

**THE  
NUSRL JOURNAL OF LAW AND POLICY**

**Cite this Issue**  
**As**  
**Vol. 2 No. 2 NUSRL JLP (2015)**

The NUSRL Journal of Law and Policy is published bi-annually by the National University of Study and Research in Law, Ranchi. Articles and other contributions for possible publication are welcome and these as well as books for review should be addressed to the Executive Editor, NUSRL Journal of Law and Policy, National University of Study and Research in Law, Ranchi. Views expressed in the Articles, Shorter Articles, Book Reviews and all other contributions published in this Journal are those of the respective authors and do not necessarily reflect the views of the Editorial Board of the NUSRL journal of Law and Policy.

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ISSN: 2349-9982

Published by: Satish Upadhyay, Satyam Law International 2/13, Ansari Road,  
Daryaganj, New Delhi-110 002, India

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Printed in India

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Vol. 2, No. 2

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ISSN 2349-9982

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# **Approaches of the Supreme Court to Regulate Exercise of Discretionary Power of the Labour Court/ Tribunal to Interfere with the Quantum of Punishment Imposed by the Management**

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*S. C. Srivastava\**

**Abstract:** The biggest challenge for Indian Judiciary is how to provide uniform norms/guidelines to regulate the exercise of labour tribunal's power to interfere in the management's order of dismissal /discharge against delinquent workmen. Equally difficult task is who will regulate and how the conflicting judgments of Supreme Court may be followed and applied by subordinate courts and tribunals. This paper seeks to examine and evaluate the decisions of the Supreme Court on exercise of tribunal's discretion in respect to quantum of punishment awarded by the management in disciplinary matters.

**Key Words:** Discretionary power of Labour Court, Dismissal of workmen, Doctrine of proportionality, Misconduct by employees.

## **INTRODUCTION**

In day-to-day administration, management is called upon to take *bona fide* decisions against erring workmen. It is also called upon to take disciplinary action against a workman who is found guilty of serious misconduct such as intentional damage to the property of the concern, abuse and assault of senior officers or other employees, theft, misappropriation, corruption, sabotage or other serious misconduct and instigation, abetment or incitement of workers of the concern to participate in the

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aforsaid activities. These activities encourage indiscipline and render day-to-day running of the concern impossible. In such situation management takes disciplinary action (including dismissal ) against erring workmen. However decided cases reveals that in several cases the tribunals/ Courts held that management's order of dismissal of the workman are not only *mala fide or* wrongful but also, disproportionate to the misconduct committed by them. To meet this situation, the apex court has evolved various norms to regulate the management's power to take disciplinary measure and punishment imposed by it and also the power of tribunal to interfere in cases of disciplinary measures taken by the management.

The need to empower the Labour Court, Tribunal and National Tribunal was felt in *Indian Iron and Steel Co. Ltd. v. Their Workmen*,<sup>1</sup> wherein the Supreme Court while considering the tribunal's power to interfere with the management's decision to dismiss, discharge or terminate the services of a workman, observed that in cases of dismissal for misconduct the tribunal does not act as court of appeal and substitute its own judgment for that of the management and that the tribunal will interfere only when there is want of good faith, victimization, unfair labour practice, etc. on the part of the management.

Quite apart from the aforesaid decision of apex court the International Labour Organization, of which India is a founder member, also in its recommendation (No. 119) concerning 'Termination of employment at the initiative of the employer' adopted in June 1963, recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination order, to neutral body such as an Arbitrator, a Court, an Arbitration Committee or a similar body and that the neutral body concerned should be empowered to examine the reasons given in the termination of employment and the other circumstances relating to the case and to render a decision on the justification of their termination. The International Labour Organization has further recommended that the neutral body should be empowered, if it finds that the termination of employment was unjustified, to order that the worker concerned, unless reinstated with or without back wages should be paid adequate compensation or afforded some other relief.

In view of the aforesaid recommendation, it was considered by the government of India that the tribunals' power in adjudication proceeding relating to discharge or dismissal of a workman should not be limited and that the tribunal should have the power, in cases, wherever necessary, to set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

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<sup>1</sup> (1958)1 LLJ 260

Accordingly Section 11-A<sup>2</sup> was inserted in the Industrial Disputes Act, 1947. Thus, while previously the tribunal had no power to interfere with the punishment, but now under section 11A it is now clothed with such a power.

A survey of decided cases, however, reveals that the tribunal while exercising its power and reviewing the punishment imposed by the employer has acted arbitrarily and in whimsical manner and was influenced by humanitarian consideration. Cases are not lacking where labour courts and Tribunal or National Tribunal have exercised its discretionary power where a worker has been dismissed or removed from service after a proper and fair enquiry even in cases of serious misconduct such as assault, using abusive language against the superiors, violence, sabotage, drunkenness, loss of confidence, theft, and misappropriation etc. In order to regulate the exercise of discretionary power of labour tribunals to review the order of dismissal/discharge and award any lesser punishment the Supreme has evolved various norms. But in this process conflicting decisions have been given. In such a situation the difficulty arises as to which of decision of the apex court should be relied upon by the tribunal if there are conflicting decisions of the Supreme Court. This is so because under Article 141 of the Constitution the decision of the Supreme Court is binding on all Courts and tribunals in India..

In the following pages an attempt has been made to examine and evaluate the decisions of the Supreme Court on exercise of tribunal's discretion in respect to quantum of punishment awarded by the management in disciplinary matters.

## **II. POWERS OF LABOUR COURT, TRIBUNAL AND NATIONAL TRIBUNAL TO APPROPRIATE RELIEF IN CASES OF DISCHARGE OR DISMISSAL OF WORKMEN**

Section 11-A of the Industrial Disputes Act empowers the labour court, tribunal and national tribunal to evaluate the severity of misconduct as to assess whether the punishment imposed by the employer is commensurate with the gravity of the misconduct. It provides as follows:

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a labour court, tribunal or national tribunal for adjudication and,

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<sup>2</sup> The Industrial Disputes Act, 1947, Section 11 A provides: Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and. In the course of the adjudication proceedings the Labour Court, Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions. if any, as it thinks fit, or give such other relief to the Workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section. the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on' record and shall not take any fresh evidence in relation to the matter.

in the course of the adjudication proceedings, the labour court, tribunal or national tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions if any as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

From the above it is evident that under the aforesaid provision even in cases where the finding of misconduct is proved or established, the tribunal may hold that the misconduct does not merit punishment by way of discharge or dismissal of the workmen and may award lesser punishment instead including reinstate. The scope of interference of the Labour Court and Tribunal has been the subject matter of judicial review by the Supreme Court.

## II. PROCEDURE TO BE FOLLOWED BY MANAGEMENT BEFORE DECIDING THE QUANTUM OF PUNISHMENT

The ambit and scope of section 11-A came up for consideration before the Supreme Court in *Workmen of Firestone Tyre and Rubber Company of India (P) Ltd. v. Firestone Tyre and Rubber Company of India (P) Ltd.*<sup>3</sup> The Court laid down the following principles:

1. The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions but if a dispute is referred to a tribunal, the latter has power to see if action of the employer before imposing the punishment is in accordance with the provisions of the standing orders, if applicable, and principles of natural justice. Such inquiry should not be an empty formality.
2. When a proper inquiry has been held by an employee, and the finding of misconduct is plausible conclusion flowing from the evidence, adduced at the said inquiry, the tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when findings arrived at in the inquiry are perverse or the management is guilty of victimization, unfair labour practice or *mala fide* conduct.
3. Even if no inquiry has been held by an employer or if the inquiry held by him is found to be defective, the tribunal in order to satisfy itself about the legality and the validity of the order, is required to give an opportunity to the employer and employee to adduce evidence before it. In other words it is open to the employer to adduce evidence for the first time justifying his action and to adduce evidence contra.

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<sup>3</sup> (1973)1 LLJ 278; AIR 1973 SC1273

4. The effect of not holding an inquiry is that the tribunal would not only have to consider whether there was a *prima facie* case but also the issue about the merits of the impugned order of dismissal or discharge on the evidence adduced before it. It has to decide for itself whether the misconduct alleged is proved. In such cases the point about the exercise of managerial functions does not arise at all. A case of defective inquiry stands on the same footing as if no inquiry is held.
5. The tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no inquiry has been held or after the inquiry conducted by an employer is found to be defective.
6. It has never been recognized that the tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee once it is found that no domestic inquiry has been held or the said inquiry is found to be defective.
7. An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the tribunal is in the interest of both the management and the employee and to enable the tribunal itself to be satisfied about the alleged misconduct. Once the misconduct is proved either in the inquiry conducted by an employer or by the evidence placed before a tribunal for the first time, punishment imposed cannot be interfered with by the tribunal except in cases where the punishment is so harsh as to suggest victimization.

#### **IV. JUDICIAL NORMS FOR EXERCISE OF TRIBUNAL'S INTERFERENCE IN QUANTUM OF PUNISHMENT**

The Supreme Court ruled that the discretion vested in the labour court under section 11-A is not unlimited.<sup>4</sup> Normally they should not interfere with the punishment imposed by the disciplinary/ appellate authorities but when it shocks the conscience of the tribunal/Court the relief can be moulded in exceptional cases which should be supported with cogent reasons.<sup>5</sup>

Having said so the Supreme Court laid down the following principles to be applied while exercising discretionary power under section 11-A of the Industrial Disputes Act, 1947 by the Labour Court, Tribunal and National Tribunal:

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<sup>4</sup> *Mahindra & Mahindra v. N.V. Narvavada* (2003) 9 SCC 32

<sup>5</sup> *Dev Singh v. Punjab Transport Development Corporation* 2003 LLR 1023

1. The discretion which can be exercised under Section 11-A is available on existence of certain factors, namely:
  - i. punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court,
  - ii. the existence of any mitigating circumstances which require reduction of the sentence, or
  - iii. the past conduct of the workman which may persuade the labour court to reduce the punishment.

In the absence of any of the aforesaid factors, the labour court/ tribunal cannot by way of sympathy alone exercise power under Section 11-A and reduce the punishment.<sup>6</sup>

2. The industrial courts would not sit in appeal over the decision of the employer unless there exists a statutory provision in this behalf. Although its jurisdiction is wide, but the same must be applied in terms of the provisions of the statute and no other.<sup>7</sup>
3. If the punishment is harsh, albeit a lesser punishment may be imposed, but such an order cannot be passed on an irrational or extraneous factor and certainly not on a compassionate ground<sup>8</sup>.
4. The exercise of discretionary jurisdiction by Labour Court/Tribunal under Section 11A of the Industrial Disputes Act must be based on sound reasoning and not in a casual manner,
5. Unless punishment is shockingly disproportionate to the charge which has been proved, the punishment awarded by the disciplinary authority should not be interfered with in exercise of power of judicial review<sup>9</sup>
6. Exercise of power under section 11-A will always have to be made judicially and judiciously<sup>10</sup>
7. It is for the disciplinary authority and not for tribunal to decide as to which punishment should be imposed on delinquent who has admitted his misconduct<sup>11</sup>

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<sup>6</sup> *Mahindra & Mahindra v. N.V. Narvavada* (2003) 9 SCC 32

<sup>7</sup> *Bharat Forge Co. v. Uttam Manohar Nakate* 2005 LLR 210

<sup>8</sup> *Devalsab Hussain Mull v. North West Karnataka Road Transport Corporation*, Civil Appeal 8487 of 2013 dated September 24, 2013

<sup>9</sup> *Devender Swamy v. State Road Transport Corporation* 2002 Lab IC 2475

<sup>10</sup> *Supra* note 8

<sup>11</sup> *Stat Bank of India v. Bela Bagchi* JT 2005 (8) SC 96

## V. DOCTRINE OF PROPORTIONALITY- BASIS FOR INTERFERENCE

The Supreme Court of India has recognized the doctrine of proportionality as one of the grounds for judicial review.

In *Charanjit Lamba v. Commanding Officer*<sup>12</sup>, the Supreme Court held that the punishment imposed upon the delinquent should be commensurate with the nature of the misconduct is not only a requirement of fairness, objectivity and non-discriminatory treatment but the same is recognized as being part of Article 14 of the Constitution. Referring to scope of judicial review, the Court pointed out that while judicially reviewing an order of punishment imposed on a delinquent employee, the writ court would not assume the role of an appellate authority. It would not impose a lesser punishment. The power of the court or an administrative tribunal is limited to finding out whether the punishment is so outrageous merely because it considers the same to be more reasonable than what the disciplinary authority had imposed. It is only in cases where the punishment is so disproportionate to the gravity of charge that no reasonable person placed in the position of the disciplinary authority could have imposed such a punishment that a writ court may step in to interfere with the same

## VI. THE TESTS FOR DETERMINING THE QUESTION OF QUANTUM OF PUNISHMENT

In *Chairman-cum-MD, Coal India Ltd and Another v. Mukluk Kumar Choudhun*<sup>13</sup> the apex court held that one of the tests to be applied while dealing with the question of quantum of punishment would be: whether any reasonable employer have imposed such punishment in like circumstances. Having said so the Court pointed out that, a reasonable employer is expected to take into consideration (i)measure, (ii)magnitude, (iii) degree of misconduct and; (iv) other relevant circumstances. But it would excludes irrelevant matters before imposing punishment.

## VII. CONFLICTING APPROACHES OF SUPREME COURT

### *General Principles of Interference by the Tribunal*

In *Hombe Gowda EDN Trust v. State of Karnataka*<sup>14</sup> the Supreme Court ruled that 'the tribunal would not normally interfere with the quantum of punishment imposed by the employers unless an appropriate case is made out therefor. The Court cautioned that tribunal being inferior to this Court, was bound to follow the decision of this

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<sup>12</sup> (2010) 7 MLJ 367 (SC)

<sup>13</sup> (2009) 8 MLJ 460 (SC)

<sup>14</sup> 2006 LLR 141(SC)

Court The tribunal can neither ignore the ratio laid down by this Court nor refuse to follow the same.’ The Court added:

Discipline at the workplace in an organization is a *sine quo non* for the efficient working of the organization. When an employee breaches such discipline and the employer terminates his service, it is not open to the labour court or an industrial tribunal to take the view that the punishment awarded is shockingly disproportionate to the charge proved..

On the contrary in *Management of Hindustan Machine Tools Ltd, Bangalore v. Mohd. Usman*<sup>15</sup> the Supreme Court held that even in a case where the labour court held that the domestic inquiry was conducted properly and without prejudice to the worker, it can analyse the evidence to decide whether the dismissal of the worker was justified. It is within the jurisdiction of the labour court to consider the propriety and justifiability of the punishment in the case and direct reinstatement if found necessary

It is difficult to reconcile the aforesaid decisions of the apex court on the exercise of power under section 11-A.

## V. CONFLICTING APPROACHES OF SUPREME COURT IN SPECIFIC CASES

### A. *Authorised Leave*

A survey of decided cases reveals that conflicting views have been expressed by the Supreme Court as to when and in what case of absence on account of unauthorized leave, the order of dismissal imposed by the management can be interfered with by the tribunals.

#### 1. General Principle

In *Delhi Transport Corporation v. Sardar Singh*<sup>16</sup>, the Delhi Transport Corporation initiated departmental proceedings against respondents who were conductors on the ground of unauthorized long absence from duty, negligence of duties and lack of interest in the employer’s work. Such acts amounted to misconduct under Paras 4 (11) and 19 (h) of the Standing Orders issued under Para 15 (1) of the Delhi Road Transport Authority (Conditions of Appointment and Service Regulation, 1952) which were applicable to respondents. After having found the respondents-conductor guilty, the disciplinary authority imposed punishment of dismissal/removal from service. Since an industrial dispute was already pending before the industrial tribunal, the Corporation filed an application for approval of its action before the said tribunal under Section 33(2) (b) of the Industrial Dispute Act, 1947. The tribunal found that

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<sup>15</sup> (1997)1 LLN 391(SC)

<sup>16</sup> (2004) 7 SCC 574

proper inquiry was not held. It, therefore, granted opportunity to the corporation to adduce further evidence to justify its action. The Corporation, therefore, led further evidence. But, the tribunal on consideration of materials brought before it held that absence from duty without leave amounted to sanction of leave and did not amount to misconduct. Thus, availing leave without pay also did not amount to misconduct. In view of this, the tribunal refused to grant approval of the action taken by the Corporation, mainly on the ground in most cases, the leave was treated without pay and that being the position it cannot be said that the absence was unauthorized. Against this order, the Corporation preferred a writ petition before the High Court. The single judge of the High Court held that the disapproval by the tribunal was not in order. Thereupon, the respondent's conductors filed letters patent appeals before the Delhi High Court. The division bench of the High Court affirmed the findings of the tribunal and reversed the decision of the single judge. Aggrieved by this order, the Corporation filed appeal by special leave in the Supreme Court. On these facts, the Supreme Court ruled:

Mere making of an application after or even before absence from work does not in any way assist the employee concerned. The requirement is obtaining leave in advance. In all these cases, the absence was without obtaining leave in advance.

- i. When an employee absents himself from duty, even without sanctioned leave for a very long period, it *prima facie* shows lack of interest in work. Para 19(h) of the Standing Orders as quoted above relates to habitual negligence of duties and lack of interest in the authority's work. When an employee absents himself from duty without sanctioned leave, the authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and exhibiting lack of interest in the employer's work.
- ii. Ample material was produced before the tribunal in each case to show as to how the employees concerned were remaining absent for long periods which affects the work of the employer and the employee concerned was required at least to bring some material on record to show as to how his absence was on the basis of sanctioned leave and as to how there was no negligence.
- iii. Habitual absence is a factor which establishes lack of interest in work. There cannot be any sweeping generalization. But at the same time, some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.
- iv. Conclusion regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when leave is unauthorized.

- v. Burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials.
- vi. Clause (ii) of Para 4 of the Standing Orders shows the seriousness attached to habitual absence. In Clause (i) thereof, there is requirement of prior permission. Only exception made is in case of sudden illness. There also conditions are stipulated, non- observance of which renders the absence unauthorized.

The Court, accordingly allowed these appeals and affirmed the view taken by the single judge while reversing that of division bench.

In *State of Punjab v. Jagir Singh*<sup>17</sup>, a driver in Punjab Roadways absented himself from duty without applying for leave. He was asked to report for duty by a registered letter but despite the same he failed to report for duty. A notice was therefore published in a newspaper stating the date by which he was required to resume his duty. When he failed to do so even thereafter, the management terminated his service on the ground of his being absent from duty. Thereupon, the driver raised an industrial dispute and the labour court by an award reinstated him with continuity of service and full back wages. On a writ petition filed by the management, the High Court held that the workman was entitled to 60 per cent of the back wages. Aggrieved by this both the state and workman filed special leave to appeal petitions in the Supreme Court. The Supreme Court held that *the finding of the labour court were incorrect and self-contradictory and it had failed to consider the conduct of the workman in not joining duty despite having been asked to do so by a registered letter as well as publication of a notice in the newspapers.*

## 2. Application in Specific Cases

### ***a. Dismissal for a absence due to sufferings from tuberculosis- held Justified***

In *New India Assurance Co. Ltd. v. Vipin Behari Srivastava*<sup>18</sup>, the respondent-workman remained absent unauthorisedly for more than 600 days. The management after holding departmental inquiry removed the workman. Thereupon, the workman raised an industrial dispute which was referred to the tribunal. The tribunal held that the respondent was suffering from tuberculosis and had applied for medical leave but management took no action. It, therefore, granted reinstatement. On a writ petition, the High Court upheld the order of the tribunal. On appeal, the Supreme Court noticed that 'no leave was due and even leave without pay cannot be granted'. The Court laid down the following principles:

- i. Mere sending of an application for grant of leave much after the period of

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<sup>17</sup> (2004) 8 SCC 1209

<sup>18</sup> (2008) 3 SCC 446

leave was over as also the date of resuming duties cannot be said to be a *bona fide* act on the part of the workman. The bank, as noticed hereinbefore, in response to the lawyer's notice categorically stated that the workman had been carrying on some business elsewhere.

- ii. Only because on a later date an application for grant of medical leave was filed, the same *ipso facto* would (not) put an embargo on the exercise of the jurisdiction of the bank from invoking clause 2 of the bipartite settlement.

The Court accordingly set aside the order of the tribunal and the High Court.

The aforesaid decision requires a careful examination. It is true that 'mere sending of application for grant of leave' cannot amount to grant of leave but in an exceptional situation where the workman was suffering from tuberculosis and applies for medical leave, it is difficult to support the view. It is submitted that the above principle cannot be applied in such cases

***b. Dismissal for unauthorized absence to sort out the problem of his daughter in-laws was held not justified.***

In *Jagdish Singh v. Punjab Engineering College*<sup>19</sup> the appellant was working as a sweeper in Punjab Engineering College. He remained absent unauthorized for 7 days in February 2004 and 9 days in March 2004. The management, after holding an inquiry, dismissed the workman. Thereupon, he filed a writ petition before the High Court challenging the order of dismissal. The High Court dismissed the petition. Aggrieved by the order, the appellant filed an appeal before the Supreme Court. It was contended by the appellant that the punishment imposed by the disciplinary authority was disproportionate to the gravity of misconduct, especially in view of the explanation offered by the appellant for his unauthorized absence for a few days and lesser punishment would meet the ends of justice. On the other hand, the respondent submitted that unauthorized absence is a serious misconduct and said charge having been proved against the employee, the disciplinary authority was justified in imposing a major penalty of dismissal from service. Dealing with the case, the Supreme Court observed:

The instant case is not a case of habitual absenteeism. The appellant seems to have a good track record from the date he joined service as a sweeper. In his long career of service, he remained absent for 15 days on four occasions in the months of February and March, 2004. This was primarily to sort out the problem of his daughter with her in-laws. The filial bondage and emotional attachment might have come in his way to apply and obtain leave from his employer. The misconduct that is alleged, in our view, would definitely amount to violation of discipline that is expected

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<sup>19</sup> (2010) 1 SLR 166

of an employee to maintain in an establishment, but may not fit into the category of gross violation of discipline. We hasten to add that if it was habitual absenteeism, we would not have ventured to entertain this appeal.

The Court held that taking the totality of facts and circumstances of the case and having due regard to unblemished record of the appellant and the reasons for which he remained absent without obtaining permission; the end of justice would be met if the punishment imposed by the disciplinary authority is modified to stoppage of two increments with cumulative effect and further declare that he would not be entitled to any monetary benefits during the period he was out of service but that period would be counted only for the purpose of his service benefits. The Court accordingly allowed the appeal and set aside the order of the disciplinary authority affirmed by the High Court.

*Regional Manager, Bank of Baroda v. Anita Nandrajog*<sup>20</sup> saw irresponsible behaviour of the bank employee to remain on unauthorized leave 'whenever she liked and for whatever period she liked'. In this case, respondent number 2 remained absent from duty on two occasions, i.e. from 4 August 1986 to 29 March 1987 and again from 20 September 1987 to 10 April 1988 (more than 266 days), but the petitioner bank condoned the aforesaid acts of absence for leaving the country without permission. She again left for Libya on 22 August 1988 without permission and without sanctioned leave. She did not resume her duties for more than 150 consecutive days. The petitioner bank therefore invoked the provisions of clause 17(b) of the Fifth Bipartite Settlement and issued notice to her to report for duty within 30 days, failing which it would be presumed that she had voluntarily retired from the service of the bank. But she did not report for duty and instead send two letters to the bank in which she stated that she would be resuming duty in the last week of August 1989 and in the second letter, she requested for extension of leave without pay up to April 1990 on the ground of her domestic problems. Despite her letter, she did not resume duty in the last week of August 1989. Through communication dated 25 August 1989, the petitioner bank treated the respondent as having voluntarily terminated her employment, and asked her to approach the authority concerned for claiming terminal benefits. Aggrieved by this order, the respondent approached the ministry of labour, Central Government which referred the dispute to the labour court for adjudication. The tribunal held that the termination order was illegal and unjustified. Against the order of the tribunal, the bank filed a writ petition in Allahabad High Court which was dismissed. Thereupon, the bank filed a special leave petition before the Supreme Court.

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<sup>20</sup> 2009 LLR 1135

The main contention on behalf of the respondent employee before the tribunal and the high court was that she was neither given any charge-sheet nor was any inquiry held regarding her misconduct of being absent without leave, and hence the order dated 25 August 1989 was illegal and against the principles of natural justice. On the other hand, the contention on behalf of the bank was that no inquiry was necessary since clause 17(b) of the Fifth Bipartite Settlement dated 10 April 1989 was being invoked. The Supreme Court observed that the management had been extremely lenient to the respondent by condoning her absence without leave on the first occasion for a period of about 7 months. 'However, the respondent thought that she could do whatever she liked for whatever period she liked.' She again sent an application for leave for 60 days which was not sanctioned. However, she remained absent without leave and kept sending letters for extension of leave although she was on unauthorized absence.

In the bank's letter, it was clearly mentioned in clause 4 that the respondent did not have any leave remaining to her credit yet she had remained on unauthorized leave for a period of more than 150 days continuously and it appeared she had no intention of joining duty. She was asked to report for duty within 30 days, failing which it would be deemed that she had taken voluntary retirement from service. In reply, she wrote a letter that she will be joining duty in the last week of August 1989 but she wrote another letter for extension of leave till April 1990 on account of domestic problems. In view of this, the Court remarked that such behavior on the part of an employee is clearly unfortunate and highly improper.

The Court referred to clause 17(b) of the Bipartite Settlement and observed that if an employee is absent without leave for more than 150 days and has no more leave to his/ her credit, then the bank can validly order voluntary cessation of employment. Further, under clause 17(b), when the management is reasonably satisfied that the employee has no intention of joining duty, it may call upon the employee to report for duty within 30 days failing which action can be taken. Such a notice was given by the bank but the respondent wanted leave till April 1990, i.e. for another 8 months. The Court found that she had no intention of resuming duty within 30 days. The Court accordingly held that the action of the bank in terminating her service on the ground of voluntary cessation of employment was valid. The appeal was accordingly allowed.

The aforesaid judgment is more in conformity with *Syndicate Bank v. General Secretary, Syndicate Bank Staff Association*<sup>21</sup> and *Aligarh Muslim University v. Mansoor Ali Khan*<sup>22</sup>.

