his jurisdiction and the Protection Officers are bound to follow the same. The duties assigned by the Magistrate are to be performed by the Protection Officer, who will be under the control and supervision of the Magistrate. Aggrieved persons are required external assistance to recourse the law or to get the appropriate remedy from the appropriate authorities.

Women, though they excel in many field as like their male partners, in the society, still large number of women are illiterate, not able to raise their voice to get their right from this patriarchal society, fertile in decision making and over patience, they are not able to come out of the circle. They need proper guidance and assistance. Keeping in mind, this legislation, in its ambit provide Protection Officers and Service

6. Ibid Section 2(r).

Providers. The Protection Officer shall be under the control and supervision of the Magistrate and shall perform the duties imposed on him by the Magistrate and the Government.

Section 10 concerns with the power of service provider to record the domestic incident report, to get the aggrieved medically examined and to ensure that the aggrieved is given the shelter in a shelter home, if so requires. The service provider is given the protection for the act done or intended to be done in good faith from any suit, prosecution or other legal proceedings.

Section 12 refers to the presenting of an application to the Magistrate claiming single or more reliefs by an aggrieved person or a Protection Officer or any other individual on behalf of the aggrieved.

Section 12(5) of the Act specifies that the Magistrate shall endeavor to dispose of every application made under sub-section (1) within a period of 60 days from the date of its first hearing is only directory and not mandatory. As per Section 14, the Magistrate can direct the aggrieved individual or the respondent at any stage of the proceedings to undergo counselling single or jointly.

The counsellor in counselling as per Section 14 is to appreciate the grievances of the affected individuals and to remedy the same to the maximum extent and the counsellor will take into consideration the desires of the affected and if any settlement is arrived at between the parties, the same shall be in writing as endorsed and thereafter, the Court will pass orders.

In terms of Section 15, a suitable person's services may be secured by the Magistrate with a performance to a woman whether related or not inclusive of a person engaged in promoting family welfare in assisting the Court for discharging its functions.

Section 17(1) of the Act gives the right to the wife to claim a right of residence in a shared household, and a shared household means, the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member and that as per decision[7] a questioned property cannot be called a 'shared household'.

As per Section 19 a residence order restraining the respondent from dispossessing or disturbing the possession of an aggrieved from the shared household, restraining the respondent or his relatives from entering the shared household, restraining the respondent or his

7. *S.R. Batra* v. *Taruna Batra*, AIR 2007 SC 1118

relatives from entering the shared household, restraining the respondent from alienating or dispossessing or encumbering the shared household except with the leave of the Magistrate may be passed by him, on being satisfied that a domestic violence has taken place etc. It is pertinent to point out that the claim for alternative accommodation can only be made against the husband and not against the husband in laws or other relatives.[8]

Section 20 enjoins the Magistrate to pass orders for grant of monetary relief to the affected from the respondent to meet out the expenses like medical or loss to property, or loss suffered including loss of earning etc. This relief must be a reasonable one taking into consideration, the standard of living to which the affected is accustomed.

The Magistrate is given the power for passing orders in regard to the grant of monetary relief to the affected from the respondents to meet out the expenses and the loss suffered including loss of earnings, medical expenses, loss of property and maintenance of the aggrieved and her children including maintenance under, or in addition to, Section 125 of the Criminal Procedure Code etc.

Section 26 enjoins that any relief to be availed of under the Act may also be sought in any legal proceedings before a Civil Court, Family Court or a Criminal Court and that any relief which may be granted under the Act may be sought for in addition to and along with reliefs sought for any suit or legal proceedings before a Civil and Criminal Court.

In lieu of under Section 27(1), the Magistrate within whose jurisdiction the affected person permanently or temporarily resides etc., is entitled to issue protection orders and other orders and to try the offences under the Act.

Section 32 speaks of the offence of breach of protection order, which is a cognizable and non-bailable offence and the Court can come to the conclusion that the offence has been committed, based on the sole testimony of the affected.

Section 35 gives protection in regard to action taken in good faith and "good faith" means honestly without fraud, collusion or deceit, without pretense etc.[9] "If f a thing is done honestly, it is deemed to be in good faith not withstanding some negligence."

8. Ibid.
9. *State of Rajasthan* v. *Rikhabchand,* AIR 1961 Rajasthan p.64

In the case of breach of protection orders, an aggrieved person may report to the officer and intura it may be forwarded to the Magistrate for appropriate orders. The complaint regard to breach of protection orders may be directly lodged before Magistrate. On cognizance it may be proceeded in accordance with the provisions of Chapter XXI of the Cr.P.C. Further it may be reported to the police and it may be considered as cognizable offence.[10]

The last section of the Protection of Women from Domestic Violence Act, 2005 speaks about cognizance and proof of the offence. Section 32(1) envisages that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under sub-Section(1) of Section 31 shall be cognizable and non-bailable. Though the offences are non-bailable, either bail and anticipatory bail may be granted by the Courts concerned under Section 437 or 438 of the Code of Criminal Procedure.

In respect of proof, on the basis of the sole testimony of the aggrieved person, the Court may conclude that offence under Section (1) of Section 31 has been committed by the accused.

Conclusion

The trials and tribulations of the nacent Protection of Women from Domestic Violence Act can be gauged by the afflux of time, not withstanding the salutary right it has given to the affected women to live in a shared house, whether she has any right etc. Before that, the cackle that there is no enabling provision in the Act to file a complaint against the wife or females by any woman relative of the husband or male partner can be plugged and a suitable amendment is brought in treating all alike, thereby sailing the boat in promoting the interest of the Act itself without any fetter.

10. Section 32(1) of the Proection of Women from Domestic Violence Act, 2005.

Judicial Activism and Overreach in India*

R. Shanmugasundaram**

Introduction

"Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that. At the same time, the dividing line between Judicial Activism and Judicial Overreach is a thin one"[1]

This statement is perceived to be the fall out of the widespread debates going on in varius forums in India regarding judicial accountability. In 2006 conference of Chief Justices of High Courts and Chief Ministers in the previous year the Prime Minister Dr. Manmohan Singh said:

"There is growing dissatisfaction regarding the funcioning of the executive and the legislature and their ability to deliver effective governance to meet the needs and challenges of our times. In this background, it is a matter of grerat satisfaction that the public at large continues to hold our judiciary in high esteem. The judiciary as custodians and watchdogs of the fundamental rights of our people has discharged its responsibility very well indeed"

It is apt to highlight some of the incidents that would have made the impact for the change in the stand.

A noted constitutional lawyer and former Solicitor General of India Mr. T.R. Andhyarjuna wrote:

.... whilst the Indian higher judiciary is perhaps one of the most

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* Lecture delivered at the Institute of Advanced Legal Studies, Brussells, London on the 4th of July, 2007.

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1. Prime Minister Dr. Manmohan Singh while addressing a conference of Chief Ministers and Chief Justices of High Court in April, 2007, at New Delhi.

powerful judiciaries in the world today and the socialist perception of it is very high, accountability mechanisms particularly in the disciplining of judges of superior court and the reprresentative character of the courts have not matched with the power and esteem.[2]

Judicial Review

The Constitution of India provides for judicial review under Art. 32[3] and Art. 226[4]. The Supreme Court has pronounced that judicial review is a fundamental feature of the Constitution. The power of judicial review by courts therefore is not subject to amendment and thus has been effectively taken out of the field of the Parlilament power to amend or in anyway abridge. The judiciary had declared a hands-off command to the legislature.

Judicial review is understood as the revision of the decree or sentence of an inferior court by a superior court. However, the Judicial review of Executive or Legislative actions are brought into controversies unlike the judicial review of judicial action. The orders passed by lower courts which are either being set aside, revised or modified, are greater in number than the executive orders or the legislative actions. Still the criticism against judicial review of the Executive and Legislative actions are stronger and vociferous.

In our Constitutional scheme the judiciary alone has been entrusted with the power and duty to test the constitutional validity of the legislations and to test the validity of administrative actions. The Superioir Courts are empowered to declare a statute *ultra vires* the Constitution and to nullilfy an executive action as unconstitutional. These powers of judicial review are given not with a view to make the judiciary a supreme body superior to the other wings of the constitutional set up, but to ensure a system of checks and balances between the legislature and the executive on one hand, and the judiciary on the other hand. Such mechanism has been envisaged to function in such a way that the unconstitutional actions of one of the wings are corrected by the other and vice versa. The powers of judicial review are not envisaged to criticise the legislative or executive actions as the opposition is expected to function in a democratic polity. The judiciary on the contrary has to review the executive and legislative actions and declare whether those actions are in conformity with the dictates of the Constitution of India.

2. Judicial Accountability: India's Methods and Experience 2003.
3. Writ jurisdiction of Supreme Court.
4. Writ jurisdiction of High Court.

Justice Dr. A.S. Anand, former Chief Justice of India and former Chairperson, Human Rights Commission of India while addressing on "Judicial Review - Judicial Activism - Need for Caution" said:

> *The legislature, the executive and the judiciary are three co-ordinate organs of the state. All the three are bound by the Constitution. The ministers representing the executive, the elected candidatets as members of Parlilament representing the legislature and the judges of the Supreme Court and the High Courts representing the judiciary have all to take oaths prescribed by the Third Schedule of the Constitution. All of them swear to bear true faith and allegiance to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony.*
>
> *A judicial decisiion either "stigmatises or legitimises" a decision of the legislature or of the executive. In either case the court neither approves nor condemns any legislature policy, nor is it concerned with its wisdom or expediency. Its concern is merely to determine whether the legislation is in conformity with or contrary of the provision of the Constitution. It often includes consideration of the rationality of the statue. Similarly, where the court strike down an executive order, it does so not in a spirit of confrontation or to assert its superiority but in discharge of its constitutional duties and the majesty of the law. In all those cases, the Court discharges its duty as a judicial sentinel.*

Judicial Activism

Courts of today are not remaining passive with the negative attitude merely striking down a law or preventing something being done. The new attitude is towards positive affirmative actions, issuing orders and decrees directing remedial actions.

In the estimate of an ordinary Indian citizen the legislature and executive had failed miserably in their cherished duties towards the general public. The executive and the legislators are made accountable for their actions. Their nearness to the people generates lots of expectations from the people and attracts sharp criticism whenever their actions are not in the expected lines. The common citizen feels that the administration has become so apathetic and non-performing that they have no other option except to approach the judiciary to redress their grievances. It is under this situation the judiciary takes into the activist approach. The judicial activism has flourished in India

and has acquired enormous legitimacy with the Indian Public. This activist approach of the judiciary is bound to create friction and tension with the other organs of the state. Such tension is natural and to some extend desirable.

Judicial Activism earned a humane face in India with the liberalising of access to justice and granting of relief to disadvantaged groups and the have-nots through Public Interest Litigations (PIL). Postal letter or even a postcard addressed to the Court is accepted by Courts for intiating prerogative writs disregarding the technicalities. The Supreme Court of India relaxed the traditional concept of *Locus* by allowing public-spirited citizens to bring public causes to the Court. Thus the PIL have started increasing in number after 1977. The growth of PIL post 1977 is mainly attributed to the incidents happened during the emergency rule between 1975 and 1977. One can see the marked differences between the judicial approach prior to 1977 and post emergency rule in India. This change of approach was in response to the changing times and aspirations of the people. Several cases of violations of fundamental human rights were reported during the Emergency regime. Still the approach of the courts is conservative.

In *ADM Jabalpur* v. *Sivakant Shukla*[5] the Supreme Court held that a detainee under preventive detention did not even have the common law right of securing from the courts his release from an illegal and arbitrary preventive detention order even if it was passed without the authority of law. The reason given by the court was that the fundamental rights guaranteed under the constitution were suspended during emergency.

There was a huge change in judicial approach after emergency rule.

Judiciary is not a Despotic Branch of the State

The Supreme Court of India though has widened its scope of interference in public administration and policy decisions of the Government, is well aware of its limitations with in which it should function. In the case of *P. Ramachandran Rao* v. *State of Karnataka*[6], it was observed that the Supreme Court does not consider itself to be an imperium in imperio or would function as a despotic branch of the State.

The Indian Constitution does not envisage a rigid separation of powers, the respective powers of the three wings are well defined with

5. (1976) 2 SCC 521.
6. (2002) 4 SCC 578.

the object that each wing must function within the field ear marked by the constitution. The Supreme Court of India taking all this into account in the case of *State of Kerala* v. *A. Lakshmi Kutty*[7] *states* that

> *special responsibility devolves upon the judges to avoid an over activist approach and to ensure that they do not trespass within the spheres earmaked for the other two branches of the State.*

The judges should not enter the fields constitutionally earmarked for the legislature and the executive. While interpreting the provisions of the constitution the judiciary often rewrites them without explicity stating so. In this process some of the personal opinion of the judges crystallizes into legal principles and constitutional values.

A classic example of the above problem is the recent order by the Supreme Court of India to demolilsh and seal all the commercial places run in residential areas at Delhi. Even though the Delhi Government passed a bill regularising all the constructions, which were illegal, the Supreme Court of India took the view that all those places should be sealed. The Delhi Municipal Corporation was reluctant to continue with the sealing drive as it is against the popular sentiments of the people. However the Supreme Court remained stead fast in its decision and the Municipal Authorities had no other option except the go ahead with the sealing drive. Incidentally the Congress Party, which was in power during the sealing drive lost Municipal Councillor seats in the elections, conducted during the time. The argument about the economic social and psychological impact the sealing drinve would create did not dissuade the court. The Supreme Court of India is well aware of its limitations, and hence restrains itself and cautions about encroaching the field exclusively reserved for the Legislature and the Excutive. The Seven Judge bench of the Supreme Court declares in P. Ramachandra Rao's case[8] that:

> *The primary function of the Judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left upon and unoccupied by legislation. But they cannot entrench upon in the field of legislation properly meant for the legislature. It is not difficult to perceive the dividing line between permissible legislation by judicial directives and enacting law - the field exclusively reserved for the legislature.*

In the case of Keshavananda Bharathi[9] for the first time the Supreme Court held that a constitutional amendment duly passed by

7. (1986) 4 SCC 632.
8. Supra note 6.
9. AIR 1973 SC 1461.

the legislature was invalid as damaging or destroying its basic structure. This was a gigantic judicial leap unkown to any legal system. Supremacy and permanency of the constitution was ensurred by this pronouncement, with the result that the basic features of the constitution are now beyond the reach of the parliament. The criticism against this judgment of the Supreme Court is that since the Supreme Court has not exhaustively enumerated what ar the basic features, the judicial arm can be extended to any distance at its free will.

Art. 21 of the Constitution of India envisages that no person shall be deprived of his life and personal liberty except according to procedurre established by law has become the most dynamic article in the hands of the Indian Courts. A whole new sets of rights which were not explicitlyi provided by the Constitution were read into Art. 21.

Substantive Due Process and Art. 21

The Surpreme Court of India gave a new interpretation to Art. 21 of the Constitution of India in case of *Maneka Gandhi* v. *Union of India*.[10] It became a great trendsetter for further evolution of notions of reasonableness and fairness. The Supreme Court for the first time stated that it is not enough that merely a procedure is prescribed for denying life and liberty, but the procedure itself must be fair and reasonable, paving way for the concept of substantive due process which does not find a direct mention in the Indian Constitution.

The concept of substantive due process which does not find a specific mention in Indian Consitution unlike the American Constitution was imported into Art. 21 by the decision in Maneka Gandhi's Case. It was asserted by the Supreme Court that the courts have the power, to not only judge the fairness and justness of procedure established by a law for the purpose of Art. 21, but also the power to judge and decide the reasonableness of the law itself.

Legislation by the Judiciary

The Supreme Court of India took serious note of the Secual Harassment of women at work places. It stated that each incident of sexual harassment of women at workplace results in violation of the fundamental rights of Gender Equality and Right to Life and Liberty.

In the case of *Vishaka* v. *State of Rajasthan*,[11] the Supreme Court lamented that the Legislature has not brought in comprehensive legislation to deal with sexual harassment of women at work places. Therefore the Supreme Court enacted the law,

10. AIR 1978 SC 597.
11. AIR 1997 SC 301.

In view of the above, and in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and gurantee against sexual harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms are hereby laid down for strict observance. This is done in exercise of the power available under Art. 32 for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by the Supreme Court under Art. 141 of the Constitution of India.

This is a clear case of judicial legislation and the usurpation of the Power of the Legislature, but ultimately it benefits the people. When the legislature slumbers, the judicial usurpation obtains legitimacy and approval from the general public. It is not often criticised that, even after ten years of this decision of the Supreme Court, the Legislature is yet to come up with a comprehensive legislation dealing with sexual harassment of woman at work place.

Regim of PIL: Heydays of Judicial Activism

The proponents of judicial activism were judges lilke V.R. Krishna Iyer, P.N. Bhagwati, Chinnappa Reddy and D.A. Desai who have rendered many judgements touching upon basic rights of the people. It is often said that the genesis of judicial activism lies in the evolution of public interest litigation and the consequent liberalization of the *locus standi* principle. Public Interest Litigation (PIL) was originally conceived with the noble objective of empowering the downtrodden, the poor and the needy by ensuring justice to them by relaxing the rigour of the *locus standi* rule. In the year 1979 in *Hussainara Khatoon* v. *State of Bihar,*[12] the Supreme Court firt took up a PIL on behalf of under trial prisoners who had been langushing in jails for periods longer than the maximum punishment prescribed for the offences concerned. The court in this case issued directions ensuring appropriate relief to the prisoners. Thereafter, there was no looking back in the fields of PILs. Again in *Suni Batra* v. *Delhi Administration (I),*[13] and in *Sheela Barse* v. *Union of India,*[14] the Court gave significant directions for the protection of accused and convicts, male and female, their safety and security, better conditions in prisons, separate lock-ups for female prisoners,. etc.

Judicial Activism and Environemental Jurisprudence

The steady growth of principles and doctrines that have enriched

12. AIR 1980 SC 1360.
13. AIR 1978 SC 1675.
14. AIR 1983 SC 378.

environmental jurisprudence owe their existence to PILs and the accompanying activist approach of the judiciary. In Oleum Gas Leak case,[15] the Supreme Court formulated the doctrine of absolute liability for harm caused by hazardous and inherently dangerous industries. It also gave directions, which by implication have expanded the jurisdiction of the Supreme Court under Art. 32. Thereafter, right from the Rural Litigation Kendra case,[16] the Court has been propounding principles such as 'sustainable development', 'polluter pays' principle., and also adopting certain other principles from international instruments such as the Stockholm Declaration, Rio Declaration, Kyoto Protocol, Biodiversity Convention, the various United Nations Environmental Programmes, etc. In the Narmada Bachao Andolan case,[17] the Court has ensured that development byway of building of dams does not take its toll on the employment, shelter and the homes of people. It has directd the State Governments concerned to rehabillitate the displaced people before going ahead with the part of the courts has done yeomen service to the welfare of the public, especially in the areas of custodial deaths, prisoners' rights, abolition of bonded labour, labourers' rights, fixing absollute liability on hazardous industries, condition of mental homes, regulating pollution, enlarging the scope of "rights of life", etc.