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<sup>21</sup> (2005) 5 SCC 65

<sup>22</sup> JT 2000 (7) SC 529

**c. *Dismissal for unauthorized Absence from duty for six months for personal reason-not justified***

In contrast to the aforesaid decisions, the Supreme Court in *Chairman-cum-Managing Director, Coal India Ltd v. Mukul K. Choudhuri*<sup>23</sup> took a different line of approach. Here, the respondent, after expiry of sanctioned leave for 14 days, did not report for duty and despite reminders, remained absent for 6 months without any authorization. Thereupon, the management initiated disciplinary inquiry against him under rule 29 of the Coal India Executives Conduct, Discipline and Appeal Rules, 1978 for misconduct on his part by (i) absenting himself without leave, (ii) overstaying the sanctioned leave for more than 4 consecutive days and (iii) desertion of job and failure to maintain integrity and devotion to duty. During pendency of inquiry, the respondent sent a letter of resignation which was not accepted by the management. Accordingly, he joined duty. He also appeared before the inquiry officer and admitted the charges leveled against him. The inquiry officer held that the delinquent was guilty of the charges mentioned in the charge-sheet. Upon receipt of the inquiry report, a second show-cause notice was issued. The delinquent was asked to show cause as to why the punishment of termination of service be not awarded to him. A copy of the inquiry report was sent along with the second show-cause notice. Not satisfied with his explanation, he was removed from service with immediate effect. He then pursued departmental remedy but without any success. Thereupon, he filed a writ petition with the High Court. The single judge of the High Court directed the reinstatement of the respondent without back wages but with continuous service, without any break and without affecting his seniority. On appeal, the division bench, besides reinstatement, held that he was entitled to back wages from the year 2000 until reinstatement. Against this order, an appeal was filed before the Supreme Court. The Court held that where the misconduct of the delinquent was unauthorized absence from duty for 6 months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reason for his absence by stating that he did not have any intention nor desire to disobey the order of higher authority or violate any of the company's rules and regulations; but the reason was purely personal and beyond his control and as a matter of fact, he sent his resignation which was not accepted. The order of removal cannot be held to be justified, since no reasonable employer would have imposed extreme punishment of removal in like circumstances. The Court felt that the punishment is not only unduly harsh but grossly in excess of the allegations. The Court therefore affirmed the order of reinstatement but without back wages for the entire period by way of punishment for the proved misconduct of unauthorized absence for 6 months.

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<sup>23</sup> 2009 III CLR 645

It is difficult to reconcile the aforesaid decision with other decisions of the Supreme Court discussed above. It is surprising that the Court even did not mention its earlier decisions.

**d. Evolution of the doctrine of Limited Inquiry in case of failure to resume duties on expiry of leave**

In *New India Assurance Co. Ltd. v. Vipin Behari Srivastava*<sup>24</sup> the Supreme Court evolved the new concept of limited inquiry in a case of failure of employee to resume duties after the expiry of sanctioned leave despite repeated reminders. In such cases no doubt the principles of natural justice are required to be complied with but the same would not mean that a full-fledged departmental proceeding was required to be initiated. A limited inquiry as to whether the employee concerned had sufficient explanation for not reporting for duty after the period of leave had expired or failure to resume duty when asked to do so would suffice.

**3. Abusing and Threatening a Superior Officer**

**a. Liberal interpretation**

In *Rama Kant Mishra v. State of UP*,<sup>25</sup> the workman was charge-sheeted for abusing an official saying, 'Are these persons your father? I will make you forget your high-handedness either here or somewhere else.' On these facts, the Supreme Court ruled that the labour court has jurisdiction and power to interfere when it finds that the order of discharge/dismissal was not justified. The Court directed reinstatement with back wages but withheld two increments.

In *Ved Prakash Gupta v. M/s Delton Cable India Ltd.*,<sup>26</sup> the workman, besides other charges, was also guilty of abusing in filthy manner/language, namely 'You may go to Vijay Kumar or Ram Kumar'. On these facts, the Supreme Court held that the charges leveled against him were not serious and it was not known how these charges would result in total loss of confidence of the management. The Court accordingly directed reinstatement.

In *B C Chaturvedi v. Union of India*<sup>27</sup>, the three-judge bench of the Supreme Court held that under Section 11-A, the High Court's interference is permissible only when the punishment/penalty is shockingly disproportionate.

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<sup>24</sup> *Supra* note 19

<sup>25</sup> 2003 LLR 895

<sup>26</sup> 1982 Lab IC 1790 (SC)

<sup>27</sup> 1995 (6) SCC 749

### ***b. Strict interpretation***

In *UP State Road Transport Corporation v. Subhash Chandra Sharma*<sup>28</sup>, the charge against the respondent was that in a drunken state, he along with the conductor went to the assistant cashier in the cash room of the appellant and demanded money from him. When the assistant cashier refused, the respondent abused him and threatened to assault him. On these facts, the Supreme Court observed that, 'It was certainly a serious charge of misconduct against the respondent. In such circumstances, the labour court was not justified in interfering with the order of removal of the respondent from service when the charge against him stood proved. Rather we find that the discretion exercised by the labour court in the circumstances of the present case was capricious and arbitrary and certainly not justified. It could not be said that the punishment awarded to the respondent was in any way "shockingly disproportionate" to the nature of charges proved against him. In our opinion, the High Court failed to exercise its jurisdiction under Article 226 of the Constitution and did not correct the erroneous order of the labour court which, if allowed to stand, would certainly result in miscarriage of justice.'

In *Kailash Nath Gupta v. Inquiry Officer (R K Raj), Allahabad Bank*<sup>29</sup> the Supreme Court went a step further when it observed that the power of interference of tribunal with the quantum of punishment awarded by the management is extremely limited.

In *Mahindra & Mahindra Ltd v. N B Naravada*<sup>30</sup>, the respondent workman used abusive and filthy language against his supervisor. Thereupon, the management, after holding a domestic inquiry, terminated his service. The labour court came to the conclusion that under Section 11-A, the punishment was harsh and improper and deserved to be set aside. It therefore, directed reinstatement with continuity of service but with 2/3<sup>rd</sup> of the back wages. On a writ petition, a single judge of the High Court dismissed the petition. On appeal, the division bench of the High Court also dismissed the petition. Thereupon, the management filed an appeal before the Supreme Court. The Supreme Court reversed the judgments of the lower courts and ruled:

- (a) The discretion vested in the labour court under Section 11-A is not unlimited.
- (b) The discretion which can be exercised under Section 11-A is available on existence of certain factors, namely: (i) punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, (ii) the existence of any mitigating circumstances which require reduction of the sentence, or (iii) the past conduct of the workman which may persuade the labour court to reduce the punishment.

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<sup>28</sup> 1995(6)SCC749

<sup>29</sup> *Ibid.*

<sup>30</sup> (2003) 9 SCC 32

- (c) In the absence of any such factor, the labour court cannot by way of sympathy alone exercise power under Section 11-A and reduce the punishment.
- (d) Punishment of dismissal for using abusive language cannot be held to be disproportionate.
- (e) The language used by the workman is such that it cannot be tolerated by any civilized society. Use of such abusive language against a superior officer, that too not once but twice, in the presence of subordinates cannot be said to be indiscipline calling for lesser punishment.

The Court accordingly set aside the order of lower courts and upheld the dismissal order of the disciplinary authority.

In *L K Verma v. HMT Ltd.*,<sup>31</sup> the Supreme Court ruled:

- (a) As regards the quantum of punishment, suffice it to say that verbal abuse has been held to be sufficient for inflicting a punishment of dismissal.
- (b) Once the appellant accepted that he made utterances which admittedly lack civility and he also threatened a superior officer, it was for him to show that he later on felt remorse. If he was under tension, at a later stage, he could have at least tendered an apology. Furthermore, witnesses were examined and the charges were proved.
- (c) An order of suspension may be passed by the employer by way of punishment in terms of conduct rules in exercise of its inherent power in the sense that he may not take any work from the delinquent officer who may be paid only the subsistence allowance specified therein.

In *Biecco Lawrie Ltd v. State of West Bengal*<sup>32</sup>, the respondent, a mazdoor in the switch gear works, was charge-sheeted for instigation, insubordination and using of abusive language against his superiors which was a major misconduct under the standing orders of the appellant company. The respondent, through a letter, admitted to all the charges and sought condonation and mercy attributing his acts to his mental illness. However, his plea was rejected by the company on the ground that he had been charged on an earlier occasion also on similar misconduct and was given a chance to make amends. On inquiry, the inquiry officer held that the respondent was guilty of major misconduct. After consideration of the report of the inquiry officer, the disciplinary authority dismissed him from service. Thereupon, he raised an industrial dispute which was referred to the tribunal. The tribunal held that there was violation of principles of natural justice. It heard the matter afresh on merits. The tribunal on consideration of the inquiry report and evidence on record affirmed

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<sup>31</sup> 2006 LLR 296 (SC)

<sup>32</sup> (2009) 10 SCC 32

the order of the disciplinary authority. Thereupon, the respondent approached the High Court which set aside the order of the tribunal by holding that the charge of using abusive language was not specific and was vague. It accordingly remitted the matter to the tribunal for reconsideration on the basis of existing evidence only with respect to the charge of disobedience. The decision was affirmed by the division bench of the High Court. The management then filed an appeal with the Supreme Court. The Court observed that the general trend of judicial decisions is to minimize interference when punishment is not harsh for charges that are leveled against a respondent and in the instant matter, dismissal is definitely not shocking to the conscience of the Court. It added that the High Court misused the power vested in it by remanding the matter back to the industrial tribunal for reconsideration when the charges were found proved. The tribunal also erred by reversing its own decision.

## IX. APPLICATION OF PRINCIPLE OF INTERFERENCE IN QUANTUM OF PUNISHMENT IN OTHER SPECIFIC CASES

### A. *Non-Issuance of Tickets:*

In *Devendra Swamy v. State Road Transport Corporation*<sup>33</sup>, the services of a bus conductor were terminated after departmental inquiry for not issuing tickets to eight passengers. Earlier, he was found guilty of similar offence in more than 41 cases in which lesser punishments were imposed upon him. Thereupon, an appeal was filed before the Supreme Court. While dealing with justifiability of termination of service, the Supreme Court referred to its earlier decision<sup>34</sup> wherein it was held that unless punishment is shockingly disproportionate to the charge which has been proved, the punishment awarded by the disciplinary authority should not be interfered with in exercise of power of judicial review. The Supreme Court held that the corporation was fully justified in awarding the punishment of dismissal looking to the gravity of the charge of misconduct for which disciplinary proceedings were initiated and proved as also in the light of previous service record of the appellant.

The Supreme Court in *Regional Manager v. Ghanshayam Sharma*<sup>35</sup> was invited to assess the quantum of punishment keeping in view the nature and severity of misconduct. In this case, the respondent employed as a conductor by the Rajasthan Road Transport Corporation was punished several times for having been charge sheeted on the ground of not issuing tickets to passengers. In this case, he was again found carrying 23-1/2 passengers without ticket. An inquiry was conducted and he

<sup>33</sup> 2002 Lab IC 2475

<sup>34</sup> *State of Haryana v. Rattan Singh*, AIR 1977 SC 1512; *U P State Road Transport Corporation v. Basudeo Chaudhary*, (1997) 11 SCC 370; *U P State Road Transport Corporation v. Subhash Chandra Sharma*, 2000 (3) SCC 324

<sup>35</sup> (2002) ILLJ 234

was removed from service. On a reference, the labour court invoked its jurisdiction under section 11-A and held that even though the respondent was guilty of misconduct he was entitled to reinstatement with continuity of service but without back wages. On a writ petition, the single judge of the High Court set aside the award. On a letters patent appeal the division bench reversed the award of the single judge. Thereupon an appeal was filed before the Supreme Court. The Court relied upon its earlier decision in *Karnataka State Road Transport Corporation v. B S Hullikatti*<sup>36</sup> and held that in such cases where the bus conductors carry passengers without ticket or issue tickets at a less rate than the proper rate, the said acts would, *inter alia*, amount to either being a case of dishonesty or of gross negligence and such conductors were not to be retained in service because such inaction or action on the part of the conductors results in financial loss to the Corporation. The Court remarked that although under Section 11-A, the labour court has jurisdiction and power to interfere with the quantum of punishment, the discretion has to be used judiciously. The Court added that if the conductor fails to perform his main duty or function to issue tickets, collect the fare and deposit the same with the Road Transport Corporation it will be misplaced sympathy to order his reinstatement instead of dismissal. The Court accordingly set aside the order of the division bench and restored the order of the single judge.

In *UP State Road Transport Corporation v. Vinod Kumar*<sup>37</sup>, a workman was found carrying passengers without issuing tickets. The management, after holding a domestic inquiry, terminated his services. Thereupon, the workman raised an industrial dispute in which he challenged the conclusion arrived at by the inquiry officer as also the punishment awarded to him by the disciplinary authority. However, the labour court held that the charge of misappropriation had not been proved and thus, punishment of removal from service was harsh. It therefore, held that the removal be substituted by stoppage of one increment without any cumulative effect and directed him to be reinstated with full back wages. On a writ petition filed by the management, the High Court confirmed the order of reinstatement but instead of full back wages, it ordered 50 per cent of the back wages. In an appeal before the Supreme Court against this order, the Court held that since the respondent had not challenged the correctness or the legality of the inquiry conducted, it was not open to the labour court to go into the findings recorded by the Inquiry officer regarding the misconduct committed by the workman. The Court observed that it is a well-settled legal position that punishment of removal/dismissal is the appropriate punishment for an employee found guilty of misappropriation of funds; and the court should be reluctant to reduce the punishment on misplaced sympathy for a workman.

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<sup>36</sup> 2001) ILLJ 725

<sup>37</sup> 2008) 1 SCC 115

The Court also held that there was nothing wrong in the employer losing confidence or faith in such an employee and awarding punishment of dismissal. The Court reiterated that there is no place for generosity or misplaced sympathy on the part of judicial forums and interfering with the quantum of punishment. The Court accordingly set aside the judgment of the High Court as well as the award of labour court and restored the order of removal from service ordered by the disciplinary authority.

In *Divisional Manager, Rajasthan SRTC v. Kamruddin*<sup>38</sup> a conductor employed by the Rajasthan State Roadways Corporation during his probationary period of two years was charged for carrying passengers without tickets on not less than five occasions for which he was given warnings. He was again found guilty of not issuing tickets to two passengers and carrying large quantities of luggage. The management, after holding a departmental inquiry, terminated his services. He then raised an industrial dispute which was referred to the labour court. The court found the inquiry to be in order but held that the punishment was disproportionate to the gravity of the misconduct. It accordingly substituted the order of termination to stoppage of two increments with cumulative effect and ordered his reinstatement with continuity in service but without back wages. The award of the labour court was upheld by the High Court. Against this order, a special leave to appeal was filed before the Supreme Court. Dealing with the case, the Court relied upon its earlier decision in *Karnataka SRTC v. B D Hullikatti*<sup>39</sup> and *Rajasthan SRTC v. Sharma Ghamshyam*<sup>40</sup> and observed that it is now a settled legal position that if the conductor failed to issue tickets, collect fare and deposit the same with the corporation he would be considered dishonest or grossly negligent in performing his duty and, therefore, he was not fit to be retained as a conductor whose acts of omission and commission were bound to cause financial loss to the corporation. The Court strongly felt that such a workman should be shown the door. The Court also pointed out that it would be misplaced sympathy to award him lesser punishment. It therefore, restored the order of termination of service by the management and set aside the award of the labour court. The Court remarked that even though the power of the labour court or industrial tribunal in terms of Section 11-A of the IDA to interfere with the quantum of punishment cannot be denied, but it is also a well-settled principle of law that the said power has to be exercised judiciously.

In *UP State Road Transport Corporation v. Nanhe Lal Kushwaha*<sup>41</sup>, the respondent who was employed as a bus conductor by the corporation was charged for carrying passengers without tickets on six occasions. The management, after holding a departmental inquiry, removed him from service. He then raised an industrial

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<sup>38</sup> (2009) 7 SCC 552

<sup>39</sup> (2001) 2 SCC 574

<sup>40</sup> (2002) 10 SCC 330

<sup>41</sup> 2010 LLR 230

dispute. The labour court found him guilty on two occasions. It therefore, directed reinstatement with 75 per cent back wages. Against this order, the management filed a writ petition before the Allahabad High Court which, without assigning any cogent reason, modified the award to the extent that no back wages shall be payable to the workman. Thereupon, the management filed an appeal before the Supreme Court. The Supreme Court, relying on its earlier decision in *UP SRTC v. Hoti Lal*<sup>42</sup>, observed that the conductor was holding a position of trust and acting in a fiduciary capacity. The misconduct was serious and could not be dealt with leniently as was done both by the labour court and the High Court. The Court also deprecated the practice followed by high courts in disposing of writ petitions without assigning any cogent reason. It observed that the labour courts should not ordinarily interfere with the discretion exercised by employers in awarding punishment despite the wide discretion given to them under Section 11-A of the IDA. The Court observed that it was not the amount of loss to the corporation which was material for determining the quantum of punishment. It accordingly set aside the award of the labour court and the judgment of the High Court and affirmed the order of the management.

In the same year, the above issue was again raised in *UPSRTC v. Suresh Chand Sharma*<sup>43</sup>. In this case, the respondent was a conductor with UP Roadway Transport Corporation and was found carrying 13 passengers without tickets on 24 May 1987. Again on 10 May 1988, he was found carrying 10 passengers without tickets. On both occasions, he had recovered the fare from them. The management, after holding an inquiry, dismissed the respondent. The workman then preferred a departmental appeal which was rejected. He then raised an industrial dispute which was referred by the appropriate government to the labour court for adjudication. The labour court held that the inquiry had been held strictly in accordance with law and both charges in respect of the two incidents were found duly proved. Therefore, the employee was not entitled to relief whatsoever. Being aggrieved, the employee challenged the award by filing a writ petition before the Allahabad High Court. The High Court allowed the petition partly and directed the reinstatement of the employee without back wages. Thereupon, the appeal was filed before the Supreme Court. The Supreme Court found that the High Court had decided the writ petition only on the ground that the passengers were found without tickets and the cash with the employee was checked. No other reasoning whatsoever was given by the court. The Supreme Court referred to the decision in *State of Haryana v. Rattan Singh* wherein the Court has categorically held that the only right of a delinquent employee is that he must be informed as to what are the charges against him and he must be given full opportunity to defend himself on the said charges. However, the Court

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<sup>42</sup> (2003) 3 SCC 605

<sup>43</sup> 2010 (6) SCALE 87

rejected the contention that inquiry report stood vitiated for not recording the statement of the passengers who were found travelling without tickets.

In view of the above, the Court held that the reasoning given by the High Court cannot be sustained in the eyes of law. The Court added that the High Court is under an obligation to give not only the reasons but cogent reasons while reversing the findings of fact recorded by a domestic tribunal. In case the judgment and order of the High Court is found not duly supported by reasons, the judgment itself stands vitiated. The Court also rejected the contention of the employee that for embezzlement of such a petty amount, punishment of dismissal could not be justified for the reason that it is not the amount embezzled by a delinquent employee but the intention to misappropriate public money. In view of the above, the Court set aside the judgment and order of the High Court.

An examination of the aforesaid decisions reveals that the courts have consistently held that non-issuance of tickets by conductors should be treated to be a case of serious misconduct and accordingly upheld the order of the punishment of dismissal awarded by managements.

Again in *Davalsab Husainsab Mulla v. North West Karnataka Road Transport Corporation*,<sup>44</sup> the Supreme Court had an opportunity to delineate on the scope of interference under section 11-A of the Industrial Disputes Act, 1947. In this case the appellant, who was working as a driver in the respondent Corporation, while travelling in the Corporation bus without ticket was detected by the checking squad. The checking squad imposed the usual penalty on the appellant. However enraged by the action of the checking squad, the appellant abused the Checking Inspector by using filthy language and also threatened to do away with his life. The appellant also stated to have attempted to assault the Checking Inspector. Subsequently, he is stated to have approached the coordinator in the Divisional Office, Belgaum and behaved in an arrogant manner with the said officer. The Corporation after holding the disciplinary enquiry, where charges leveled against the appellant was proved, and after giving second show cause notice dismissed him. There upon the appellant raised an industrial dispute which was referred to the Labour Court for adjudication. The Labour Court held that the order of dismissal was fully justified and there was no scope to invoke section 11A of the Industrial Disputes Act to interfere with the punishment imposed on the appellant. Against this order the appellant filed a writ petition in the High Court challenging the said award of the Labour Court. The single judge set aside the award of the Labour Court, modified the order of dismissal by ordering withholding of two increments with cumulative effect without consequential benefits and without back wages but with continuity of service. The Court further directed the corporation to reinstate

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<sup>44</sup> (2013) 10 SCC 185

the appellant. Against this order the corporation filed a writ appeal before the Division Bench of the High Court. The Division Bench, however, set aside the order of the Single Judge and upheld the order of dismissal. Thereupon an appeal was filed before the Supreme Court. The Supreme Court while upholding the findings of the division bench held that there were no good grounds to interfere with the impugned judgment of the Division Bench. The Court observed that the act of misconduct was proved against the appellant in an enquiry held for that purpose by way of disciplinary procedure prescribed in the relevant rules, the conclusion of the Labour Court on this aspect cannot be assailed. It also held that the Labour Court rightly declined to exercise its discretionary jurisdiction under section 11A of the ID Act to interfere with the punishment of dismissal imposed on the appellant.

Dealing with the discretionary power of the Labour Court under Section 11A of the Industrial Disputes Act, 1947 the apex Court observed that exercise of such power will always have to be made judicially and judiciously. The court added that under the said provision, wide powers have been conferred upon the Labour Court to set aside the punishment of discharge or dismissal and in its place award any lesser punishment. Therefore, high amount of care and caution should be exercised by the Labour Court while invoking the said discretionary jurisdiction for replacing the punishment of discharge or dismissal. Such exercise of discretion will have to depend upon the facts and circumstances of each case.

The apex court laid down the following norms to be followed before exercising the discretion under section 11-A of the Industrial Disputes Act, 1947:

- (a) the Labour Court had to necessarily reach a finding that the order of discharge or dismissal was not justified.
- (b) the satisfaction to be arrived at by the Labour Court while exercising its discretionary jurisdiction under Section 11A of the Industrial Disputes Act must be based on sound reasoning.
- (c) The exercise of its power to interfere or to exercise its discretion cannot be arrived at in a casual manner, inasmuch as, on the one hand the interference with the capital punishment imposed on the workman would deprive him and his family members of the source of livelihood, while on the other hand the employer having provided the opportunity of employment to the concerned workman would be equally entitled to be ensured that the employee concerned maintains utmost discipline in the establishment and duly follow the rules and regulations applicable to the establishment.

An examination of the decisions of the apex court have consistently held that non-issuance of tickets by conductors should be treated to be a case of serious misconduct and for which it upheld the order of the punishment of dismissal awarded by management.

### ***B. Misplacement of File***

Section 11-A of the Industrial Disputes Act, 1947 empowers the labour court to evaluate severity of misconduct and to assess whether the punishments imposed by the employer are commensurate with the gravity of misconduct. The Supreme Court in *Dev Singh v. Punjab Tourism Development Corporation Ltd*<sup>45</sup> had an opportunity to delineate the scope of interference under Section 11-A. In this case the Punjab Tourism Development Corporation terminated the services of an employee (who served the corporation for about 20 years with unblemished service) for mere misplacement of a file. Such misplacement of file was not proved to be a deliberate act with ulterior consideration, but was at the most an act of negligence. On these facts, the Supreme Court held that the punishment of dismissal for mere misplacement of a file without any ulterior motive is too harsh a punishment which is totally disproportionate to the misconduct alleged and the appellant be imposed a punishment of withholding of one increment including stoppage in substitution of the punishment of dismissal awarded by the disciplinary authority. Dealing with the general principle of interference, the Court ruled that normally courts will not interfere with the punishment as imparted by the disciplinary/ appellate authorities but when it shocks the conscience of the Court it can mould the relief in exceptional cases which should be supported with cogent reasons.

### ***C. Assault of Senior Officer***

In *India Railways Construction Co. Ltd. v. Ajay Kumar*<sup>46</sup>, an employee on probation allegedly assaulted a senior officer along with others and ransacked the office by creating chaotic conditions. The employer, therefore terminated his service without holding an inquiry. On these facts, the Supreme Court laid down the following principles:

- (i) It is fairly well settled that the power to dismiss an employee by dispensing with an inquiry is not to be exercised so as to circumvent the prescribed rules. The satisfaction as to whether the facts exist to justify dispensing with inquiry has to be of the disciplinary authority. Where two views are possible as to whether holding of an inquiry would have been proper or not, it would not be within the domain of the Court to substitute its view for that of the disciplinary authority as if the Court is sitting as an appellate authority over the disciplinary authority. The contemporaneous circumstances can be duly taken note of in arriving at a decision whether to dispense with an inquiry or not. What the High Court was required to do was to see whether

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<sup>45</sup> 2003 LLR 1023

<sup>46</sup> 2003 LLR 337

there was any scope for judicial review of the disciplinary authority's order dispensing with inquiry. The focus was required to be on the impracticability or otherwise of holding the inquiry.

- (ii) An employee, even if he claims to be a member of the employees' union, has to act with sense of discipline and decorum. Presentation of demands relating to employees cannot be exhibited by muscle power. It must be borne in mind that every employee is a part of a functioning system, which may collapse if its functioning is affected improperly. For smooth functioning, every employer depends upon a disciplined employees' force. In the name of presenting demands they cannot hold the employer to ransom. The employer has a duty to look into as far as practicable, obviate the genuine grievances of the employees. The working atmosphere should be cordial, as that would be in the best interest of the establishment. Unless an atmosphere of cordiality exists, there is likelihood of inefficient working and that would not be in the interest of the establishment and would be rather destructive of common interest of both employer and employees.
- (iii) The alleged acts are *prima facie* acts of misconduct. Therefore, the employer can legitimately raise a plea of losing confidence in the employee, warranting his non-continuance in the employment. The time gap is another significant factor.

The Court accordingly held that compensating in lieu of reinstatement with back wages would be appropriate relief to the employee, more so when he has lost the confidence of management.

In *Muriadih Colliery BCC Ltd v. Bihar Colliery Kamgar Union*<sup>47</sup>, the workman assaulted the senior officials in discharge of their duties. On these facts, the Supreme Court held that the courts below by condoning an act of physical violence have undermined the discipline in the organization. The Court accordingly held that it was not permissible for the industrial tribunal to have exercised its authority under Section 11-A of the Act to interfere with the punishment of dismissal.

In *M P Electricity Board v. Jagdish Chandra Sharma*<sup>48</sup>, the respondent, an employee working as a muster-roll laborer in the M.P. Electricity Board (appellant) while in employment allegedly assaulted a superior officer in the presence of other employee with a tension screw on his back and nose, which resulted in fracture of the nose and severe bleeding. This incident was followed by unauthorized absence from work for several days. The management after holding a domestic inquiry terminated his services. The respondent-employee raised an industrial dispute. The appropriate government referred the dispute to the labour court for adjudication.

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<sup>47</sup> (2005) 3 SCC 331

<sup>48</sup> (2005) 3 SCC 331

The labour court, even though did not disagree with the finding of the inquiry on the inflicting of injuries on the superior officer or on the unauthorized absence and the consequent violations of the service rules, took the view that the punishment of termination inflicted on the employee was punitive in nature. According to the court, the employee who had been kept out of service till the date of the decision was enough punishment in the circumstances. Therefore, exercising its power under Section 107-A of the Madhya Pradesh Industrial Relations Act, 1906, which corresponds to Section 11-A of the Industrial Disputes Act, the labour court set aside the punishment of termination and ordered reinstatement of the employee but without back wages. Thereupon, the employer filed an appeal before the industrial court challenging the labour court's interference with the punishment imposed by the employer. The employee also filed an appeal challenging the denial of back wages. The industrial court held that the labour court acted illegally and perversely in interfering with the punishment awarded on the findings at the inquiry accepted by the labour court. Therefore, it set aside the order of the labour court and held that the termination of service as a punishment was justified in the circumstances.