Trespassing the Boundaries: Transformation from Activism to Over-reach

In all the above mentioned cases, the judiciary has called upon the executive to perform its obligations under the Constitution and the laws. While this was and will continue to be desirable, it will be against the scheme and philosophy of the Constitution if the judiciary oversteps and dons the mantle of the executive and the legislature. While in cases related to labour policy, like minimum wages, working conditions, etc. and also in respect of issues related to environmental and ecology, the judicial behaviour can be perceived to be proacive, judicial intervention in matters related to the fiscal policy, plitical affairs, internal proceedings of the legislature, etc. can be categorized as judicial over-reach. Frequent interventions tend to weaken the funding of those two wings of the Constitution, which are excpected to perform by themselves.

15. AIR 1987 SC 1086.
16. AIR 1987 SC 359.
17. AIR 1999 SC 3345.

In the words of Justice J.S. Verma (former Chief Justice of India):

> *.... the judicary should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate. Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neighter be judicial adhocism nor judicial tyranny.*

The adknowledgement of this difference between "judicial activism" and "judicial over-reach" becomes vital for the smooth functioning of a constitutional democracy with separation of powers as its characteristic and supremacy of the Constitution as the foundation of its edifice.

Glaring instances of judicial over-reach are the Police Reforms case, the sealing of unauthorized commercial operations in Delhi, demolition of anauthorized constructions in the city of Chennai and the creation of a Monitoring Committee to oversee the same, the judgment of the Supreme Court in *S.R. Bommai* v. *Union of India*[18] laying down that the Presidential Proclamation dissolving a State Legislative Assembliy is subject to judicial review and that if the Court strikes down the proclamation, it has the pwer to restore the dismissed State Government to office, the Supreme Court's directions to videograph the proceedings of the Jharkhand Assembly and the appointment of a protem Speaker and convening of a special session in the Assembly, declaring as unconstitutional the dissolution of the Bihar Assembliy by the Governor and thereby diluting the status of the constitutional functionary in Buta Singh's case, creation of a Central Empowered Committee (CEC) giving it powers like that of judicial body, judicial legislation in Vishakha's case regarding prevention of sexual harassment of women in the workplace, creation of a High-Powered Committee to monitor parking charges, wearing of helmets, parking space, one-way traffic, balck film on vehicle windows, removal of billboards, usurping the functions of Tamil Nadu Public Service Commission by the High Court in the matter of recruitment of District Judges, interference in educational policies of the Government in cases such as T.M.A. Pai Foundation case, Islamic Academy case, to cite a few. Even the recent Gujarat fake encouter case, in which the court has decided to monitor the investigation and take over the role of the investigating agency while not entrusting the case to the CBI, is a case of over-stepping the constitutional thin line which is the mythological

18. AIR 1994 SC 1918

lakshman rekha.

Judicial Restraint: Need of the Hour

The Supreme Court has on various occasions highlighted the importance of judicial restraint, for the maintenance of the delicate balance of power of the different limbs in a democracy. Justice Markandey Katju in Minor Priyadarshini's case,[19] has explained thus:

> *Under the Constitution, the legislature, the executive and the judiciary have their own broad spheres of operation. It is, therefore, important that these three organs of the State do not encroach upon the domain of another and confine themselves to their own, otherwise the delicate balance in the Constitution will be upset..... The judiciary must therefore exercise self-rrestraint and eschew the temptation to act as a super legislature. By exercising restraint, it will only enhance its own respect and prestige.... Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First it not only rercognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary..... Secondly, it tends to protect the independence of the judiciary.... If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. The touchstone of an independent judiciary has been its removal from the political and administrative process..... Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers."*

In the recent Cash for Query case,[20] a Constitution bench of the Supreme Court has acknowledged the power of the legislature to expel their members and that the legislature is supreme in its own sphere and it is the sole authority to deal with and regulate its internal proceedings and other affairs.

The Madras High Court has passed the following order while disposing a Public Interest Litigation assailing and executive order regarding free distributioin of colour television sets to eligible families in Tamil Nadu State:

> *The scheme is with the proven object of uplift of the poor, needy and under privileged to render social justice, to make them aware of the wordly happenings. A free hand should be given to the Government*

19. (2005) 3 CTC 449.
20. *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha* (2007).

in spending public money for such purpose. Courts cannot poke their nose into each and every activity of the Government, particularly in the economic activities of the Government, under the garb of judicial review.[21]

Lack of Accountability

The adoption of such an all powerful attitude by the judiciary does not augur well for a healthy democracy. This is underscored by the fact that judiciary as an institution is not accountable to the people in the same way like the legislature and the executive. The actions of the executive are subject to judicial review when there is injustice - social, economic or political - or aberration from the provisions of law and the Constitution. When the legislature make laws beyond constitutional bounds or acts arbitrarily, contrary to its basic structure, the highest court examines and corrects. When the judiciary is guilty of excesses, either a larger Bench or a constitutional amendment alone can intervene. Even today, the only mode of removal of judges, as prescribed in the Constitution, is impeachment, which is too Herculean a task to take off easily. This lack of accountability requires the judiciary to watch its step and exercise self-restraint. Not long ago, a judicial statesman[22] said:

The independence of judiciary and the legitimacy of its claim to credibility and esteem must in the last instance rest on the integrity and the judicial temper of the judges, the intellectual and emotional equipment they bring to bear upon the process of adjudication, the personal qualities of character they project, and the parameters they seek to identify on the exercise of judicial power. Judicial power is potentially no more immune from vulnerability to abuse than legislative or executive power but the difference is this: the abuse of legislative or executive power can be policed by an independent judiciary but there is no effective constitutional mechanism to police the abusse of judiciary power. It is therefore crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breath of judicial "Power" is matched by the real depth of judicial "Responsibility". Judicial responsibility becomes all the more onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to reveiw their own wrongs.

21. The Hindu, June 26, 2007.
22. The late Chief Justice Ismail Mohamed of South Africa.

Abuse of Power of Contempt

The use of the power of contempt by the higher Courts has often been uncalled for and unregulated. There are more instances of abuse of the contempt power than its use. Vetern journalist Kuldip Nayar states that "the unpalatable truth is that the judiciary, for some years, has been struck with its own image of authority and truth."

The Governance of our Republic, in the totality of administration, is vested in the trinity of executive, legislature, and the judiciary. In a democratic Republic like India it is the Constitution that is supreme and rule of law rerquires that every organ of the State, adhere to the Constitutional Policy.

What then is the Solution?

A former Solicitor General of India, Mr. Dipankar P. Gupta writes[23]

"There is a real danger that the activism of the courts may aggravate the activism of the authorities. Today, inconvenient decisions are left by the executive for the courts to take. Extensive use of judicial powers in the administrative field may well, in the long-run, blunt the judicial powers themselve. This is not a healthy situation.

What then is the solution? The task of the court should be to compel the authorities to act and to pass appropriate executive orders rather than substitute judicial orders for administrative ones. They must be told how their duties are to be properly discharged and then commanded to do so. For this, they must be held accountable to the court."

The Supreme Court recently noted in *Indian Drugs & Pharmaceuticals Ltd.* v. *Workmen*[24] that the Supreme Court cannot arrogate to itself the powers of the executive or legislature.... There is a broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits.

23. Hindustan Times, 15th June, 2007.
24. (2007) 1 SCC 408.

Human Rights Aspects of Female Foeticide

Dr. A. David Ambrose*

It is often said that women are subjected to discrimination from birth to death. But thanks to the recent technological developments in the field of medical sciences today discrimination of women starts even before a girl child is born. It is very much disappointing and disgusting to know that discrimination against women is now feared to begin even from the womb itself; even before the girl child sees the light. The latest advances in modern medical sciences, like the sex-determination tests, which are originally designed for the detection of gender related congenital abnormality of foetus, are now used to know the sex of foetus with the intention of aborting the foetus if it happens to be that of a female and thus resulting in female foeticide.

Female foeticide has been on the increase in the modern society and has become a menace. It is agony to know that the consequence of female foeticide could be detrimental to the development as it could lead to demographic impairment paving the way for violent alcoholism, depression drugs and even rape. It is no more a sex related individual concern rather it turned out to be a major problem in the society.

Human Rights:

Human rights has aroused greater significance in the post World War II period. Today there is hardly any branch of law in which human rights do not get involved in some degree or other. Human rights has got it self entangled in both law and politics. Every problem has now a human rights dimension and female foeticide problem is not an

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exception to this. Female foeticide is a reflection of what happens when science and technology is misused. The need to discuss the human rights aspects of female foeticide has been now felt than ever before. Because such a discussion would undoubtedly help us to minimize/ cure the ill effects of the science and technological misuse. In order to justify, an attempt is made here and to discuss the human rights dimensions of female foeticide as it would provide a linkage to augment the rights of the women across the globe are discussed here under in this paper.

Ethics and Human Rights

It is not surprising that human rights itself was considered to be an ethical imperative[1] that compels the state to be just and accountable. Human rights emerged as a moral ethical discourse furnishing standards of the evolution of state action. The ethics of human rights is what communities and individuals outfits to desire. At the same time it should be conceded that ethical approach to human rights would strengthen and reinforce human rights implementation especially when human rights violations are due to the misuse of science and technological developments. As the ethical values in the society undergo changes[2], it results in a better understanding, and expansion due to broader interpretation, in the wide application and effective implementation of human rights in the era of science and technology. It will not be an exaggeration to say that the ethical wind turned the rising tide of human rights into a human rights tidal wave that can swallow any challenges posed by development of science and technology.

There are at least three core ethical values with their new understanding and new human sensibility that have revolutionized the human right thinking and understanding. They are human dignity, equality and development (human well being).

Dignity:

It can be boldly said that human dignity as an ethic has been the mother of many human rights that have come into existence due to new developments. In fact 'dignity" has become a core ethical value read into human right protection thereby expanding the scope of many known established human rights. Decency and dignity are non-negotiable facets of human rights opined by Justice V.R. Krishna Iyer way back in 1980 itself.[3]

1. Upendra Baxi, **The Future of Human Rights**, 3rd Edn. (Oxford, 2003) p.7.
2. Ibid at 7-8.
3. *Ratlam Municipal Council* v. *Vardhi Chand* AIR 1980 SC 1622.

The Indian Supreme Court, starting from *Maneka Gandhi's*[4] case, on numerous occasions has held that the right to life guaranteed under Art. 21 of the Constitution include the right to live with human dignity. In fact this proposition laid down by the Supreme Court has opened the floodgates and allowed the flow of many unenumerated human rights from Art. 21. It includes promotion of health and strength of workers of men and women, tender age of children against abuse, opportunities, facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities just and humane conditions of work and maternity relief. These are the Minimum requirements, which must exist in order to enable a person to live with human dignity.[5]

Equality:

Equality is another core ethical concept known for a long time. "Respect towards the other as a coequal humans", observes Baxi, "is the ground work of an ethic of human rights, furnishing universally valid norms for human conduct and the basic structure of the society"[6]. Love and concern for our fellow human beings is the basic tenet of just society. From this emerges the equality principle and non-discrimination principle. It is heartening to note that this non-discrimination principle has brought many human rights to fore.

Development:

Guaranteeing of human rights is for facilitating or increasing development. Many of the human rights are discussed and interpreted using the development concept. However, it should be noted that the concept of development has unlike yesteryears has underwent changes. Early 1970's and 1980's,when the third world countries supported the New International Economic Order (NIEO), development meant simply economic development. But today due to holistic approach, development means not only economic but also, social, cultural, intellectual, spiritual, political development in short over all development. Accordingly, if the very essence of human rights is development then it should not be development in the context of a particular development alone. In other words the ethic of development i.e. overall, warrants a fresh look at the human rights and more specifically the relationship among various human rights. The mutual inter-relationship and interdependence between civil and political

4. *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.
5. *Bandhu Mukthi Morcha* v. *Union of India* AIR 1984 SC 802.
6. Baxi, supra note 1 at p.7.

rights and economic and social rights has been strengthened by the holistic approach to development. Moreover, the development ethics has also helped in solving the conflict, if any, between and among various human rights. In addition the development ethics stresses that the development should not be one sided; one type of development should not be over emphasised; and misuse of any particular development should be avoided.

Female Foeticide:

Foeticide means killing of foetus and female foeticide refers to killing of female foetus. An abortion of foetus only for the reason that the sex of the foetus is determined or known to be a girl is often referred as female foeticide. Hence sometimes it is also known as "sex selective abortion". Thus three steps are involved in female foeticide. First the sex of the foetus has to be determined; second the sex of the foetus should be of a girl; thirdly for that reason abortion of foetus must take place. The sex of the foetus can be determined through the following three methods:

(a) Amniocentesis (b) Chronic villus sampling and (c) Ultrasonography.

The portable ultrasound machines have made sex determination very simple and available at the doorstep. Here only the manifestation of the misuse of medical science and technology is very much evident.

Abortion and Female foeticide:

As seen earlier female foeticide necessarily involves "abortion". Abortion and female foeticide are closely inter-linked. It is very difficult to distinguish foeticide from abortion as long as it is preferred with the express approval of the mother. That is why there is a complaint that liberal abortion laws have encouraged female foeticide[7]. The only difference between abortion and foeticide is that sex determination is not used in abortion. At the same time it is also argued that any move to prohibit female foeticide could impede the effective enjoyment of women's right to abortion. But a closer look would prove this proportion to be wrong. First of all right to abortion, at least as far as India is concerned, is not an emerged basic right but only an emerging basic right[8]. Secondly, what is condemned is not abortion *per se* but abortion after sex selection or determination. Thus any move to link

7. Pawan Nair, *"Are Liberal Abortion Laws Responsible for Female Foeticide"* 5th Oct 2005, available at www.countercurrents.org cf. *Eradication of Female Foeticide* speech of Hon'ble Justice Y.K.Sabharwal C.J delivered at Patiala on Dec 17, 2006.
8. See Dr. A.David Ambrose, *"Abortion: A Basic Human Right?"* Legal Opus Issue no 2 (2007) p. 5-13.

female foeticide with right to abortion is misconceived and should be discouraged.

Legislative Response:

Two central laws primarily regulate sex determination and abortion in India namely: the Medical Termination of Pregnancy Act (MTP Act) and the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act).[9]

The MTP Act legalizes abortion under certain conditions. According to this Act, a pregnancy can be terminated by a Registered Medical Practitioner on the following two grounds: a) if it poses a grave risk to mother's mental or physical health b) if there is a substantial risk that child would suffer from mental or physical abnormalities. Interestingly enough, by the way of explanation, a clause has been inserted which permits abortion in case of contraceptive failure (only in case of married mothers) which is defined as having met the standard of event one. (Threat to mother's mental health) It is of interest to note that the express purpose of the MTP Act was to act as a population control mechanism. The unfettered right to abortion it has granted (via the contraceptive failure clause which for obvious reasons is unverifiable) is a *de facto* implication-not *de jure*.

Where as the PCPNDT Act seeks to tackle the issue of female foeticide and sex selection by banning even pre-conception provision. This Act provides for strict regulation of genetic clinics, laboratories or centers with minimum standards prescribed in terms of space, equipment and qualification of the staff: for monitoring proper records; for maintaining and also for setting up of various authorities to ensure effective implementation of the Act.

Sometimes the provisions of MTP Act are misunderstood to encourage female foeticide. To remove the confusion a comparison between the two central Acts is warranted. The Bombay High Court in *Vijay Sharma and another V Union of India*[10], while comparing the two Acts in the light of Art 14 of our Constitution observed, "It must be remembered that the termination of pregnancy under the MTP Act is not promoted because of the unwarranted sex of the foetus. It could be a male or female foetus. The MTP Act does not deal with sex selection."[11]

9. This Act was previously known as the Prenatal Diagnostic Technique (Regulation & Prevention of Misuse) Act 1994 (PNDTA Act). By the Amendment Act 2002 it was renamed following the Supreme Court's decision in *CEHAT* v. *Union of India* May 2001.
10. Writ Petition No 2227 of 2005 date of the judgement 6th Sep 2007.
11. Ibid at p 23 of the judgment.

It is of interest to note that the ordinary legislative means have not produced desired results. Still due to various societal factors including male child craze, female foeticide is till prevalent. Under these circumstances in order to reduce the menace by sensitizing the society it is important to understand the human rights aspects of female foeticide for the simple reason human rights have become the ethics of the society.

Women Rights as Human Rights:

The World Conference on Human Rights in Vienna in 1993 ushered a significant change in the approach to women related rights. It not only recognized violence against women as human rights issue but also initiated the process of intriguing the issues of women's rights and gender equality into international system at all levels. The Conference promulgated the Vienna Decleration and Programme of Action, which "expressly recognised that the human rights of women are an inalienable and indivisible part of Universal Human Rights".[12] "Women rights are human rights," observed the then UN High Commissioner for Human Rights Sergio Vieira de mello while speaking on the International Women's Day.

When we talk about woman's right, it also includes the girl child.[13] They are inalienable and integral to her. Any right, which is necessary for the full development of her personality, is her human right, which she is very much entitled to enjoy. These rights must be safeguarded and ensured for they are indispensable for a full national development and social and family stability. Therefore, women's human rights are to be protected not only from the individual woman's/girl's point of view but also for safeguarding society's interest.

Violence against Women:

Female foeticide is one form of violence against Women. The UN Committee on the Elimination of Discrimination against Women has recognized as violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human

12. Vienna Declaration and Programme of Action 1993. World Conference on Human rights, at p 1, para 18, UN Doc .A /CONF 157/24 (1993) ; rept in **ILM** Vol. 32 (1993) at p. 1661.

13. The Fourth Conference on Women at Beijing gave the world community the opportunity to reaffirm, support and strengthen women's right as an integral part of international paradigm. The Beijing Declaration and Platform for action adopted at 5th conference specified the need to take up steps to eliminate violence against women. It also resolved *inter alia* "ensure the full enjoyment by women and girl child of all human rights and fundamental freedoms". Beijing Declaration and Platform of Auction. Fourth world Conference on Women UN Doc A/CONF. 177/20 (1995).

rights.[14] Accordingly, the Committee recommended in 1992 that "state parties should ensure laws against family violence and rape sexual assault and other gender based violence give adequate protection to all women and respect for their integrity and dignity."[15] Since female foeticide takes place only on the basis of gender bias against girl child it is thus a form of violence against women, a clean violation of recognized human rights.

Gender equality – non-discrimination:

The biological norm for birth ratios is about 105 boys for every 100 girls worldwide. But this general norm has been drastically altered in India. The sex ratio as per 2001 census the female is 933 per 1000 men. The following is the sex ratio census from 1901 to 2001.[16]

Year – sex ratio female per 1000 men:

1901	972	1961	941
1911	964	1971	930
1921	955	1981	934
1931	950	1991	927
1941	945	2001	933
1951	946		

The report by the UN Children's Fund says that up to 50 million girls and women are missing from India's population as a result of systemic gender discrimination. Female foeticide if allowed would result in perpetuating male dominant society, where in there will be no gender equity resulting in discrimination against women.

Right to Life or to be Born:

Art 21 of our Constitution guarantees right to life and personal liberty. The judiciary has been liberal to hold that right to life means right to live with human dignity. Human dignity has become a corner stone of right to life. Killing the foetus only because it happens to be a girl in a sense violates the dignity of a woman. It is not only rape that violates the dignity of women but female foeticide also. Whether the unborn female child has a right to be born? Under certain circumstances

14. Art. 1 as interpreted by Committee on Elimination of Discrimination Against Women General Recommendation No 19 Eleventh Session, 1992).
15. General Recommendation 19 (Eleventh Session, 1992).
16. Source Census of India 2001.

the answer to this question is a big yes. The right to life does not include the right to die.[17] But right to life should include right to be born. Like any right, right to life is also subject to reasonable restrictions and it can be abridged by a procedure established by law. Thus by MTP Act, abortion can be done or right to be born may be curtailed but if its sex selective abortion then it could be violative of Art 21. The Bombay High Court also highlighted this problem by saying; "we have so far laid stress on the possibility of severe imbalance in male to female ratio on account of artificial reduction in the number of female children caused by the use of said (scientific) techniques. But there is yet another and more important fact of this problem. The society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It under mines their importance. It violates women's right to life."[18]

Conclusion:

Equality is a basic human right. It guarantees rule of law. As Alexis Tocqueville has said equality is the foundation upon which all other rights are built[19]. Equality is seen as a fountain of rights because of its intimate link to human rights, justice and impartiality. Equality and non-discrimination principles help us to develop "new" rights. Equality condemns female foeticide as it results in discrimination against women.

The UN General Assembly has recognized the need for states to pursue appropriate measures to modify the social and cultural pattern of conduct of men and women and to eliminate prejudices, containing practices and stereotyped ratios for men and women. The Declaration on the Elimination of Violence against Women stipulates that: states should pursue by all appropriate means and without delay a policy of eliminating violence against women and to this end should:

(1) *Adopt all appropriate means especially in the field of education to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices customary practices and all other*

17. In *P.Rathinam* v. *Union of India* [(1994) 3 SCC 394] the Supreme Court held that the right to life guaranteed by Art 21 include the right to die. However, in *Gian Kour* v. *Union of India* [(1996) 2 SCC 648] a five judge Constitutional Bench of the Supreme Court over ruled *P.Rathinam's case* and held that "right to life under Art 21 of the Constitution does not include "right to die" or right to be killed".

18. supra note 10 at p. 31-32.

19. Alexis de Tocqueville, Demacracy in America 10th edn vol. 1 at p. 41.

practices based on the idea of inferiority or superiority of either of the sexes and on stereotyped roles for men and women.[20]

The human rights approach to female foeticide thus imposes an obligation on states to change cultural and social patterns of conduct that favours discrimination against women. Thus there is a human rights obligation on India to work for the change the *"son mania"* society. A proactive role of the state is envisaged. From the above discussion it becomes clear that female foeticide violates many established principles of human rights. It violates equality, non-discrimination right to life and right to live with human dignity. It is a crime against women, a dreadful form of discrimination against women. Art 51A(e) of the Constitution also states that it shall be the duty of every citizen of India to renounce practices derogating to dignity of the women. Development of medical science and techniques has been misused with out any ethical considerations and if seen in the light of human rights a public law remedy will be available against those who commit female foeticide.

The Supreme Court in *Center for Enquiry in to Health and Allied Themes (CEHAT) and others* v. *Union of India*[21] has noted that it has already issued directions to secure compliance of provisions of PCPNDT Act. It has further issued directions to the various governments to ensure compliance of its earlier directions. When science and technology has been misused with out any ethical considerations, the human rights concept along with its ethical considerations compel every one including Governments and medical professionals to ensure female foeticide is eliminated from the society. The human rights aspects of female foeticide makes it a crime against women, a gross violation of recognized human rights and emphasizes for its renouncement and perseverance of equality in the society.

20. Declaration on the Elimination of Violence Against Women GA Res 48/104 UN Doc 4/48/49(1993) Art. 3 (Emphasis supplied).

21. (2003) 8 SCC 398.

Challenges Facing Trade Unionism in India

M.S. Soundara Pandian*

Introduction:

Trade unionism in India is nearly a century old. It is passing through a critical phase and facing unprecedented challenges in a liberalized and privatized global economy. Labour is being pushed from the organized sector to the unorganized sector leading to an increase in casual and contract labour. Downsizing, organizational restructuring, political instability, apathetic attitude of Government are the major factors, which weaken the power of unions. Employers are bypassing unions as they find them obstructing the production process. This created more tension and pressure for the unions and making them increasingly vulnerable.[1]

Of the total Indian labour force, the organized labour force, working under modern conditions in factories, mines, Government service etc., constitutes only one tenth of the total labour force. This small body of industrial workers, though numerically insignificant, is looked upon by most people with distrust, suspicion and disgust.[2] Trade unions are also perceived as institutions protecting the unproductive workforce who have no social commitment. They have lost the sympathy of the public by resorting to frequent strikes in public utility services like transport, telecom, postal etc.,

The workers now realize that some trade unions have not made any honest and sincere effort to protect their interests and welfare.

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1. Dr. Biswanth Ghosh : **Industrial Relations of Developing Economy,** (2001, Himalaya Publishing House).
2. Rajan Sinha : *"The Indian Industrial Relations Model"*, **The Indian Journal of Labour Economics**, Vol. 34, No. 2, 1991.

Unless the organization is efficient in it's functioning, it cannot afford to provide various benefits to the employees. But the leaders in trade unions have been indifferent to the functional efficiency.

The trade unions have to play a constructive role in the society, develop a rational and reasonable attitude towards their organizations, understand the organization's vision, and strategy. This would help them in successfully communicating with the management, presenting their grievances and demands before the management, promoting collective bargaining and participation in joint fora. It is also necessary for establishing and maintaining a cooperative work culture in the organization. The workers have to develop a sense of associative partnership with their organization.[3]

The Indian trade unions of today suffer from many problems. Recent studies have reported that economic restructuring led to flexible labour market, employment loss, retrenchment, casualisation of employment, contract employment, decline of union membership, weakening of union power, job redesigning and organizational restructuring, downsizing and sub contracting, change in public policy etc.,[4] Thus, trade unions have to rethink of their roles and accept such strategies, which would help them to act as an agent of socio-economic change and undertake a variety of non-bargaining activities.

This paper aims to explore the impact of economic reforms on the role and functions of the trade unions, examine the challenges and strategies to strengthen trade unions and promote a better industrial relations climate resulting in greater productivity.

CHALLENGES:

A brief account of the challenges the trade unions meet is given below:

1. Labour market flexibility:

Labour market flexibility (LMF) means quick adjustment of labour costs in enterprises. It implies freedom to enterprises in recruitment, retrenchment and layoffs. It ensures an additional right to hire and fire the work force. It would call for deregulation of labour market which would ensure greater efficiency in the industrial sector.[5]

3. Chhabera T.N. and Suri.R.K. : **Industrial Relations – concepts and Issues** (2005, Dhanpat Rai & Co. (P) Ltd.) p. 630.
4. Venkataratnam.C.S. : *"Economic Reforms and Labour – Productivity"*. Vol. 39, No.3 . (1998) p. 373-383.
5. Leelavathi.D.S : *"Second National Commission on Labour : Agenda for Labour Sector Reforms."* **Southern Economic,** May 1, 2001.

There has been a major shift of employment from the organized sector to the unorganized sector due to various factors. The share of the organized sector was barely 8.19 percent of the total employment in the country whereas the share of unorganized sector was 91.81 percent in 1993–94.[6] Increased casualisation of employment has posed a challenge to unions. Employment in the organized manufacturing sector is declining and there is no expansion of employment in the public sector. Organizations are taking advantage of this favorable labour market conditions and have changed their nomenclature from manufacturing to marketing companies, and subcontracting product manufacturing to ancillary companies. As the marketing company is flat and lean, the profit is bigger and it is not sent back to the production unit. As a result, the employees of the manufacturing organization have no opportunity to share the profit or ask for an increase in wages.

2. Down sizing and subcontracting:

The effect of sixteen years of globalisation had been severe on the Indian working class with downsizing of manpower, increased workload, removal of the social security net and marginalisation of trade unions.[7] Many public and private organizations have offered VRS to their employees to restructure the organization in the name of right sizing with the ultimate objective to reduce labour cost and enhance organizational competitiveness.[8] As per the estimates of the industry, the public sector got rid of more than two lakh employees.[9] As a result, organizations became flat and lean, bringing workers closer to the management and reducing the need for unions. The production process is also being sub contracted to ancillary units whereas assembling and marketing alone is done by the main unit. Technological changes and automation have resulted in job-loss, change in work-design and lack of skill formation to match capital formation, as the trade unions are not based on trade specialization.

3. Advent of multinational corporations:

Multinational corporations constitute an important component of world trade and controls nearly 1/3 of the same. Free entry and exit has been the long standing demand of MNCs. On account of the red carpet welcome, out of one hundred big MNCs of the world, fifty are

6. Supra note 1 at p. 252.
7. Pandhe M.K, President, CITU : The Hindu dated 18.01.07.
8. Lam.H and Reshaf (1999), *"Are Quality Improvement and Downsizing compatible? An Human Resource Perspective"* – **Industrial Relations**, Vol.54. No.4 p. 727-747.
9. The Economic Times. Dec.4, 1997.

operating in India. The entry of such MNCs has drastically changed the industrial relations system in India. MNCs invariably curb the trade union rights with the result, collective bargaining has become weak. Even if MNCs fix wages unilaterally, their high wages attract the cream of the work force and within the organized labour market, this creates a dualism. MNCs demand efficiency and effectiveness at every level of production and management. It does not tolerate the culture of seniority based promotions, bonus with no clear relation to profit and performance, excessive employment, politicisation of work environment, labour laws giving excessive protection to workers even at the cost of efficiency, indiscipline etc., which have hither to been supported by the trade unions. Thus the base of the trade union movement further gets narrowed down. The undue privileges enjoyed by the MNCs with regard to labour recruitment and retrenchment create additional burden and tensions on the part of the Government.[10]

4. Declining union power:

The new economic environment has affected the power dynamics between the union and the management. The ownership power or control power of the management has come to prevail over the collective power enjoyed by the unions. Technological upgradation, modernization, change of manufacturing companies to marketing companies etc., have enhanced the control power of the management. Ancilliarisation of production, casualisation of employment, entry of knowledge workers, retrenchment of unskilled labour etc., have weakened the collective power of trade unions.[11] This trend has made an adverse impact on unionized workers who tend to be less satisfied than non-unionized workers with their jobs.

5. Unfavourable public policy:

Human Resource policies are not favorable to unions as employees establish a direct link with employers. Unions feel uncomfortable with this practice and consider employer's direct links with workers as anti-union. Emerging HR policies aim at team work, continuous improvement, reward system, training, counselling, performance review, quality of work life and employee welfare and have created a better labour- management relationship and in the process bypassed the unions.[12]

10. Leelavathi D.S – *"Industrial Relations in India: Challenges and Strategies"*. **Southern Economist,** July 15, 2000. p. 19-20.
11. Supra note 1 at p. 255. & Leelavathi D.S: *"Industrial Relations in India: Challenges and Strategies"*. **Southern Economist,** July 15, 2000.
12. Saini, Delei. S. (1997) *"Globalisation Syndrome, Human Resource Management and Trade Unions"* – **Management and Change,** Vol. 1, p. 110 – 111.

6. Unhelpful management's attitude:

Management, by and large, take an unhelpful attitude. Unionism is considered by them as an anathema. Union leaders, according to managers are troublemakers who break the harmony between the management and workers. They restrict manager's power in decision-making, question their discretion and wisdom and obstruct their right to manage. Given this mindset, very often they find fault with union for all difficulties faced by the management be it low productivity, low quality, low profitability or lack of goodwill from customers. Management also takes advantage of multiple trade unions and their inter-union rivalry by playing one against another. Management considers trade union a legal obligation, which does not bring faith and goodwill.[13]

7. Diminishing patronage of state:

Government in several countries are known to consider workers as "vote banks" and employers as "note banks". India is no exception. The role of Government in industrial relations is assuming even greater importance in the post-liberalization era. The conflicting interests of management and union have necessitated a greater involvement on the part of the Government.[14] In most countries, including India, state patronage through regulation and other means of intervention have been the primary source of strength for unions. When state goes offensive against trade unions, unions face serious challenge that is difficult to overcome. Experience reveals that it is not necessary for the state to be explicitly anti-labour. Even when the state adopts a neutral stand in a market economy, it tantamounts to a tacit collusion of employers militancy against unions accelerating the decline of unions and their power base.[15]

8. Weakening trade union movement:

Multiple trade unions are the biggest curse of Indian trade union movement. Existence of many unions, each trying to compete with each other on membership drive and securing management support to recognize their union not only weakens the trade union movement but also causes disunity among the workers leading to inter-union rivalry. Unions try to play down each other in a bid to gain greater influence among workers. In the process, they do more harm than good

13. Nair N.G and Latha Nair : **Personnel Management and Industrial Relations**, (2004, S.Chand & Co. Ltd. New Delhi). p. 228-299.
14. Supra note 3 at p. 629.
15. Venkata Ratnam C.S: *"Trade Unions and Wider Society"*. **IJIR,** Vol.42, No.4, April 2007.

to the cause of unionism as a whole. Unscrupulous managements exploit this situation to their advantage.

Most of the trade unions in India have affiliation to political parties, which provide ideological support for their sustainability. Political affiliation contributed to the growth of unionism in the early stages but proved detrimental later on. These trade unions have professional political leadership who is interested in exploiting workers. Very often, negotiations with employers fail due to such political interference. The interest and welfare of the workers are very often ignored.[16]

Political influence often necessitates projecting outside politicians as trade union leaders who have never worked in the industry. These outside leaders fail to understand the problems of workers; rather they use the union to further their own vested interests. The main reasons for such preponderance of outside leadership are:

(a) A large majority of the workers is illiterate and thus unable to communicate effectively with the management

(b) The rank and file lack knowledge, education, training and ability which make a successful leader. They also lack the confidence required of a worker to talk with the employer as equal and

(c) Victimization of workers, office–bearers can be avoided by taking outsiders as leaders.[17] The existence of outside leadership in trade unions has also hampered the growth of healthy labour-management relations because their approach towards labour problems is coloured by political considerations as they try to solve industrial disputes through political pressures and interventions.

STRATEGIES:

The challenges explained above have affected the course of Indian trade unionism in recent times. With most industries now open to national and international competition, labour is under unprecedented pressure to increase its efficiency and productivity without corresponding rise in wages. The public sector, which has been the major provider of employment and source of union membership, has already lost its occupancy of the commanding heights of the economy. Many public sector enterprises are not only in the red but have wiped out their entire capital and are, therefore, either to be shut down or

16. Myers A.Charles and Kannappan Subbiah : **Industrial Relations in India.** (1970, Asia Publishing House).

17. Ramasamy, E.A and Uma Ramasamy : **Industry and Labour, An Introduction.** (1981, Oxford University Press, Delhi).

kept open just to provide jobs. This, infact, is a very gloomy situation for our trade unions which are already hopelessly fragmented. All central trade unions in India are reported to have lost about 25% of their membership. There is decline in union membership in western countries also. This fall in membership is to be taken as an indication of worker's dissatisfaction with its kind and quality of the service rendered by these unions[18]. The challenges posed by the increasing globalisation of production, liberalization of world trade, changing profile of workers and shift in management strategies have forced the labour movement to redefine their role and tactics and adopt the following strategies:

1. Promoting effective unionism:

At present the trade unions communicate about service conditions and related issues only to the workers under the wrong assumption that workers are not interested in receiving information on any other important issues. They should pass on greater and varied informations about themselves and the organization. There is a growing trend of disrespect for law as a result of the sharp decline in standard of discipline. Trade union should not only confine with defending a worker during departmental enquiry for misconduct but also play a very positive role in providing counseling service to workers in cases of excessive drinking, drug addiction, indebtedness, absenteeism etc., and also make them learn a new attitude towards work. Improving labour efficiency and quality of work, restructuring their organizational functioning, implementing strategies to improve enterprise competitiveness, broadening the base of trade union movement, encouraging more take over by the worker's co-operatives, boosting productivity by creating a satisfied work force, maintaining industrial safety, reducing absenteeism etc., are the new roles which the trade unions should play in the changing economic environment. This form of "effective unionism" is therefore proactive and strategic in approach and is no longer concerned with union actions alone which are restrictive in nature.

2. Performing social task:

In a society such as India, trade unions and their methods are naturally looked upon by most people with distrust, suspicion and, in many cases, disgust. The trade unions, over the years, have lost the sympathy of the general public. Strikes, often, disrupt everyday life

18. Tripathi.P.C. : **Personnel Management and Industrial Relations** (2004, Sultanchavel & Sons. New Delhi) p. 399.

and cause inconvenience to the masses. Consumer welfare fora now assert that no trade union has the right to resort to illegal strike, in contravention of the mandatory prerequisite, which may result in grave and irreparable hardships, inconvenience and loss to the members of the public. Thus the dilemma faced by the trade unions is the need to simultaneously serve the interests of the members and society as a whole. Indian trade unions operate within their own domain and do not actively coordinate with other social groups. Trade unions today face the challenges of convincing the public that they can act on behalf of all employees, unionized or not. This requires building alliances with community bodies in social movements such as NGO's which may require addressing concerns of communities like child labour, human rights, environment, gender inequalities, unorganized labour etc., which lie beyond the realm of work place. This will enable the union movement to deal with the onslaught of globalisation and repression that it brings. Therefore, unions will have to take the public along when they want to defend their rights on exclusive interests where workers interests are in conflict with those of the society. They should act as a true social partner, helping people outside the work place and voicing their concern collectively. The unions should consider themselves as instrument of society and should strengthen society and not just its members in isolation.[19]

3. Organising the unorganized:

Unlike the organized sector workers, the unorganized sector workers have not acquired a high profile, tasted the benefits that can be gained from organizations, or derived the advantages flowing from the high visibility. The vast unorganized sector accounts for more than 92 percent of the total workforce i.e., around one-third of India's population. In absolute terms, this sector contributes more to the economy and employment in India. Nearly 65 percent of the national income is contributed by the unorganized sector. These workers, particularly women, have not been able to organize themselves and are further discriminated again.[20]

The existing labour legislations that focus mainly on the organized sector do not protect the interests of labour in the unorganized sector. Increased casualisation of employment and its concentration in the unorganized sector has posed a challenge for unions to organize them.

19. Sharma . B.R. & Dayal.I (1999) *"Emerging Challenges and Changing Role of Trade Unions"* In Sivananthiran.A & Venkataratnam. C.S. (ed), **Globalisation and Labour Management Relations in South Asia**, ILO, New Delhi.
20. Report of the National Commission on Labour, 2002. Govt. of India.

Most union leaders would argue that organizing the unorganized is not very easy. This is the biggest challenge and opportunity before trade unions. Once this field of work force is organized, this sector will show greater commitment and loyalty than an average worker in the organized sector.