Aggrieved by the decision of the industrial court, the employee filed a writ petition in the High Court of Madhya Pradesh invoking Articles 226 and 227 of the Constitution. The High Court held that the charges against the employee stood proved but since the labour court had decided to award a lesser punishment, the same should not have been interfered with by the industrial court. Thus, the High Court set aside the decision of the industrial court and restored the decision of the labour court. Against this order both the employer and the employee challenged this decision of the High Court in an appeal by special leave before the Supreme Court. While the employer has questioned the interference with the punishment awarded, the employee questioned the denial of back wages to him. The three- judge bench of the Supreme Court observed:

In the case on hand, the employee had been found guilty of hitting and injuring his superior officer at the workplace, obviously in the presence of other employees. This clearly amounted to breach of discipline in the organization. Discipline at the workplace in an organization like the employer herein, is the *sine qua non* for the efficient working of the organization. When an employee breaches such discipline and the employer terminates his services, it is not open to a labour court or an industrial tribunal to take the view that the punishment awarded is shockingly disproportionate to the charge proved. The Court quotes Jack Chan:

‘discipline is a form of civilly responsible behavior which helps maintain social order and contributes to the preservation, if not advancement, of collective interests of society at large.’

Obviously, the idea is more relevant in considering the working of an organization like the employer herein or an industrial undertaking. Obedience to authority in a workplace is not slavery. It is not volatile of one's natural rights. It is essential for the prosperity of the organization as well as that of its employees. When in such situation, a punishment of termination is awarded for hitting and injuring a superior officer supervising the work of the employees, with no extenuating circumstance established, it cannot be said to be not justified. It cannot certainly be termed unduly harsh or disproportionate. The labour court and the high court in this case totally misdirected themselves while exercising their jurisdiction. The industrial court made the correct approach and came to the right conclusion.

The Court therefore, allowed the appeal filed by the employer, set aside the decision of the High Court, restored the decision of the industrial court and thereby the punishment awarded by the employer was upheld. The appeal filed by the employee was also dismissed.

In *Hombe Gowda EDN Trust v. State of Karnataka*<sup>49</sup>, the respondent, a teacher, abused the head of the institution in filthy language and assaulted him with a chappal. The management, therefore, dismissed the teacher. However, the tribunal in place of dismissal ordered withholding of three increments. On appeal, the Supreme Court held that punishment of dismissal from services, cannot be said to be wholly inadequate punishment. The Court also held that to keep the appellant within the bounds of well disciplined conduct, a further punishment is also called for and should be imposed so that our humanistic approach may not induce him to repeat his intemperate performance. A person, when dismissed from services, is put to great hardship but that would not mean that a grave misconduct should go unpunished. Although the doctrine of proportionality may be applicable in such matters, but a punishment of dismissal from service for such a misconduct cannot be said to be unheard of. Maintenance of discipline in an institution is equally important. It was added: 'This Court has come a long way from its earlier view-points. The recent trend in the decisions of this Court seek to strike a balance between the earlier approach of industrial relations wherein only the interest of the workmen was sought to be protected with the avowed object of fast industrial growth of the country. In several decisions of this Court, it has been noticed that how discipline at the workplaces/industrial undertaking received a set-back. In view of the change in economic policy of the country, it may not now be proper to allow the employees to break discipline with impunity. Our country is governed by rule of law. All actions, therefore, must be taken in accordance with law. Law declared by this Court in terms of Article 141 of the Constitution of India categorically demonstrates that the tribunal would not normally interfere with the quantum of punishment imposed by

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<sup>49</sup> 2006 LLR 141

the employers unless an appropriate case is made out therefor. The tribunal, being inferior to this Court, was bound to follow the decisions of this Court which are applicable to the fact of the present case in question. The tribunal can neither ignore the ratio laid down by this Court nor refuse to follow the same. The Court accordingly allowed the appeal.

#### ***D. Persistent Refusal to Join Duty at the Transferred Place***

In *Viveka Nanda Sethi v. Chairman, J&K Bank*<sup>50</sup>, the workman was a cashier-cum-clerk. He was transferred to Kolkata but he did not join. After show-cause notice and taking a lenient view, he was transferred to Amritsar, then to Simla and again to Amritsar. He applied for leave for 28 days which was sanctioned. A further leave for 9 days was also sanctioned. again applied for 1 month's leave although he had only 25 days of accumulated leave and his leave account had already been debited by 50 days medical leave. Despite the expiry of the period of leave, he did not join. An explanation was called and he was asked to join duty immediately. A show-cause notice was therefore, served on him, where under he was intimated that in the event of his failure to resume duty by 15 January 1984, he would be deemed to have discharged from the service of the bank. In reply, a telegram was received from another person saying that the said workman was unwell and would not join on the said date. He again applied for medical leave on 15 February 1984, i.e., one month after the telegram. The bank dispensed with his services invoking bipartite settlement. A legal notice was served by the workman on the bank asking for reinstatement. Conciliation proceedings were initiated and later a reference was made by the Central Government. The CCIT ordered reinstatement without back wages. Thereupon, a writ petition was filed by the bank and also by workman for grant of back wages. Both the single judge and the division bench held that it was obligatory on the part of the bank to conduct full-fledged departmental proceedings. However, the High Court dismissed the petition of the workman. Thereupon, he filed an appeal before the Supreme Court. The Supreme Court ruled:

- (a) It may be true that in a case of this nature, the principles of natural justice were required to be complied with but the same would not mean that full-fledged departmental proceedings were required to be initiated. A limited inquiry as to whether the employee concerned had sufficient explanation for not reporting for duty after the period of leave had expired or failure on his part on being asked to do so, amount to sufficient compliance with the requirements of natural justice.
- (b) Mere sending of an application for grant of leave much after the period of leave was over cannot be said to be a *bona fide* act.

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<sup>50</sup> 2005 LLR 641

- (b) The workman's appeal under 17-B cannot be entertained as he did not file an affidavit.

The Court accordingly allowed the appeal of the bank that the workman should be dismissed

In *Novartis India Ltd v. State of West Bengal*,<sup>51</sup> the management dismissed an employee for not joining the place to which he had been transferred without holding a domestic inquiry. The court held that the same was hit by principles of natural justice and such dismissal could only be effected after holding a domestic inquiry/disciplinary proceedings. However, the Supreme Court ruled:

When an employee does not join at his transferred place, he commits a misconduct. A disciplinary proceeding was, therefore, required to be initiated. The order of discharge is not a substitute for an order of punishment. If an employee is to be dismissed from service on the ground that he had committed a misconduct, he was entitled to an opportunity of hearing. Had such an opportunity of hearing been given to him, he could have shown that there were compelling reasons for his not joining at the transferred place. Even a minor punishment could have been granted.

In *Kallakurichi Taluk Cooperative Housing Society Ltd v. M Maria Soosai*<sup>52</sup>, the respondent joined the post to which he had been transferred but thereafter, unilaterally stopped coming to work without submitting any leave application or prior intimation and that too not for a few days but for many months. Despite the maximum latitude shown to him by allowing him to rejoin duty in the appellants society, the respondent again failed to report for work. As a result, he was placed under suspension and a domestic inquiry was conducted in which he was found guilty of the charges brought against him. However, the High Court ordered reinstatement which was complied with by the management. On appeal, the Supreme Court observed:

It is, in fact, surprising as to why a decision was taken to consider his case on a compassionate basis despite lapses of his own making. The decision of the appellants society to reappoint respondent 1 on compassionate grounds leading to the order of the registrar (housing) dated 27 July 1995, permitting the appellants society to reappoint him was in itself a concession made to respondent 1 which he missed subsequently.

The Court held that in such circumstances, the judgment and order of the division bench of the High Court cannot be sustained and must necessarily be set aside. However, having regard to the fact that a domestic inquiry was conducted against respondent 1 in which he was found guilty, we do not propose to interfere with that part of the order impugned directing reinstatement, but we are not inclined to maintain the order of the division bench of the High Court regarding payment of back wages.

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<sup>51</sup> (2009) 3 SCC 124

### ***E. Sleeping while on Duty***

In *Bharat Forge Co. Ltd v. Uttam Manohar Nakat*<sup>53</sup>, the respondent who was working as helper in the Bharat Forge Co. Ltd, was found sleeping on an iron plate in the first shift at his work place. The management therefore, initiated disciplinary proceedings against him in terms of the standing order 24(1) of the model standing orders framed under the Industrial Employment (Standing Orders) Act, 1946. He was found guilty in the said domestic inquiry. The management accordingly dismissed him from service. On a dispute being raised, the labour court held that the punishment of dismissal imposed upon the employee was harsh and disproportionate and no reasonable employer could impose such punishment for the proved misconduct. It therefore directed the management to reinstate the respondent employee on his original post with continuity of service with 50 per cent of back wages for the period of his dismissal. Aggrieved and dissatisfied, both parties preferred separate revision applications before the industrial tribunal. By a common judgment, the revision application filed by the appellant was allowed and the respondent was dismissed. The respondent thereupon filed a writ petition before the Bombay High Court which was dismissed. On a letter patent appeal, the High Court quashed and set aside the order of the single judge as also of the industrial court and directed the employer to pay a sum of '2,50,000 to the employee within one month from the date of order. Thereupon, the management filed an appeal before the Supreme Court. The Court ruled:

It is trite that the labour court or industrial tribunal as the case may be, in terms of the provisions of the Act must act within the four corners thereof. The Industrial Court would not sit in an appeal over the decision of the employer unless there exists a statutory provision in this behalf. Although its jurisdiction is wide, but the same must be applied in terms of the provisions of the statute and no other. If the punishment is harsh, albeit, a lesser punishment may be imposed, but such an order cannot be passed on an irrational or extraneous factor and certainly not on Compassionate ground. The Court accordingly set aside the order of the lower court.

### ***F. Gheraoing the Manager and Causing Damage to the Property***

In *Management of Krishnakali Tea Estate v. Akhil Bharatiya Chah Mazdoor Sang*<sup>54</sup>, the workmen concerned entered the estate armed with deadly weapons with a view to gherao the manager and others and in that process, they caused damage to the property of the estate. They wrongfully confined the manager and

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<sup>52</sup> 2004 LLR 1016

<sup>53</sup> 2005 LLR 210 (SC)

<sup>54</sup> JT 2004 (7) SCC 333; (2004) 8 SCC 200

others from 8.30 pm on 12 October to 3 am the next day. On these facts, the Supreme Court held that these charges are grave enough to attract the punishment of dismissal even without the allegation of extortion. The Court added that the fact that the management entered into a settlement with some of the workmen who were also found guilty of the charge, would not in any manner reduce the gravity of the misconduct with regard to the workmen concerned because these workmen did not agree with the settlement to which others agreed.

### ***G. Fraud and Corruption***

In *State Bank of India v. Bela Bagchi*<sup>55</sup>, the bank employee was charge-sheeted for gross misconduct as he had colluded with one of the branch managers and enabled grant of fictitious loan to Ramkrishna while the real beneficiary was named Raghav. The employee was dismissed after an inquiry. The single judge and division bench of the High Court ordered reinstatement. The Supreme Court ruled that it is for the disciplinary authority and not for the court to decide as to which punishment should be imposed on a delinquent who has admitted his misconduct. The Supreme Court has held in a series of cases that employees have to exercise a higher degree of honesty and integrity. The Court also held that the bank employee concerned with the deposits of customers of the bank cannot be permitted to tinker with the deposits in any manner.

In *Damoh Panna Sagar Rural Regional Bank v. Munna Lal Jain*<sup>56</sup>, the manager of a bank who had indulged in unauthorized withdrawals, subsequently returned the amount with interest. Yet, the Supreme Court held that this conduct of unauthorized withdrawals amounted to a serious misconduct. In *General Manager (P), Punjab and Sind Bank v. Daya Singh*<sup>57</sup>, the respondent who was working as manager was found on vigilance inspection to have disbursed some 20 loans to the tune of '16.48 lakh to some persons against FDR which were in the names of other persons. The management, after holding a domestic inquiry, dismissed the respondent. However, the High Court set aside the order of dismissal and directed reinstatement. On appeal, the Supreme Court held that there was clear documentary evidence on record in the handwriting of the respondent which established his role in the withdrawal of huge amounts for fictitious persons. The ledger entries also showed that whereas the FDRs were in one name, the withdrawals showed the names of altogether different persons and they were far in excess of the amounts in FDRs. The respondent had no explanation and therefore, it had to be held that the respondent had misappropriated the amount. Dealing with the order of the High Court, the Supreme Court observed that in spite of a well-reasoned order by the inquiry officer, the High

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<sup>55</sup> JT 2005 (8) SC 96; (2005) 7 SCC 435

<sup>56</sup> (2005) 10 SCC 84

<sup>57</sup> 2010 LLJ 1029

Court had interfered therein by calling the same as sketchy. The High Court has completely overlooked the role of the bank manager. In view of this, the Court set aside the impugned judgment and order passed by the division bench of the High Court.

Can the dismissal of a bank employee, guilty of dishonesty and misappropriation be set aside merely because though convicted by the criminal court, he has been released on Probation of Offenders Act? This issue was raised in *Sushil Kumar Singhal v. The Regional Manager, Punjab National Bank*<sup>58</sup>. In this case, the appellant who was appointed as a peon was later confirmed on the said post in the respondent bank. He was handed over ₹5,000 in cash for depositing as dues for the telephone bill in the post office. However, on his failure to deposit the same, the bank lodged an FIR under Section 409 of the Indian Penal Code, 1860. The trial court convicted the appellant. Thereupon, the respondent bank issued a show-cause notice to the appellant proposing dismissal from service and asked the appellant to respond within 7 days. The respondent bank, on consideration of explanation dismissed him from service. The appellant then raised an industrial dispute under the Industrial Disputes Act, 1947 which was referred to the tribunal. In the meanwhile, the appeal filed by the appellant against the order of conviction was decided by the appellate court which maintained the conviction, but granted him the benefit of probation under the Probation of Offenders Act, 1958 and released the appellant on probation. The tribunal in the award rejected the claim of the appellant by holding his dismissal from service to be justified and in accordance with law. Being aggrieved, the appellant challenged the said award of tribunal by filing a writ petition before the High Court which was also dismissed. Thereupon, a special leave to appeal was filed before the Supreme Court. The Court was invited to decide the question whether the benefit granted to the appellant under the provisions of the Probation of Offenders Act, 1958 makes him entitled to reinstatement in service. While dealing with the issue, the Court referred to Section 10(1)(b)(i) of the Act, which reads as under:

No banking company shall employ or continue the employment of any person who is, or at any time has been, adjudicated insolvent, or had suspended payment or has compounded with his creditors, or who is, or has been, convicted by a criminal court of an offence involving moral turpitude.

Moral turpitude means anything contrary to honesty, modesty or good morals. It means vileness and depravity. The Court added that the conviction of a person in a crime involving moral turpitude impeaches his credibility and he has been found to have indulged in shameful, wicked and base activities. The Court also observed that the embezzlement of ₹5,000 by the appellant for which he had been convicted was an offence involving moral turpitude. The statutory provisions of the Act, 1949,

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<sup>58</sup> 2010 LLJ 1025

provide that the management shall not permit any person convicted for an offence involving moral turpitude to continue in employment.

The Court also referred to the decision in *Manish Goel v. Rohini Goel*<sup>59</sup>, wherein it held that no court is competent to issue a direction contrary to law nor can it direct an authority to act in contravention of the statutory provisions. Indeed, the courts are meant to enforce the rule of law and not to pass orders or directions which are contrary to what has been injected by law. In view of this, the Court held that once a criminal court grants a delinquent employee the benefit of Probation of Offenders Act, 1958, its order does not have any bearing so far as the service of such employee is concerned. The word, 'disqualification' on Section 12 of the Probation of Offenders Act provides that such a person shall not stand disqualified for the purpose of other Acts like Representation of People Act, 1950, etc. The Court added that conviction in a criminal case is one part of the case and release on probation is another. Therefore, grant of benefit of the provision of the Act only enables the delinquent not to undergo the sentence on showing his good conduct during the period of probation. In case, after being released, the delinquent commits another offence, benefit of the Probation of Offenders Act, 1958 gets terminated and the delinquent can be made liable to undergo the sentence. Therefore, in case of an employee who stands convicted for an offence involving moral turpitude, it is his misconduct that leads to his dismissal. The Court accordingly dismissed the appeal.

In *PSEB v. Leela Singh*<sup>60</sup>, the respondent was appointed as a lineman in Punjab Electricity Board on the basis of the purported experience certificate produced by him. However, in a vigilance inquiry, the charge against the respondent was that he had committed fraud in obtaining the appointment by production of a forged experience certificate. On the direction of the appellant board, his services were terminated without holding a domestic inquiry. A question arose whether in these circumstances, the appellant board could terminate the services of the respondent, the Supreme Court held that the said charge was required to be proved in a duly constituted departmental proceeding. The services could not have been directed to be terminated relying on and/or on the basis of the decision of the board. The Court, therefore, directed the appellant board to initiate departmental proceedings against the respondent.

## ***H. Corruption***

In *Municipal Committee, Bahadurgarh v. Krishnan Bihari*<sup>61</sup>, the Supreme Court held that in cases involving corruption, there cannot be any other punishment except

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<sup>59</sup> AIR 2010 SC 1099; JT 2010 (3) SC 189

<sup>60</sup> 2007 LLR 590 (SC)

<sup>61</sup> AIR 1996 SC 1249

dismissal. It felt that any sympathy shown in such cases is totally uncalled for and opposed to public interest. It also held that the amount misappropriated may be small or large but it is the act of misappropriation that is relevant.

In *Prabhulingappa H M Munichendragowda v. Divisional Controller, KSRTC, Kolar*<sup>62</sup>, it was held that the discretion which can be exercised under Section 11A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court. However, such discretion cannot be exercised by the labour court under Section 11A where appointment was obtained on the basis of false certificate by playing a fraud.

### ***I. Theft***

In *Depot Manager, Andhra Pradesh State Road Transport Corporation v. Raghuda Siva Sankar Prasad*<sup>63</sup>, the respondent was charged for committing a theft of fuel injection pump. He was also involved in stealing an alternator bearing while working in the night shift. The management, after holding a domestic inquiry, removed the respondent from the corporation. Earlier, a criminal case was also initiated against him. The criminal court acquitted the respondent of the charges that were leveled against him. Aggrieved by the order of his removal, the respondent raised an industrial dispute. The labour court held that the charges of respondent being involved in a case of theft of the property belonging to the corporation were justified under the factual circumstances of the case. Aggrieved by the award of the labour court, the respondent preferred a writ petition before the Andhra Pradesh High Court. The single judge of the High Court held that the charges of theft were correctly proved against the respondent. It however, came to the conclusion that punishment of removal was not in consonance with the gravity of the charges proved against him. It therefore, set aside the order of removal and directed reinstatement of the respondent with continuity of service but without back wages.

On appeal, the Supreme Court observed that when the delinquent employee admitted his guilt before the inquiry officer that he had handed over the alternator from the pan shop to the police authorities and further deposed that he had handed over the stolen property and requested the labour court to excuse him since it was his first offence. The tribunal rightly set aside the request by taking into consideration the inquiry report and other evidence. The Court also held that it is also not open to the tribunals and courts to substitute their subjective opinion in place of the one arrived at by the domestic inquiry. In the instant case, the opinion arrived at by the corporation was rightly accepted by the tribunal but not by the court. The Court therefore, held that the order of reinstatement passed by the High Court is contrary

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<sup>62</sup> 2012 Lab. IC 221

<sup>63</sup> 2007 LLR 113

to the law on the basis of a catena of decisions in this Court. In such cases, there is no place for generosity or sympathy on the part of the judicial forums for interfering with the quantum of punishment of removal which cannot be justified.

In *Workmen v. Balmadies Estates*<sup>64</sup>, it was alleged that two employees had stolen large quantities of chemicals from the storeroom during the specified period. The management, after holding an inquiry, dismissed the concerned workmen from service. Thereupon, they raised an industrial dispute which was referred to the labour court. The labour court held that there was no direct evidence to show that they had committed theft. It accordingly directed reinstatement. On a writ petition, the single judge held that appreciation of evidence by the labour court was perverse and its interference with the order of termination could not be supported in law. The writ appeal was also dismissed. Against this order, the workmen filed special leave petition before the Supreme Court. The Supreme Court observed that it is well settled that in view of wide powers of the labour court under Section 11A, it can, in an appropriate case, reconsider the evidence which has been considered by the domestic tribunal and on such reconsideration, arrive at a conclusion different from the one arrived at by the domestic tribunal. The Court however, made it clear that the assessment of evidence in a domestic inquiry was not required to be made by applying the same yardstick as a civil court could do when a *lis* is brought before it. Further, the Evidence Act, 1872 is not applicable to the proceedings so far as domestic inquiries are concerned, though principles of fairness can apply. It also observed that it is established that in a domestic inquiry, guilt may not be established beyond reasonable doubt and the proof of misconduct could be sufficient. In a domestic inquiry, all materials which are logically probative including hearsay evidence can be acted upon, provided it has reasonable nexus and credibility. Even confessional and circumstantial evidence, despite lack of any direct evidence, was sufficient to hold the delinquent guilty of misconduct and to justify the order of termination that had been passed. The order of the High Court was upheld and the order of the labour court was set aside.

### ***J. Negligence***

In *Subhash v. Divisional Controller, Maharashtra SRTC*<sup>65</sup>, the appellant was employed as a driver in 1980 with the respondent corporation. He was made permanent in 1985. However, while driving the bus on the fateful day, it ramped on the railing of a bridge due to his rash and negligent driving resulting in damage to the bus. The management, after holding an inquiry, held that charges were proved against the appellant and accordingly, dismissed him from service. The appellant challenged the order of dismissal before the appellate authority. The first appellate authority set

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<sup>64</sup> 2008) 1 SCC 115

<sup>65</sup> (2009) 9 SCC 344

aside the order and directed that he be appointed afresh without any monetary benefit for past service. Thereupon, he joined duty reserving his right to challenge the order of denying him reinstatement with continuity of service and back wages. He then filed a complaint under Section 28 read with items 5 and 9 of the schedule IV of the Maharashtra Recognition of Trade Union and Prevention Act, 1971 before the industrial tribunal, Aurangabad, which was dismissed. A writ petition filed against the order was also dismissed. Thereupon, he filed a special leave to appeal before the Supreme Court. The Supreme Court observed that there was negligence on the part of the appellant in driving the bus on that fateful day and as a result of which, the bus ramped on the railing of a bridge resulting in damage to the bus. This act no doubt was a misconduct. But taking into account the fact that during his service tenure of 21 years, he had been punished, twice the Court set aside the order of dismissal and ordered that fresh appointment be given to the appellant but without any benefit of past service. The Court, after looking into all the relevant aspects, thought it fit in the interest of doing complete justice that the order of the appellate authority be modified by ordering his reinstatement with continuity of service but without back wages. The Court felt that in the interest of justice and fair play, denial of back wages for the entire period from the date of dismissal until his rejoining duties would be an appropriate punishment. The appeal of the appellant was accordingly allowed in part to the extent stated above.

## X. POWERS OF HIGH COURTS UNDER ARTICLE 226

The high courts, in exercise of writ jurisdiction, can exercise similar power and discretion as is exercised by the labour court under Section 11A<sup>66</sup>. However, they cannot interfere with award of labour court and quantum of punishment if the labour court has exercised its discretion judicially. Decision of the management in matter of punishment could be interfered with by labour court if it is satisfied that the punishment imposed by the management is highly disproportionate with the degree of guilt of the workman concerned<sup>67</sup>

## XI. CONCLUSIONS AND RECOMMENDATIONS

1. A survey of decided cases reveals that prior to twenty first century the Supreme Court even in cases of serious misconduct tried to protect the interest of workmen may be because of the superior bargaining position of employer and generally did not interfere in the exercise of discretion of Labour Court/Tribunal in awarding lesser punishment in lieu of dismissal. But since the beginning of the present century generally the Supreme Court

<sup>66</sup> *Oriental Containers Ltd v. Engineering Workers' Association* 1996 LLR 739

<sup>67</sup> *Essorpe Mills (P) Ltd v. Labour Court* 1999 LLR 89

have tried to strike a balance between the earlier approach of industrial relations, wherein according to it, only the interest of the workmen was sought to be protected but now in view of the change in economic policy of the country, it may not now be proper to allow the employees to break discipline with impunity. The Court deprecated this attitude of some of the tribunals which while exercising its discretion under section 11-A normally interfere with the quantum of punishment imposed by the employers ignoring the decision of Supreme Court. It also reminded them that they are governed by rule of law and all actions, therefore, must be taken in accordance with law declared by the Supreme Court in terms of Article 141 of the Constitution of India, and as such the tribunal would not normally interfere with the quantum of punishment imposed by the employers unless an appropriate case is made out therefor. The Court warned that the tribunal can neither ignore the ratio laid down by the Supreme Court nor refuse to follow the same.

2. A survey of decided cases also reveals in recent years the apex court has taken serious view about the undue interference of tribunal where a workman has been dismissed or discharged from service after a proper and fair enquiry even in cases of serious misconduct and granted reinstatement. It has deprecated this tendency and noticed its effect on industrial discipline and work culture. The court has ruled that before exercising the said discretion, the Labour Court had to necessarily reach a finding that the order of discharge or dismissal was not justified. Therefore, the satisfaction to be arrived at by the Labour Court /Industrial Tribunal while exercising its discretionary jurisdiction under section 11A of the Industrial Disputes Act, 1947 must be based on sound reasoning and cannot be arrived at in a casual manner, inasmuch as, on the one hand the interference with the capital punishment imposed on the workman would deprive him and his family members of the source of livelihood, while on the other hand the employer having provided the opportunity of employment to the concerned workman would be equally entitled to be ensured that the employee concerned maintains utmost discipline in the establishment and duly complies with the rules and regulations applicable to the establishment. The court ruled that the Labour Court/Tribunal should not interfere with the quantum of punishment awarded by the management after the charges of misconduct are proved against employees. However cases are not lacking where labour courts/Tribunals have exercised its discretionary power where a workman has been dismissed or removed from service after a proper and fair enquiry even in cases of serious misconduct such as assault, using abusive language against the superiors, violence, sabotage,

drunkenness, loss of confidence, theft, and misappropriation etc. This has brought uncertainty and confusion. Thus there is a need to amend section 11-A.