All national trade union centres are aware and conscious of the need to organize the unorganized sector. Although there is no dearth of efforts, the results are not commensurate with efforts. Attempt in organizing the unorganized sector came from AITUC which has made some dent in organizing unions in Beedi, Cigar, Construction, Anganwadi and Fisheries sectors. Bhartiya Mazdoor Sangh(BMS) has been playing a crucial role in organizing unorganized sector workers, especially beedi workers. INTUC has launched a massive project to organize the unorganized workers in 10 states. The HMS in 1997 issued a social charter, which sought extension of living wage, employment rights and social security coverage to the workers in the informal sector. The attitude of the leadership of the central trade unions in India in organizing the unorganized sector particularly in informal sector activities has been generally positive. They recognize that the task is gigantic and they need the support and collaborative effort of many partners who are able and willing to lend a helping hand.

It is, therefore, very essential that trade unions equip themselves and train their functionaries for an effective role in the unorganized sector. National trade unions should have a separate wing to undertake organizing campaigns and training programs. These cells can take up the issues relating to payment of minimum wages, equal wages for equal work, social security, effective enforcement, welfare and training program for skill development. In their strategy they could concentrate on women workers who would prove to be better union members. Trade unions should network and form alliances with other interest groups such as the media and NGO's. Unionization of informal sector workers not only helps unorganized sector workers but also it will improve the development process and growth of the informal economy.

4. Launching Research Projects:

As the global economy becomes more complex, there is an increase of roles to be played by the trade unions. Technological changes have made the trade unions learn new skills and expertise by developing their own internal human resources. The union leaders of the future will have to combine the traditional political acumen with the modern business acumen. To promote efficiency of workforce, unions need to generate data's on various dimensions of workers needs, aspirations,

standard of living etc., For this purpose, they can launch research projects either independently or in collaboration with academic institutions. Research can also be conducted to know how trade unions influence job satisfaction, wages and benefits, workers participation in management, absenteeism, employee - turnover and overall economic growth of the organization. Further, research can also be conducted to redefine the role of trade unions as to whether unions should adopt a path of cooperation or confrontation for their development. There is a strong need to evolve such strategies which can help unions to retain their influence and power of collective bargaining. There is also an imperative need to undertake educational programs for workers. This will enable them to meet the challenges of the high-tech industrial society, which is likely to emerge in the near future.

5. Formulating Labour Policy:

Labour policy essentially implies legislation or Government action calculated to effect changes in the labour market to attain specific objectives of social and economic policy. Labour policy involves several issues including relationship between employers and workers, protection of worker's right, wages and conditions of work, social security, labour welfare, employment generation and job security. The change of economic policy during the last decade has initiated fresh debate for change of labour policy. Employer's side has called for an exit policy for labour and the removal of protections that restrict its downsizing and labour adjustment, which would make Indian industries to be competitive in the global market. The trade unions side has favoured protection of workers in the changing economic environment. National labour policy to be effective, a consensus is to be arrived at by accommodating the views of both the sides without detrimental to social and economic policy while labour policy on specific issues may be evolved through negotiations between trade unions and employer's federation at the industry level. Adoption of this model will involve shift of some activities in policy making, policy implementation and its evaluation from the Government to the institution of capital and labour. This model is not only concerned with the promotion of industry and protection of workers, but also building of partnership between capital and labour for the benefit of society as a whole.

6. Reforming trade union law:

The emerging economic environment involving rapid technological changes, globalisation of economy, liberalization of trade

and industry and emphasis on international competitiveness give rise to the need for bringing the existing labour laws in tune with the future labour market needs and demands. There is an urgent need for reformation of labour laws, which has been continuously debated but ultimately shelved for lack of consensus within the labour movement. All efforts must be made to promote consensus among the central trade unions and employers federation at the central level along with the union and the State Governments. This move will facilitate bringing of changes in the existing labour laws in the coming years. Among industrial relations legalisations, it is desirable to undertake the following measures by amending suitably the provisions of the Trade Union Act, 1926 to make the trade unions in India to effectively play their roles.

a) **Making registration compulsory:**

Under the Trade Union Act, 1926 the registration of trade union is not compulsory but is merely voluntary. To ensure application of uniform standards of functioning to all unions and prevent fraud, embezzlement and deception practiced by some of the unscrupulous office-bearers of these unions, registration of trade unions should be made compulsory.[21] This recommendation may be incorporated in the proposed comprehensive legislation.[22]

b) **Checking multiplicity of unions:**

The use of the trade union movement as pawn on the political chessboard will never help the cause of the workers nor can it promote healthy trade unionism. There should be one union in one industry.[23] However where legislation makes it so easy for the formation of a number of unions, it is difficult to enforce this concept. Till the Amendment Act 2001, any seven persons could form a union and claim to represent the workers. This resulted in a mushroom growth of unions in every organization. So many unions not only compete with each other for the same jurisdiction but also try to outbid each other in militancy. Multiplicity of unions can be checked in several ways. One way is to raise the minimum to 10% of the regular employees of a plant or 100 whichever is lower subject to a minimum of 7.[24] Another way is to withhold certain roles,

21. Report of the National Commission on Labour, 1969. Govt. of India.
22. Ibid.
23. Giri V.V : **Labour Problems in Indian Industry**, (1972, Asia Publishing House).
24. Trade Union (Amendment) Act, 2001.

privileges and immunities under the Act from all those unions, which have not been granted the bargaining status. A union with less than 10% support in an establishment should have no locus standi in that establishment and a union with atleast 10% support should only have the right to represent individual workers in various forums such as conciliations, arbitration and adjudication.

c) **Strengthening internal leadership:**

At present 1/3 or 5 (which is less) of the office-bearers of the executive of a union can be outsiders. The role of outsiders, of late, has come under fire. These outsiders are generally professional politicians or ex-employees of the company who have either voluntarily resigned from their jobs to work as full-time union activists or who have been dismissed from service for their union activities. It will be unfair to dub these persons as outsiders. These persons bring with them a wider exposure, experience and contacts and are, therefore, a boon to the unions in several ways.

In a democracy, political influence of trade unionism cannot be avoided. In India, trade union movement was inseparably intermingled with political movement through freedom struggle. It is important to understand that trade unionism and politics have a symbiotic relationship, which is inevitable. If a total ban on outsiders is imposed, this will not necessarily prevent unions from importing extraneous considerations in the maintenance of industrial relations and the inside leadership will be subject to remote control by outsiders. As a solution to this problem, the first National Commission on Labour has recommended that the proportion of outsiders in a union executive should depend on the total membership of a union. This solution is not likely to prove very effective. Even if the number of outsiders in a union is reduced to a very negligible proportion, it will not matter much as long as there are one or two outsiders who occupy the key position of either the President or the Secretary. Hence the trade union's right to select their leaders should remain unfettered. Another solution to the problem may be to demarcate separate areas of operation to inside and outside leaders. Thus, union leadership at the plant level may be given only to inside leaders who are supposed to have more intimate knowledge of plant conditions and union leadership at the national or

industry level may be given to outside leaders who claim to posses wider exposure and experience. Intensifying worker's education and training in union organization may strengthen internal leadership.

d) Prescribing criteria for recognition:

At present the Trade Union Act, 1926 is silent as to how a union is to be granted the status of a negotiating agent nor prescribes any criterion for this purpose. The result is that today every registered union considers itself capable of acting as a negotiating agent and regulating tripartite relations. To avoid this situation, the law should prescribe the "majority following" as the criteria for the recognition of a union as a negotiating agent. Trade union with 66 percent support should be recognized as the single negotiating agency and if no union has 66 percent support, then unions that have the support of more than 25 percent should be given proportionate representation on the negotiating college. The recognition once given should be valid for 4 years to be coterminous with the period of settlement.[25] Representative character of a union can be determined by 3 modes namely simple verification, secret ballot and check off. Considering the merits and demerits, check-off method is desirable for enterprises employing 300 or more workers. However, in the case of establishments employing less than 300 workers, secret ballot may be adopted. Once these measures are enforced, multiplicity of unions and inter-union rivalries would be avoided.

Conclusion:

Changes in the world economy, technological advancements, response of the state and employers are creating tension and pressure for unions and making them increasingly vulnerable. The balance of power at the beginning of the 21st to be heavily loaded against trade unions particularly when there is diminishing patronage of state. The objectives of trade unions may not change because of change in environment. Certainly the means of action to achieve them have to change in view of the changes in work, work place and work force. They have to shift the focus from the protection of workers to the welfare of the society. In brief, unless the trade unions prove that they are living organisms, their future remains very bleak and unpromising.

25. Supra note 20.

Police-Public Relations

- Conflicting Perceptions and Alternative Strategies

"A policeman possess a few power not enjoyed by the ordinary citizen and he is only a person paid to perform, as a matter of duty, act which if he is so minded be might have done voluntarily."

Dr. N. Ravi*

The Indian Police set up, basically structured and modeled by the alien rulers, has not undergone a phenomenal change. While the Indian society after Independence has undergone rapidly escalating social change and its needs have been changing and are on the increase, the growth of the police has been extremely inadequate. Being the principal agency primarily concerned with enforcing law and order and prevention of crimes, the present day police are entrusted with bulk of burden and a grave reponsibility demanding of them the highest standard of conduct, particularly those of honesty, impartiality and integrity. The colonial concept of the police has created a gap between its role and the needs of the society. Even after the country relieved itself from the shackles of colonial rule, the gap between the expectations of the people and their fulfillment by the police is widening, leading to a lack of understanding and rapport between the police and the public.

Unfortunately, in India, as in some other developing countries, there is a negative image of the police in the minds of the public. The image of the Indian Police is not that of citizen friendly and it has rarely been held at high esteem by its compatriots. It is common observance that the florid faced men clad in khaki flannels and baizers, who are responsible for Law and order on the streets, are seen by the public with fear, suspicion and distrust. More often, people regard

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police as a little more than a necessary evil. They are disrespected, taunted and scorned. They are looked upon as a force imposed upon the people quite opposed to the historical tradition that the police are the public and that the public are the police.

By and large, the people are afraid of the police and they would like to keep away from them, as far as possible rather than coming forward to help. The deplorable treatment that victimes and witnesses receive in the Police Station disuade them from reporting crimes and coming forward to give evidence. Even after the dawn of 21st Century people are frightened when they get a call from a Police Station for whatever purpose. Uncertainty prevails as to why a person has been called to the police station and when and whether he would come back. Somehow, rightly or wrongly, there is an impression that the police has always the tendency to oppress the innocent and ignore the just grievances of the poor and the downtrodden and on the other hand side the guilty who are affuluent and influential. Such an impression the people have over the police, the negative image the police bears and consequently the attitude of the public to keep away from the police can not bring forth any help or public co-operation which is a *sine qua non* for the effective and efficient functioning of the agency.

Efficient performance of the duties of the police very much depends on the extent of ready co-operation they receive from the public. For the proper functioning of the police, be it prevention, detention or investigation of crime, or their regulatory duties, or maintenance of peace, there should be a good development of relation between the police and the public. This in turn depends on the ability of police to secure public approval for their conduct and actions and to retain public respect and confidence. The success of police in almost every sphare of their activity is dependant on the approval and respect of the public. If public approval and respect is secured and maintained, then securing the willing co-operation of the public in the task of observance of law is not difficult.

What are the reasons for the widening gap in the police public rerlation? Have they done or undone anything in discharging their funtions that has produced unfavourable public attitude towards them? Is it something concerning the structural inadequacies and functional crisis? Or it is due to police reliance on force and violence? Whether the misdeeds of the Police have been exaggerated? Or could be the outdated and unscientific methodolgy adopted in problem solving? What is to be done by the police agency to win the support and respect of the citizen they serve? These questions can not be easiliy

aswered and involves consideration of various issues.

In a complex society, the range of demands and calls on the police are widening. In addition to the primary functions of maintenance of law and order and curbing criminal activities, they are called upon to perform numerous duties like ensuring safety in the streets, combating natural calamities, quelling mob riot, rendering bandobust to politicians. V.I.Ps and elite, executing orders of the court of law, helping to enforce protective legislations, collections of intellilgence, regulation of traffic, dealing with student unrest etc. And the list goes on. Futher, various socio-economic issues that could be handled by the administrative wing of the Govt. are dubbed as law and order problems and thrust upon the police casting a fair burden of them. 'Escalating crime rate due to population rise and growing pressure of living accommodation, outbursts, agitations and demonstrations arising from labour disputes and political activities including the cult of extremists' have all added new dimension to police tasks in India and have tended to bring the police in confrontation with the public much more frequently.

Expanding the role of the police, embracing many fields of human activities, makes the police overworked and impede its professional acumen. There is less scope for maximizing the utilization of available police resources. There is a skewed distribution of scarce resources towards high profile activities as against accelerating the basic functions. The machinery is made to work round the clock and its men are exposed to more hazards than their counterparts in any other profession. Due to these prevailing conditions, serioius wave of police discontent is found in many parts of our country, even to the extent of defiance of superior orders. The inevitable corollaries are the slumber in self confidence of the police, hesitation in taking adequate steps to prevent violation of law and maintenance of peace, mechanical attitude in enforcement of law, failing courtesy and patience, indifference towards the public, belated response to the distress calls of the public, non registration of cases and lack of commitment in police functioning. This inturn creates a lot of discontent, panic and annoyance among the public which ultimately recoils the public co-operation to the police.

In the present day complex society a basic and radical change of the concept of police is needed. The social milieu in which the polilce live and work, the quality of the resources available to them and the constitutional and legal limitations within which they operate, all these require a through examination. The pattern of its organization structure should be based on the added dimensions to the concept and the role

of police and should be designed by its objectives and goals. Keeping in view the wide spectrum of police functioning and the array of duties thrust on them, there should be division of the force into different branches and clear demarcation.

It is high time that appropriate steps are taken, both, legal and political, to go for the division into different and varied functions, with ample opportunities for mobility from one wing to another. Apart from the existing pattern of division of police into Traffic, Law and Order and Intelligence, day-to-day policing should be separated from the investigation of crimes. In this context it will not be out of place to make a point of reference to the French system of police. The French investigative police called, *police judiciare* (Judicial Police), dealing with crimes and investigation are subject to the supervision and control of Procurer, a member of the magistracy, some difficult cases they are directed by a judicial magistrate, *called the Examining Magistrate*. The other wing of police concerned with law and order and other functions are referred as Executive Police and will come under the supervision of ministerial hierarchies and the State. Back to the Indian position, special staff may be demarcated for presentation of cases before the court. Specialization in different aspects of policing such as intelligence and investigation should be introduced. Special squads with specialized training and equipment to facilitate fast reaction are to be categorized to deal with communal violence, student unrest, labour conflicts, public calamity and problems encountered on great public occasions and sporting events. Officers should be encouraged to opt for one stream or the other depending on their aptitude and inclination. A full co-operation and liaison between wings should be maintained. There should be fuller understanding of the roles of the different branches of police force as a whole.

A police sub-culture, inimical to democratic policing, pervades the organization and is perpetrated with indifference or connivance from the upper hierarchy. Decentralized power structure can bring about the needed initiation and commitment of the police. Within the overall big family of police force a proper and just equation is to be established. In this regard it can be indicated that adopting and giving practical orientation to the concept of participative management in the hierarchical organization of the police, without unduly interfering with the requirement of discipline, will give a better organizational approach to problem solving.

Another roadblock to the needed police-public relation is the excessive reliance on use of force by the police officers. In totalitarian

society police is the 'Force' and in a free society police should be 'Service'. Use of force can become an improper crutch for a policeman who must face a wide verity of complex situations, in our country many policemen assume power from the minute they don the police uniform and get obsessed with the idea that they are empowered to apply force and violence. Often they misconceive that force is indispensable in the effective discharge of their punitive, regulatory and restrictive functions of the natural corollaries of this would be police brutality, abuse of power and unnecessary use of force. That, exactly, is what is happening in different parts of our country in varying degrees and in different pattern. Instances of police misconduct are escalating. The observation made a century back by the Police Commission[1] seems not to be out of place in the present day context. False arrest has become common. Occasions are not in frequent where the police unleash brutality on the persons they apprehend on grounds of suspicion, forgetting the fact that their role is to investigate and place before the court their findings and not decide on their own the guilt or innocence of the suspect The existence of an array of Constitutional and Legal provisions[2] has in no way deterred the police from resorting to these inhuman and barbaric practices. The increasing incidence of theses abuses has assumed such an alarming proportion that it is affecting the very credibility of Rule of Law and the administration of criminal justice system. They inflict inhuman treatment on the unfortunate lot who were picked up by them for interrogation on a complaint given by an influential local person, alleging theft, in a number of cases, force of highest degree is used to oppress innocent poor and downtrodden belonging to a particular community, at the instance of affluent and elite group. Public and media outcry is that often the police deal with the poor villagers in an inhuman brutal and uncivilized way, to the extent of outraging the modesty of women and sexually assaulting them.

Dehumanizing third degree method has become an integral and essential part of police functioning. The methodology of the police in India in using third degree while interrogating the accused and suspects has become a common practice. Incidents where the police play havoc in a community causing injuries to body and heavy loss to the property

1. "The police force throughout the country is in a most unsatisfactory condition, that abuses are common everywhere that this involves great injury to the people and discredit to the Government - Govt. of India, Report of the Indian Police Commission, 1902-1903.

2. Arts. 19, 20, 21, 22, 32, 39-A etc. of Constitution of India and Sections 49, 50, 56, 57, 151, *163*, 167, 303,304 etc. of Criminal Procedure Code, 1973.

of the native people are not stray events. The degree and pattern varies from place to place. Of the many reasons for the misuse and abase of power and authority, two are noteworthy. One is that a lot of discretion is written into the law regulating police functioning because the human situation which the police men are catted upon to deal with are ambiguous and the other being their inflated feeling of their uncrowned status and pseudo-authority. Then the critical inference should be that

(a) the police in our country is oblivious of the fact as to why they are named as Police Services and not Police Force

(b) the police authority is probably degenerating into authoritarianism

(c) there is no realisation on the part of the police that they are integral part of the society.

In the Indian system of criminal justice, comprising of the Police, courts and prison, traces of indifference, inertia, negligence, cruelty and callousness are visibly present. The existing legal safeguards against the issues[3] of notoriety are not being implemented by the police and the law enforcement agencies. The Supreme Court, with the subordinate judiciary, in a plethora of landmark renderings,[4] has given a number of guidelines and issued many directives in regard to various issues concerning the police. In *D.K.Basu* v. *State of West Bengal*[5] the court gave a new custodial jurisprudence and issued 11 specific directions *to* ensure safety of suspects under interrogation and for avoiding violence and torture in custody. Despite the Supreme Court frowning on the police through epoch making judgments, the police continue to function as a force against everyone viz. the complainant, accused, suspect, witnesses and people at large. This is probably as a negative response to the strictures and censures passed against them by the judiciary and the consequential public brandishment. They are contemptuous towards the court ."The Indian police have become so

3. Issues like routine flouting of procedures of arrest interrogation and investigation, arbitrary arrest prolonged and lengthy pre-trial detention, non-production of the arrested before the Magistrate within 24 hours of arrest, custodial torture, sexual assault by police on women arrestees, failure to hold inquest into death in custody, etc.

4. *Premshankar Shukla* v. *Delhi Administration,* AIR 1981 SC 1535; *Kishore Singh Ravinder Dev.* v. *State of Rajansthan,* AIR 1981 SC 625; *Sunnil Gupta* v. *State of M.P.* (1990) 3 SCC 119; *Chandraprkash Kewechand Jain* v. *Slate,* (1990) 1 SCC 550; *State of Punjab* v. *Gurmit Singh,* (1996) 2 SCC 384; *State of Mahrashtra* v. *Ravikant Patil,* (1991) 2 SCC 373; *Johinder Kumar* v. *State of U.P.,* (1994) 4 SCC 260; *D.K. BAsu* v. *State of West Bengal,* AIR 1997 SC 610; *State of H.P* v. *Lekh Raj,* (200) 1 SCC 247.

5. AIR 1997 SC 610.

impervious to judicial inquiries and court structure that they continue to behave in a recalcitrant manner."[6]

Incidents of misuse of power and unnecessary use offence create an atmosphere of fear and suspicion where there should be trust and co-operation. The blatant misuse aid abuse of authority by the police, its oppressive conduct and telling malpractices have been escalating. It is a fact that police are facing refusal of the public to co-operate as informers, complainants and witnesses. Even the police reluctantly admit: that 'no self respecting person would willingly associate with police' - whether as a witness, a complainant or defendant. The fact that complainants and the witnesses are humiliated, ill-treated and subjected to difficulties is a bitter truth.

Police should earn the respect of the people not by instilling fear but through being alert and courteous. By proportionately diminishing the use of force and compulsion, they can secure public co-operation. There should be a strong realization of the ideal purpose of police in society as described in the International Code of Enforcement Ethics.[7] The efficiency of the police does not lie on the show of police power but in being able to strike at the roots and prevent the occasions which necessitate the use of police power. Public favour can be invited by the police by constantly demonstrating absolutely impartial service in complete independence of policy, which is possible only when they are absolutely free from political interference[8] and disregard any consideration of wealth or social standing.

Increasing social complexity and rapid increase in population generates and non-conformist behavior, communal disturbances, increasing crimes involving sophisticated methodology and weapons, agitations and demonstration and acts of subversion. There is an extremely inadequate growth of police and they are in a

6. Srivasthava S.P, in his Key Note Address at the National Seminar on Human Rights and Criminal Justice Administration, held at University of Madras, February 25-26, 2000.

7. International Code of Conduct for Enforcement Officials adopted by the UN General Assembly on 17th December 1979 envisages that the fundamental duty of law enforcement officer is to serve mankind, to safeguard life and property, to protect the interest of innocent against deception, the weak against oppression and intimidation, and the peaceful against violence and disorder and to respect constitutional rights of all men to liberty, equality and justice.

8. The political interference in the work of police is manifested in appointments, transfers and promotion and interference in the day-to-day working in the form of exerting pressure on the to get the proceeding against some accused quashed or to gat some innocent persons wrongly implicated.

disadvantageous position, ill-equipped, lacking the necessary framing, special tact and attitude and sophisticated methodology required to get the better of the situation without getting accused of excessive use of force and so forth. In matters relating to the maintenance of public order that involves human interaction, police do not have any legal standard to judge when a dispute becomes disorder and calls for police intervention. It is left to the prudence and considered judgment of the police, which many times tend to be erroneous and imbalanced creating havoc, leading to serve public criticism for inaction or high-handedness. The Indian police are ill-trained for a workload that necessitates a high degree of autonomy, discretion and speedy action.

In the mandatory role of law enforcement, the police is saddled with the task which often causes annoyance to the people especially when the legislation does not have the police support and sanction. Rather than exercising discretion that would soften public resentment, they resort to compulsive force, acting like a robot without any thinking for the feeling of human beings and concern for human rights. The police should not play merely the role of an agency to enforce law and must also serve as a social agency that acts on behalf of the public to prevent crime and public disorder by mediation and advise. Social scientists are of the view that, the role of police in the enforcement of law would be wholesome, meaningful and purposive only if it is discretionary, conciliatory and mediatory.

The feeling in the minds of the police that they' are ill equipped to meet the challenges of the criminals in terms of sophisticated not been trained on up-to-date scientific lines of investigation, drive them to take recourse to force and dehumanising third degree methods. Due to insurmountable pressure on them to check the rate of crime, there is a tendency to either suppress the registering of case to show a low figure or to resort to unethical practices.

The police should be provided with the latest and most modem gadgets and scientific equipments, improved communication systems and conveyance facilities, In this cyber age where computers and internet (i) play havoc in terms of the increasing rate of modem crimes and (ii) have become integral part of and play vital role in investigation, law enforcement and administration of justice, it becomes imperative that the police should be given intensive training in computers and information technology application. Pre-elementally what is needed on the part of the police officer is a good deal of patience, understanding and clear thinking, an empathetic approach to the clientele in view of their ever increasing needs and expectations. Police should listen with

sympathy and act with speed. In case where redressal is not possible they should explain that to the public concerned without brushing them aside. The police force of our country needs to develop specific skills particularly the capacity to successfully negotiate a diversity of human encounters. Training courses aiming at fast values and attitude pertaining to national and international standards, particularly relevant to day-to-day activity should be developed. By the process of repeatedly requiring him to simulate the street experience, policeman must be encouraged to develop his own concept of how his approach to police duties produces reaction ranging from approval and compliance to anger and hostility. Behavioral re-orientation through training to effect attitudinal change in the police force will teach them to encounter their problems perfectly in consonance with the provisions of law.

While stressing the role of police in bringing about harmonious and integrated police-public rapport, one should not loss sight of the responsibility of the public in this regard. Police-Public co-operation is a two-way traffic. Most of the police-public problems stem from the discrepancy between the community's perceptions of the police and the perception of the police itself. Community evolves a concept of police that is rounded in the idea of community service, demanding a ready and willing help and assistance in a vast range of human situation. The police are judged by the public from the quality of their performance. But there is no proper realisation and understanding of the severe operational limitations of policemen and the difficult nature of their duties discharged under stress and strain. The uncooperativeness, antagonism or hostility of the public whom a policeman serves often places an emotional strain on him. Pitted against criminals and bad characters all the time without adequate public support and sympathy and subjected to hard work in a bad service condition, the emotional strains of the policemen gets added up. Public ire against police is insufficiently cognizant of the condition under which the force operates viz. poor pay, abysmal housing conditions, torturously long hours of work etc., and, to the distorted perception about police realities, the media contributes further.

The tendency of the public is to avoid police as long as one can and to call help only when it is unavoidable. Co-operation of the public with the police and participation in criminal investigations and crime control is very much lacking. Such tendency of the public is quite opposed to the legislative directives that impose it on the public as a matter of duty to assist and provide information to the police. The Criminal Procedure has created a duty on the part of the public

generally to give information to the police regarding certain offences[9] and requires every private citizen to give reasonable assistance is demanded by a police or magistrate.[10] Intentional omission to give information or assistance as required above is punishable under Indian Penal Code.[11]

Despite the wide sweep of the provisions of Criminal Procedure Code and the penal sanctions provided by the Indian Penal Code neither the police nor the public attach adequate importance to these provisions of law. This is due to the apprehension that they have to face harsh treatment in the hands of the police and have to undergo the rigorous of court and procedure spending considerable time. This can be subdued if there is a strong realisation that the police are acting in the best interest of the community and to safeguard the individuals. The general tendency of the public to keep away from the problem of others results in lack of social responsibility and duty towards fellow human being. That is the reason when a bodily or sexual assault takes place on the streets in the broad day light in the presence of many persons, no one is coming forward to help the victim or the police and to give evidence in a court of law. Even a normal law abiding citizen gets disillusioned and disappointment about the administration of criminal justice on the non-redressal of his grievances speedily. It is the technicalities of law which is responsible for the inability of the police to take action on certain categories of complaints. 'A general misunderstanding of the police procedure, methods and work and a general resentment of authority are several of the factors which contribute to a citizen's hostility towards a policemen.'[12] The sorry state of affairs of our criminal justice system involving systemic constraints and procedural delays and an antediluvian legal process, at times leads to a belated response of the police for the distress calls of

9. Section 37 of Cr. P.C.: "Every person is bound to assist Magistrate or Police Officer reasonably demanding his aid (i) to the taking or preventing the escape of any person whom the police officer is authorised to arrest (ii) to the prevention and suppression of a breach of the peace, (iii) to the prevention of any injury attempted to be committed to any railway, canal, telegraph and public property".
10. Section 39 of Cr.P.C : "Every person who is aware of the commission of, or the intention to commit any of the following offences under the L.P.C. shall, in the absence of reasonable excuse at once inform the nearest Magistrate or Police Officer of such commission".
11. The disobedience of an order given under Section 37 of Cr. P.C. is an offence under Section 187 of Indian Penal Code and failure to give information required to be given under Section 39 of Cr.P.C. has been made punishable under Sections 176 and 202 of Indian Penal Code.
12. Cinnappa Reddy. O, **Developing Society and Police,** (Osmania University Publications).

the public. If only the public understand this they will not blame the police.

Since Police is an integral part of the society, public stands on morality, integrity and courtesy will certainly reflect on the police force. Self esteem and professional pride can hardly be expected to flower in an environment compounded by suspicion and hostility. Professional pride is linked to morale. Delayed postings, denied promotions, frequent transfers, suspensions and withdrawn facilities like phone and vehicle hurt humiliations on the policeman and shatter the pride of profession and best can never be achieved. True and effective policing is possible only from a position of strength and pride.

Public mould the performance level of the police and unjust and a vile criticism would jeopardize their morale and commitment to work. Unfortunately there is a public indulgence in wholesale condemnation of the police without appreciating the problems. Hurting criticism against the police at the drop of hat is not a new phenomenon and has been going on for long. "The police have always been the object of attack by press and the politicians, Bench and Bar, Lawyers and Legislators, rogue and reformer, citizen and criminals.'[13] Public understanding of police efforts and its sympathy for police problem should increase. They should shed hostile attitude towards and the traditional prejudice against the police. Proper appreciation and recognition of the police and its role should be forthcoming from the public.

People should realize their roles and responsibilities and develop a positive image in their minds. Good image brings public co-operation and participation which increases the social recognition of the police. The public should extend co-operation and help to the police and must avoid destructive attitudes causing discouragement and frustration. There should be a strong recognition of the fact that the fulfillment of the functions and duties of the police force depends much on the public approval of their existence, actions and behaviour. Securing such approval of the public means ensuring its willing cooperation in the task of securing observance of law. Constant interaction between the police and the public, public relation campaign by the police, integration of the police with the community, especially in the rural areas and the involvement and participation of the public at the police process will promote the mutual co-operation and understanding between the

13. Ibid at p. 2.

police and the public which is vital and formidable. A healthy and harmonious police-public relationship would give reality to the historic tradition that 'the police are the public and the public are the police'.

To conclude, it can be said that the measures one suggest to call for a well adjusted police-community relationship may sound optimistic in a society as stratified as Indian today, but it is not Utopian. Though not immediately possible, there can be revolutionary change. A perceptible change can be noticed when the system goes through an evolution over a considerable period of time.

Law and Economics

Dr.B.V. Narayana Rao *

Economics is a social science. It reflects the Socio-Economic ethos of the country in particular and world in general. A person who has never made a systematic study of economics is handicapped in even about national issues... Really he is.[1]

Politically people are given equal rights while people are not economically equal i.e., to say politically a man is asked to stand in line along with his neighbours but economically he is asked to over take them. "Succeed or suffer" is the command. Such is the double standard of a democracy professing and pursuing an egalitarian political system and simultaneously generating gapping disputes in economic well-being. This mixture of equality and inequality sometimes smacks of inconsistency and even insincerity.[2]

"Inequality is a deceptively simple problem. The facts seem clear. So do the causes and the remedies. Actually none are."[3]

A very important connected issue to the lack of equal opportunity is that of unequal opportunity at one point of time that generates unequal opportunities overtime. Once people are excluded from good jobs, they are deprived of the incentives and opportunities to develop the skills that would otherwise qualify them for good jobs. No one will invest in education for a managerial position if he has no hope of

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1. Samuelson, (Economic McGrew Hill Kogekusha Ltd. 9th Edition) p.95.
2. Arthur Okun- **'Equality and Efficiency' The Big Trade off**, (Oxford Publisher's Co. New Delhi), p.1.
3. Gramp and Weiler (Eds): *"Economic policy-Readings in Political Economy"*- (D.B. Taraporevalla and Sons Pvt Ltd. Bombay, 1972), p.175.

becoming a manager. If he is blocked from his firm's ladder-climbing career programme he accumulates fewer skills on the job. This inefficiency can grow at a compound interest.

Prof. John Rawls, a famous political Philosopher from Harvard says, "Give priority to equality on the principle of equality in the assignment of basic rights and duties.[4]

Prof. Milton Friedman, Nobel price -winner economist emphasizes that efficiency shall be given priority.[5]

Therefore the laws and economic thinking and policies necessarily interact with one another in the economic sphere of society. It describes how men earn from their employment and spend their income to satisfy their physical and psychic needs. It also explains how a society choose to use natural resources like land, forest and mineral deposits, human resources like farmers, factory workers, doctors, lawyers, engineers, teachers and capital resources like buildings, machinery tools, roads, bridges to produce tangible and intangible goods which satisfy the needs of human being.[6]

Adam Smith, a classical economist defines economics as a science of wealth in his book "An inquiry into Nature and Causes of the Wealth of Nationals. According to him, Political Economy is considered as a branch of science of statesman or legislators. It proposes two distinct objects. First to provide a plentiful revenue or subsistence for themselves and secondly to supply the state or common wealth with revenue sufficient for the public services. It proposes to enrich both people and sovereign.

J.B. Say supported the Adam Smith's definition of economics which deals with the phenomenon of wealth. "The aim to political economy is to show the way in which wealth is produced, distributed and consumed."[7]

Economics is basically a social science and it has become popular in the world because of its impact on the people, their day today problems, prospective hopes etc. Economics is part of culture, humanities and science. It is a subject that combines the rigour of science with the poetry of the humanities.

Judge Posner in his book "The economic Analysis of law(1972)" says that much of the common law can be explained in economic terms

4. John Rawl. **A Theory of Justice** (Harvard University Press 1971), p.14 & 62.
5. Miltan Fredman, 'Capitalism and Freedom' University of Chicago Press 1972 P. 161 to 166.
6. Adam Smith, **An inquiring into the Nature and causes of the wealth of Nations.**
7. JB Say in his "Traite d" Economic politique (1803).

and all branches of common and statute law has been examined in the light of this theory. Empirical Research has proved that law has developed according to the economic structure of the country. The more one looks at this inter disciplinary knowledge, the more one gets intellectually stimulated and professionally trained to deal with law as a policy of science.

"Economic analysis is part and parcel of law. Admittedly a significant contribution of Economic Science to law is its analytical perspective in examining individual and social behavior. Law is a social creation. In this continuing interaction two most important social functions which law perform are:

a) Providing facilities for private arrangements between individuals. Bulks of private law consist of contracts, partnership, sale of goods, marriages, succession tort etc.

b) Provision of services and goods essential for development. Thus public law inter alia, relates to economy, education, health etc. In these fields economics has contributed a great deal to the development of law. Law in turn has also influenced economics, by the provision of a legal framework with in which the factors and interest on economics have had to work. Law has also helped the socio-economic process through the introduction of various legislations in areas like agriculture, labour, social welfare, fiscal and monitory matters. Thus there is an active interaction between law and economics.

Because of this impact of law, Roscoe Pound, termed it as "Social Engineering" and the theories of law and economics are closely related to the strong currents of thought prevailing at the time when they were promoted. Economics and Law are human creations, both involve human errors and contradictions.[8]

The moral basis of property rights' is that exclusive ownership rights give incentives to raise productivity of assets. Since common joint ownership reduces incentives to invest for the lack of security of reward. Creations of exclusive right is a necessary condition for efficient use of resources. It is alienation or transfer right that become sufficient condition for transferring assets from those who value them low to those who value them high through a voluntary bargain. The common law extends thus in its motto of wealth maximisation in the law in respect of property rights.

8. Lock Anderson and Others, **Economics,** (Prentice Hall of India Pvt. Ltd., New York 12th Edition).

In India the land reforms are broadly institutional changes. Land Reforms Act made through legislative enactments. The Zamindari Abolition Acts were challenged on constitutional grounds. The Supreme Court, while upholding the right of the State to acquire lands for a public purpose ruled that the compensation payable is sustainable issue. As a result Art. 19(l)(f) and Art. 31 were deleted by the 44th Amendment Act, 1978 on the plea that "There has to be a balance between individual rights guaranteed under Art. 19(1) and the exigencies of the State which is the custodian of the interests of the general public."[9]

The right to property is no longer a fundamental right but only a constitutional right under Art. 300-A of the Constitution. Equal important are being given to tenancy reforms i.e. ceiling on agricultural holdings, and the State Governments have enacted catena of statutes to achieve the above purposes. The time-lag in decision-making and implementation resulted in fake transfers, partitions and gifts by landowners. The enactments have been defective in two aspects i.e. vague words and provision of too many exemptions in the Act. As a result there were 1.65 million cases pending in Maharashtra and 1.20 million cases in Gujarat. According to the Seventh Plan Report 1.6 million acres of distributable land is involved in litigation.[10]

It is thus seen that land reforms - a complex of legal and socio-economic relations - have not yet resulted in the achievement of socio-economic objectives. This is because : " In a society in which the entire weight of civil and criminal laws, judicial pronouncements and precedents, administrative traditions and practice is thrown on the existing social order on the inviolability of private property, an isolated law aiming at the restructuring of property relations in the rural areas has little chance of success. And whatever little chance of success was there completely evaporated because of the loopholes in laws and protracted legislation."[11]

This is a typical case in which log-rolling between the political parties, bureaucracy and pressure groups (rich landed aristocracy) defeated the land reform laws from achieving the desired socio-economic objectives. A competent authority, after reviewing the land reforms legislation in India castigated it as "Planned failure".

9. AIR 1956 SC 565, also cited in V.N. Shukla : **Constitution of India**, (7th Edn., Eastern Book Co.,) p.69.
10. G.S. Sharma : **Property Relations in Independent India**, (The Indian Law Institute, New Delhi), p. 152.
11. Planning Commission Report of the Task Force on Agrarian Relations (1977) p. 9-10.

According to Earnest Banker, Economics has influenced law, Law has also influenced Economics. If economic factors and economic interests have partly determined the legal framework, it is even more true that law has furnished the whole general framework of rules within which and under which the factors and interests of economics have had to work."

There are instances where both Economics and Law have influenced each other on the same issues: The classic example is the development of Trust Law.

Trust was originally designed to protect the social position and property of the children of landed aristocracies but the concept has been enlarged and trusts are shaped into a system protecting trade unions, religious organisations, educational institutions, etc., and had been made to serve, in the words of Prof. Maitland as "the most powerful instrument of social experimentation."[12]

Coming to the topic, it is restricted to Economics as a basis of Social Welfare and Social justice. For example Art. 38 of the Constitution of India provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may be social order in which justice, social, economic and political shall inform all the institutions of the national life.[13]

Social Justice is Justice according to social interest. Social Justice is designed to undo the injustice of in equal birth and opportunity to make. It is possible that wealth should be distributed as equally as possible and to provide that material things of life should be guaranteed to each man.