3. In *Hombe Gowda EDN Trust v. State of Karnataka*<sup>68</sup> The Supreme Court ruled that when an employee breaches the discipline and the employer terminates his service, it is not open to the labour court or an industrial tribunal to take the view that the punishment awarded is shockingly disproportionate to the charge proved. On the contrary in *Management of Hindustan Machine Tools Ltd, Bangalore v. Mohd. Usman*<sup>69</sup> the Supreme Court held that even in a case where the labour court held that the domestic inquiry was conducted properly and without prejudice to the worker, it can analyse the evidence to decide whether the dismissal of the worker was justified. It is within the jurisdiction of the labour court to consider the propriety and justifiability of the punishment in the case and direct reinstatement if found necessary.
4. A survey of decided cases reveals that the Supreme Court have given conflicting decisions as to when for absence on account of unauthorized leave. the order of dismissal imposed by the management cannot be interfered with by the tribunals. Thus in *New India Assurance Co. Ltd. v. Vipin Bihari*<sup>70</sup> the order of dismissal passed by the management against a workman who unauthorisedly absented himself from duty was upheld by the Supreme Court but in *Jagdish Singh v. Punjab Engineering College*<sup>71</sup> where a workman who absented himself from duty without sanctioned leave for a long period to sort out the domestic problems and in *Chairman –cum –Managing Director v. Mukul Choudhary*<sup>72</sup> where the employee without sanctioned leave absented himself for duty for over six months the Supreme Court held that the order of dismissal imposed by the management was not only duly harsh but grossly in excess of the allegations and therefore set aside the order of dismissal of the management. Whatever may be the justification of such divergent order of the apex court there is uncertainty about law and frustration in the society about the law laid down by the Supreme Court particularly when the law laid by the Supreme Court is binding upon all subordinate courts, but the fact remains that we cannot do without law. It is now for the apex Court to decide as to what should be done in such a situation.

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<sup>68</sup> 2000 LLR 141

<sup>69</sup> (1997) 1 LLN 391(SC)

<sup>70</sup> (2008) 3 SCC 446

<sup>71</sup> (2010) 1 SLR 166

<sup>72</sup> 2009 III CLR 645

5. The Supreme Court is also divided on the issue as to whether the tribunal should interfere in the decision of management to terminate the services of workman who used abusive or filthy language against superior officer and award lesser punishment in lieu of dismissal. Thus in *Rama Kant Mishra v. State of UP*,<sup>73</sup> the Supreme Court upheld the order of tribunal directing reinstatement with back wages but withheld two increments. Likewise in *Ved Prakash Gupta v. M/s Delton Cable India Ltd*,<sup>74</sup> the workman, besides other charges, was also guilty of abusing in filthy manner/language the Supreme Court upheld the order of reinstatement. But in *Mahindra & Mahindra Ltd v. N B Naravada*<sup>75</sup>, and *L K Verma v. HMT Ltd*,<sup>76</sup> where the respondent workman used abusive and filthy language against his supervisor and for which he was dismissed. The Supreme Court upheld the order of dismissal passed by management and set aside the order of reinstatement passed by tribunal and High Court. *Mahindra & Mahindra Ltd v. N B Naravada*<sup>77</sup> also raises the issue whether it is necessary that to sustain the order of dismissal the delinquent workman must have abused more than once. Be that as it may it makes the law fluid and unsettled and thereby raises a wider issue as to which decision the tribunals and High Court would follow because the law laid down by the Supreme Court is the law of the land and is binding on all subordinate courts and tribunals in India under Art.141 of the Constitution.
6. Dealing with the discretionary power of the Labour Court under Section 11A of the Industrial Disputes Act, 1947 the apex Court observed that exercise of such power will always have to be made judicially and judiciously. The court cautioned that under the said provision, wide powers have been conferred upon the Labour Court to set aside the punishment of discharge or dismissal and in its place award any lesser punishment. Therefore, it directed that high amount of care and caution should be exercised by the Labour Court while invoking the said discretionary jurisdiction for replacing the punishment of discharge or dismissal. Such exercise of discretion will have to depend upon the facts and circumstances of each case.
7. In cases of negligence the Supreme Court appears to have adopted humanitarian approach when it held that considering the past record of the driver and the fact that no passenger was injured in the accident the order of dismissal was not proper, a tendency which has been deprecated in some other case.

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<sup>73</sup> 2003 LLR 895

<sup>74</sup> 1982 Lab IC 1790 (SC)

<sup>75</sup> (2003) 9 SCC 32

<sup>76</sup> 2006 LLR 296 (SC)

<sup>77</sup> (2003) 9 SCC 32

## RECOMMENDATION

In order to bring uniformity it is suggested that a proviso be added in section 11A of the Industrial Disputes Act, 1947 to the effect that where a worker has been dismissed or discharged from service after a fair enquiry on charges of serious misconduct such as assault, violence, sabotage, drunkenness, theft, misappropriation, fraud, corruption, embezzlement, sleeping on duty in case of security personnel and watch and ward staff and other grave charges while on duty and if the labour court/tribunal comes to the conclusion that the charges have been proved, then the Labour Court, Tribunal and National Tribunal will have no power to order reinstatement in lieu of dismissal/discharge of the delinquent worker.

## **Legal Transplant and the ‘Dialogue of Deaf’: Revisiting the Debate between Transferists and Culturalists**

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**Abstract:** In comparative law, legal transplant has been a subject matter of great attention and concern leading to discourse between two factions of legal ideologists. The debate revolved between *Transferists* and *Culturalists*, which is popularly known as “dialogue of deaf”. On one hand, Transferists argue that in almost all countries very small portion of law is original and in order to have legal change in the society, borrowing of law from other countries is a must. Legal transplant has been perceived by the comparative law scholars as the most prolific tool for legal development. Watson asserts that the moving of rule or a system of law from one country to another has been shown to be the most fertile source of legal development since most changes in most systems are the result of borrowing of law. On the other hand, Culturalists do not see any link between law and the society and perceive it as two separate ideas, independent of each other. Globalization is perceived as the main factor for the growth of legal transplants in the world. The possibility on the transplantability of the law, where and why it has been transplanted, and its successes and failures have been subject matter to lengthy discussions among the comparative law lawyers. In this paper, the authors analyze the Cultrulists’ and Transferists’ point of views on legal transplant and determine the possible degree of transplantability of laws. For this, the paper looks into the positions of transplantability of laws in some selected countries such as Turkey, Tunisia and Malaysia, Pakistan. In case of zero transplants, the paper examines the reasons behind the failure of legal transplant; and if there were some successes, the paper explores the reasons behind that. The problem with the legal transplant is that in vast majority of cases, the

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transplantability took place because of colonization without any regard to social, political, historical and religious values in colonized countries. It is because of this reason that many countries, in order to make law suited to their people, are going back to formulating laws distinct from the laws imposed by colonial masters.

**Key Words:** Comparative law, legal transplant, dialogue of deaf, transferists, culturalists, legal development, globalization.

## I. INTRODUCTION

“At all stages of comparative research (data acquisition, analysis and interpretation of the data, and actual in-depth comparison and eventual evaluation), the real problems are the lack of full knowledge and understanding of foreign legal rules and cultures. They (*comparatists*) must know something about the historical, social, economic, political, cultural and psychological context which has made a rule or proposition what it is. We must look not only at rules but at legal cultures, traditions, ideals, ideologies, identities, and entire legal discourses.”<sup>1</sup>

In comparative law, legal transplant has been a subject matter of great concerns and endless discussions. Culturalists argue that to a large extent the successes and failures of legal transplant are contingent upon firstly where it has originated from and secondly where it is going to be implemented. Conversely, Transferists draw a line between law and culture and see them both as autonomous and believe that a good law is always exchangeable irrespective of differences in cultures.<sup>2</sup>

An explanatory definition is therefore needed to describe the development of legal transplant. For this purpose, Watson described legal transplants as “the moving of a rule or a system of law from one country to another, of from one people to another”.<sup>3</sup>

‘Rules not just statutory rules institutions, legal concepts and structures that are borrowed, not the spirit of the legal system’<sup>4</sup>are considered as objects of legal transplant for Watson. Transferists see no relationship between law and society and call it as fallacy.<sup>5</sup>Therefore, they say that changing the law in a society is

<sup>1</sup> Anne Peters and Heiner Schwenke, “Comparative Law beyond Post-Modernism,” 49(4) *International and Comparative Law Quarterly*, 2000, at 832

<sup>2</sup> Nicholas H.D. Foster, “Transmigration and Transferability of Commercial Law in a Globalised World,” 2002

<sup>3</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974) at 21

<sup>4</sup> Alan Watson and Ius Commune, *Legal Transplants and European Private Law*, Vol. 4 (Metro Maastricht, 2000)

<sup>5</sup> *Id.*, at 108

completely independent of historical, cultural and social substratum and it is rather rule's function extracted from different legal systems. Clearly, Watson believes on the simplicity and easiness of legal rule's transplantability.<sup>6</sup> He further claims: "it would be a relatively easy task to frame a single basic code of private law to operate throughout the whole of the western world."<sup>7</sup>In addition to that, the main concern of comparatists should only be "the existence of similar rules' and 'not with how they operate within society."<sup>8</sup>

Former Scottish Law Commissioner quote is worth-mentioning here. He asserted that:

"Account has necessarily to be taken of English solutions even if these are eventually rejected as unsuitable for reception into Scots law. Indeed in many contexts English solutions have to be studied to identify fundamental differences from Scots law cloaked by superficial similarity. Endeavors to achieve unified solutions in the field of Contract law have in particular revealed that what has been assumed to be common ground was approached by members of the Scottish and English Contracts Teams through conceptually opposed habits of thought. Whereas English comparative research relied particularly on American and Commonwealth sources, the background of some of the Scottish proposals derived from French, Greek, Italian and Netherlands sources - and from the Ethiopian Civil Code, which was, of course, drafted by a distinguished French comparative lawyer. Now this, to me, is rather too academic. If the *rules* of contract law of the two countries are already similar (as they are) it should be no obstacle to their unification or harmonisation that the legal *principles* involved come ultimately from different sources, or that the habits of thought of the commission teams are rather different. It is scholarly law reformers who are deeply troubled by historical factors and habits of thought. Commercial lawyers and businessmen in Scotland and England do not in general perceive differences in habits of thought, but only - and often with irritation-differences in rules."<sup>9</sup>

## II. THEORIES OF LEGAL TRANSPLANT

Whether is it possible for law to be transplanted, why it is transplanted, where it has been transplanted and the success and failure of this transplantation has been a

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<sup>6</sup> *Id.*, at 95

<sup>7</sup> *Id.*, pp.100-101

<sup>8</sup> *Id.*, at 96

<sup>9</sup> *Id.*, pp.96-97 [emphasis original]

subject of constant debate since 1700. It has been claimed by Alan Watson that Code of Hammurabi in the 7<sup>th</sup> century is the first recorded legal transplant.<sup>10</sup>

The approaches to the issue of legal transplant has revolved around two contradictory theories of culturalist and transferist theory<sup>11</sup> a “dialogue of the deaf,”<sup>12</sup>and it has provided a useful platform for the study of legal transplant.<sup>13</sup>

Watson is the one championing for notion of Transferist approach as opposed to its Culturalist counterparts; he purports that law and society are independent of each other and are separate notions. Watson asserts that if lawmakers happen to perceive other laws to be good, they would transplant or import it into their own system.<sup>14</sup> He maintains that legal rules borrowing may successfully be done even though there are big differences in political, social, and economic circumstances and gives the Reception of Roman law in Western Europe as an example.<sup>15</sup>Watson has been subject to William Ewald’s criticism by saying that Watson has been unable to “provide an adequate foundation for a full-blown theory of law and society”;<sup>16</sup> nonetheless, sums up that “even the weak versions of Watson’s theses are adequate to scupper the traditional mirror culturalist theories that have so dominated modern legal thought”.<sup>17</sup>

Therefore, Transferists<sup>18</sup>claim that for a legal change borrowing other laws are necessary and very nominal parts in law remains original. Watson follows them by saying that “the moving of a rule or a system of law from one country to another has been shown to be the most fertile source of legal development since most changes in most systems are the result of borrowing.”<sup>19</sup>

Transferists perceive the legal history as a history that is dependent on legal borrowings. For instance, Sacco sees the imitation and borrowing as a major legal change and believes that very rarely new rules and institution will emerge.<sup>20</sup>

<sup>10</sup> Watson Alan, *Supra* note 3 pp.22–24

<sup>11</sup> Foster, “Transmigration and Transferability of Commercial Law in a Globalised World” *Supra* note 2.

<sup>12</sup> Nicholas H.D. Foster, “Company Law Theory in Comparative Perspective: England and France,” *The American Journal of Comparative Law*, 2000, pp.573–621

<sup>13</sup> Richard G. Small, “Towards a Theory of Contextual Transplants”, 19 *Emory Int’l L. Rev.*, 2005, at 1431

<sup>14</sup> Alan Watson, “Comparative Law and Legal Change”, 37(2) *The Cambridge Law Journal*, 1978, pp.313-36

<sup>15</sup> Alan Watson, “Legal Transplants and Law Reform”, 92 *Law Quarterly Review*, 1976, pp.82–83

<sup>16</sup> William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplants”, *The American Journal of Comparative Law*, 1995, pp.489–510. *See also*, William Ewald, “Comparative Jurisprudence (I): What Was It Like to Try a Rat?”, *University of Pennsylvania Law Review*, 1995, pp.1889–2149

<sup>17</sup> Ewald, *Supra* note 16 at 508

<sup>18</sup> Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academy Press, 1974)

<sup>19</sup> Watson, *Supra* note 15

<sup>20</sup> Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (installment II of II)”, *The American Journal of Comparative Law*, 1991, pp.343–401

Moreover, for Watson, “legal rules may be successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system.”<sup>21</sup>

On the other hand, Montesquieu championed the Culturalism and maintains that laws cannot overpass the limits of the different cultures. He propounded that laws are deeply rooted and embedded in the spirit of nations and cannot be separated from their political, customary and geographic context. He believes that manners and customs must evolve and cannot be changed and that transfer would constitute a “grand hazard”.<sup>22</sup>

Culturalists claim that laws are ‘felt needs’ of the society and there is a low probability that it will induce the same behavior in different cultures and societies. The *transplantation* of doctrinal and statutory rules do not really transfer the entire law because there is much ‘*law*’ beyond *legal* rules. It has been argued that rules lie on the surface of *legal* systems and do not properly portray profound fundamental sociopolitical characters.<sup>23</sup> Therefore, they insist that development of law and modernization must take place within that particular society. Their assertion is that “in introducing foreign legal and political norms into any society, those norms will become effective and take root only if they incorporate also a part at least of the norms and philosophy of the native society”.<sup>24</sup>

### III. KAHN-FREUND VS ALAN WATSON

Kahn-Freund for determining the degree of transplantibility of rules and institutions proposes a set of standards, referring to Montesquieu, by asserting that law created for the people of one country is only appropriate for the citizens of that specific nation and not any other; and if it happens that laws of two nations are the same, that is just a coincidence.<sup>25</sup> It means certain laws of a country only suit that particular country and it is difficult to transplant it to another country. Montesquieu, thus, said, “Laws are the necessary relations arising from the nature of things.”<sup>26</sup> He then stressed that these obstacles were determined by two groups of variables: one being environmental factor, including geographical, socio-economic and cultural factors; and the other being “purely political” factor.<sup>27</sup>

<sup>21</sup> Watson and Commune, *Legal Transplants and European Private Law*, *Supra* note 4 pp.79–80

<sup>22</sup> John Gillespie, “Globalisation and Legal Transplantation: Lessons from the Past”, 6 *Deakin L. Rev.*, 2001, at 286

<sup>23</sup> *Ibid.*

<sup>24</sup> Pierre Legrand, “Against a European Civil Code”, 60(1) *The Modern Law Review*, 1997, pp.44–63

<sup>25</sup> Zongling Shen, “Légal Transplant and Comparative Law”, 51(4) *Revue Internationale de Droit Comparé*, 1999, at 853

<sup>26</sup> Charles-Louis De Montesquieu, *The Spirit of the Laws* (Simon and Schuster, 1970)

<sup>27</sup> Shen, “Légal Transplant and Comparative Law”, *Supra* note 25.

He affirmed that the developments in communication, urbanization and industrialization reduced the environmental obstacles such as geographical, socio-economic and cultural conditions and lost its significance; but on the other hand, political differentiation caused divisions and gave birth to different political ideologies ranging from communist and non-communist bloc, democracies and dictatorships, parliamentary and presidential forms of governance and the roles played for making and maintenance of the law by their organized interests. Kahn Freund in this perspective said that in order to use comparative law methods, in addition to foreign law knowledge, proper understanding of social and political context was required too; otherwise if one doesn't do so, its usage becomes a misuse.<sup>28</sup>

Kahn Freund's idea is challenged by Professor Watson with regards to legal transplant.<sup>29</sup> He rejected the arguments leveled by Kahn by saying that history had clearly shown that successful transplantation has taken place from a very different legal system to the other; and he do not see any necessity for having knowledge of foreign systems. He gives the example of Roman law reception by the Western Europe as a proof for prosperous legal transplantation.<sup>30</sup>

It is stated by Professor Eric Steni on the debate between Kahn-Fruend and Watson that their differences on transplant were due to particular focus of their inquiry where Watson, as a historical lawyer, took the "macro-legal" view which believed in a massive transplant; whereas, Kahn Fruend, the sociological lawyer, took the "macro-legal" view that primarily focuses on modern reform legislation.<sup>31</sup>

As to the objects or contents of legal transplant, we may divide what kind of law we intend to transplant. It is a whole legal system, a whole code or a whole branch of law of the foreign country, or only individual legal rule or institution? Is law closely related to a foreign country's basic social system, ideology and of value or is it not or only marginally related with them? Is it a law tending to be internationalized or to be nationalized? So far as the same rule or institute is concerned, we may divide its political purposes and its social functions.<sup>32</sup>

### ***a. Causes of Legal Transplant***

One of the main reasons in the development of legal transplant in the world is mainly due to Globalization.<sup>33</sup> Accordingly, globalization brings more straight forward, close, frequent and often stressed and complicated contact between law and legal

<sup>28</sup> Otto Kahn-Freund, "On Uses and Misuses of Comparative Law", 37(1) *The Modern Law Review*, 1974, pp.1-27

<sup>29</sup> Watson, *Supra* note 15

<sup>30</sup> *Ibid.*

<sup>31</sup> Eric Stein, "Uses, Misuses—and Nonuses of Comparative Law", 72 *Nw. UL Rev.*, 1977, at 198

<sup>32</sup> *Id.*, at 855

<sup>33</sup> Irma Johanna Mosquera Valderrama, "Legal Transplants and Comparative Law", 2 *International Law: Revista Colombiana de Derecho Internacional*, 2004, pp.264–65

cultures. It increases and assists the knowledge of legal professionals on what they want and need to know about foreign law, obtain and process information, how their transfer takes place, and how decisions are being made. Understanding globalization and its effects on development of the laws and strategies and how to deal with them is what is expected of comparative law field.<sup>34</sup>

Globalization has substantially increased the need for the legal scholars to have knowledge of foreign laws. Substantial advancements in technologies have created a global village where people are more connected to each other more than ever. Thus, globalization has caused the need for new and unified laws more imminent than ever.

In addition to that, the below factors are being discussed as the main causes of legal transplant as stated by legal scholars. Legal transplant may find its way through “authority, prestige and imposition, chance and necessity, expected efficacy of the law, political, economic and reputational incentives from the countries and third parties.”<sup>35</sup>

First and the foremost, according to Watson, authority is needed for the explanation of the development of legal transplant. He goes on and says: “In the absence of legislation, which typically has been scarce for private law, law making is left to subordinates judges and jurists— who, however, are not given power to make law. They must justify their opinion. It will not do to say ‘This is my decision because I like the result’. They must seek authority.”<sup>36</sup>

Prestige and imitation has been classified as the next reason. Sacco is the one who developed this theory by categorizing the reasons behind imitation of legal transplantation into two, which are namely; imposition and prestige and asserts that anyone with the authority and power tends to impose its institution over others and one only can put an end to the reception (imposition) once the force is removed.<sup>37</sup>

Furthermore, it may also take place due to enthusiasm to follow the work of others because of the intrinsic qualities that it possesses and thus it has become very prestigious.<sup>38</sup> Orucu explained that chances and necessity is another reason for legal transplantation and that the borrowing may not only take place out of luck but rather out of necessity. And he has given the example of criteria needed to be met by Eastern Europe to join the European Union.<sup>39</sup>

<sup>34</sup> David J. Gerber, “Globalization and Legal Knowledge: Implications for Comparative Law”, 2001, at 950

<sup>35</sup> *Id.*, at 265

<sup>36</sup> Watson, Alan, “Legal culture v. Legal tradition”, paper presented at the Conference of Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels, October 24-26, 2002, at 2

<sup>37</sup> Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (installment II of II)”, *Supra* note 20 at 398

<sup>38</sup> *Ibid.*

<sup>39</sup> Esin Orucu, “Family Trees for Legal Systems: Towards a Contemporary Approach”, 2004, at 9

The theory of ‘Expected Efficacy of the Law’ has been claimed as another reason behind legal transplantation. It has been detailed out by Walsh in these words: “The way in which a formal legal order incubated in Europe was transplanted into other countries was a far more important predictor of the effectiveness of legal institutions than the association of that transplant with any particular legal family. The quality of transplantation process counted far more than the content of the transplant effect”.<sup>40</sup>

This idea of ‘Political and Economic Reputational Incentives’ was developed by Schauer He asserted that: “The transnational and cross-border spread of law and legal ideas is not, as it may be for scientific, technical, and economic ideas, largely a matter of the power and value of the ideas themselves, but may instead be substantially dependent, both on the supply side and on the demand side, on political and symbolic factors that may have more explanatory power in determining how law migrates than do factors that relate to the intrinsic or instrumental value of the migrating law itself”.<sup>41</sup>

Hence, as it could be seen, legal transplant may find its way to any legal system through voluntary, i.e. prestige, necessity, expected efficacy of the law, political, economic and reputational incentives or involuntary means such as imposition. Involuntary means are the worst type of legal transplantation and in numerous cases it has resulted into chaotic and disastrous situations.

### ***b. Successes and Failure of Legal Transplant***

As to the effect of legal transplant, we usually divide it into failure and success. There are remarkable cases where it proved that legal transplant can successfully take place as the ombudsman and trust system, the French Civil Code and Administrative Court, the Anti-trust legislation and judicial review in the United States. Kahn specifically cited the attempted introduction of 1971 British industrial relation and English jury system to the continent in the 19<sup>th</sup> century as an example of misuse of comparative law, a kind of failure of legal transplant due to the opposition of the continent legal profession.<sup>42</sup>

### ***c. Problems of Legal Transplant in some Countries***

#### **(1) Turkey**

As in Turkey the family law was tightly attached to Islam even during the uprising of Ottoman Empire, which was done through compilation of legal code named

<sup>40</sup> Catherine Walsh, “Law in Transition, Advancing Legal Reform”, 2000, at 10

<sup>41</sup> Frederick Schauer, *The Politics and Incentives of Legal Transplantation* (Center for International Development at Harvard University, 2000) at 2

<sup>42</sup> Shen, “Légal Transplant and Comparative Law”, *Supra* note 25 at 856

*Mejelle* and the Shari‘ah concerning family laws, and which remained unchanged. Under that men were allowed legally to have four wives as it connotes that polygamy was an accepted practice during that time. In 1917, the Ottoman Law of Family Rights Act was enacted in which new requirements were added. It required that:

- i. The law required that state procedures must be strictly followed for every marriage and divorce in which both marriage and divorce had to be registered with the state.
- ii. New age limit for marriage was set up which was 9 for females and 12 for males.
- iii. The marriage needed to be solemnized before the judge or deputy and simple marriage renunciation which traditionally was done in the presence of two witnesses was not enough any longer.
- iv. Females were given two grounds for divorce of their husbands which were epidemic sickness or leaving her without providing maintainance for her.<sup>43</sup>

And more importantly, women were allowed to insert a clause in a marriage contract at the time of betrothal which would render marriage null and void if the husband would take another wife. It interfered in an area that was previously dominated by Islamic law and tradition.<sup>44</sup>

Subsequently, the Shari‘ah law was entirely replaced by the European civil law, a radical move taken by Mustafa Kemal (Atatürk) in form of the Civil Code of 1926, in which

- i. Polygamy was prohibited.
- ii. Methods of Civil Law were used in order to prove the grounds of divorce in the presence of two witnesses.
- iii. In the matters of custody and inheritance, both were given the equal rights.
- iv. 18 for males and 17 for females were new age limit for marriage.
- v. In order to legitimize marriage, it was not sufficient to be performed and solemnized before imam but state civil servant.
- vi. No religious marriages were allowed to happen before the official civil marriage.
- vii. Religious ceremony had to take place strictly after civil marriage as stated in Section 110 (later 143/2).<sup>45</sup>

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<sup>43</sup> Nursel Atar, "The Impossibility of a Grand Transplant Theory", 4(2) *Ankara Law Review*, 2007, pp.177-97

<sup>44</sup> June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Sunny Press, 1992) at 40

<sup>45</sup> *Ibid.*

However, this Code, led to a lot of social problems, as the majority of people were still performing religious marriages in the society. Seven years after, by passing the Amnesty Act 1933, legislature was forced to recognize the religious marriages, which was previously considered illegal and the children as the outcome of those marriages were considered illegitimate. The enactment took place due to the following problems:

- i. Religious marriages were still taking place without complying with civil marriages which was legally prohibited and their cohabitation was not recognized.
- ii. Husband and wife were not given the right of inheritance from each other and their children were considered illegitimate.

Even after the Amnesty Act was passed, in order to give people time to assimilate the civil law rules with regards to marriages, the above-mentioned problems persisted until 1936. Frustrated over this social problem, legislature took another shocking step and added section 237/3-4 into the Criminal Code in which religious marriages were criminalized if it was taken place without prior civil marriage and non-compliance would result in two to six year's imprisonment. The Imams who conducted these types of marriages were not immune from criminal prosecution and could face up to one to three months imprisonment if they were to solemnize a marriage without looking at the proof of its civil marriage.<sup>46</sup>

## (2) Tunisia

Tunisia went through drastic reforms same as Turkey. In Tunisia, initially laws were determined by the state and religious principles, and it had gone through waves of reforms especially after its independence in 1956. In 1956, the Code of Personal Status (CPS) was adopted under Habib Bourguiba the former president in which it included series of laws that were inconsistent with the Sahri'ah. These law reforms were as follow:

- i. It abolished polygamy even though the head of household were still males.
- ii. CPS increase the minimum age for marriage.
- iii. Marriages had to be registered and it recognized child adoption.
- iv. In the middle of 1960s contraception was available and in 1970s it legalized abortion.<sup>47</sup>

<sup>46</sup> Atar, *supra* note 43, at 188

<sup>47</sup> Mounira M. Charrad, "Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation", 64 *Wash. & Lee L. Rev.*, 2007, at 1513

Thus, the authority on family law, was taken out of Ulamas' hands and was usurped by the authorities and eventually instituted a secular alternative to the Shari'ah.<sup>48</sup> Secularization of the court system, dismantling of Zitouna's religious university and conformity with the western's calendar were among other steps which were taken by the government for further secularization of the country.<sup>49</sup> Therefore a secular form of dictatorship was established under Bourgiba's leadership. It was continued by Ben Ali, his successor, who's regime lasted until Arab Spring.