Social Justice is founded on the basic idea of Socio-economic equality and it aims at assisting the removal of socio-economic disparities and inequalities of birth and status and endeavors to solve the competing claim? Especially between employees and workers. Thus social justice can be considered as a function of each individual's welfare. The object of social welfare is to secure for each human being the economic necessities, a decent standard of health and living conditions and the highest possible degree of self respect and freedom of thought and action without interfering with the same rights of others.

Social legislation is designated to protect the interest of a" class society who because of their economic condition deserves such protection. The right to get work is included in the directive principles

12. Some problems of **India's Economic Policy**, (2nd Edn.,) p. 437.
13. Art. 38, Directive Principles of State Policy, Indian Constitution.

of state policy. Art. 41 of the Indian constitution recognizes inter alia, every citizens has right to work.[14]

The rights to be protected by the State are, right to live and right to work. Without the later there can be no duty to see that the necessities of life are produced in the quality proportionate to the number of citizens that everyone can satisfy his needs through work.[15]

Ensuring a decent standard of life and full employment of leisure with social and cultural opportunities. The above provision can be termed as the Magna Carta of all workers.[16]

The Bonded Labour System

Law provides for the abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people. The object is to abolish the bonded labour system in different part of the country. It is a system of usury under which the debtor or his descendants have to work for the creditor without reasonable wages or with no wages in order to extinguish the debt. This system implies the infringement of the basic human rights and destruction of the dignity of human labour.

Art. 23 (1) of the constitution prohibits 'begar' and other similar forms of forced labour, and further provides that any contravention of the said provision shall be an offence punishable in accordance with law. The Bonded Labour System (Abolition) Ordinance 1975 was promulgated by the President on the 24th October 1975. By the said ordinance the bonded labour system was abolished and bonded labourers were freed and discharged from any obligation.

In *People's Union for Democratic Rights* v. *Union of India,*[17] popularly known as Asiad Workers' case, where non-payment of minimum wages to construction workers was successfully challenged, among others,' for the violation of Art. 23, the Supreme Court, after an elaborate discussion on the background, philosophy and scope of that article, held that the prohibition against "traffic in human beings and begar and other similar forms of forced labour" is " a general prohibition, total in its effect and all pervasive in its range."[18]

14. *Delhi Development Horticultural Employees Union* v. *Delhi Administration* 1992 Supreme Court 789.
15. As Quoted in the report of National Commission on Labour p.47-48. The freedom of employees to associate is also affirmed in I.L.O. convention and the European Social Chapter and is implicit in general guarantees.
16. Art. 43 and Art. 45 of Indian Constitution.
17. (1982) 3 SCC 235: AIR 1982 SC 1473.
18. Ibid. at p.254.

It is a charter of recognition of human dignity, the Court said, against all - State as well as private persons. Rejecting the argument of the Union that it prohibits only begar or other unpaid labour the Court held that all unwilling labour is forced labour whether paid or not and is therefore prohibited.[19]

On the specific question of minimum wages the Court held that where someone works for less than minimum wages the presumption is that he is working under some compulsion.[20]

The compulsion may be either the result of physical force or of legal provisions or of want, hunger and poverty.[21]

Emphasising on the last factor and declaring the non-payment of wages as forced labour the Court concluded: any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be forced labour.[22]

International Standards relating to collective organization

Freedom of Association is regarded as a fundamental right under International Human Rights Convention. The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 proclaims that everyone has a right to form and join trade union for the protection of his interest. The International Covenant on Economic Social and Cultural Right (ICESCR) of 1966 reiterates this principle.

The fundamental importance of freedom of association in this context emphasized by his presence in treaties dealing both with civil and political rights on one hand and economic social and cultural rights on the other. The universal declaration of human rights adopted by the United Nations General Assembly in 1948 proclaims that every one has a right to form and join trade unions for protection of his interest. The International Covenant on Economic Social and Cultural Rights. (ICESCR) and the International Covenant on Civil and Political rights (ICCPR) of 1966. Freedom of association has been a fundamental principle of international labour organizations (I.L.O.). Since its inception in 1919.

19. *People's Union for Democratic Rights* v. *Union of India*, (1982) 3 SCC 235,256: AIR 1982 SC 1473.
20. Ibid at p. 258.
21. Ibid at p. 259.
22. On the same point also see *Labourer, Salal Hydro Project* v. *State of J & K*, (1983) 2 SCC 181: AIR 1984 SC 177.

In a welfare state the law has a leading role in achieving socio-economic goals. Even in U.S.A. which is a capitalist country the role of government in regulating the economy is expanding. Prof. Samuelson stated "No longer does a modern man seems act as if he believed that the Government governs the best which governs the least". The constitutional powers of the government were interpreted broadly and used to secure the public interest and police the economic system... State and federal legislation expanded to include minimum wages law, compulsory workman's compensation schemes, old age pension, collective bargaining laws, regulation of factory conditions etc. As a result private property is never wholly private, free enterprises never wholly free.[23]

In a welfare state like India, "the concept of property has developed in two angles; positive and negative. The positive aspect of property concerns the control of and use of material resources to be distributed so as to best subserve the common good. Negative facet conceives foreclosure of any operations, which culminates in concentration of economic power and results in the use of property as common detriment of the people in general."[24]

The Supreme Court of India held that "the concept of Social and Economic justice is a concept of revolutionary import, it gives subsistence to the rule of law meaning and significance to the ideal of welfare state."[25]

Justice Hidayatullah while dealing with the concept of social justice, says that "Social justice is not based on contractual relations and is not to be enforced on the principles of contract. It is something outside these principles and is involved to do justice without a contact to back it.[26]

Fiscal Policy

In a developing economy, fiscal policy is mainly relied upon for achieving economic objectives i.e. economic growth and socio-economic justice i.e. reduction of unemployment and inequalities of income. Therefore, fiscal reform is defined 'as insertion of variety of incentives and disincentives to achieve planned objectives' is accepted in all such countries. Taxation laws contain a number of incentives for economic

23. Samuelson op. cit p. 760.
24. S. Krishnamurthy : **Impact of social legislation on the criminal law in India** (R.R.Publishers Bangalore), p.14.
25. *State of Mysore* v. *Workers of Gold Mines* AIR 1958 SC p.923
26. AIR 1960 SC, p. 825.

development. At the same time tax laws do contain provisions for getting more revenue. However, in actual experience, it has been realised that both these ideas in tax laws have not been achieved fully because, "Income is a concept that has proved elusive of agreed definition by economists and the obstacles to giving it effective legal form have proved even greater."[27]

Tax avoidance and evasion, the basic problems, of tax laws, are mainly due to various factors-the most important being reliance heavily on income based tax. As stated earlier, income is an economic and accounting concept to which it has proved impossible to give effective and objective legislative content.[28]

The Wanchoo Committee (Direct Taxes Inquiry Committee) has stated: "Black money is a menace to the economy and is a challenge to the fulfillment of the avowed objectives of distributive justice and setting up of an egalitarian society."[29]

Black money destroys the economy by the creation of artificial scarcities to make more profits, increase in conspicuous consumption, diversion of money to unproductive investments like gold, diamonds, etc. Therefore, the control of black money is one of the most important aspects of fiscal policy. This can be done apart from perfecting the administration of taxes by suitable fiscal laws. The tax laws are replete with various provisions to deal with black money and Voluntary Disclosure Schemes (Section 68 of the Finance Act, 1965), Block Schemes (Section 24 of the Finance Act No.2 of 1965), the Taxation Laws (Amendments Ordinance, 1965) later enacted as law in 1975 and the Special Bearer Bonds (Immunities and Exemptions) Act, 1981 are examples in point. The Act of 1981 was challenged on constitutional grounds that it allegedly violated Art. 14 of the Constitution in *R.K. Garg* v. *Union of India*.[30]

However, the Supreme Court rejected the petition on the ground that the classification made by the Act between persons having black money and those who do not have such money is based on intelligible differentia having a rational relation with the object of the Act. In coming to this decision the Supreme Court has stated that laws relating to economic activities should be viewed with greater latitude than laws

27. Paul Burrows and others (Ed): **The Economic Approach to Law** (1981, Butterworths, London), p. 320.
28. Ibid, at p. 333.
29. Cited in B.Sivaramayya: **Inequalities and the Law** (1984, Eastern Book Co., Lucknow), p. 112.
30. (1981) 4 SCC 675.

touching upon civil rights such as freedom of speech, religion, etc. The Supreme Court has also cited with approval the observation of Justice Frankfurter:

"In utilities, tax and economic regulation cases there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibilities. The Courts have only the power to destroy, not to reconstruct.[31]

Contract Law

The concept of 'sanctity of contract' in consumer protection law in as much as the changed role of freedom of contract is viewed as one of the foundations of a well-organised society. Broadly, there are four reasons for the use of consumer protection laws.[32]

i) The doctrine of 'caveat emptor' does not make sense in the modern world since information is asymmetrically distributed.

ii) The free market system does not lead to optimal use of resources.

iii) The value judgment implicit in the "devil take the hindmost" attitude to the parting of money from a fool is now much less widely held.

The economic consequences of consumer protection laws are, the legislation produces a different outcome with respect to resource allocation, prices and income distribution to that which would otherwise occur, and it results in the companies' devoting more resources to quality control or even withdraw from some markets resulting in higher market prices and different resource allocation. In economic language, following the equimarginal rule, companies would be advised to allocate extra resources to quality control, while the marginal cost of those resources is less than the marginal cost of the legal actions thus avoided. Thus, Consumer Protection Acts directly affect resource allocation and prices of commodities.

The Child Labour (Prohibition and regulation Act 1986

This Act prohibits the enlargement of the children in certain employments and to regulate the condition of work of children in certain other employment.

No child below the age of fourteen years shall be employed to

31. Cited in B.Sivaramayya: **Inequalities and the Law** (1984, Eastern Book Co., Lucknow), p. 115-116.

32. J.M.Oliver, op.cit., p. 83-85.

work in any factory or mine or engaged in any other hazardous employment.

Employment of children below the age of 14 years in any factory or mine or other hazardous occupation is forbidden. Obviously, the provision is in the interest of health and strength of young persons and is in keeping with the provisions of the directives in Art. 39(e) and (f). But in view of our socio-economic realities the Constitution makers could not prohibit the employment of children generally.

In *M.C.Mehta* v. *State of T.N.* the Supreme Court noted that the menace of child labour was widespread. Therefore, the Supreme Court issued wide ranging directions in the context of employment and exploitation of children in Sivakasi, prohibiting employment of children below the age of 14 and making arrangements for their education by creating a fund and providing employment to the parents or able bodied adults in the family. These directions were reiterated in *Bandhua Mukti Morcha* v. *Union of India* concerning the employment of children in carpet weaving industry in the State of Uttar Pradesh.

Property

Due to technological revolution and growth, the intangible aspects of property surfaced and they had to be protected for economic development. Therefore, the definition of property has been widened to include not only physical property but also the intellectual property (i.e. goodwill, patents, copyrights, etc.). This wider definition of the property is attractive to economists and predates modern work on Demand Theory which in fact focuses on the characteristics of 'goods', rather than the 'goods' itself.[33]

Conclusion

In view of the above said analysis, the study of Law without knowledge of other related social sciences , political theory , Sociology and Economics is incomplete. There fore law and Economics are closely related to each other and they interact the field with International Dimensions.

33. Ibid at p.35.

SUO- MOTU Powers of NHRC and the Implementation of Human Rights: - A critical study

B. Venugopal*

Human Right Act, 1993 defines 'human rights' as rights relating to life, liberty, equality and dignity guaranteed by the Constitution[1] or embodied in the international covenants and enforceable by Courts in India.[2]

The Indian citizens enjoy fundamental rights. They are some times referred as human rights. They are enshrined in Part III of the Constitution. Human rights are not to be anybody, by an individual, authority or the Government.

Among the fundamental rights relating to person there are rights to life and liberty, right to be free from torture, inhuman and cruel punishment are available. Right to privacy and liberty are also guaranteed as fundamental rights under the constitution.[3] All these rights can be enforced through the Courts in India.

The Directive Principle's of State policy enshrined in Part IV of the Constitution of India contains many rights listed in the International Covenants on Civil and Political Rights, and Economic and Social Rights and are considered human rights. Nevertheless, they are still treated as moral ends to be served by the Government of India. The protection of Human Rights Act 1993 clarifies that International Covenants means International Covenants on Civil and Political Rights

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1. See Protection of Human Rights Act 1993, Section 2(d).
2. *Babulal* v. *State of Maharashtra* 1961 SC 884.
3. Art. 21 of the Indian Constitution.

and the International Covenants on Economic, Social and Political Rights adopted by the General Assembly of the United Nations on 16th December 1966.

National Human Rights Commission is empowered to conduct inquire *Suo-motu* or on a petition presented to it by a victim or any person on his behalf complaining of

i) Violation of Human Rights or abetment thereof

ii) the negligence in the prevention of violation by a public servant

If we go through the provisions of the Protection of Human Rights Act 1993 there can find that the National Human Rights Commission is only a fact finding machinery. Formerly, whenever, a complaint against custodial violence or custodial death is to be made, the individual has to approach the court of law with a suit or to the Government with a petition to make inquiries.

The complaint may be inquired into by an officer of the department, or of another department or by a Judicial Commission as the Government may decide. After the Institution of the Commission, there is no need for the affected citizens to go from pillar to post with complaints of human rights violations. They can approach the Commission and in that way, this is a permanent forum for the citizens to make complaints about human rights violations. The commission is given powers to recommend further action or compensation and nothing is said in the Act about the acceptance or rejection of the recommendations made by the commission by the government, of course, even when the recommendations are rejected, the commission's observations receives wide propaganda through the media or otherwise so much so that a public opinion on the alleged violations of human rights is created.

The Act empowers the Commission to approach the Supreme Court or the High Courts for such Directions, Writs or Orders as the court may deem necessary. They are intended for the speedy trial of offences arising out of human rights violations. There is no direction as to the type of offences that may be sent to these courts for speedy trials. Any offence against human body, liberty, security can be human rights violations.

Under section 13 (1) of the Protection of Human Rights Act 1993, the Commission shall, while inquiring into complaints under this Act, have all the powers of a civil court trying a suit under the code of civil procedure 1908, section 13 (2) further provides that the commission

shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points on matters as in the opinion of the Commission, may be useful for or relevant to, the subject matter of the inquiry and any person shall be deemed to the legally bound to furnish such information with in the meaning of section 176 and section 177 of the IPC. Section 15 of the Protection of Human Rights Act 1993, protects those who give evidence before the Commission. It also provides for prosecution of those who give false evidence.

Custodial death of Hamid in Raisen District, Madhya Pradesh.[4]

The National Human Rights Commission took Suo-motu cognizance of a report which appeared in the Newspaper NAVI DUNIYA,[5] Bhopal on 15th June 1995 regarding the custodial death of one Hamid, son of Hafizulla. Hamid was picked up by the police from his house for questioning in a theft case reported by his employer, though in fact he was not present at the place on the date of the alleged theft. He was beaten mercilessly and released on 13th July 1995 and again arrested on 14th June 1995 on the night of which he died. The commission called for a report from the Government of Madhya Pradesh. In the report submitted by the State Government stated it is that he was Summoned on 14th June 1995 to the police station and had consumed poisonous substance while in police custody. The inquiry report submitted by the Additional Magistrate revealed that he was illegally detained by the police from 8th June 1995 to 13th June 1995. The post mortem report indicated that there were simple Injuries. The officer incharge failed to take him to the hospital. But the office records shows that he was summoned on 11th June 1995, and on 13th 1995 and subsequently released on both the dates after interrogation.

The commission after inquiry found the blatant manner in which records had been tampered with by the very people who were duty bound to maintain law and order and to up hold the "Rule of law". Every citizen has the right to life,[6] which includes freedom from illegal confinement and torture. The commission recommended that Government of Madhya Pradesh pay Rs. 50,000 as compensation to Hamid's family, it also recorded to take proceedings against the errant police officials.

4. Case No. 1460/95-96/NHRC.
5. See Magazine NAVI DUNIYA, dated 15th June 1995.
6. Art. 21.

Regarding the death of workers in Silicon factories of Madhya Pradesh[7] a news item appeared in "Sunday Observer" in September 1996, captioned "Death on the air". The commission took *Suo-motu* cognizance of the news item and called for a report from the Government. In 134 state factories in Mandasur District of Madhya Pradesh, the health of the majority workers in these factories were affected due to inhalation of silicon dust. The Government provides all medical facilities to the workers. They were even provided with pensions on the declaration that the workers were affected by the disease, which was an occupational hazard. The owners did not install the BHEL machinery to minimize dust particles which affected the workers.

The Commission issued direction to the State Government to ensure installing of BHEL machinery in the factories to prevent pollution. The commission observed that the Right to Health and Medical care is a Fundamental Right under Art. 21, read with Art. 39 (e), 41 and 43 of the Constitution of India. The duty of the state, under the Directive principles of state policy is to ensure the protection of health of the workers employed.

The Commission took suo motu cognizance of a news item published in the "Statesman"[8] captioned "Jawan rapes mentally disturbed girl in public."[9] The report from the ministry of Defence confirmed the rape of ABC (name withheld to protect identify)[10] and awarded 8 years rigorous imprisonment to the Jawan and dismissed him from service. The commission also recommended that the girl also needed to be compensated and as a result the District Magistrate, Kokrajhan directed the government to pay a sum of Rs. 25,000 as compensation to the parents of the girl.

Killing of 35 Sikhs by militants in Chatisinghpora, Jammu and Kashmir;[11] The Commission took suo-motu cognizance of reports dated 22 March 2000 which appeared in all leading Newspapers, condemning the killing of 35 members of the Sikh community in chastisinghpora village, during the night of 21 March 2000 by heavily armed militants. The commission issued notice to the Chief Secretary and Director General of Police, Government of J.K and directed to provide adequate safety to the village people.

7. Case No. 7894/96-96/NHRC.
8. See Statesman dated 10th April, 1999.
9. Case No. 27/3/1999-2000.
10. See Right of Privacy under Art. 21 of the Indian Constitution.
11. Case No. 206/9/1999-2000.

Illegal detention of three year old child for ten years due to apathy of police and other authorities.[12] The incident had been reported in the "Times of India" under the caption "witness spends 10 years in custody, case yet to begin." The girl's father murdered his own mother and she is the only eye witness in the case and she was kept lodged at Lilvahahome and produced before the court, as and when required. When she was shifted from Lilvahahome from a child care Home (run by an NGO) on the order passed by the IAS officer, for proper Up keep, schooling. When the NGO moved the learned court for approval of transfer, the learned Judge termed the act as highly irregular and asked for explanation against her transfer to lilvahahome.