Religious political parties were banned to be formed in Tunisia throughout Ben Ali's era in order to curb their influence in the society.<sup>50</sup> After the revolution of 2011 in Tunisia, the role of religious based political parties were enhanced and were allowed to contest general elections which led to the wining of al-Nahda an Islamic political party in October 2011 for the Constituent Assembly.<sup>51</sup>

The need for the representation of an Islamic party was apparent because the process of securitization went simultaneously with political compression. Under Habib Bourguiba's leadership from 1957 till 1987, formation of any Islamic political party was prohibited and his dissenters were imprisoned, he on a live television show, drank orange juice during Ramadan, meaning to say that fasting prevents development and it reported to have said that "We cannot advance... with an empty stomach", and all these happened in a country with Islam as the dominant religion with 99 percent Muslims. This action was followed by his successor Ben Ali as well. Therefore, the discussion about the role of Islam with law was new concept and freedom which was still hammered for over 50 years in Tunisia.<sup>52</sup>

Subsequently, after the winning of al-Nahda, there were calls for drafting a new constitution and legalizing polygamous marriages in line the constitution with Islamic principles.<sup>53</sup> These law-reforms were mainly enhancing the role of Islamic law in the Tunisian constitution as well as its domestic laws and criminalizing blasphemy in both constitution as well as its penal code.<sup>54</sup>

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<sup>48</sup> Abdelbaki Hermassi, "The Political and the Religious in the Modern History of the Maghrib", *Islamism and Secularism in North Africa*, 1994, pp. 92–93

<sup>49</sup> *Ibid.*

<sup>50</sup> Colleen McCullough, "Tunisia: Islamists and the Upcoming Election | The Maghreb Center Student Blog on WordPress.com," 2011, available at: <https://themaghrebcenter.wordpress.com/2011/06/24/tunisia-islamists-and-the-upcoming-election/>

<sup>51</sup> Bureau Chief Habib Toumi, "Al Nahda Wins Historic Tunisia Elections | GulfNews.com," 2011, available at: <http://gulfnews.com/news/mena/tunisia/al-nahda-wins-historic-tunisia-elections-1.919988>

<sup>52</sup> McCullough, *supra* note 51

<sup>53</sup> Lamia Ajabi, "Tunisian World: No to Polygamy in Tunisia", 2012, available at: <http://tunisianworld.blogspot.my/2012/09/no-to-polygamy-in-tunisia.html>

<sup>54</sup> George Sadek, "The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring," 2013, available at: <http://www.loc.gov/law/help/tunisia.php>

Problems which arose out of this legal transplantation in Tunisia were as follows:

- i. Religious marriages were still taking place without complying with civil marriage requirements in which non-compliance was legally prohibited and any cohabitation was strictly not recognized.
- ii. Husband and wife were not given the right of inheritance from each other and their children were considered illegitimate.
- iii. Laws enacted were non-compliant to *Sharia*'s rules in a country with over 90% Muslim population.

### (3) Pakistan

The judicial system of Pakistan has evolved over a long period of time and the root of the current judicial system can be traced back to the medieval period and even before. The system has gone through several eras, ranging from the Hindu era, Muslim period comprising of the Mughal Empire, British colonial period and the current post-independence era. The following changes in its rules and dynasties were the natural result of political and socio-economic transformation of the Indian society. Generally, the judicial system sustained a gradual advance and a stable growth towards consolidation and improvement, without really, having to experience any major disturbance or breakdown.<sup>55</sup>

Before the creation of Pakistan (as it was part of India), the Charter of 1623 authorized the East India Company to resolve the cases of its English employees which led to the establishment of its own court. All the cases of criminal and civil nature were heard by the President and Council of the Company. The Charter of 1661 further brought about the expansion of such powers such as authorizing the council and the governors to not only hear cases of East Indian Company's employee but rather those people who reside in the settlement. Therefore, the English law was applied when they were adjudicating on those cases. With the result of this, there was shift in the character of the Company from a trading company into a territorial power; thus, in course of its territorial expansion it established additional courts for the settlement of disputes of its employees and the subjects. Therefore, these courts were comprised of English judges and English laws were generally applied.<sup>56</sup>

As a provisional Constitution, Government of India Act 1935 was retained on independence. Consequently, with modifications and adaptation, the legal and judicial system of the British period was continued to suit the requirements of the new Republic. Therefore, the operation of the legal system's operation continued without any interruption and breakdown and the judicial structure also remained the same.<sup>57</sup>

<sup>55</sup> Faqir Hussain, "The Judicial System of Pakistan", *Federal Judicial Academy Islamabad*, 2015

<sup>56</sup> *Ibid.*

<sup>57</sup> By the High Court (Bengal) Order 1947

Similarly, for Pakistan, a new Supreme Court was also established.<sup>58</sup> Through the Government of India Act 1935, the powers, jurisdictions and authorities of the Supreme Court and High Courts remained intact.<sup>59</sup>

The British colonization brought nothing but division between the different segments of the society. Indian National Congress became the representative body of the whole county and it was heavily criticized by the prominent Muslims who allegedly saw the coming bitter split between the communities. They stressed that the Indians did not form one nationality which was the basic requirement for a successful democracy in any nation. They further added that the current model of the governance is unworkable as the Muslims and Hindus are divided and are far unequal in their strengths and national representation.<sup>60</sup> Accordingly, creating a distinct identity for the Muslims was the motivating factor behind the creation of an independent Pakistan.<sup>61</sup>

It was argued by Maulana Maududi that from the start of the struggle for Pakistan, there was a belief among the people demanding a separate country that it would be an Islamic state and the law and policy will be based on the Shari'ah. It would result in the revival of Islamic law as well as Islamic culture. Muslim League leaders were always giving that impression in their speeches. Therefore after the independence of the Pakistan, special position was given to Islam in its constitution. Article 1 of the Pakistan's constitution with this regards states that: "Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan. Islam shall be the State religion of Pakistan." Because of this, the colonial laws were Islamized so that they could be in line with the Qur'an and Sunnah.

#### IV. LEGAL CULTURE

The relationship between legal culture and legal tradition was put forward by Watson after the development of legal transplant theory. He stated that: "The answers for understanding the nature of law and its place in society can only be found in the legal tradition and legal culture."<sup>62</sup>

Blankenburg must be referred to in order to understand the definition of "legal culture" which he puts forward in the subsequent terms on "A complex interrelationship in four levels:

- i. The level of values, beliefs and attitudes towards law.
- ii. Patterns of behavior.

<sup>58</sup> By the Federal Government of Pakistan Order 1948

<sup>59</sup> *Ibid.*

<sup>60</sup> Chief Justice (rtd) Qadeeruddin Ahmed, The Demand of a Muslim Homeland, Dawn 23.3.1992

<sup>61</sup> *Ibid.*

<sup>62</sup> Valderrama, "Legal Transplants and Comparative Law", *Supra* note 33 at 271

- iii. Institutional features.
- iv. The body of substantive as well as procedural law.”<sup>63</sup>

The importance of “legal culture” can be properly understood with regard to the approach to the study of comparative law where Peter and Schwenke rightly stated that:

“At all stages of comparative research (data acquisition, analysis and interpretation of the data, and actual in-depth comparison and eventual evaluation), the real problems are the lack of full knowledge and understanding of foreign legal rules and cultures. They (*comparatists*) must know something about the historical, social, economic, political, cultural and psychological context which has made a rule or proposition what it is. We must look not only at rules but at legal cultures, traditions, ideals, ideologies, identities, and entire legal discourse.”<sup>64</sup>

### ***Why has the Legal Transplant’s Debate led to the “Dialogue of Deaf”?***

There have been infinite discussions on legal transplant’s workability or unworkability between comparative law scholars and somehow it has led to a “dialogue of deaf”. The problem is that it has always been discussed from the perspective of Culturalists or Transferists. The discussion has always been either on legal transplant’s successes or on failures. If there are any successes, Transferist hail that. Actually, legal transplants worked and Culturalists are wrong and vice versa.

We believe that, in order to properly examine legal transplant and put an end to this partisan discussion, we should closely look at the reasons behind successes and failures of legal transplants. If it worked in one society, we cannot jump to a conclusion that the same exact legal system would work in another society. This is because the conditions in that country may not be the same.

There should not be any discussion on the workability of legal transplant and whether legal transplant is necessary or not as one can rightly say that legal transplant is a tool needed by every legislature in order to make law reforms in their societies. Therefore, we believe that there shouldn’t be any dispute on the necessity and importance of legal transplant.

Nevertheless, the most fundamental question has to be: how can legal transplant come about in a society which meets its socio-political and religious values? As Professor Sacco rightly said that ‘imposition’ or ‘prestige’ were the two main reasons behind legal transplantation. He further clarified that any powerful nation would in order to spread its own laws, would impose it on other nations or its reception may happen due to its prestige.<sup>65</sup>

<sup>63</sup> Erhard Blankenburg, “Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany,” *The American Journal of Comparative Law*, 1998, pp.1–41

<sup>64</sup> Peters and Schwenke, “Comparative Law beyond Post-Modernism”, *Supra* note 1 at 832

<sup>65</sup> Shen, “Légál Transplant and Comparative Law”, *Supra* note 25 at 855

If a legal transplant takes place through the first classification (imposition) and forceful means, it leads to nothing but catastrophic results. If one takes a look at the failure of legal transplants in countries such as Tunisia and Turkey and Malaysia and the problem it brought afterwards in those societies, one may find a common reason behind its failure and that is imposition where the legal transplantation found its way in a society through forceful means without any regards to its social, historical and religious values.

Let's take a look on how legal transplant took place in those countries and let's start with Turkey. When Atatürk came into power, he adopted dictatorial method of governance and extreme actions were taken against his political dissenters. He substituted the whole body of *Shari'ah* enacted under Othoman Empire with various European Civil Law, specifically the Civil Code of 1926. It put an end to polygamy, the law of inheritance was changed and women would inherit the same as male, and would give child custody to both, it required the ground of divorce to be corroborated by witnesses before the secular court which would look at the matter from civil law perspective and religious marriages were not a valid form of marriage anymore and so on and so forth.

Thus, Kemalism became the official Turkey's ideology that came into existence due to anti-Islamic and ultra-secular views of Mustafa Kemal Atatürk. He disposed of the caliphate, banned Islamic education and Sufi brotherhood and removed the Arabic alphabets which were an integral part of the society.<sup>66</sup>

These radical changes (a kind of legal transplant) took place in a dictatorial manner without any regards to the legal cultures in a country of above 90 percent Muslim population. Those who opposed these radical changes were harshly prosecuted. Therefore, decades of those impositions generated people's frustration with the legal system and paved the way for an Islamist Party Justice and Development Party (AKP) to come to power. If it wasn't for those radical changes which entirely changed the legal system and structure of the society, Justice and Development Party may have never come into power. Islam is currently going through a remarkable revival in Turkey. President Tayyip Erdogan and Prime Minister Ahmed Davutoglu are putting a lot of effort on re-awakening of Muslims and reestablishment of Islam within Turkey as well as abroad.<sup>67</sup> The decades-long ban on wearing of headscarf in public institutions was lifted and in primary schools, no more daily pledge of allegiance is needed.<sup>68</sup> Likewise, selling alcoholic beverages

<sup>66</sup> Ömer Tappýnar, "Islamist Politics in Turkey: The New Model?", 2012, available at: <http://www.brookings.edu/research/papers/2012/04/24-turkey-new-model-taspinar>

<sup>67</sup> Can Erimtan, "President Erdogan and Islam: Piety and Ottomanitas- RT Op-Edge", 2014, available at: <https://www.rt.com/op-edge/208447-turkey-erdogan-religion-islam/>

<sup>68</sup> Elhanan Miller, "Erdogan's Turkey: Less Nationalism, More Islam | The Times of Israel", 2013, available at: <http://www.timesofisrael.com/erdogans-turkey-less-nationalism-more-islam/>

are banned between 10 pm to 6am by the retailers as well as the selling cannot take place near schools and place of worships.<sup>69</sup>

We would agree with the Culturalists point of view in Turkey where Christians in Europe and Muslims in Turkey were politically, culturally and socio-culturally different and held dramatically different values and, therefore, the legal transplant was a mistake.<sup>70</sup>

Thus, we can see in the case of Turkey that neither legal transplant took in a proper way (imposition) nor it was needed. A country which had codified *Shari'ah* law, which suited that society, was not in need of European civil law because their own law met the needs of the society. Ottoman Empire was defeated in the World War I and it came under the leadership of Atatürk with pro-west ideology that chose a dictatorial way of leadership.

Tunisia almost went through the same trend and transformation as well. Code of Personal Status (CPS) under president Bourguiba's leadership was adopted in 1956. It was consisted of a series of laws which led to the different illustration of the dominant law, i.e. Islamic law. It banned polygamy, it led to the legalization of child adoption, law of inheritance and male unilateral divorce (*talaq*) was changed. These laws gave no regards to the fact that above 90 percent of Tunisians were Muslims and some of these changes coming under the name law reforms were non-Shari'ah compliant.

No consideration was given to the probable consequences of this process of secularization which was implemented through dictatorship. It led to chaotic revolution not only in Tunisia but also in Arab world. It led to coming of Islamic party al-Nahda into the power in order to reform laws and once again enhance the position of Shari'ah law in Tunisian's constitution and domestic legislation.

Malaysia was not immune from this phenomenon as well. After the British colonization of Malay Peninsula, the process of secularization of the Malaysian legal system began which was previously administered by Islamic law. Therefore, through secular fiat only administration of Islamic law was validated which resulted to be only personal law applicable only to Muslims such as inheritance, marriage and divorce.<sup>71</sup>

As to address how and when did Islam was brought into Malay Peninsula, it was introduced and brought by Arab traders and Indian merchants in the Malay

<sup>69</sup> Güneş Kömürçüler, "Restrictions on Alcohol Sales Go into Effect Today in Turkey- Economics", 2013, available at: <http://www.hurriyetdailynews.com/restrictions-on-alcohol-sales-go-into-effect-today-in-turkey.aspx?PageID=238&NID=54074&NewsCatID=344>

<sup>70</sup> Atar, *supra* note 43

<sup>71</sup> "The Position of Shariah Court in Malaysian Legal System – Rosli Dahlan and Fawza Sabila Faudzi - The Malaysian Insider", 2015, available at: <http://www.themalaysianinsider.com/sideviews/article/the-position-of-shariah-court-in-malaysian-legal-system-rosli-dahlan-and-fa>

land estimated between 7th and 12th century.<sup>72</sup> Later, Islam became the official religion of the region not only applicable to rituals and rites but rather substantive and procedural law and the law was not only applicable to the residents residing in Tanah Melayu but rather the victors as well.<sup>73</sup>

The position of Islamic law in Malayan Peninsula started after the “Anglo-Dutch Treaty” in 1824 and British colonization and had a major role on ramification of Islamic Law and Shari‘ah Court’s Statutes. The enactment and administration of Islamic Law was given to the states and its state legislative council.<sup>74</sup>

In *Shaik Abdul Latif & Ors. v. Shaik Elias Bux*,<sup>75</sup> it was stated by Edward CJ that “before the first treaties the population of the states consisted almost solely of Mohamedan Malays with a large industrial and mining community in their midst. The only law at the time applicable to the Malays was Mohamedan modified by local custom.” In *Ramah v. Laton*<sup>76</sup> Thorn J. illustrated that: “Muslim law is not foreign law but local law; it is the law of the land, and the local law is a matter of which the court must take judicial notice. The court must propound the law.” In *Tengku Jaafar & Anor v. The State of Pahang*<sup>77</sup> the endorsement was given by the Supreme Court that before coming of Torrens system, Islamic law was the applicable law in relation to the land matters in Pahang.<sup>78</sup>

Regardless of all these, through Civil Law Act 1956, Common Law and rules of equity was imposed into the Malaysian Legal system. Section 3 stated that:

- (1) “Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—
  - (a) In Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
  - (b) In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
  - (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in

<sup>72</sup> Johan H. Meuleman, “The History of Islam in Southeast Asia: Some Questions and Debates”, *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21<sup>st</sup> Century*. Singapore: *Institute of South East Asian Studies*, 2005, pp.22–23

<sup>73</sup> Ramizah Wan Muhammad, “The Administration of Syariah Courts in Malaysia, 1957–2009”, 13(2–3) *Journal of Islamic Law and Culture*, 2012, pp.242–52

<sup>74</sup> *Ibid.*

<sup>75</sup> (1915) 1 FMSLR 204

<sup>76</sup> (1927) FMSLR 128

<sup>77</sup> [1978] MLJ 33

<sup>78</sup> [1987] 2 MLJ 74

force in England on 12 December 1949, subject however to subparagraph(3)(ii)".<sup>79</sup>

Moreover, Article 160 of the Malaysian Federal Constitution describes "law as includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof".<sup>80</sup>

Therefore, the position of Islam degraded to the personal matters and common law became the dominant law. Since independence, in Malaysia there has been coexistence of justice system where Shari'ah courts deals with the matters related to Islam and people profess the religion of Islam whereas civil courts deals with civil and criminal matters. However even with that, the relationship between Civil and Shari'ah court has not been an amicable one where prior to 1988, the decision of Shari'ah Court was regularly reviewed by civil court by *certiorari* and overturned it.<sup>81</sup>

In order to enhance the position of the *Shari'ah* court, and to overcome the clash of jurisdictions, to protect its integrity, to free the *Shari'ah* courts from the civil courts interference and in order to avoid conflict of jurisdiction, in 1988, Parliament passed the Constitution (Amendment) Act 1988 [Act A704]. Clause (1A) was further added in the Article 121 of the Federal Constitution which provided that "the civil courts shall have no jurisdiction with respect to matters within the jurisdiction of the *Shari'ah* courts".<sup>82</sup>

Even with that, new conflicts have sparked between the *Shari'ah* and Civil Courts over child custody and religious rights of children in *Deepa Subramaniam*,<sup>83</sup> *Indira Gandhi*<sup>84</sup> and *Subashini Rajasingam*.<sup>85</sup> Therefore, the problem continues and there are more amendments expected to further clarify the position of Islam and the *Shari'ah* court's jurisdiction.

In *Indira Gandhi*, the court of appeal held that Muslim convert Muhammad Riduan Abdullah's conversion of his three Hindu children to Islam without obtaining their mother's consent was not valid as it did not comply with Islamic law requirements. The three children's Hindu mother, M. Indira Gandhi, had in 2013 managed to get the civil Ipoh High Court to quash the unilateral religious conversion,

<sup>79</sup> Civil Law Act 1956

<sup>80</sup> Federal Constitution of Malaysia

<sup>81</sup> *Myriam v. Ariff* (1971) 1 MlJ 265 and *Commissioner for Religious Affairs, Terengganu & Ors v. Tengku Mariam* (1969) 1 MLJ 110

<sup>82</sup> *Sukma Dermawan Sasmataat Madja v. Ketua Pengarah Penjara Malaysia* (1999) 1 CLJ 481

<sup>83</sup> *Viran Nagapan v Deepa Subramaniam* [2015] 3 CLJ 537 (CA)

<sup>84</sup> *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552

<sup>85</sup> *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147

but the Perak Islamic Religious Department (JAIPK) and other bodies appealed against the verdict.<sup>86</sup>

Therefore, still the problem is in existence and an immediate solution is needed to address this issue to prevent the clash of both the courts. It is undeniably better and will be in the best interest of the children if there was only one court handling this issue taking into consideration the best interest of the kids.

However on the other hand, if the legal transplant takes place through other means such as imitation due to the prestige that it possesses, then that would in our opinion be considered a perfect legal transplant. Legislature would take all aspect of societal, cultural and religious background of the society and then would enact a law that is compatible with their values.

Brunei is an example to look at where *Shari'ah* law has been fully adopted as the law of the land. *Shari'ah* law is not a new notion in Brunei where Islam was accepted in the 15<sup>th</sup> century and it has been long embedded in the country's governance and the head of state had the responsibility to promote and protect Islam. However, only Family law matters were referred to the *Shari'ah* Court but on May 2014, the first phase of the Syariah Penal Code Order 2013, came into force<sup>87</sup> it provided particular offences and punishments for the crimes that are prescribed by the Quran and Sunnah (prophetic tradition). Mandatory attendance of Friday prayer and offences such as disrespecting Ramadhan was also added in the Penal Code even though it was prescribed in the Quran or Sunnah.<sup>88</sup>

For offences such as Sariqah (theft), Hirabah (robbery), Zina (adultery) Zina Bil-Jabar (rape), Liwat (sodomy), Qazaf (accusation of adultery, sodomy and rape), drinking intoxicating drinks, Irtidad (apostasy), punishment and penalties are Hadd - Punishment as ordained by Quran and Hadith, including amputation of hand (theft), death or amputation of hand/foot (robbery), stoning to death or whipping (adultery or rape) Other – Fine, imprisonment, whipping.<sup>89</sup>

## V. CONCLUSION

There is still hope on the workability of legal transplant and undoubtedly it is an essential process of law reforms in every country. As Sacco rightly said that imitation and borrowing is a major legal change and very rarely new rules and institution will emerge. It is always the question of how legal transplant takes place. If it happens through colonization (imposition) and forceful means as it happened in the past, there will not be any doubt on its unworkability and ultimate failure.

<sup>86</sup> Available at: <http://www.themalaymailonline.com/malaysia/article/converting-children-unilaterally-is-un-islamic-court-told-in-indira-gandhi#sthash.vktNpdAl.dpuf>

<sup>87</sup> Brunei Syariah Penal Code Order, 2013

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

Oliver Deneys Schreiner rightly said that: “I like the picture of the growing law, developing indefinitely into the future, not losing its roots but ever throwing out fresh branches and deriving its sustenance from any source above or below the ground that can be of use to it. Looking at it that way one can see that your legal system and mine can continue to grow in beauty side by side if one’s interest is in the harmony of the law or providing ever more appropriate and convenient rules if one is more concerned with the practical service of the community. I suggest that we can both be proud of our legal systems and of the association that has for more than a century existed between them. Long may that association continue and much may we together contribute to the strengthening of the supremacy of the law inside our respective jurisdictions and, above all, in these dangerous days, between the nations of the world”.<sup>90</sup>

Therefore, there is no doubt on the workability of legal transplant if takes place through proper means as stated. If the legal culture, societal and religious background are taken into consideration before legal transplant takes place, there is high possibility of its workability. If those factors are ignored and legal transplant found its way through imposition, undoubtedly it leads to disastrous results.

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<sup>90</sup> Oliver Deneys Schreiner, *The Contribution of English Law to South African Law; and the Rule of Law in South Africa* (Stevens, 1967) at 105

# Rethinking the Sexual Politics of “Law” and “Order” §

Rachna Chaudhary\*

**Abstract:** This paper deals with the impact of gendered identities upon judicial discourse through critical analyses of select judgments. It emerges from the analysis that ‘promiscuous’ women, by way of their positioning as the ‘other’ of the ‘normal’ women who are ‘non-promiscuous’, get constantly defined in relation to them and in the process define these ‘normal’ women. The law and its agents as instruments of state hegemony, also produce, enforce and reiterate the differences between the two categories. Nevertheless, the space thus occupied by both conformists and ‘deviants’ is not merely as inert objects but also as agents (at times in a subtle and otherwise more obvious manner), thus subverting or at least undermining patriarchy and other structures of social control. The paper argues that there definitely is a distinction between ‘the law’ and the impact of law and legal processes. The existing structural inequalities between the sexes have continuously informed judicial practice and in the process, have been further entrenched within the socio-political system.

**Key Words:** Feminist Jurisprudence, Patriarchy, Subjectivity, Heteronormativity, Gender Justice, Power, Resistance

## I. INTRODUCTION

Dworkin rightly says that “We live in and by the law.”<sup>1</sup> It gives us the ‘only permissible identities in modern democracies.’<sup>2</sup> This paper draws upon the work of critical theorists mentioned in the preceding sentences and deals with the impact of gendered

§ Earlier versions of this paper were presented at the International Seminar organized by the Women’s Studies and Development Centre, University of Delhi on “In the Name of Honour: A Dialogue on Androcentric Matrimonial Practices and Women’s Subjugation in South Asia” held during 16<sup>th</sup>-18<sup>th</sup> Feb., 2011 and the National Seminar on “Gender, Law and Social Transformation in India” 17<sup>th</sup> -18<sup>th</sup> September, 2012, University of Hyderabad.

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<sup>1</sup> Ronald Dworkin, *Law’s Empire* (Universal (1<sup>st</sup> Indian Reprint, Delhi, 2002) at vii

<sup>2</sup> Nivedita Menon, *Recovering Subversion: Feminist Politics beyond the Law* (Delhi: Permanent Black, 2004) at 236

identities upon judicial discourse. The analysis focuses upon the manner in which different categories of women and their sexuality is constructed and treated in the judgments delivered by various courts in India since 1990s. The cases included range from matters pertaining to matrimonial and related disputes to those involving women accused of various crimes ranging from murder to prostitution.

The paper has focused upon the law as not just an apparatus for regulation but also as a means of social transformation. Discursive subject formation is important in this context because the law and legal agents not only regulate the 'subject' of their discourse but also produce it by supplying terms of description and references. It is important to understand the implication of these terms and references in order to chart future politics. The analysis of legislative provisions and judgments would thus help in suggesting the changes in provisions and the approach towards addressing the related issues.

## I. UNMARRIED WOMEN AND THE CRIMINAL JUSTICE SYSTEM

It emerges from these judgments that the portrayal of women interacting with the criminal justice system is based upon certain stereotypical images or what Rafter and Stanko call 'cultural configurations'.<sup>3</sup> The 'abnormal' is thus compared to the 'normal', the ideal or the reasonable. These judicial pronouncements are thus informed by prevalent societal notions despite normative law being the basis of these judgments. In that sense, despite 'gender neutral' laws, the person to be 'assessed' by the court is very much gendered and is assessed according to the preconceptions of the judge about gender roles. Pitch reasserts what she calls a 'familiar (feminist) critique of legal discourse', "Juridical 'persons' are 'neutral'; then there are gendered beings and these are women, who, therefore, are not really 'persons'."<sup>4</sup>

The case *Priyanka v. State* involved a young unmarried girl as an accused in an alleged dowry death case.<sup>5</sup> The judges while denying bail would remark, "Petitioner is a girl of marriageable age. The car perhaps might be needed for giving in dowry for her marriage, as is also stated in some of the statements."<sup>6</sup> An implication of this remark is that marriage is 'essential' for a girl and that she is 'eligible' for marriage upto a certain age only. And this girl would 'need' dowry for her marriage. In the same case, the judges tried to stay away from 'soft justice' since they believed that "A young woman of intelligence, character, education would

<sup>3</sup> N.H. Rafter and E. Stanko, (eds.), *Judge, Lawyer, Victim, Thief: Women, Gender Roles, and Criminal Justice* (Boston: Northeastern University, 1982) at 4

<sup>4</sup> Tamar Pitch, "Feminist Politics, Crime, Law and Order in Italy" in Rafter and Heidenshon (eds.), *International Feminist Perspectives in Criminology: Engendering a Discipline* (Buckingham: Open University Press, 1995) at 93

<sup>5</sup> *Priyanka v. State* 1998 (76) D.L.T. 204.

<sup>6</sup> *Ibid.*

not welcome the embrace of death unless provoked to that desperate step by the intolerance of her misery."<sup>7</sup> Would it mean that a woman lacking in all these qualities has no right to live or her death would not be as big a loss? In fact the deceased was being praised for her 'womanly' virtues because these are the 'desirable' qualities that a woman should possess. And such a righteous woman needs protection because her 'femininity' and conformity make her vulnerable as well as 'valuable'.

In a case of alleged kidnapping and rape of a minor, the judge, while accepting the female accused Bhuro's innocence as argued by her counsel, observed about Urmila (the minor) and Raghbir (main male accused) that "It would be too much to assume that when a young boy and girl get together, they would pander to illicit intercourse. In the ordinary course of human conduct, in the absence of proof such a perverse thought cannot be entertained....that Urmila voluntarily participated in the frolic with Raghbir chops off the case of the prosecution against Bhuro."<sup>8</sup> It is evident from the language of the judgment that intercourse outside marriage is 'illicit'. It effectively brings out the relationship between power and sex as elaborated by Foucault wherein 'sex is placed by power in a binary system, licit and illicit, permitted and forbidden and thus 'sex is to be deciphered on the basis of its relation to the law'.<sup>9</sup>

It emerges that the 'promiscuous' women, by way of their positioning as the 'other' of the 'normal' women who are 'non-promiscuous', get constantly defined in relation to them and in the process define these 'normal' women. This construction of 'promiscuous' women, as belonging to a separate category is based on stereotypical ideologies of female sexuality and hence the 'fallen' woman is stigmatized for not being passive, submissive and feminine like the 'normal' woman. In fact a non-prostitute but 'promiscuous' woman is often labeled as a 'prostitute'.

The law and its agents as instruments of state hegemony, also produce, enforce and reiterate the differences between the two categories. The duality in 'moral' expectations from men and women, prevalent in Indian society is also evident. This is because women have always been portrayed as the guardians of social morality since they were (and are) expected to be more 'virtuous' than men. By making their explanations appear natural, the judges use discourse as a mode of sustaining the power relations within the society and also contribute towards institutionalization of patriarchal norms.

The judge in this case also deduced that since the ossification tests revealed that Urmila had 'a fairly well-formed and developed body as that of a girl around 18 years old', she was capable of 'knowing and had the capacity to know the full

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Raghbir Singh and Another v. State* 1991 (44) D.L.T. 253

<sup>9</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality*, translated by Robert Hurley (Penguin, London, 1998) at 83

import of what she was doing'.<sup>10</sup> Urmila is thus 'judged' as having willingly accompanied Raghbir and her age established the legitimacy of her consent.<sup>11</sup> So the pelvic bones emerge as the seat of rationality even though the veracity of these tests has been questioned by experts from forensic science itself. In this context, Menon opines that the demand of law for objective evidence in sexual abuse or rape cases necessitates the establishment of the victim's 'innocence' based upon her non-complicity and non-consent.<sup>12</sup> So Bhuro the 'accused' rather than Urmila the 'victim' was found worthy of judicial patronage and hence acquitted. In the course of the judgment, not only the 'innocence' of Bhuro was established but the 'guilt' of Urmila was also brought out. The 'efficiency' of our criminal justice system is evident in this case as the incident took place in 1971 and the trial court had awarded Raghbir and Bhuro, two years and one year prison sentence respectively and while Raghbir died during the trial, Bhuro was acquitted after twenty years by the High Court.

### III. STATE AND THE PROSTITUTE

In *Kumari Sangeeta and Another v. State and Others*<sup>13</sup>, the High Court Judge quashed the order of the subordinate judge and the petitioners were set free. But certain observations of the magistrate in the lower court came up like he assumed that since the petitioners belonged to Badya caste which is known to have pursued singing and dancing as a profession, they must be involved in prostitution. Baxi has cautioned against the stereotyping and stigmatization of these social groups as he feels that it might further alienate them from the mainstream and that they would also lose faith in the judicial system.<sup>14</sup> The High Court judge in this case, questioned the wisdom behind this casteist assumption. The judge also differed with the magistrate's opinion that since the medical examination proved that the petitioners had had sex within a week before their medical examination, thus they were indulging in prostitution. The judge pointed out the fact that sexual intercourse in itself is not an offence.

In *Meena and Others v. State*,<sup>15</sup> The High Court judge held that no case could be made against the accused as the girls 'offered' themselves 'of their own free will' to the decoy customer sent to them by the raiding party. And thus the judge quashed the order of the subordinate judge. While the judge has used the term profession for prostitution, the attitude towards the prostitute is not one of dignity as is evident from the use of words like 'illicit intercourse' and 'offering

<sup>10</sup> *Ibid.*

<sup>11</sup> Nivedita Menon, *supra* note 2, pp.126-129

<sup>12</sup> *Id.*, at 130

<sup>13</sup> *Kumari Sangeeta and Another v. State and Others* 1995 (58) D.L.T. 589

<sup>14</sup> Upendra Baxi, *Towards A Sociology of Indian Law* (New Delhi: Satvahan, 1986) at 106

<sup>15</sup> *Meena and Others v. State* 1991 (43) D.L.T. 554.

herself promiscuously for money to customers'.<sup>16</sup> Again the binary of legitimate and illegitimate is created.

#### IV. CENTRALITY OF MARRIAGE

Marriage and procreative sex within the institution of marriage have been the givens of the patriarchal, patrilineal, patri-virilocal Indian society. There is a mutually reinforcing relationship between marriage and birth as marriage is essential for giving birth and because one is born, so one is expected to get married. This 'essentialisation' of marriage has greater implications for women as 'failure to marry is a greater disgrace for a woman than for a man'.<sup>17</sup> In fact marriage is regarded to be the only 'natural' and 'legitimate' institution within which a woman's sexuality is recognized and allowed to be practiced. All others falling outside this category and making sexual choices are seen as 'fallen' women and even the law barely comes to their rescue. This is because deviance from established norms is seen as a threat to the entire societal fabric. The Court observed in *Chetan Dass v. Kamla Devi*, that matrimonial conduct "is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society."<sup>18</sup> An ideal society is the one based upon monogamous, heterosexual marital relations as recognized by law. And with this homogenization of the diverse family forms located on a continuum, a number of intimate relations are rendered illegal. Barrett and MacIntosh have rightly observed that "Just as the family has been socially constructed, so society has been familialized."<sup>19</sup>

It can thus be explained why the judges in *D. Velusamy v. D. Patchaiammal* observed about non-marital live-in relationships that "a new social phenomenon which has emerged in our country known as live-in relationship. This new relationship is still rare in our country, and is sometimes found in big urban cities in India, but it is very common in North America and Europe."<sup>20</sup> This positioning of the Western world as being more permissive and hence different from the Oriental world helps in assertion of comparative moral superiority. In India also, live-in relationships have been a part of human existence though their nature varies in different contexts. Later, in the same case, the judges traced live-in relationships in distant past thus again creating the impression that modernity is in sharp contrast to and in fact more permissive than feudal society. They wrote, "In feudal society sexual relationship

<sup>16</sup> *Ibid.*

<sup>17</sup> Ursula Sharma, "Dowry in North India: Its Consequences for Women" in Patricia Uberoi (ed.), *Family, Kinship and Marriage in India* (New Delhi: Oxford University Press, 2001) at 350

<sup>18</sup> *Chetan Dass v. Kamla Devi* (2001) 4 SCC 250

<sup>19</sup> M. Barrett and M. MacIntosh, *The Anti-Social Family* (London: Verso, 1982) at 31

<sup>20</sup> *D. Velusamy v. D. Patchaiammal* (2010) 10 SCC 469

between man and woman outside marriage was totally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel 'Anna Karenina', Gustave Flaubert's novel 'Madame Bovary' and the novels of the great Bengali writer Sharat Chandra Chattopadhyaya. However, Indian society is changing, and this change has been reflected and recognized by Parliament by enacting The Protection of Women from Domestic Violence Act, 2005."<sup>21</sup>

How objectification of women as a tool takes place and how the myth of the insatiable male sexual desire is sustained and justified is evident in the following words in this judgment: "Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. ... If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage"<sup>22</sup>

Hence the woman who unknowingly married an already married man was merely seen as a 'keep' and judicial protection was denied to her. Despite the centrality of marriage in Indian society, marriage as a choice is not available to all as there are certain conditions which are required to be fulfilled like those related to age, health, socio-economic status, caste, gotra, religion, sexual orientation and so on. It would then imply that all those who are not married would be denied certain basic rights.

This implication is more pronounced in case of women since, unlike men who have 'natural' rights over the ancestral property, the property rights of women are often mediated by their marital status as accordingly their stake is recognized, that is if not outrightly denied. And it is only when they have been projected as 'helpless' victims of a broken marriage, desertion, violence among others that they are extended these rights and remedies within law.

Similarly, in *Savitaben Somabhai Bhatiya v. State of Gujarat and Ors.*, the female appellant claimed that she was married to the respondent according to the customary rites and rituals of their caste and also had a child from that relationship.<sup>23</sup> It was later found that the respondent was already married to a woman for the past 22 years. Both, the Gujarat High Court and the Supreme Court held that the appellant was not legally wedded wife of respondent. There were eloquent remarks about the plight of such women throughout the judgment, but the law ultimately was applied in the manner in which hegemonic norms were barely disturbed. The normalization of existing laws despite their biases is apparent as the court refused to enlarge the scope of definition of the word wife by "introducing any artificial definition to include woman not lawfully married in the expression 'wife'."<sup>24</sup> In fact the ever changing

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Savitaben Somabhai Bhatiya v. State of Gujarat and Ors.* AIR (2005) SC 1809

<sup>24</sup> *Ibid.* The court refused to 'widen' the definition of wife as contained in Section 125 of the Code of Criminal Procedure, 1973 which deals with "maintenance of wives, children and parents".

aphorisms of the experts though passed off as the 'truth' are nothing more than individual opinions very much 'informed' by personal prejudices and perceptions. The cases discussed here throw light upon the fact that despite statutory provisions, certain forms of domestic violence are still condoned as the 'victim' of that violence does not come under the purview of that particular law as it emerges in the cases related to bigamy, where the 'second' wife was denied judicial protection.

The importance attached to marriage is emphasized in *Jamni v. State* in which a newly wedded wife was accused of killing her husband.<sup>25</sup> The judges observed that since the appellant was widowed and orphaned in her childhood, "such girls never receive respect in Indian society unless they are remarried. In low birth Hindu Families remarriage is permissible. In the present case, remarriage of the accused appellant took place with the deceased who gave her respectability in society and also gave her a ray of hope to live a deginified (sic) happy life."<sup>26</sup> The man who bought himself a wife like a commodity is projected as her saviour as otherwise her life would have been meaningless. And these things have been repeated many times in the judgment. The judges further observed that "even birds and animals understand and identify where their welfare lie. Therefore, it is impossible to think that accused appellant being human being was not able to understand her welfare by living as wife of her deceased husband."<sup>27</sup> That Rameshwar possessed 'sufficient agricultural land together with a well' was another reason which made the judges deny the possibility of Jamni murdering her husband. The thought was unthinkable for the judges as Rameshwar provided Jamni with a ray of hope 'to live a happy and deginified (sic) life and to bear children from his association which is the wish of every woman.'<sup>28</sup> The judges also thought it impossible that an able bodied male could be killed by the blows of a woman at least when in his senses. In this regard, Morgan claims that the 'natural' association of violence and masculinity often results in denial of legitimacy to the violence committed by women.<sup>29</sup>

In fact the judges had their own suspicions about Gordhan, the brother of the deceased as he "also had no wife and, therefore when he saw that his younger brother has been married overlooking his claim and he himself is aged about 25 years then it might have come to his mind to kill his brother and to enjoy his newly wedded wife."<sup>30</sup> Again marriage is regarded as essential for one's existence and the desire of the wife is not taken into account as she is to be 'enjoyed' by her

<sup>25</sup> *Jamni v. State of Rajasthan* 1995 CRI. L.J. 3071

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> David H.J. Morgan, "Masculinity and Violence" in Jalna Hanmer and Mary Maynard (eds.), *Women, Violence and Social Control* (London: MacMillan Press, 1987) at 184.

<sup>30</sup> *Jamni v. State of Rajasthan*, *supra* note 25

brother-in-law. A female ‘criminal’ thus commits the dual crime of not only violating criminal statutes but also gender norms and would be punished accordingly.

Whether normative or non-normative, the ultimate objective of heterosexual intimate relationships appears to be aiming at having children. In *Sujata Uday Patil v. Uday Madhukar Patil* the court expressed its concern that “whether the marriage can be saved and the husband and wife can live together happily and maintain a proper atmosphere at home for the upbringing of their offsprings.”<sup>31</sup> In *Parveen Mehta v. Inderjit Mehta* also, the court granted divorce as the wife could not conceive even after 14 years of marriage along with “a stubborn attitude and inexplicably unreasonable conduct”.<sup>32</sup> All these were accepted as causes of mental cruelty to the husband. For a woman, her primary role after getting married is to prove her fertility and thus justify her continued existence in her matrimonial home. That is how even women themselves gauge their worth, owing to internalisation of patriarchal norms. The stigma attached to a woman’s inability to conceive can sometimes be frustrating to the extent of pushing her to the verge of suicide. The male is seldom held responsible for it, though the problem could be as much with him as with the woman.

## V. STEREOTYPES AND DISCURSIVE ENDORSEMENT

In contrast, in *Neerja Saraph v. Jayant V. Saraph*, the man being an NRI who abandoned the wife after a brief period of marriage was the target of judicial ire.<sup>33</sup> The judge observed, “The attraction of getting a groom and that too serving or earning abroad without dowry, lures many especially from middle class. Even otherwise parental insistence for Indian bride in the hope that their son is not lost forever is not uncommon. Result, at times, is matrimonial alliance by a reluctant husband to assuage the sentiments of his parents.”<sup>34</sup> The judicial sympathy in this case was with the girl who was seen as the victim. “Victim is the helpless, poor, educated girl, normally, of a middle class family with dreams of a foreign land. ....the marriage was performed with gusto befitting the status of both the families.”<sup>35</sup> There is a sort of judicial admiration and endorsement of lavish marriages. She was referred to as the ‘innocent girl’ for whom “it was loss of everything, her maidenhood, status, service, dignity and peace. Her dreams stood shattered and she was reduced to nothing.”<sup>36</sup> Such generalizations reiterate the stereotype of women as extremely emotional creatures who come to life only if they have a satisfying and long term

<sup>31</sup> *Sujata Uday Patil v. Uday Madhukar Patil* (2006) 13 SCC 272

<sup>32</sup> *Praveen Mehta v. Inderjit Mehta* AIR (2002) SC 2582

<sup>33</sup> *Neerja Saraph v. Jayant V. Saraph* (1994) SCC (6) 461

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

conjugal relationship otherwise they are reduced to nothing. This is why Dhanda suggests that "This conferral of precedent value to role stereotypes in judgments necessitates cautious judicial endorsement of them."<sup>37</sup> The judges in this case were concerned with providing "some practical solution to the disaster brought about by him."<sup>38</sup> They did it by granting the right to maintenance in favour of the woman.

It emerges that judicial pronouncements help in perpetuation of gender role and other stereotypes and lawyers also play a prominent role in this as they categorise the various things associated with their client into necessary and unnecessary according to the requirement of the case they are presenting before the court. In *Payal Ashok Kumar Jindal v. Capt. Ashok Kumar Jindal*, Payal's lawyer vehemently denied the allegations made by the husband about her being an alcoholic and claimed that 'she was a homely, vegetarian, non-smoking, teetotaler and faithful house-wife'.<sup>39</sup> She was being projected as the ideal wife living well within the definitions of womanhood and chastity. The references to the matrimonial advertisement, which brought the couple together, also point to marriage being 'the medium through which transmission of resources, perpetuation of traditions and social mobility was engineered.'<sup>40</sup> It appears equivalent to buying a product from the market as "His parents advertised for "homely non-medico" bride" and her parents responded.<sup>41</sup> The desire for homely wives is a double trap as women are not allowed to work and as a result are constructed as parasites upon the familial economic structure, since the tasks associated with 'homemaking' are considered unproductive and uneconomical. Their relegation to the status of being dependents is thus secured in a permanent manner.

As long as children are treated as property by the parents, girls are treated as a burden and boys as 'post-dated cheques'<sup>42</sup>, marriage (even if abusive) is regarded as essential for existence and religion and custom continue ascribing a subordinate status to brides and their families, little is expected to change.

## VI. RE-PRODUCING THE 'IDEAL'

In *Samar Ghosh v. Jaya Ghosh*, the Supreme Court claimed that the High Court had erred in absolving the wife charged with committing mental cruelty towards the

<sup>37</sup> Amita Dhanda, "Psychologising Dissent: Psychiatric Labeling and Social Control", Amita Dhanda and Archana Parasher (eds.), *Engendering Law-Essays in Honour of Lotika Sarkar* (Lucknow: Eastern Book Co., 1999) at 328

<sup>38</sup> *Neerja Saraph v. Jayant V. Saraph* (1994) SCC (6) 461

<sup>39</sup> *Payal Ashok Kumar Jindal v. Capt. Ashok Kumar Jindal* (1992) SCC (3) 116

<sup>40</sup> J.S. Tyagi, "Hierarchical Projections of Women in the Household: *Brahmanical* Perceptions Recorded in the Early Grhyasutras 800-500 B.C.", 32(5-6) *Social Scientist*, 2004, at 4

<sup>41</sup> *Payal Ashok Kumar Jindal v. Capt. Ashok Kumar Jindal* (1992) SCC (3) 116

<sup>42</sup> M.S.A. Rao, *Tradition, Rationality and Change: Essays in Sociology of Economic Development And Social Change* (Bombay: Popular Prakashan, 1972, at 142

husband and stressed that “the finding of the High Court that the respondent’s refusal to cook food for the appellant could not amount to mental cruelty as she had to go to office, is not sustainable. .... The question was not of cooking food, but wife’s cooking food only for herself and not for the husband would be a clear instance of causing annoyance which may lead to mental cruelty.”<sup>43</sup> One wonders, if husbands can also be adjudged guilty of committing mental cruelty for not cooking for their wives! The ideology of familialism through its concrete manifestation(s) reproduces gender identity and its meaning. In the process, caring for family gets labelled as a ‘natural adjunct of femininity’. Even sleeping in separate rooms in the same house can be a ground for mental cruelty.

In the following judgments, judicial subjectivity is revealed in conflicting opinions expressed by the judges in defining mental cruelty. The court has tried to define mental cruelty in various cases but has also in the same vein tried to avoid arriving at a “straight-jacket formula” for the same.

In *Samar Ghosh v. Jaya Ghosh*, the court firmly believed that “No uniform standard can ever be laid down for guidance” yet the judges enumerated some instances of human behaviour as yardsticks for dealing with the cases of ‘mental cruelty’ like:<sup>44</sup>

- “(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
- (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.....
- (v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.”<sup>45</sup>

It appears that till the court is convinced that there has been enough torture and suffering in a marriage for a prolonged period, the chances of getting a divorce are minimal as living in ‘failed’ marriages are any day preferred to divorcees ‘out on a prowl’ to disrupt societal (patriarchal) order!

Similarly, in *V. Bhagat v. D. Bhagat*, the Court observed “Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must

<sup>43</sup> *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party."<sup>46</sup>

But in the same case, the court laid down that while deciding mental cruelty as a ground for divorce, "regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."<sup>47</sup>

Similar views were expressed by the Court in the case of *Gananath Pattnaik v. State of Orissa* as the judge observed "The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs." "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."<sup>48</sup>

In the case of *Savitri Pandey v. Prem Chandra Pandey*, the Court, construing the question of 'cruelty' as a ground of divorce, made the following observations: "Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."<sup>49</sup>

These generalizations and explanations of human behaviour can be interpreted as an effort by the judges to justify their pronouncement within a consensual societal framework of behavioural norms. Even slight deviations are seen as a challenge to the principles which have been 'commonly' agreed upon. And by taking upon themselves the responsibility of speaking on behalf of community, the judges re-assert their authority as experts. Anne Worrall claims that by using their notions of human nature as a parameter of expected and acceptable behaviour, the judges are 'employing a procedural device which allows them to make sense of data which have no inherent meaning or coherence.'<sup>50</sup> Such generalizations thus mean negation of differences and specificities. Since the judges often tend to justify their pronouncements in the name of 'the community', it serves the purpose of absolving

<sup>46</sup> *V. Bhagat v. D. Bhagat* (1994) 1 SCC 337

<sup>47</sup> *Ibid.*

<sup>48</sup> *Gananath Pattnaik v. State of Orissa* (2002) 2 SCC 619

<sup>49</sup> *Savitri Pandey v. Prem Chandra Pandey* (2002) 2 SCC 73

<sup>50</sup> A. Worrall, *Offending Women: Female Lawbreakers and The Criminal Justice System* (London: Routledge, 1990) at 18

them of their responsibility since they do it 'for' the community and it also reasserts their position as representatives of the community. The notion of 'the community as a homogeneous entity does not negate differences within 'the community' but assumes that there exists a general consensus about the interests of the community and in this manner these differences are rendered meaningless.'<sup>51</sup> Is justice a 'reflection' of this consensus? But what about the mechanism of this consensus building?

## VII. THE POWER OF DISCOURSE

The above analyses provides scope for proposing certain arguments which might be applicable for both the categories of women, but more so for those accused of a certain crime. The people who come into contact with the criminal or civil justice system, engage lawyers in order to ensure that their case is well presented for a favourable judgment. Worrall rightly suggests that thereafter their account is 'muted'.<sup>52</sup> The agency ascribed to the offender/the accused/ petitioner gets transferred to the authorized experts of the legal system. The process involves not merely disqualifying the defendant/petitioner as a speaker but also 'normalization' of the defendant/petitioner or redefining everything in the desired manner. Thus when required to defend a female accused, the lawyers generally seek refuge in evoking gender stereotypes. And the 'harm' done is undone as she is returned to her 'expected' gender role. Ania Wilczynski rightly laments that criminality in women is rarely, if ever, seen as a rational reaction to life stresses, or as a response to social, political or physical inequalities, as is often cited in case of men.<sup>53</sup>

Accordingly, the agency of these accused/petitioner as legal subjects would be decided depending upon the acceptance or rejection of their culpability and responsibility. They *perform* the subjectivity chosen for them by their lawyer in order to be accepted by the penal discourse in the 'desirable' manner. The female accused thus performs the act of being a conformist despite being a deviant.

The portions of judgments cited in the study are not reflections upon the fairness or otherwise of respective judges. It is the working of the system which is being commented upon. The judges themselves are at times rendered 'powerless' by the system as they give the 'expected' judgment rather than the one they believe in. This 'powerlessness' can be explained through Jackson's concept of 'co-referentiality' in legal discourse which refers to the simultaneous invoking of

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<sup>51</sup> *Id.* at 15.

<sup>52</sup> *Id.*, at 21.

<sup>53</sup> Ania Wilczynski, "Images of Women Who Kill Their Infants: The Mad and the Bad", 2(2) *Women and Criminal Justice*, 1991, at 72

<sup>54</sup> Bernard Jackson, *Law, Fact and Narrative Coherence* (Liverpool: Deborah Charles Publications, 1988) at 132

arguments and individual laws as required for a particular matter, and the reference to 'the law' which is objective, neutral, universal and timeless.<sup>54</sup> But this does not absolve them of their individual responsibility towards the individuals whom they assess, judge and categorise. After all, judges exercise their authority with institutional backing and whatever they say about law is considered authoritative and contributes to the growth of the judicial discourse.

It is not to argue that judges should not have the power of discretion as it sometimes helps in overcoming the inherent rigidity of a particular law. The law, despite its formal rigidity, claims to be 'flexible' by providing scope for discretion through interpretation and thus it keeps pace with 'changing societal requirements'. But this flexibility also does little to change the existing balance of power in our patriarchal society since "Once again, these multiple interpretations, far from demonstrating the elasticity of the law, point to precisely the opposite – the inevitable movements within legal discourse to codify, fix and regulate meaning."<sup>55</sup> This paper concurs with Foucault as it is evident that "the sentence that condemns or acquits is not simply a judgment of guilt, a legal decision that lays down punishment; it bears within it an assessment of normality and a technical prescription for a possible normalization. Today the judge – magistrate or juror – certainly does more than 'judge'."<sup>56</sup> (emphasis in original) The 'accumulated wisdom' of the judges about both female accused and victims stands exposed as an aggregation of 'common sense', 'desire for certitude' and power derived from the system (but not always the law).<sup>57</sup>

## VIII. CONCLUSION

Till the time the power to define and control remains in the hands of a dominant class of people actively engaged in marginalizing 'others' on different bases, the effects of law would remain the same. Law is a product of, and a part and parcel of, the power structure. Thus, rather than targeting individual laws, we need to dismantle the oppressive structure which facilitates the formulation and working of such laws.

The paper also foregrounds that legal norms are essentially marriage-centric and those outside normative intimate relationships are seen as deviants and treated accordingly. The implications are more severe for women living in non-normative relationships as they are stigmatized within society and even the law seldom comes

<sup>54</sup> Nivedita Menon, *supra* note 2, at 127

<sup>56</sup> M. Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Vintage, 1995) pp.20-21

<sup>57</sup> The phrase 'desire for certitude' has been borrowed from Rajashwari Sunder Rajan, *The Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Delhi: Permanent Black, 2003) at 82

to their rescue. Even in these relationships, women suffer the same subordination and oppression since their sexuality, reproductive capability and labour is still under patriarchal control. Yet, it is not that the women involved in these cases emerge as merely 'impotent' victims of male oppression. Such projections in a way assert the stereotype of the virile male and passive female – and lead to denial of her 'responsibility, culpability, agency and often her rationality as well'.<sup>58</sup>

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<sup>58</sup> Belinda Morrissey, *When Women Kill: Questions Of Agency And Subjectivity* (London: Routledge, 2003) at 25

# Protection of Traditional Knowledge through Intellectual Property Rights: Challenges and Expositions

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*Neeru Nakra\**

**Abstract:** This is the era of knowledge economy and technology boom. Still, the efforts have always been made to grant protection to the legacy of traditional knowledge. The intellectual property rights are based on monopolization of the system; however, traditional knowledge requires collective protection. India has endeavoured to take steps towards protection of traditional knowledge, without prejudice to the rights of indigenous people. It is evident from the creation of task forces, working groups, funding of private and institutional projects on traditional knowledge, conducting conferences etc.