The Commission expressed its shock, at the inhuman, and apathetic manner in which the case was handled by the police and other authorities and the court not even cared to pass on order for her future guardianship. The Commission also recommended that a sum of Rs. 50,000 be deposited in her name through a court guardian.

The Commission relied on the Universal Declaration of Human Rights 1948, convention of the Rights of the child.[13] That in all actions concerning children, whether undertaken by public (or) private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Commission also took *suo-motu* cognizance[14] of a news item that appeared in Frontline on 3rd August 1999 captioned, "Tirunelveli Massacre". It reported that 17 persons had lost their lives following attacks on a procession that had been taken out in support of the labour struggle in the Manjolai Tea Estates. In response to a notice of the NHRC, the State Government indicated that it had set up a commission of inquiry to look into the incident and that it had made payment Rs. 2 lakhs to each of the families, of those who had lost their lives.

In mass cremation of unidentified dead bodies by Punjab police case, referred by Supreme Court, in regard to the objection relating to the time limitation on its jurisdiction, the commission took the position that the Supreme Court, by its order had designated the commission as a body sui generis to carry out the functions and to determine issues as entrusted to it by the Supreme Court. In addition it is a body Sui Juris created under the Act of Parliament.

12. Case No. 78/25/98-99.
13. Art. 3 of the Convention on the Rights of the Child, 1989.
14. Case No. 465/22/99-2000.

Under section 12 (f) of the Protection of Human Rights Act 1993, the commission has a statutory responsibility to study treaties and other International instruments on human rights and make recommendations for their effective implementation. The Commission's views in regard to the need for India to develop a national policy and possibly a National Law, fully in consonance with 1951 United Nations convention relating to the status of refugees and the 1967 protocol on the subject have been recounted in its reports.[15] The Commission continued to take suo motu cognizance of news item highlighting the plight of Srilankan refuges in Tamil Nadu, Karnataka. Commission based on a report of the people union for civil liberties, an NGO, the commissions examined allegations of human rights violations of 56 refugees held in special camp in Vellore. While concluding its proceeding in this case, The commission resolved to pursue the general issue relating to the enactment of a national legislation relating to the status of refugees. In response to questions by the commission, the Government of India indicated that the possibility of enacting legislation relevant legislation was being examined, as also the possibility of signing the 1951 convention on the status of refugees and the 1967 protocol on the subject.

Section 36 (1) to provide for NHRC to entertain, either suo motu, or at the instance of the aggrieved person, any matter already considered and decided by any other commission except on the question of compensation, with a view to giving the commission a certain power of individual superintendence and powers similar to those exercised by the Supreme Court.

The commission has examined complaints, or acted suo motu, on reports of violations of human rights in areas affected by terrorism and insurgency it has continued to insist on full accountability in accordance with the demanding standards that nation has, as a democratic state governed by law.

Conclusion:

We live in the era of liberalisation, Privatisation and Globalisation, where everything has become more materialistic. Due to this, more and more Human Right, violations are witnessed. Earlier we thought that the State or its Agencies are the main violators of Human Rights. Today many Human Rights violations are carried out not by the State or its agencies but by private bodies and Individuals. This posses a severe problem for protection of Human Rights. Many a

15. Report of the NHRC, 1999-2000.

a breach of international obligations of States and with what consequences?

Conditions for fulfillment of obligation

Do diplomatic assurances for fair treatment relieve the sending state from its refoulement obligation of not removing a person to an extra-territorial situation where he might be subjected to torture? Is the receiving state liable for the violation of international obligations as well as the assurance? How does the responsibility of the receiving and sending states differ in this respect?

State Responsibility for Internationally Wrongful Acts

When relying on diplomatic assurance to what extent are the states responsible for the commission of internationally wrongful acts such as torture?

Opportunity of hearing and the remedies

What is the position of the individual vis-a-vis the state responsibility of not removing a person to a risk of torture? Is there any state obligation to provide effective opportunity to challenge the reliability and adequacy of the diplomatic assurances? What, possible remedies are available to the States and individuals for breaches of diplomatic assurances?

Conclusion

It is opined that the unrestricted use of diplomatic assurances without a well-established system of checks and balances will undermine the existing scheme of state obligations and the international system of protection against torture. This underlines the significance of a detailed study on how far the law of state responsibility can be applied in the emerging area of diplomatic assurances to resolve the outstanding issues.

Real Estate Crimes

A. Arumujga Nainar*

Crimes relating to property date back to immemorial when the concept of personal property was legally recognized by the State. Due to the phenomenal sky rocketing of cost of land crimes relating to Real Estate have shot up alarmingly and have been not only grabbing the attention of the Police Force but also the precious time of the Courts in recent times.

Types of Real Estate Crimes

Real Estate crimes may be broadly classified into three types. (1) Cheating for gain (2)Forgery of documents (3) Impersonation.

Cheating

Sometimes genuine owners of the property due to migration to other places or countries are not able to look after their properties properly. Land grabbers take this opportunity and take possession of the land, create some bogus Title Deeds and sell this property to other gullible purchasers without the knowledge of the real owner. They may also transfer the Title in favour of their own family members or others close to them, so that they can enjoy the property later for themselves. There are many instances, where properties let out to greedy persons for long periods were disposed off by the tenants themselves posing as genuine owners, betraying the trust placed upon them by the unsuspecting Landlords. There are also instances where original owners themselves have cheated careless purchasers by selling the same property to more than one person through subsequent transactions.

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times due to lack of powers, lack of money, or time, victims of Human Rights violation do not approach the court or any other Individual Institutions. The courts of India generally lack the powers to take *suo-motu* action, as some one has to set the wheels of Justice on motion. Under these circumstances the *suo-motu* power of NHRC is a significant move forward in implementing Human Rights. Saddled with the power to take *suo-motu* actions the NHRC has earnestly endeavoured to implement Human Rights. This is evident from the above discussions. It is healing to note that NHRC is moving ahead towards greater implementation of Human Rights, the National Human Rights Commission has become a role model to state Human Rights Commission. Where Human Rights violations are day-by-day becoming complex, the *suo-motu* power of NHRC is welcome move to lead people in the right direction.

Questions of State Responsibility for Use of Diplomatic Assurances in the War on Terror under International Law

S. R. Subramanian *

Globalized human rights and the global terror

While globalization has long been touted as a force for the good, at least for the industrialized world, the increasing incident of terrorism have highlighted the darker side of the globalization. While the mobility of ideas, people and technology have created new opportunities for realization of human rights, conspicuous through the examples of establishment of the International Criminal Court and the trial of international crimes, human rights is also negatively influenced by the same processes of globalization.

With the end of colonization and the adoption of Universal Declaration of Human Rights, International Covenants and other regional instruments, human rights have almost become the norm of the post-colonial world. Though the worldwide application of human rights was never free from criticisms and controversies, including culturally unrelativistic and highly politicised, the so-called first world was fortunate to maintain a culture of human rights. However, with the onset of the organized violence by the non-state actors at the international level (the September 9/11 attacks) and the governments trying to control them by all means, human rights have become the casualty, in both home and abroad. The civil society groups across the countries have started criticizing the governments of the first world for flagrant violations of human rights. The countries, which were

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instrumental in the incorporation of the human rights protection at the international level, have currently been found criticized for their dwindling human rights record in the context of counter terrorism measures.

Another worst case is that the denial of human rights have also entered into the world of international relations, with countries campaigning for the war on terror actively and secretively cooperating with each other to the detriment of human rights. It took many forms including the controversial extra-ordinary renditions etc., In view of the high, standards of human rights protection expected at home, the governments of United States, United Kingdom, Canada, Sweden and The Netherlands, among others, have transferred the alleged terrorists to mostly countries in the Middle East, such as Jordon, Egypt, Morocco, Turkey and Uzbekistan, on condition that they will not be subjected to torture. Such state practices circumventing the existing obligations of the state give rise to a number of issues under international law. The purpose of the article is to highlight some of the issues inherent in the discussion of this topic.

Prohibition of torture under International law

The prohibition of torture and other forms of ill-treatment is universally recognized and is enshrined in all of the major international and regional human rights instruments.[1] The prohibition of torture is also regarded as the principle of customary international law binding on all states and is generally considered to be absolute and non-derogable in character.[2] Taken together with the decisions of relevant monitoring bodies, international law sets out several obligations on States, including the requirement to criminalize, investigate and punish acts of torture and conspiracy in torture and to facilitate redressal of torture victims.[3]

Though these state obligations are limited by the territorial jurisdiction of the state, the states were obligated not to remove a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture (non-refoulement obligation).[4]

1. For Instance, Art.1 and 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Art. 7 of the International Covenant on Civil and Political Rights; Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. All Party Parliamentary Group on Extra-ordinary Rendition, "Torture by Proxy: International Law Applicable to Extra-ordinary Renditions (Briefing)", (New York: NYU School of Law, 20005), p.9.
3. Art. 4 and Art.12 of the UNCAT.
4. Art. 3 of the UNCAT.

Further, Art. 16 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts provides that the state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (i) that state does so with the knowledge of the circumstances of the internationally wrongful act and (ii) the act would he internationally wrongful if committed by that state. This demonstrates that international law not only prohibits torture but also prohibits the complicity in torture (principle of complicity) and tries to keep the relations among states within the bounds of international law.[5]

Use of Diplomatic Assurances in the War on Terror

According to a study by United Nations High Commissioner for Refugees, the term "diplomatic assurances' as used in the context of a transfer of a person from one state to another, refers to an undertaking by three receiving state to the effect that the person concerned will be treated in accordance with the conditions set by the sending state or, more generally, in keeping with its obligations under international law.[6] Reliance on diplomatic assurances has been a long-standing practice in international relations, where they serve the purpose of enabling the requested state to extradite without acting in breach of its international human rights obligations that would otherwise preclude the surrender of the individual concerned.[7]

However, the recent use of diplomatic assurances in the context of war on terror has the effect of outsourcing the torture to the less protective jurisdictions in the world forsaking the state obligations of human rights and also with little or no protection to the individual concerned. The problem with the use of diplomatic assurances is that they do not constitute legally binding promises.[8] Broadly speaking, the instrument of assurance do not provide any mechanism for its enforcement nor the failure to fulfill the promise entail legally actionable remedy at the international level, once the person has been transferred to the receiving state.[9] As diplomatic assurances are solicited to ensure fair treatment of the transferred person in the transferred state, questions arise as to the conditions under which the sending state may

5. See Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001.
6. United Nations High Commissioner for Refugees, *"UNHCR note on Diplomatic Assurances and Refugee Protection"* (Geneva: UNHCR, 2006), p. 2.
7. Ibid at p. 2.
8. Ibid at p. 3.
9. Ibid at p. 3.

rely on such assurances as a basis for removing a person from its territory in keeping with its obligations under international and national standards.[10]

Divergent opinions are also expressed on how to deal with the use of diplomatic assurances. While civil society groups, citing the non-derogable character of prohibition of torture, argue that the diplomatic assurances are unacceptable in the realm of torture,[11] States engaged in the war on terror maintain that the provision of diplomatic assurance per se is not illegal under international law,[12] implying that they can be developed and strengthened The Council of Europe, echoing the views of the leading human rights advocacy groups across the trans-Atlantic, is not in favor of a new international instrument specifying state obligations in the case of deportation of terrorist suspects and urges member states not to draft any standards or minimum requirements as this would de facto indirectly legitimize illegal practices under international law.[13] Earlier, the UN Special Rapporteur on Torture did not rule out the possibility of use of diplomatic assurances, provided effective monitoring mechanism is in place.[14]

The state practices also seem to vary across jurisdictions with few jurisdictions expressly provide for the use of diplomatic assurances in law. While the relevant federal legislation of US allows the use of diplomatic assurances even in the context of torture,[15] no European legal instrument, expressly provides for the reliance on diplomatic assurances as a safeguard against torture or ill-treatment, albeit the European Convention on Extradition, the Framework Decision on European Arrest Warrant and the Protocol amending the European Convention on the Suppression of Terrorism permits their use in limited circumstances.[16] The academic viewpoint has been to make the assurances transparent, reliable and enforceable rather than to condemn and risk further situations where States enter into secret arrangements, which are difficult to monitor.[17]

10. Ibid at p. 3.
11. Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture", April, 205.
12. The Government of the United Kingdom takes a position on this line.
13. Report of the Group of Specialists on Human Rights and the Fight Against Terrorism, Steering Committee for Human Rights, Council of Europe, 3rd April, 2006.
14. The 2006 Report of the Special Rapporteur on Commission on Human Rights on Torture comments on the non-binding nature of these assurances.
15. 8 C.F.R. & 208. 18(c).
16. E.g., Art. 5(1) of the Framework Decision on European Arrest Warrant.
17. Sara Isman, *"Diplomatic Assurances - Safeguard Against Torture or Undermining the Prohibition of Refoulement"*, Lund University, p. 9.

The decisions of the European Court of Human Rights in the cases of *Chahal* v. *United Kingdom*,"[18] *Shamayev* v. *Georgia and Russia*[19] and *Mamaikulo* v. *Turkey*,[20] despite their jurisprudential value, do not resolve all the questions concerning the use of diplomatic assurances, in fact, they once again raise the question of whether the diplomatic assurances should ever be accepted as an adequate safeguard against potential torture when pro-offered by a state where torture violations are systematic."[21]

In spite of the high importance of the questions involved, there has been a relative paucity of legal scholarship in this area. Gregor Noll in his Diplomatic Assurances: The Silence of the Human Rights Law shows how these assurances deny the articulation of human rights violations on multiple levels and opines that the silence thus produced is not accidental, but must be seen as the productivity of human rights law in a system of nation-states.[22] Martin Jones in his Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings demonstrates how diplomatic assurances exist at the crossroads of international law, between the state centered model of treaties and the modern human rights centered model and concludes that the diplomatic assurances as they are currently practiced, do not qualitatively change the position of the individual facing the removal to a risk of torture.[23]

Rising Concerns and the Legal Issues

The indiscriminate use of diplomatic assurances to prosecute the 'War on Terror" raises a number of questions of international law:

The nature of states obligations and the consequences for its breach

Whether diplomatic assurances create binding obligations for states? If diplomatic assurances in the realm of torture are permissible in limited circumstances, when can a state rely on diplomatic assurances for the removal of a person from its territory without violating its obligations'? Whether and if so, when the breach of assurance will be

18. ECHR No. 22414/93.
19. Application No. 36378/02.
20. Application No. 46827/99 and 46951/99.
21. Human Rights Watch, "Empty Promises: Diplomatic Assurances No Safeguard Against Torture", April, 2004.
22. Gregor Noll, "Diplomatic Assurances and the Silence of Human Rights Law", Melbourne Journal of International Law, 2006.
23. Martin Jones, *"Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings"*, **European Journal of Migration and Law**, Vol.8, No.1, 2006, p. 9-39.

Power of Attorney and its dangers

A lot of transactions are covered by Power of Attorneys some of which are given for genuine reasons and many others in order to save or to cheat upon Stamp Duty and Registration Fees. Usually, the Power Agent pays the whole amount of consideration to the Principal for the property and gets the power in his favour. If the Agent happens to be a Real Estate Promoter or Speculator, he takes a lot of time for preparing the layout, drawing plans, getting approval from the Local Body and other connected chores. On the other hand, speculators invest in many properties and wait for price escalation and sell the property after a few months using the Power of Attorney obtained from the Principal.

In both of the cases, there is a lurking danger and that is the Cancellation of the Power of Attorney by the Principal with or without notice. In some cases, where the Power Agent happens to be a Real Estate Promoter, he sometimes pays or promises to pay the Principal, the consideration, in instalments. Out of human nature, misunderstandings and quarrels arise between them, which may lead to a break up of the contract and ultimately the Cancellation of the Power of Attorney. Such cancellation should immediately be brought to the notice of the Power Agent as per Law.[1] But unscrupulous Principals cancel the Power often without notice and they themselves sell the property to some third party. The problem arises, when the Power Agent, ignorant of the fact that the Power has already been cancelled and rendered invalid, transfers the property to a person of his choice for valuable consideration as per the terms of the now non-existent Power which has been cancelled. It may also happen in some cases that the Power Agent knowing very well that the Power has been cancelled by the Principal deliberately chooses to cheat another person by selling the property on the authority of a cancelled Power of Attorney which is "non est" in the eye of Law. Meanwhile the Principal also unwittingly, transfers the property to someone which has been already sold to another person by his erstwhile Power Agent, by suppressing the fact that his power to sell has been cancelled.

Confidence Tricksters

Public themselves under certain circumstances bring their own downfall in the matter of Real Estate dealings. Usually, Financiers advance money on properties by way of Mortgage Deeds. To avoid stamp duty, some Financiers and Mortgagees collude and execute Agreement for Sale coupled with a Power of Attorney in favour of the

1. As per Sec. 203, 206 and 207 of the Specific Contract Act.

Financier or his nominee. The consideration setforth is also very meagre. When disputes arise between the Financier and the borrower, the Financier either dispose the property by using the Power of Attorney or opts for Specific Performance [2] before the court of Law as per the Agreement to sell andget a decree in his favour compelling the debtor to hand over the property at a very cheap price. In the above case, judicial remedy is very difficult for the owner of the property since there is nothing per se illegal in the above process.

Forgery

Forgery is another branch of Real Estate related crimes. Forgery in the matter of Real Estate pertains to preparation of bogus documents like Title Deeds, Pattas, Encumbrance certificates and other Registration and Revenue records. Criminals often obtain copies of documents and prepare anti-dated documents by using old unused stamp papers dating several years back. Signature of original title holders are forged upon these bogus documents. While preparing the bogus deeds, the forgers usually forge the signature as they like. But when high stakes are involved, original signatures are procured and exactly forged so as to appear as genuine. Afterwards bogus rubber stamps and seals as used in the Sub Registrar offices are also impressed upon the documents. Lastly all requisite particulars are diligently written upon the Deeds and the signatures of the registering officers are also forged.

We come across so many of such forged documents; some of which could be declared fakes, even if held at a considerable distance, because of the cheap methodology adopted by the forgers. Some bogus documents appeared so genuine that these could not recognized as fakes even after close scrutiny. The discolourisation of the stamp papers and the use of appropriate ink were so realistic, that the documents appeared old and original. But there are always some tell-tale marks that betray the tricks. Especially the forgers use rubber stamps for forging the seal of the Sub Registrar. These rubber stamps give a clear impression displaying all the details sharply. In contrast the registering officers use brass metal seals which do not give sharp impressions. Some metal seals have become worn out due to age and continuous usage. But the rubber stamp seals on the forged documents are crisp and clear without showing any sign of wear and tear.

Forgers sometimes miss upon crucial information due to ignorance. One forger, used a forged seal of the Sub Registrar. Actually there was no such Sub Registrar, because the above Sub Registrar was attached to the District Registrar's office and so the seal should have

2. As per Sec. 10 of the Specific Relief Act.

read as " Seal of the ..... District Registrar".