The protection of traditional knowledge becomes a contentious issue in contemporary intellectual property regime. With the advancement in biotechnology, the developed countries demand access to biogenetic resources and associated traditional knowledge of bio rich countries for obtaining headway in bio prospecting research, drug discovery and patents. Notwithstanding the adoption of Agreements and Conventions, the cases of bio piracy are on rise. There is a great demand from the indigenous communities of developing and under developed countries to protect their traditional knowledge from misappropriation.

Although India has been empathetic towards the protection of traditional knowledge, yet the present Indian legal regime in the field of traditional knowledge is inadequate. The growing interests of indigenous people and local traditional communities in owning, controlling and accessing documentation of their cultures held by museums, libraries and archives raises a number of IP issues. The need of the hour seems to be a *sui generis* policy for the protection of traditional knowledge.

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This paper aims at giving a comprehensive overview of the interface between traditional knowledge and IPRs in national perspective, challenges posed by monopoly rights in contrast with collective right.

**Key Words:** Traditional knowledge, Intellectual property, *Sui generis* protection, Traditional Knowledge Digital Library, Geographical indications, Plant varieties.

## I. INTRODUCTION

India has always been a land of cultural diversity and traditional knowledge, popularly known as Dadi-Nanikenuskhe. The *Haldi* (Turmeric) is a wonderful antiseptic, *Amlais* good tonic for health, immunity system and many more form the underlying basis for traditional knowledge which belongs to the indigenous communities and their right to self-determination. But we have ushered in the era of knowledge economy and technology boom. Still, the efforts have always been made to grant protection to the heritage and traditional knowledge. With the upsurge in the intellectual property rights concern worldwide, it has become imperative to look deep into the protective measures for traditional knowledge. The intellectual property rights are based on monopolization of the system because the exclusive rights are granted to the creators to bear the fruits of their hard work. The traditional knowledge, however, belongs to the communities collectively and kept passing on the generations to generations and it requires collective protection.

India has endeavoured to take steps towards protection of traditional knowledge, without prejudice to the rights of indigenous people.<sup>1</sup> It is evident from the creation of task forces, working groups, funding of private and institutional projects on traditional knowledge, conducting conferences etc. The creditable step taken by India to protect traditional knowledge is to create Traditional Knowledge Digital Library (TKDL) serving as a tool to prevent misappropriation of traditional knowledge by providing the database of the traditional knowledge.

This paper aims at giving a comprehensive overview of the interface between traditional knowledge and IPRs while examining the bio piracy cases, gray area in the protection of traditional knowledge and complications in attempting to protect traditional knowledge within the prevailing regime of IPRs or any combination thereof. It also seeks to analyse the international legal framework and national efforts to protect traditional knowledge.

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<sup>1</sup> Indigenous people are people defined in international or national parlance as having a set of specific rights based on their historical ties to a particular territory and their cultural or historic distinctiveness from other populations that are politically dominant. For details, see Indigenous People Literature, available at: [www.indigenouspeople.net](http://www.indigenouspeople.net).

## II. TRADITIONAL KNOWLEDGE: CONCEPT

Traditional Knowledge (TK) is generally associated with biological resources and is invariably, a component of such a biological resource. TK has the potential of being translated into commercial benefits by providing *leads/clues* for development of useful practices and processes for the benefit of mankind.<sup>2</sup>

Traditional knowledge is a living body of knowledge that is developed, sustained and developed from generation to generation within a community, often forming part of its cultural or spiritual identity. In other words, TK is understood as knowledge, knowhow skills, innovations and practices; that are passed between generations in a traditional context and that forms part of the traditional lifestyle of indigenous and local communities who act as their guardian or custodian.<sup>3</sup> TK can be, for example, agricultural, environmental or medicinal knowledge and knowledge associated with genetic resources.<sup>4</sup> The traditional knowledge about the characteristics of the local flora and fauna has accrued over the centuries, and generally this information is often valuable to the pharmaceutical companies.

Traditional knowledge means an information that people in given community have developed over time and continue to develop based on experience and adaptation to a local culture and environment. The sustenance of the community and continuity of the survival of the generic resources, in fact, depends on the traditional knowledge and its use. The traditional knowledge is generally regarded as being in the public domain system and for free use by all by the conventional property system. TK is collective in nature and at times termed as the property of the entire community. The main purpose of the advocacy for the protection of the traditional knowledge is to give impetus to the intellectual innovation and creativity.

The protection of traditional knowledge becomes a contentious issue in contemporary intellectual property regime. With the advancement in biotechnology, the developed countries demand access to biogenetic resources and associated traditional knowledge of bio rich countries for obtaining headway in bio prospecting research, drug discovery and patents. Notwithstanding the adoption of various agreements and conventions, the cases of bio piracy are on rise. There is a great demand from the indigenous communities of developing and under developed countries to protect their traditional knowledge from misappropriation. In recent years, indigenous people, local communities and governments- mainly in developed countries, have demanded IP protection for creativity and innovation, which under

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<sup>2</sup> Hon'ble Mr. Justice Vijender Jain on "Safeguarding the Traditional Knowledge in India," in Asia Pacific Jurist Association (APJA) Seminar held on 28.04.2008, available at: [http://highcourtchd.gov.in/sub\\_pages/top\\_menu/about/events\\_files/apjaspeech.pdf](http://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/apjaspeech.pdf)

<sup>3</sup> *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, WIPO, 2015, at 13

the conventional IP system are generally regarded as being in the public domain and thus free for anyone to use.

The various controversies, however, on bio piracy and cases fought against the patents based on *neem* and *turmeric* have put forth the questions of interface between traditional knowledge and intellectual property rights. Although India has been empathetic towards the protection of traditional knowledge, yet the present legal regime in the field of traditional knowledge is inadequate. The growing interests of indigenous people and local traditional communities in owning, controlling and accessing documentation of their cultures held by museums, libraries and archives raises a number of IP issues. The need of the hour seems to be the *sui generis* policy for the protection of traditional knowledge.

It is relevant here to present the concept of intellectual property in brief. Intellectual property law is that area of law which concerns legal rights associated with creative effort of commercial reputation and goodwill. The rationale behind its protection is not only encouraging the creativity by imparting due recognition on the creator but also to give an impetus to the industrial and economic development of a country. The prosperity achieved by developed nations is the result of exploitation of their intellectual property.

Intellectual property was, generally, considered to be of two kinds i.e., industrial property including patents, trademarks, undisclosed information, integrated circuits etc. and Copyright. The concept of intellectual property was disintegrated into separate and independent classifications by Trade Related Aspects of Intellectual Property Rights (TRIPS) and now seven kinds of intellectual properties are: *Patents, Copyright, Trademarks, Geographical Indications, Trade Secrets, Industrial Designs and Integrated Circuits (Topographies)*. Now the *Plant varieties* have also become the area of intellectual property. It seems that the law makers have realized that the food for thought can only be there when the need of food for stomach is fulfilled.

### III. EDGE BETWEEN TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS: INTERNATIONAL PERSPECTIVE

One of the major concerns of the developing countries is the process of globalisation and its impact on the policies, the economy, the social milieu and the society as a whole of a nation. The need of the hour is to protect these fragile knowledge systems through national policies and international understanding linked to intellectual property rights and preserving the traditional knowledge. Misappropriation of traditional

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<sup>4</sup> Examples of traditional knowledge may include: knowledge about traditional medicines, traditional hunting or fishing techniques, knowledge about animal migration patterns or water management, to mention a few.

knowledge and bio piracy erode the rights of indigenous people and adversely affect conservation and sustainable use of biodiversity and associated traditional knowledge. Ecological and genetic multiplicity together makes the very foundation of existence. Traditional knowledge, on the other hand, is the result of intellectual activity in a traditional context. This knowledge is transmitted through songs, stories, rituals and legends.<sup>5</sup>

The Intellectual property rights (IPRs) regime needs to be fine-tuned in such a way that it can bolster the cultural identity of indigenous communities and give them a greater say in managing the same. The linkage between IPRs and traditional knowledge (TK) is of recent origin. Biodiversity refers to the “variability of the living organisms from all sources and ecological complexes of which they are the part and includes diversity within species or between species and of ecosystems.”<sup>6</sup> The relationship between indigenous/traditional knowledge and intellectual property rights is complicated contemporary legal problem.

The efforts were taken up by the international bodies like, World Trade Organization (WTO), World Intellectual Property Organization (WIPO), UNCTAD, UNESCO etc. in the direction of protection of traditional knowledge.

### ***Convention on Biological Diversity (CBD)***

The CBD was the result of discussions at Rio De Jenerio 1992 United Nations Conference on Environment and Development Programme. The CBD is a significant international instrument in the development of the rights of indigenous people. It aims to provide for the equitable sharing of the benefits denied to them. It aims to respect, preserve and maintains knowledge, innovations and practices of indigenous and local communities; promote their wider application with the approval and involvement of holders of such knowledge.

### ***The Nagoya Protocol***

*The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Benefits arising from their Utilization* to the CBD is a supplementary agreement to CBD. It provides for a transparent legal framework for the effective implementation of the objective of equitable benefit sharing arising out of utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity.<sup>7</sup>

<sup>5</sup> Raju NaraynanSwamy, “Protection of Traditional Knowledge in the present IPR Regime: A Mirage or Reality,” LX (1) *Indian Journal of Public Administration*, 2004, pp.35-36

<sup>6</sup> The Biological Diversity Act, 2002, Section 2(b)

<sup>7</sup> Available at: <https://www.cbd.int/abs/about/>

### ***Protection of traditional knowledge through sui generis system***

The absence of uniform norms led to the setting up of an Intergovernmental committee on intellectual property and genetic resources. *The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*<sup>8</sup> was established by the WIPO General Assembly in September, 2000 to facilitate access to generic resources and benefit sharing; the protection of traditional knowledge and the protection of folklore.

Some countries have developed *sui generis* legislations for the protection of traditional knowledge.

**Panama** has introduced law on the special IP regime upon collective right of indigenous communities for the protection of their culture, identity and traditional knowledge of community. It protects the collective rights by registering them without any time bond.

**Philippines** government enacted the *Indigenous Protection Act, 1997* which aims at protecting right of indigenous people by recognizing their cultural diversity and community's intellectual property. The other legislation is the *Community Intellectual Right Protection Act, 2002*. It recognises the original right of indigenous people and local communities over plant, genetic resources, traditional medicines, agriculture method which have been discovered by them. After registration, the community automatically becomes the general owner of traditional knowledge.

**Bangladesh** adopted the *Biodiversity and Community Knowledge Protection Act, 1999* for the protection of indigenous community and biodiversity of the country. This Act not only protects the rights and TK of the indigenous community but also prohibits transfer of any traditional knowledge without prior information and the consent of the indigenous community.

In **South Africa**, the department of trade and industry drafted the *Policy Framework for the Protection of Indigenous Traditional Knowledge through the Intellectual Property System and the Intellectual Property Laws Amendment Bill, 2008*. The Bill provides that the law of trademarks/geographical indications may be able to provide protection of certain name associated with traditional knowledge.<sup>9</sup>

The intellectual property rights regime has undergone sea change after the Trade Related Aspects of Intellectual Property Rights (TRIPS) 1994 worldwide.

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<sup>8</sup> Available at: [www.wipo.int](http://www.wipo.int)

<sup>9</sup> "Intellectual Property Laws Amendment Bill", available at: [www.info.gov.za/view/DownloadFileAction?id=81111](http://www.info.gov.za/view/DownloadFileAction?id=81111) as cited in Suman Bimbra, dissertation on *Protection of Traditional Knowledge under Intellectual Property Rights*(2012)

#### **IV. TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS: NATIONAL PERSPECTIVE**

The importance of traditional knowledge of the indigenous communities and the inadequacy of existing law to protect the same is a worldwide concern. With this realised importance, emerges the need to protect this knowledge and to prevent its misappropriation. Protection of the traditional knowledge of the local and indigenous communities seems to be one of the most contentious and convoluted issues. The historical development of the protection of intellectual property in the wake of industrial revolution and its subsequent jurisprudential justifications based on individual private property rights, pushed the traditional knowledge and innovative practices based on it outside the purview of the intellectual property protection regime. In the past few years, ample amount of discussions and debates on the subject of protecting traditional knowledge as intellectual property has been occurring at the World Trade Organisation (WTO), Conference of Parties at the Convention on Biodiversity, etc. A few national governments in these discussions have embraced the view that traditional knowledge needs to be secured legitimately, and they have condemned the formal IPR framework in its available structure for not just neglecting to give satisfactory protection to traditional knowledge additionally for legitimizing its misappropriation.

Although legal protection to the traditional knowledge has not been imbibed by the Indian law makers initially, yet after the TRIPS Agreement and the Convention on Bio-diversity grabbed their attention to a culturally rich, but ignored area of TK. The current IPR system cannot protect traditional knowledge for three reasons: privatization of ownership; protection is time bound and restrictive interpretation of invention.

#### **V. LEGISLATIVE EFFORTS TO GRANT PROTECTION TO TK**

##### ***The Protection of Plant Varieties and Farmer's Rights Act, 2001***

To protect the traditional knowledge of the farming community, the Act facilitates the registration of 'Extant variety' and 'Farmer's variety.' The latter is defined as a variety, under the Act, which has been traditionally cultivated and evolved by the farmers in their fields and possess the common knowledge. On the conceptual level, it is doubtful whether the protection of farmers' varieties under IPRs system would have any positive impact on their conservation or stimulate breeding. Nevertheless, under this approach the protection of TK helps meet society's broader

objectives for the conservation of the environment, sustainable agriculture and food security.<sup>10</sup>

The Indian *sui generis* legislation recognises and envisages rewarding the contributions of both the commercial plant breeders and farmers in plant breeding activity. The statute admits the existing farmers' varieties to the category of extant varieties and provides for the registration of new varieties developed by the farmer breeders on their own.<sup>11</sup> This legislation also acknowledges that conservation, exploration, collection, characterization and evaluation of plant genetic resources for food and agriculture are essential to meet the goals of national food and nutritional security as also for sustainable development for agriculture not only for the present but also for future generations.<sup>12</sup>

This concern gives rise to the question of protecting traditional knowledge under IPR regime. The main criticism of protecting traditional knowledge with IPR, however, is that IPR leads to the commodification of knowledge; it treats knowledge as a commodity with economic value, which is far way different from the perspective of Indigenous People, who treat their knowledge as pious and sacred.

### ***The Geographical Indications of Goods (Registration and Protection) Act, 1999***

This Act intended to protect the valuable geographical indications of our country. The protection, however, is available only to registered authorised users. The Act and the rules, however, neither adequately addressed the issue of protection of traditional knowledge associated with the geographical indication nor ensured that only the community involved is going to use the geographical indication since the protection is limited to goods and the appellations of origin attached to them but the traditional knowledge has its own value as treasure of knowledge expanding to traditional cultural expressions like folklore and genetic resources which cannot be addressed by the Act. As a result, the Act will not enable the local and indigenous communities to protect their traditional knowledge.

### ***The Patents (Amendment) Act, 2002***

It is a matter of fact that the biological materials are closely associated with the traditional knowledge, but the Patents Act specifically excludes the patent rights of

<sup>10</sup> Carlos M Correa, "Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Traditional Knowledge", *A Discussion Paper*, available at: [www.geneva.quino.info/pdf/tkmono1.pdf](http://www.geneva.quino.info/pdf/tkmono1.pdf).

<sup>11</sup> R.R.Hanchinal, "Providing Intellectual Property Protection to Farmers' Varieties in India under the Protection of Plant Varieties and Farmer's Rights Act, 2001", at 11

<sup>12</sup> S.K.Tripathi, "Traditional Knowledge: Its Significance and Implications," 2(2) *Indian Journal of Traditional Knowledge*, 2003, pp.99-106

traditional knowledge *per se*, however, granting the monopoly rights to the new products based on traditional knowledge. The Act with all the amendments does not provide a legal right of the communities to their traditional knowledge. Nevertheless, recently amended Indian Patent law contains provisions for mandatory disclosure of resources and biological materials used in the invention while applying for the grant of patent under the Act. Apart from this, the non-disclosure of these materials serves as a ground for pre and post grant opposition and revocation of patents if granted. To further strengthen these provisions, a new provision has been added to exclude innovations which are based on traditional knowledge or aggregation or duplication of known properties of traditionally known components from being patented.<sup>13</sup>

### ***The Indian Biological Diversity Act, 2002***

This Act was enacted by the Indian Parliament to give effect to the Convention on Biological Diversity (CBD). The CBD offers opportunities to India to realize the benefit of these resources. The legislation addresses the basic concerns of collection, utilization and access to biological resources and knowledge and benefit of sharing out of such access. The patenting of *Neem*, *Basmati* and *Turmeric* by foreign companies gave rise to hue and cry in India and overseas and led to several initiatives in India, such as documentation of traditional knowledge.<sup>14</sup> The underlying policy of this Act is “...to provide for conservation of biological diversity, sustainable use of its components and equitable sharing of the benefits arising out of use of biological resources and for matters connected therewith or incidental thereto.”

In spite of the fact that this Act creates three tier system<sup>15</sup> for the implementation of its purpose and created funds also to check the alarming increase of bio piracy and restrict bio-based trade, there is no express mention of ‘Protection of traditional knowledge’ but impliedly used.

### ***Biological Diversity Rules, 2004***

Section 62 of the *Biological Diversity Act, 2002* confers on the Central Government, in exercise of its powers, to organise comprehensive programmes on conservation of biodiversity, sustainable use and benefit sharing; to build database of biological resources and the other administrative powers.

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<sup>13</sup> *Id.*, at 103

<sup>14</sup> People's Biodiversity Registeries (PBRs)

<sup>15</sup> National Biodiversity Authority (NBA); State Biodiversity Board (SBB) and Biodiversity Management Committee BMC) at the local level created for the purpose of promoting conservation, sustainable use and documentation of biological diversity, preservation of habitats, chronicling of knowledge relating to biodiversity, management and conservation of heritage sites, compensation and rehabilitation and socio-economic development of areas.

### ***The Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006***

This Act recognises the rights of forest dwellers Scheduled Tribes and other traditional forest dwellers' right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity.

Apart from these legislative efforts to protect TK, the Trade Marks Act, 1999; The Copyright Act, 1957 and the Designs Act, 2000 can also be used to protect the traditional knowledge only in the cases where it falls within the prescribed categories of these Acts.

### ***IPR Policy for Kerala, 2008***

The policy has been adopted to give protection to the traditional knowledge of God's own country, Kerala. The objectives of the policy are:

- (1) To Introduce a Legal arrangement for the protection of traditional knowledge and biodiversity associated with such knowledge, given the fact that traditional knowledge forms the basis of livelihoods of many TK practitioners and the absence of any legal property rights on such knowledge may render an opportunity for the private appropriation of the Traditional Knowledge by multinational corporates.

State proposes to commit all traditional knowledge, including traditional medicines, the practice of which sustains livelihoods of many, to the realm of "Knowledge Commons" and not to the "Public Domain". While the Policy envisages creating property rights on traditional knowledge, all the right holders will be deemed to be holding their rights under an obligation that they shall permit others the use of the knowledge in their possession for non-commercial purposes.

- (2) Setting up of a Supervisory Council on Intellectual Property (SCIP) to provide overall supervision in matters relating to intellectual property rights with Chief Minister as its Chairman and Law Minister as its Vice-Chairman. SCIP will help any potential patent applicant who asks for its assistance to prepare proper patent applications. It will disseminate knowledge in the state about intellectual property rights.
- (3) To declare the stand of the Government with regard to the ownership of Intellectual property rights over the outcome of research in state government-funded and state government-aided institutions, especially given the current trend of outsourcing from the west.<sup>16</sup>

<sup>16</sup> Available at: <http://spicyip.com/2008/06/keralas-ipr-policy.html>

## VI. INTERFACE BETWEEN TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY

The relationship between indigenous/traditional knowledge and intellectual property law is a complicated contemporary legal problem.

Intellectual property is a monopolistic right given for a limited period. On the other hand, traditional knowledge belongs to indigenous communities emerging as a collective right and creating it for ages. The main purpose of the advocacy for the protection of the TK is to ensure the intellectual innovation and creativity embodied in the TK is not wrongly used. Intellectual property rights may be recognised and exercised for exclusive rights on the protected TK.<sup>17</sup>

### *Some case studies reflecting interface between TK and IPRs*

#### **AVEDA and ownership of the word ‘Indigenous’**

In 2006, the cosmetic corporation, AVEDA, released a range of skin products under the name ‘Indigenous’ and used it as a trade mark for the marketing of the new line of products. This provoked a strong negative reaction from the indigenous groups around the world. The bone of contention was that such a significant word, politically uniting historically marginalized and excluded groups of people throughout the world, could be isolated and utilized by a cosmetic company as a trade mark for the purpose of economic profit. As a result of these reactions, AVEDA decided to drop the “Indigenous” product line and discontinue the use of trade mark. AVEDA was encouraged to appreciate that using the word “Indigenous” on a commercial product in order to derive a market advantage was disrespectful to indigenous people who struggled for recognition of rights and self-determination.

In an effort to sensitize to the ethical issues, the indigenous people raised the questions of benefit sharing with the corporations. AVEDA established a range of partnerships with indigenous groups in Australia and America. AVEDA also established an NGO (Tribal Link Foundation) that funds the participation by indigenous people at UN Permanent Forum on indigenous issues and other contexts where indigenous people are negotiating intellectual property rights.<sup>18</sup>

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<sup>17</sup> Md. RazadurRahaman, “Protection of Traditional Knowledge and Traditional Cultural Expressions in Bangladesh, 20 (3) *Journal of Intellectual Property Rights*, 2015, pp.164-171, at 164

<sup>18</sup> Statement on discontinuation of ‘Indigenous’ product line and trade mark, Press release, AVEDA, AVEDA Announces Discontinuation of Indigenous Product Collection, 2003, available at: <http://aveda.aveda.com/about/press/indigenous.asp> as cited in Dr. Jane Anderson, “Indigenous Traditional Knowledge and Intellectual Property”, *Centre for Study of the Public Domain*, 2010

## Registration of Batik Design in Indonesia

Historically, the Indonesian batik artistic community has been based in Solo, Java. The Indonesian government considers batik to be a traditional art form and over the last five years has been working on developing the new legislation to protect “Traditional Arts.” Batik is considered to be a traditional art because design and knowledge have been passed down for centuries from generation to generation. The current efforts to develop new legislation to protect Indonesia’s traditional arts are in response to the increased reproduction of batik styles in other regions of Indonesia and also in neighbouring countries. In order to protect the traditional batik design from misuse and misappropriation, the local government of Solo has developed a design patent programme for the traditional designs which means that many batik motifs will be registered at the local government office and the permission to use any design will have to be sought from the office.

This is a defensive intellectual property strategy. The design patent serves as a preventive mechanism for unauthorised use of batik design. The ownership of the traditional design upon registration, along with the fee, would be assigned to the company or the family of producers who have registered the motif.<sup>19</sup>

## Traditional Knowledge and Bikram Yoga

Bikram Choudhary is the founder of a Yoga technique known as Bikram Yoga. The instructors across the United States must obtain license from him in order to teach the yoga sequence in Bikram yoga. Bikram Choudhary has aggressively enforced claims of copyright and trade mark protection including the claim that the sequence of asanas in *Bikram’s beginning Yoga class* constitutes his copyright. Many yoga practitioners objected to the idea that Choudhary can have exclusive control over a series of postures derived from Indian traditional knowledge and practices.

Choudhary first registered the copyright for *Bikram’s Beginning Yoga Class* in 1979 and subsequently filed copyright for various books as well as certain sequences claiming that the US office recognises his exclusive right to the series of postures and breathing exercises. While Choudhary recognises the fact that the asanas are generally in public domain, but he claims that his sequence constitutes copyrightable compilation of material. He argues that he has exerted specific skill and labour in the selection and assemblage of the asanas into a specific sequence. Despite all disputes, in USA, Choudhary is still free to take legal action against the other yoga practitioners and trainers in United States.

<sup>19</sup> Charles Knobloch & Devi Savitri Reni, “Using Batik Mark as a First Step to extend Protection of Indonesian Javanese batik Patterned Textile in Foreign Countries”, 2009, available at: [http://www.usptclaw.com/pdfs/Batikmark\\_Article.pdf](http://www.usptclaw.com/pdfs/Batikmark_Article.pdf)

<sup>20</sup> *Supra* note 18

There is, however, current lobbying for government representatives in India to mount an effective legal challenge against Bikram Yoga arguing that the copyright in yoga asanas sequence constitutes misappropriation of traditional knowledge unique to India.<sup>20</sup>

### **The Neem Case**

The Neem case (Patent No. EP436257) was a landmark case where for the first time a patent based on traditional knowledge of a developing country was successfully challenged. The moot point in this case was whether a multinational corporation could usurp traditional knowledge through patents. It would lead to the erosion of the diversity of the neem tree and as a result making the neem seeds costlier to make it difficult for the poor farmers to lay their hands upon the seeds. Since the medicinal properties of neem tree as Indian traditional knowledge was in public domain for centuries, therefore, neither novelty nor inventive step was there. The Patent, therefore, was revoked by European Patent Office in 2000.

### **The Turmeric Case**

Turmeric (Haldi) is known for its medicinal properties throughout Asia to treat stomach ailments, as a good antiseptic and even in beautifying agent for the times immemorial. The patent was granted in United States. The Indian Council of Scientific and Industrial Research (CSIR) requested the U.S. patent and Trade Mark Office to re-examine the patent on the ground that turmeric has been used for thousands years for healing wounds and rashes and therefore, its medicinal use is not novel. USPTO has revoked the patent in August, 2002.

### **The Basmati Case**(US Patent No. 5663484)

Basmati is a variety of rice, slender, aromatic long grain, from Punjab (India and Pakistan). This case was concerned with the protection of traditional knowledge as well as geographical indications. The problem arose in 1997 when the USPTO granted patents for three new strains which could be sold under the name of “Basmati” referring to aromatic long grain, from Punjab. After the protest by India and Pakistan against the use of Basmati, the USPTO disallowed the patentee from using the name Basmati, not being generic but famous basmati rice from India and Pakistan. Apart from this, in 2004, after a vigorous campaign worldwide, European patent office revoked Monsanto patent on the Indian variety of wheat and has given India the joy of fourth consecutive victory against bio-piracy and to protect our ancient traditional knowledge.<sup>21</sup>

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<sup>21</sup> Foreign patents based on Amla, Pudina and Jeevani were also successfully challenged and India once again could protect its cultural heritage.