Forgery Sans "mens rea"

In certain cases, genuine owners of the property themselves resort to forging of documents out of necessity when they lose original title deeds. Lot of documents are misplaced or lost in transit or in fire or flood every year. In a case, a document was referred by a Manager of a Nationalised Bank for verification of authenticity. Even though the document was found to be a forged one even at the outset, the transaction contained in the document was confirmed to be genuine when compared to the official copy. When the Bank Manager confronted the forger later, he confessed that he lost the original deed and since the Bank insisted upon the deposit of original document for the release of the loan, a huge amount at that, he was left with no other option than to create a fake document copying the contents from the certified copy issued by the Registration Department.

Not only documents and revenue records are forged to dispose off property. In recent times, documents of identification are also forged for getting documents registered at the Sub -Registrar offices. Recently, the Registration Department had made it compulsory to prove the identity of the parties, not only through two witnesses, but also by documentary evidence regarding identity. As a result, forgers have started forging and counterfeiting documents and identity cards like, voter identity card, driving license, family ration card, Patta, Bank Pass Book, etc. to procure registration.

Impersonation

The most daring of the crimes related to Real Estate transactions is "Impersonation". Criminals after identifying a vulnerable victim, whose property lies uncared or unattended for, prepare forged documents with the help of previous records and employ some imposter or themselves masquerade as the genuine owner before the intending purchaser and also at a later stage before the registering officer. These imposters take the name of the original owner to execute documents and also sign before the registering officer as 'so and so' who they are not.[3] They are identified by some witnesses who at times may themselves be imposters with false addresses. This is necessary to mislead the Police, when there is an investigation later.

All the above crimes are punishable under Sections 420 (Cheating), Sec.120B (Criminal Conspiracy), Section 405,406 (Criminal Breach of

3. Identifying witnesses are also liable for penalty under Sec. 82 of the Act of 1908 for False Identification: vide: *Nilkantha Rao Sandapul* v. *Emperor* AIR 1922 Nag. 86: 23 Cr. L.J. 202.

Trust), Sec.441, 447 (Criminal Trespass), Sec.465,466,468(Forgery), Section 472, 473, 474, 475, 476 (Counterfeiting), Sec.416,419 (Impersonation) of the Indian Penal Code read with Sec. 81 and 82 of the Registration Act, 1908. For offences under Sec.82 of the Registration Act, 1908 fraudulent intent or motive which is essential for conviction in a Criminal trial is not necessary for prosecution or conviction.[4]

Remedial Measures

The first and foremost remedial measure to prevent frauds relating to Real Estate is awareness of the dangers involved and to proceed cautiously at every step of a Real Estate transaction. If the Vendor is a reputed concern or company, the Purchaser can rest assured since the long established concerns take so many precautions themselves lest their reputation get spoiled among the Public. A visit to the site is very much essential before clinching a deal. One should personally visit the property proposed to be purchased and make extensive local enquiries regarding the Title. In this approach any hidden encumbrance not reflected in Registration and Revenue records will be known to the purchaser in advance. Likewise, a visit to the locality of the vendor or the Power Agent and discrete enquiries regarding his reputation and previous dealings will go a long way in attesting to the reliability of the vendor. The records and Indexes kept by the Registration Department[5] will assist the purchaser in determining the Title of the vendor, but searches in such records should be made from various angles to bring out all the encumbrances relating to the property, atleast for 30 years. In many States the Purchasers or their advocates themselves search the registration records to doubly make sure that the title is clear.

In the State of Tamilnadu there is a legal provision that the purchaser or his Advocate may himself make the search[6] even if there is a remote possibility of omission if the search is made by a departmental employee due to heavy workload. In short, it is advisable to avoid a transaction even if there is a faint signal of doubt not only upon the title, but also upon the person who offers the property for sale.

If one purchases from a Power of Attorney Agent, the Power of Attorney should be checked for its validity. A visit to a Sub Registrar's office and enquiry whether the power is alive or has been cancelled, is to be done in every such case. Lastly, if you have a property and

4. *Emperor* v. *Tun Aung Gyaw*, 3 L.B.R. 222; *Emperor* v. *Kousalya* Bom LR. 138.
5. Kept as per Sec. 55 of the Registration Act, 1908.
6. As per Sec. 57(1) of the above Act.

happens to live away from that for a considerable period of time, take pains to visit it personally between intervals and check up for any encumbrances occasionally with the Sub Registrar's office. If you live very far, say in a foreign country, make friends or relatives do the same for you.

Judicial Remedy

Judicial remedies in Real Estate related crimes and frauds are available in Law, ie., Civil as well as Criminal. Civil remedies include filing of a suit to discredit a registered Title deed brought out by forgery or impersonation or even by ignorance and getting a decree in favour of the real owner and declaring the title in his favour.[7] Title deeds obtained by using bogus Power of Attorneys or previously cancelled Power of Attorneys also may be declared invalid in this manner. The courts have always consistently held that title deeds obtained by fraud are sham.[8]

Remedy through Criminal Law involves prosecution of the culprits by filing criminal complaints before the Police or the Magistrate against the forger, imposter or land grabber who illegally obtained a title deed and also trespassed and encroached upon another man's property. If the fraud or impersonation is brought to the notice of the registering officer in his official capacity he may himself commence the prosecution.[9] Otherwise the affected person may himself prosecute the offender before the Magistrate.[10] Once the process of formal registration is over the onus of proving the fraud is on the complainant.[11]

Conclusion

It is a welcome development that the Police Department is currently taking a serious view of the crimes relating to real estate and a habitual offender in this regard was booked under the Goondas Act recently by the Chennai Police. Similarly the Madras High Court recently has come down heavily upon the land grabbers in a criminal case and ordered[12] the Chennai City Police Commissioner to file F.I.R. and prosecute the offenders in a land related fraud.

7. As per Sec. 9 Order 7 Rule 1 of Civil Procedure Code 1908 and also under Sec. 25(b), 27(c) and (d) of Tamil Nadu Court Fees and Suit Valuation Act, 1955.
8. *Mudunuri Gopala Raju* v. *Yannbathula Venkanna* AIR 1984 A.P. 249 at p. 250.
9. See 83(1) of the Registration Act. 1908.
10. AIR 1972 SC 928-930; 1972 Cr. L.J. 632.
11. *Rampatti Kuer* v. *Simrekha Devi*: 2004 (18) A.I.C. 295 at p. 300 (Pat).
12. *Benjamin* v. *Commissioner of Police, Chennai* in Crl. O.P.No. 16831/2007 in order dated 9.7.07.

Dark Sides of Bright Light
- Combating Light Pollution

Dr. G. Rajasekar *

Environmental pollution now constitutes one of the biggest hazards not only to human existence but also to the enjoyment of all the gifts that nature has so kindly bestowed on mankind. The rapid growth of industrialisation and urbanisation without due regard have resulted in the problem assuming staggering proportions and this has become a major concern of the international community[1].

Commonly speaking, pollution refers to a process by which a resource is rendered unfit for some beneficial use owing to physical, chemical or biological factors. There are various kinds of pollution that affecting the quality of the gifts of nature. One among them is light pollution. Light pollution is most serious in its implication for the health and the well being of the citizens and existence of flora and fauna.

It may be pointed out that the developments and innovation in the field are no doubt boon to the mankind but it has dark side as well, which inter-alia includes the generation of hazardous lights. This problem is of very recent origin.

Light pollution: what it is?

Light pollution refers to the light that people find annoying, wasteful or harmful. It is also known as photo pollution or luminous pollution.[2] Light pollution causes much damage to the environment

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1. Dr.A.David Ambrose, *"Transfrontier Environmental Protection New Challenges and International Response"*, **Law and Social Problems** (Vol.5,1997), at p. 71.
2. Bob Mizon, Light Pollution Response and Remedies (Springer 2001), sources from http://en. wikipedia.org/wiki/lightpollution. dt. of visit 15.09.2006.

and health like other forms of pollution such as air pollution, noise pollution, water pollution and soil contamination.

Light pollution may be defined as "an adverse effect as a result of man-made lights". In other words it can be said as excess or harmful of light. Several species including plants, animals and human beings are negatively affected by light pollution. Light pollution is a broad term that is generally accepted as referring to multiple problems that are caused by inefficient, annoying or arguably unnecessary use of artificial light.[3] Specific categories of light pollution include light trespass[4], glare[5], clutter[6], and sky glow.[7] Light pollution is a major problem to the people today. But it is a neglected one less cared.

Light pollution is a side effect of industrial civilization. The main sources of light pollution are domestic lighting, advertising, commercial properties, offices, factories, street lights and lit sporting venues. It is most severe in the highly industrialized, densely populated areas of United States, Europe and Japan. Light go in too many directions, which cause most of light pollution. The world would be a better place for science, animals and people if light pollution doesn't exist. Now a days light pollution occurs all over the world.

Light Poilution and its impact

Technically speaking light pollution is a component of electromagnetic waves such as ultraviolet and infra-red rays. These rays are harmful and destructive in nature when things like Fabrics, Dyes, Paints, Plastics, Stones and Plants are exposed to these rays, they got damaged. These rays also destroy the valuable treasures like museums, art galleries, shops and even homes when they are directly exposed to these rays. Hence it may be construed that light pollution therefore from this perception the uncontrolled light exposure to such materials.

3. T. Longore and C. Rich *"Ecological Light Pollution" Frontiers in Ecology and the Environment* 2(4) (2004) 191-198. Source from http://en.wikipedia.ora/wiki/lightpollution.
4. 'Light trespass' occurs when unwanted light enters one's property, for instance by shinning over neighbour's fence.
5. 'Glare' is often the result of excessive contrast between bright and dark areas in the field of view. For eg; glare is associated with directly viewing the filament of an unshielded or badly shielded light.
6. 'Clutter' refers to excessive grouping of light. Clutter is particularly noticeable on roads where the street lights are badly designed or where brightly lit advertising surrounds the roadways.
7. 'Sky glow' is the combination of all forms of lights reflected from the illuminated lights that escapes in to the sky and also from badly directed light in a particular area that escapes in to the sky being scattered by the atmosphere back towards the earth.

Artificial light was meant to extent day light enable visible task to be performed comfortably and effectively. Specific task requirements and comfort have been sacrificed to the craze of increasing the output of light at night. "Light pollution not only reduces the pleasure of nature but also defiles the surroundings because it discolours the natural habitat[8]. The rapid growth of industrialisation give rise to fierce competition and such fierce competition brooks various attempts to launch their products has assumed multi-facet dimension in the developing society. It is a fact globally accepted that advertisement of a product is indispensable part of this competitive industrial world. Of late, putting up hoardings along busy streets will certainly affect the environment and spoils the skyline of city.[9]

Good example for the artificial light pollution in our country is at Delhi. Delhi is a cosmopolitan city and the capital city of India where in Jawaharlal Nehru Stadium and the bus terminals where the whole skyline is illuminated with wasteful light and energy consumption.[10]

Energy Loss

The excess use of lights as said as energy loss. The over illumination of light or non-beneficial light is termed as excessive use of light.

Generally speaking the using of light is closely associated with human life. This can be witnessed from using the illuminated lights as sign of his happiness during the family functions and religious festivals apart from the domestic purposes. Of late, the lights which are earlier used as a sign of happiness become a menace as it is made as a tool in the hands business men to advertise their products. Many a time the state also add fuel to this problem by their policy in the name creating Hi-Tech cities, beautification of cites for developing tourism etc.

Damage to the Ecosystem

God created the living beings so as to exist with a natural pattern of light and dark. Therefore if any disruption caused to it will affects the behaviour of these living creatures. Light pollution can confuse animal navigation, alter competitive interactions, changes predator-prey relations, influences animal physiology. Night blooming flowers that depend on moths for pollination may be affected by night light.

8. Source from: www.dnr.state.wi.us/org/caer/etc/earth/lightpollution.htm. dt. of visit 15.10.2006.
9. *Ashwinjayal* v. *Municipal Corporation Greater Mumbari* AIR 1999 Bom. 35.
10. Excerpts from, K. Kannan, Combating Light Pollution, The Hindu, dt. 03.12.2001, Delhi.

This results in declining of reproduction of plants and affects the long term ecology.[11]

Effect of light pollution on Health

The most important consequence of light pollution is the health hazard caused to mankind. Some of the diseases caused to the human community due to light pollution are headache, depression, sexual under performance, blood pressure, breast cancer etc.[12]

Light Pollution and Law

The international community considered this earth and the celestial bodies including moon are the common heritage of mankind. So, it is the right of a man to enjoy the same without any interruption or hindrance.[13]

Constitutionally speaking, it is the duty of the State and Citizens to protect and improve the environment to enjoy the same in a peaceful manner.[14]

Though many International conferences relating to environment were held, the world delegates who participated in those meets failed to take into account of the light pollution existing in the developed countries like US, UK and Japan etc.

Indian law makers, failed to consider including provisions regarding light pollution even in the so called comprehensive Act, the Environment (Protection) Act 1986. The Act defines ' environment' include "water, air and land and the inter relation ship which exists among and between water, air and land and human beings, other leaving creatures, plants, micro organism and property". But, it is silent about light pollution. The preamble of the Act says that the said Act was made pursuant to the decision taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972 in which India also participated.

The Government of India in 1972 after the Stockholm meet and

11. T. Longer and C.Rich, *"Ecological Light Pollution"* **Frontiers in Ecology and the Environment** Vol. 2(4) 2004, p. 191-198.
12. Susan L. Borks, **Managing Your Migrane** (Humanapress, Newjersy 1994) p.279 see also Andrew Baccm and John Weinman, **Cambridge Hand Book of Psychology and Medicine** (Cambridge University Press 1997) p. 9.
13. The Agreement governing on the Activities of the State on the moon and celestial bodies 1979 cf. Malcolm .N. Shaw, **International Law** (Fifth Edition, Cambridge University Press, 2004) p. 799.
14. Art. 48(A) thus runs as: the state shall endeavour to protect and improve the environment and to safe guard the forest and wildlife of the country. Art. 51A(g) to protect and improve the natural environment including forest and wildlife and to have compassion for leaving creatures.

established a National Committee on Environmental Planning and Co-ordination to advice on recommendations of improving the environment. For the purpose of protecting the environment from all its disaster, in the year 1980 a committee was constituted under the chairmanship of Shri. Tiwari. Both the committees had recommended various recommendations regarding the Legislative and Administrative Measures to be taken.

Based on the recommendations made by both the committees various steps were taken by the Indian Government to have a pollution free society.

The environmental aspects have been recognized in planning and development. In its successive five year plans environmental preservation and protection has received major place and stress[15]. The need for proper balance between development planning and environmental management has been acknowledged.[16] The sound environmental and ecological principles in land use, agriculture, forestry, wild life, water air, marine environment, minerals, fisheries, renewable resources, energy and human settlement have been emphasised[17]. During the second half of 1980's sustainable developments, harmony with environment and the environmental management received major thrust as the guiding factors for national development.[18]

Apart from administrative measures today state had enacted number of laws to protect environment.[19] Our Constitution the supreme law of the land provides for environmental protection under Arts 21, 48 A, 51-A (g) in the context of our national dimensions of human rights, right to life and liberty and pollution free environment. Enjoyment of life and its attainment and fulfillment guaranteed by Art 21 embraces the protection and preservation of nature's gift with out which life cannot be enjoyed.[20] Though all these measures were taken it is surprising to note that there was no whisper about light pollution in any of the legislative or administrative measures.

The pollution emerging out of sound and light in and around Taj Mahal, a monument was first brought before the Central Pollution

15. Planning Commission Govt. of India IVth Five Year Plan 1969-70 to 1973-74.
16. Ibid, Vth Five Year Plan, 1974 to 1979.
17. Ibid, Sixth Five Year Plan 1980-1985 p. 343.
18. Ibid, VII Five Year Plan 1985-1990 Vol: II, p. 385-387.
19. The Environment (Protection) Act, 1986, Air (Prevention and Control of Pollution) Act, 1981, The National Environment Tribunal Act, 1995.
20. Dr. Priti Saxena, *"Combating Pollution - Concern for all to create Environmental Awareness."* **AIR** 2002 Jor. 75 at p.76.

Control Board, New Delhi at the time of great musician Yani's concert. The board came with a finding that, filters are used to block harmful ultraviolet rays which affects plants and human beings.[21] So there was no question of light pollution arose. The another incident is when the Tourism authorities decided to illuminate Taj during night hours for the viewers to have glittering look of the structure. The Supreme Court in the protected monument case directed the tourism department to get a clearance certificate from the NEERI's that the illuminating of light will not affect the edifice of Taj Mahal.[22]

In Ashwin Jajal Case,[23] using of commercial advertisement in neon light sign boards was questioned in the Bombay High Court. The Court observed that it is not an unreasonable restriction on the right of free trade and not violative of Arts. 19(1)(a) and 19(1)(g) of the Constitution. Further, using of bright light being deterrent to peaceful sleep. Hence neon lights should not be allowed on residential premises.

Prior to this decision the Supreme Court in *Indian Council for Enviro Legal Action* v. *Union of India*[24] paved a way for getting damage as a remedial measures from the companies and other bodies causing pollution in any form by incorporating Polluter Pay Principle'. This principle should be extended to the light pollution incidents.

Measures to Combat Light Pollution

1. Use light only when it is really needed.
2. Switch of lights when they are not needed
3. Use light timers to light when a person away from his house.
4. Keep light directed towards the ground or exactly where it is needed.
5. Use light fixers that control light placement and brightness, minimize glare and save on energy efficient as well for street lighting, parking lots and security lighting.[25]

Light Pollution and Awareness

To stop the menace and tackle the problem of light pollution the general public can be made aware of this necessary evil by starting

21. Syed Firdus Ashraf and suparnverma, sound, light won't affect Taj, dust will says pollution board. Source from http://www.rediff.com/news/mar/15 taj. htm.
22. *M.C. Mehta* v. *Union of India and others* (2004) 8 SCC 784.
23. Supra note 9 at p. 36.
24. AIR 1996 SC 1446 at p. 1459.
25. Supra note 8.

light pollution campaigns, inducing other persons to join the fight against star glow. Putting up posters, urging people to turn off some of their extra light to save animals that suffers because of sky glow, light trampers and glare. Light pollution needs to become more well-known before it can be stopped.[26]

Conclusion and Suggestion

Present Scenario makes to conclude safely that any spill of light above horizon creates a "Blinders" that robs cities of views of the night sky. If on the other hand, light can be used as an architectural devise without wastage and spills, then it can be used to light up object and space without the glare that result in light pollution.

The task of artificial light has been forgotten as commercial interests have overriding lighting as a proposition. Over the past two decades, the developed countries have become aware of this and have focused there attention on creating comfort levels and standards of lights. The voice of light pollution in India is still a cry in the wilderness, though efforts are being made to create more awareness regarding the harmful effects of light pollution, combating light pollution is still a mirage. In order to get over from this necessary evil, such legislation may be enacted so as to guarantee pollution free light as one among the fundamental rights enshrined in Art. 21 of the Indian Constitution and also make light pollution as a 'nuisance' under common law, and is being added to the list of statutory nuisance under the Environmental Protection Act, 1986. Local authorities and people affected by light trespass will be able to take action. But specific exemptions may be given for some transport and sport facilities.

26. Light Pollution and the protection of the night environment, UNESCO, IDA Regional Meeting (2002) sources from http://www.un.org. dt. of visit 09.11.2006.