## VII. INDIA'S INITIATIVE TO PROTECT TRADITIONAL KNOWLEDGE THROUGH DATABASE

Apart from various legislations, India has taken a breakthrough initiative by establishing the database for preserving and protecting the traditional treasure of India. In India, after the *neem patent controversy*<sup>22</sup>, the urge to protect the traditional knowledge has gained importance. India has taken an initiative through Traditional Knowledge Digital Library (TKDL), a collaborative project of Council of Scientific and Industrial Research (CSIR) and Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homeopathy (AYUSH), which helps the examiners of Patent Offices to search for any information regarding substance or practice while granting patents and they can dismiss the grant of patent, if the substance or practice is already there in the TKDL list as Indian traditional knowledge. Critics have stated that this documentation could itself lead to misappropriation of India's traditional knowledge.<sup>23</sup>

India has come out with the most comprehensive database Traditional Knowledge Digital Library (TKDL). It holds 36000 formulations utilized in Ayurvedic medicinal preparations and practice. The TKDL categorizes the knowledge in ways that allow it to be linked to International patent classification systems. The information is available in English, French, German, Spanish and Japanese for an easy access and understanding.<sup>24</sup> The outcome of TKDL has been an encouraging one and it has achieved certain milestones out of which a few are mentioned hereunder. Documentation of traditional knowledge is commendable effort in order to give recognition to knowledge holders. But it is merely information and may not enable benefit sharing arising out of the use of such knowledge, unless it is backed by some mechanism for protecting the knowledge.

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<sup>22</sup> US patent No 4946681 and US patent No 5124349 were granted by the US Patent Office to W.R. Grace for extraction and storage processes of *Neem*, which is traditionally used in India since ages for its medicinal properties. US Patent Office counts only published work on inventions as prior art. However, there was a lot of hue and cry against these grants and US Patent Office Policies. India claimed that US is stealing their knowledge.

<sup>23</sup> ZoyaNafis, "India: Protecting Traditional Knowledge as Intellectual Property" *Lex Orbis*, available at: <http://www.mondaq.com/india/x/344510/trade+secrets/protecting+indian+traditional+knowledge+as+intellectual+property>

***Few Major Milestones of Traditional Knowledge Digital Library<sup>25</sup>***

Based on the TKDL evidences, application no. EP1901701 (Ott, David M., 777 Panoramic Way, Berkeley, CA 94704 / US) for “Personal care and medicinal products incorporating bound Organosulfur groups”, is deemed to be withdrawn. Application was closed on 14-Aug-2014.	15-May-2014	CSIR
Based on the TKDL evidences filed for the application no CA 2574518 entitled “Pharmaceutical composition and non-dependence coffee comprising edible Carboxylic Acid and/or its Acid Salt and Coffeine” SHIAO, SHIN-JEN (Taiwan), CIPO has declared the application as ‘Dead’.	22-May-2014	CSIR
Nanyang Polytechnic / Singapore has amended the claims of the application no EP2416793 entitled “A plant extract comprising statins and preparation techniques and uses thereof” based on the TKDL evidences.	06-Jun-2014	CSIR
Mimozax Co., Ltd. , 4291-1, Miyauchi Hatsukaichi-shi, Hiroshima 738-0034 / Japan has amended the claims of the application no EP2052731 entitled “Composition for preventing and/or treating Itching containing component originating in the Bark of Tree Belonging to the Genusacacia” based on the TKDL evidences.	17-Jun-2014	CSIR
New Chapter, Inc. / US has amended the claims of the application no EP2435057 entitled “Compositions and methods for modulating lipid composition” and application was refused on 17.06.2015 based on the TKDL evidences.	07-Jul-2014	CSIR
Laboratoires Expanscience / France has amended the claims of the application no EP2506724 entitled “Vigna Unguiculata seed extract and compositions containing the same” based on the TKDL evidences.	22-Jul-2014	CSIR
Based on the TKDL evidences, Unigen, Inc. / US, have amended the claims of application no EP1881839 for “Compositions of Bakuchiol and methods of making the same” and then the application was withdrawn. Application Closed on 12-Nov-2014.	01-Aug-2014	CSIR

<sup>25</sup> Available at: <http://www.tkdل.res.in/tkdل/langdefault/common/milestones.asp?GL=Eng>

Unitika, Ltd. / Japan has amended the claims of the application no EP2226071 entitled “Composition for oral administration” based on the TKDL evidences.	04-Aug-2014	CSIR
Kim; Hyoung-Jun, Korea, filed a patent application with publication no. 20120329739 entitled “Composition for preventing or treating Poliosis or Vitiligo comprising a Pueraria genus plant extract or Puerarin”, the Examiner decided to reject the claims on 20-Mar-14. Applicant amended the claims on 19-Jun-14. Examiner again rejected the claims on 06-Aug-14 based on the TKDL evidences. After amendment of claims on India’s TK on the basis of prior art in TKDL, patent issued	06-Aug-2014	CSIR
Based on the TKDL evidences, application no. EP2419508 (Somalabs, Inc., 40 Allen Road, South Burlington, VT 05403 / US) for “Method for the induction of a reward response by modulation of dopaminergic systems in the central nervous system”, is deemed to be withdrawn. Application was closed on 12-Nov-2014.	13-Aug-2014	CSIR
Based on the TKDL evidences, application no. EP1558271 (Metaproteomics, LLC / US) for “Compositions that treat or inhibit pathological conditions associated with inflammatory response”, is deemed to be withdrawn. Application was closed on 09-Jan-2015.	10-Oct-2014	CSIR
Based on the TKDL evidences filed for the application no CA 2546464 entitled “Sequential application of oral and topical formulations for treating wrinkles and other damage to skin” Wachsberg, Richard (Canada), CIPO has declared the application as ‘Dead’.	20-Oct-2014	CSIR
M/S Indena S.p.A. / Italy has amended the description of the application no EP2046324 entitled “Treatment and prevention Mucositis by Anthocyanidin derivatives” based on the TKDL evidences.	17-Nov-2014	CSIR
Nestec S.A., Avenue Nestlé 55, 1800 Vevey / Switzerland has amended the description of the application no EP1750651 entitled “Composition for improving skin, hair and coat health containing flavanones” based on the TKDL evidences.	25-Nov-2014	CSIR

Based on the TKDL evidences, application no. EP2266586 (Lifeline Nutraceuticals Corporation 6400 South Fiddler's Green Circle, Suite 1970 Englewood, CO 80111 / United States) for "Compositions and method for alleviating inflammation and oxidative stress in a mammal", is deemed to be withdrawn. Application was closed on 18-Mar-2015.	15-Dec-2014	CSIR
Based on the TKDL evidences, application no. EP2243383 (Nestec S.A. / Switzerland) for "A method and composition for nutritionally improving glucose control and insulin action", is deemed to be withdrawn.	05-Jan-2015	CSIR
M/S Jensen; Ned L, US, filed a patent application with publication no. 20140106002 entitled "Homeopathic composition and method for the treatment of Skin Irritations and other Skin diseases", Examiner decided to reject the claims 1-19 on 06.01.2015 based on the TKDL evidences.	06-Jan-2015	CSIR
CGPDTM refuses the application no. 1783/DEL/2007 entitled "Nutraceutical Biscuits" filed by Central Council for Research in Unani Medicines (CCRUM), India, based on the TKDL evidences.	15-Jan-2015	CSIR
Avon Products, Inc. / US has amended the description of the application no EPI827362 entitled "Compositions and methods of their use for improving the condition and appearance of skin" based on the TKDL evidences.	16-Feb-2015	CSIR
M/S Life Science Nutrition AS/ Norway has amended the claims of the publication no. EP1773363 for "NGNA compositions and methods of use" based on the TKDL evidences.	19-Feb-2015	CSIR
CGPDTM refuses the application no. 1732/DEL/2007 entitled "A novel composition of the herbal tea" filed by Central Council for Research in Unani Medicines (CCRUM), India, based on the TKDL evidences.	12-Mar-2015	CSIR
Based on the TKDL evidences, application no. EP2689806 (Colgate-Palmolive Company / United States of America) for "Oral compositions containing extracts of myristicafragrans and related methods", is deemed to be withdrawn. Application was closed on 22-Jun-2015.	17-Mar-2015	CSIR

EPO refuses the application no. EP2464363 entitled “Natural extract from whole Banana fruit (MUSA SPP.)” filed by M/S Medasani, Munisekhar, India, based on the TKDL evidences.	20-Mar-2015	CSIR
Based on the TKDL evidences, application no. EP2328598 (Phenolics, LLC / US) for “Novel compositions containing isolated Tetrameric type a Proanthocyanadin and methods of use and manufacture”, is deemed to be withdrawn. Application was closed on 13-Jul-2015.	30-Mar-2015	CSIR
Based on the TKDL evidences, Phenolics, LLC, P.O. Box 2439, 846 San Carlos Avenue, El Granada, CA 94108-2439 / US has amended the claims of the publication no. EP1572219 for “Efficient method for producing compositions enriched in total phenols” and then the application was withdrawn. Application was closed on 02-Jul-2015.	02-Apr-2015	CSIR
Based on the TKDL evidences, Morinaga Milk Industry Co, LTD., 33-1, Shiba 5-chome, Minato-ku, Tokyo 108-8384 / Japan has amended the claims of the publication no. EP1941899 for “Agent for promoting Glucagon-like Peptide 1 Secretion, food or drink for promoting Glucagon-like Peptide 1 Secretion, agent for inhibiting postprandial increase in blood sugar level and food or drink for inhibiting postprandial increase in blood sugar level” and then the application was withdrawn. Application was closed on 22-Jul-2015.	16-Apr-2015	CSIR
M/S Patankar; Suresh Balkrishna, India, filed a patent application with publication no. 20130337057 entitled “Novel herbal composition for the treatment of kidney stone and other urinary tract disorders”, Examiner decided to reject the claims 1-7, 9-13 and 15 on 01.07.2014 & again on 08.05.2015 based on the TKDL evidences. 08-May-2015	08-May-2015	CSIR
BASF Beauty Care Solutions France SAS / France has amended the claims of the publication no. EP2157966 for “MC-1R, MC-2R, AND/OR [mu] OPIOID RECEPTORS STIMULATION” based on the TKDL evidences. 12-May-2015	12-May-2015	CSIR
(VDF Futureceuticals, Inc., 819 Dixie Highway, Momence, IL 60954 / United States) have withdrawn their application no. EP2367526 for “Compositions and methods for alleviating hyposalivation and for providing oral comfort” based on the TKDL evidences. 20-Jun-2015	20-Jun-2015	CSIR

(M/S Pangaea Laboratories Limited / Great Britain) have withdrawn their application no. EP2361602 for “A hair building solid agent” based on the TKDL evidences.	29-Jun-2015	CSIR
CGPDTM refuses the application no. 172/DEL/2007 entitled “A preparation for treatment of Vitiligo and a method of preparation thereof” filed by Central Council for Research in Unani Medicines (CCRUM), India, based on the TKDL evidences.	—	CSIR
CGPDTM refuses the application no. 212/DEL/2006 entitled “A herbal preparation for the prevention and management of various types of Carcinoma” filed by Prof. S. S. Trivedi, India, based on the TKDL evidences.	—	CSIR

Documentation of traditional knowledge is also acknowledged as a means of giving due recognition to the traditional knowledge holders. The list is not exhaustive but a step towards the recognition of the rights of indigenous people and the traditional knowledge

## VIII. CONCLUSION

Needless to say, TK is largely oral and is collective knowledge, beliefs and practices of indigenous people on sustainable use and management of the resources. It embodies the wisdom developed over generations and encompasses agricultural knowledge, medicinal knowledge, biodiversity related knowledge and the like. Classic examples of medicinal TK may include: Methi for maintaining glucose levels; Amla for immune system; Haldi as antiseptic etc. the reasons to protect TK are: conserving the environment; giving recognition and improving the livelihood of TK holders; benefitting national economies in knowledge driven era and bringing the indigenous into the main streamline; preventing bio-piracy.<sup>26</sup>

In just two years, in Europe alone, India has succeeded in bringing about the cancellation or withdrawal of 36 applications to patent traditionally known medicinal formulations. The key to this success has been its Traditional Knowledge Digital Library (TKDL), a database containing 34 million pages of formatted information on some 2,260,000 medicinal formulations in multiple languages. Designed as a tool to assist patent examiners of major intellectual property (IP) offices in carrying out prior art searches, the TKDL is a unique repository of India’s traditional medical wisdom. It bridges the linguistic gap between traditional knowledge expressed in languages such as Sanskrit, Arabic, Persian, Urdu and Tamil, and those used by patent examiners of major IP offices. India’s TKDL is proving a powerful weapon

in the country's fight against erroneous patents, sometimes referred to as "bio piracy"<sup>27</sup>

The indigenous people deserve the adequate protection for the ancient treasure and they should be given the right to grant license for the traditional knowledge to be used for giving an incentive for the intellectual property creators to manifest the knowledge and keep benefitting the society at large. India has already stepped on the path of preservation of traditional knowledge not only by winning the cases in revocation of patents but also by establishing a comprehensive database for the information to be given to all. Like other countries, India can think of having *asui generis* system for the adequate protection of the traditional cultural heritage. India, being a land of rich cultural heritage and traditional (though potent) methods to cure maladies, has to go a way ahead in protecting the traditional knowledge. There is a need to take a holistic view of the entire intellectual property regime which provides equity to the creator of knowledge, whether created in laboratory of bricks or laboratory of life. The traditional knowledge is cultural spine of India but it is very important to maintain a balance between protecting the rights of indigenous communities and the benefits arising out of the commercialization of developments based upon this ancient treasure to bring about the socio-economic harmony and justice to all.

The whole world has realised that by protecting the traditional knowledge, food for thought will be richer with enough food in stomach and a healthy mind.

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<sup>26</sup> Available at: <http://www.bananaip.com/ip-news-center/traditional-knowledge-ipr-policy-2016>

<sup>27</sup> Available at: [http://www.wipo.int/wipo\\_magazine/en/2011/03/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html)

# Persons with Print Disability and Copyright Law: Marrakesh Treaty and Indian Response

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*Rajnish Kumar Singh\**

## I. INTRODUCTION

According to the World Health Organization, there are more than 314 million blind and visually impaired persons in the world, 90 per cent of whom live in developing countries. A WIPO survey in 2006 found that fewer than 60 countries have limitations and exceptions clauses in their copyright laws that make special provision for visually impaired persons, for example, for Braille, large print or digitized audio versions of copyrighted texts.<sup>1</sup> According to Patrick Hely copyright and related intellectual property law present real barriers to the visually impaired's ability to access the written word.<sup>2</sup>

Furthermore, because copyright law is "territorial,"<sup>3</sup> these exemptions usually do not cover the import or export of works converted into accessible formats, even between countries with similar rules. Organizations in each country must negotiate licenses with the right holders to exchange special formats across borders, or produce their own materials; a costly undertaking that severely limits access by visually impaired persons to printed works of all kinds.<sup>4</sup> The present paper examines the above apprehensions by referring to various provisions of Marrakesh Treaty and Copyright Act, 1957 of India. Part II of the paper introduces the Marrakesh Treaty. Part III & IV are about possibilities under Copyright Law and exemption under Indian Act. It is also relevant in the context of the present issue that Indian amendment come before Marrakesh Treaty could come into existence and thus one may argue that we may have missed the advantage of assessing the provisions of the Treaty before amending our law. The paper examines the differences and

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<sup>1</sup> Available at: [http://www.wipo.int/pressroom/en/articles/2013/article\\_0017.html](http://www.wipo.int/pressroom/en/articles/2013/article_0017.html)

<sup>2</sup> Patrick Hely, "A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO", 43 *Vand. J. Transnat'l L.*, 2010, at 1411

<sup>3</sup> One of the defining characteristics of copyright is that they are national or territorial in nature. That is, it does not operate outside of the national territory where it is granted. L. Bently and B. Sherman, *Intellectual Property Law* (New Delhi: Oxford University Press, 2003) at 3

<sup>4</sup> Available at: [http://www.wipo.int/pressroom/en/articles/2013/article\\_0017.html](http://www.wipo.int/pressroom/en/articles/2013/article_0017.html)

the implications of the differences between Indian law and the Treaty provisions. Part II of the paper introduces the Marrakesh Treaty. Part III and IV are about possibilities under copyright law and exemptions under the Indian Act.

## II. MARRAKESH TREATY AND ACCESS TO WORK FOR VISUALLY IMPAIRED PEOPLE

The World Health Organisation estimates that about 90% of the world's visually impaired live in low-income settings. 82% of people living with blindness are aged 50 and above. Globally, uncorrected refractive errors are the main cause of moderate and severe visual impairment; cataracts remain the leading cause of blindness in middle- and low-income countries. The number of people visually impaired from infectious diseases has reduced in the last 20 years according to global estimates work. 80% of all visual impairment can be prevented or cured. The data indicates the gravity of the problem. The seriousness is further striking in developing countries.<sup>5</sup> Reading is a human right; but currently not all people can access books or other reading materials. The Right to Read is the campaign to update international copyright laws pertaining to reading materials in accessible formats for blind, low vision and print-disabled individuals.<sup>6</sup> Over 90% of all published materials cannot be read by blind or print-disabled people. We need to be able to reproduce published materials into accessible formats, such as Braille, large print, and audio editions, however, copyright rules have the potential to prevent this. This limits the books that blind students can access for study to further their learning and formal education. In order to address the above issue a treaty for enabling people with disabilities to establish access to works protected by copyright was proposed by WIPO. It was apprehended that the proposed treaty will require extensive changes in the law of copyright in different countries. Further it was also believed that the proposed treaty will reduce the incentive for creating new works.<sup>7</sup> Working with WIPO, the World Blind Union (WBU) led the international campaign to develop the Marrakesh Treaty that would address this book famine. The Marrakesh Treaty (the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities) was signed in Morocco on 28 June 2013 and proposes to

<sup>5</sup> Available at: <http://www.who.int/mediacentre/factsheets/fs282/en/>

<sup>6</sup> Available at: <http://www.worldblindunion.org/English/our-work/our-priorities/Pages/right-2-read-campaign.aspx>

<sup>7</sup> Comment by Laura Ruby, Director, Accessibility Policy & Standards, Microsoft Corp. and Jule Sigall, Senior Copyright Counsel, Microsoft Corp., to Marial Pallante Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office, regarding Notice of inquiry and Request for Comments on the topic of Facilitating Access to Copyrighted Works for the Blind or other Persons with Disabilities (November 200-9) cited from Shin-Yi Serena Huang, "Comment on Marrakesh Treaty to Facilitate Access to Published Works for People who are Blind, Visually Impaired, or Otherwise Print Disabled", 1(1) *NUSRL Journal of Law and Policy* 2014, at 71

address the book famine in the context of print disabled people. It allows for an increase of materials in accessible formats through cross-border sharing and the increased production of books in more countries.<sup>8</sup> India joined the treaty on April 30, 2014 and ratified it on June 24, 2014.

The treaty recognizes that, despite the differences in national copyright laws, the positive impact of new information and communication technologies on the lives of persons with visual impairments or with other print disabilities may be reinforced by an enhanced legal framework at the international level. It also recognizes the importance of the international copyright system and desiring to harmonize limitations and exceptions with a view to facilitating access to and use of works by persons with visual impairments or with other print disabilities<sup>9</sup>

A beneficiary person according to the treaty is a person who is blind; has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.<sup>10</sup> The focus of the definition it seems is on the functional aspect. It appears that the concern was that the exception under copyright laws would be misused to aid those who did not have any disabilities. The concern is addressed by circumscribing the scope of the exception to “formats specially designed for the disabled”. Thus instead of limiting the types of formats that could be created, the governments must limit the beneficiaries i.e., any accessible format created under the exception under copyright law could be made available only to persons with disabilities. One way of implementing this was by mandating converters and distributors to take ‘reasonable measures’ to ensure that the intended beneficiary belonged to the disabled community.<sup>11</sup>

Article 4 by requiring contracting parties to have an exception to domestic copyright law for visually impaired and print disabled people means that contracting countries must ensure that their laws allow visually impaired persons and the authorized entity<sup>12</sup> to make accessible format books without the need to ask

<sup>8</sup> Available at: <http://www.worldblindunion.org/English/our-work/our-priorities/Pages/right-2-read-campaign.aspx>

<sup>9</sup> The Marrakesh Treaty, 2013, Preamble

<sup>10</sup> *Id.*, Article 3

<sup>11</sup> Rahul Cherian Jacob, Sam Taraporevala & Shamnad Basheer, “The Disability Exception and the Triumph of New Rights Advocacy”, *NUJS Law Review*, 2012, at 609

<sup>12</sup> Under the United States proposal, only ‘trusted intermediaries’ could export accessible format copies of works. A ‘trusted intermediary’ was defined as “a governmental agency or a non-profit entity with legal personality that has as a primary mission to assist persons with print

permission from the copyright owner of works<sup>13, 14</sup>

The treaty further provides that an accessible copy may be made available to an authorized entity in another Contracting Party. It also provides that for the benefit of beneficiary person the accessible format copy may be imported without authorization of the right-holder. The Treaty in Article 4(4) provides that a Contracting Party may confine limitations or exceptions to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter. The attempt in the Treaty to clarify the position may be understood in the context of the concern of the World Blind Union that accessible format copies may be received under limitations and exemptions clause only if the format is not available commercially.

It is also important to note that in the context of digital environment large number of works are protected by employing effective technological measures. The WIPO Copyright Treaty, 1996 provides that content creators may employ effective technological measures to protect their works and the member countries are obliged to provide effective legal remedy against those who circumvent the technological measures.<sup>15</sup> In the light of such a provision it was apprehended that

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disabilities by providing them with services relating to education, training, adaptive reading, or information access". This definition was highly restrictive since it would leave out mainstream libraries and educational institutions that nevertheless served persons with visual impairment. It is to be noted that the Hathi Trust in the United States, a mainstream library, has more than 10 million books in accessible formats and libraries like the Hathi Trust would not qualify as a Trusted Intermediary under the United States proposal. Rahul Cherian Jacob, Sam Taraporevala & Shannad Basheer, *Id.*, at 624

The Marrakesh Treaty, 2013, Article 2(c) defines "authorized entity" as any entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations. An authorized entity establishes and follows its own practices: (i) to establish that the persons it serves are beneficiary persons; (ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies; (iii) to discourage the reproduction, distribution and making available of unauthorized copies; and (iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8.

<sup>13</sup> *Id.*, Article 2(a) "works" means literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.

<sup>14</sup> Serena, *Supra* note 7, at 73

<sup>15</sup> The WIPO Copyright Treaty, 1996, Article 11: Obligations concerning Technological Measures Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in

the provisions of Marrakesh Treaty shall be of no use because the Digital Rights Management technologies ensure access control, use control and are self-enforcing. To address the same, Article 7 of the Treaty requires contracting parties to take appropriate measures to ensure that by providing adequate legal protection to and effective legal remedies against the circumvention of effective technological measure they do not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this treaty.

### III. POSSIBILITIES UNDER COPYRIGHT LAW

Copyright law provides rights holders with exclusive right over written works in order to stimulate innovation which in a way restricts dissemination of accessible written works. As of 2007, less than half of WIPO's member states provided copyright limitations and exceptions for converting copyrighted works into VIP-accessible formats. In this vein, international intellectual property law has long resisted erosion of the status quo of granting rights holders strong intellectual property protections.<sup>16</sup>

Under Article 9(2) of the Berne Convention, a country may provide an exception to its copyright laws if it meets the Berne "three-step test."<sup>17</sup> TRIPs also incorporates many of the provisions of the Berne Convention, thus making members of the WTO who did not sign the Berne Convention subject to most of its provisions. TRIPs establishes a structure for limitations and exceptions very similar to Berne. It actually expands the three-step test of Berne to cover rights other than reproduction (i.e., translation, public performance, broadcasting, public recitation, and adaptation, as well as the original right of rental established in TRIPs) within exception.<sup>18</sup>

Despite its addition to the Berne Convention in 1967, the three-step test was not interpreted by an international tribunal until 2001. A WTO panel decision interpreted the test as it had been adopted in Article 13 of TRIPs Agreement<sup>19</sup>. First, the panel

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connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

<sup>16</sup> Sean Williams, "Closing in on the Light at WIPO: Movement Towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements" 33 *U. Pa. J. Int'l L.*, 2011-2012, at 1038

<sup>17</sup> The Berne Convention, Article 9(2). Under the three-step test, limitations and exceptions must be limited (1) to certain special cases, (2) which do not conflict with a normal exploitation of the work, and (3) which do not unreasonably prejudice the legitimate interests of the right holder.

<sup>18</sup> Patrick Hely, *Supra* note 2, at 1380

<sup>19</sup> The TRIPs Agreement, 1994, Article 13 embodies three step test, which stipulates the following: Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder

held that the first prong (“certain special cases”) of the test requires national legislation limitations and exceptions to be clearly defined and narrow in both scope and reach. Most purpose-specific exceptions would pass the first step of the test. An exception or limitation for the blind would almost certainly be compatible with the first step of the test. The panel interpreted the second prong of the test (“do not conflict with a normal exploitation of the work”) to mean that exceptions could not affect forms that were currently economically exploited by rights holders, as well as “those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.” Finally, the panel interpreted the final prong (“do not unreasonably prejudice the legitimate interests of the right holder”) to prohibit exceptions when they “cause or have the potential to cause an unreasonable loss of income to the copyright holder.”<sup>20</sup>

#### IV. EXEMPTION UNDER INDIAN COPYRIGHT ACT

Section 52(1)(zb)<sup>21</sup> was introduced in the Copyright Act by the Copyright (Amendment) Act, 2012 which permits conversion of a work to a format which is accessible to people with disability. The provision also requires the person so converting to ensure that the work is only accessed by persons with disability. It allows conversion of the work by disabled person himself or conversion by third parties working for the benefit of the disabled persons with a condition that it must be done for nonprofit purposes. Further section 31B provides that any person working for the benefit of persons with disability on a profit basis or for business may apply to the Copyright Board, in such form and manner and accompanied by such fee as may be prescribed, for a compulsory licence to publish any work in which copyright

<sup>20</sup> Patrick Hely, *Supra* note 2, at 1379

<sup>21</sup> The Copyright Act, 1957, Section 52(1)(zb) exempts the following from infringement liabilities: The adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by-(i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or(ii) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons:

Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a nonprofit basis but to recover only the cost of production:

Provided further that the organisation shall ensure that the copies of works in such accessible format are used by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.

Explanation- For the purposes of the sub-clause, “any organisation” includes an organization registered under Section 12A of the Income Tax Act, 1961 and working for the benefit of persons with disability or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 or receiving grants from the Government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government.”

subsists for the benefit of such persons, in a case to which clause (zb) of subsection (1) of section 52 does not apply.

The Indian initiative needs to be compared with the Marrakesh Treaty so as to understand the scope of the new provisions. Article 4(1) of the Treaty obligates a contracting party to create an exception to the rights of reproduction and distribution to facilitate the domestic availability of works in accessible format for beneficiary persons. The Indian law permits any person including the person with disability and any organization working for the benefit of the persons with disabilities to adapt, reproduce, issue copies or communication to the public any work in any accessible format. The primary difference lies in the definition of beneficiaries which is only people suffering from print disability in the Treaty which is not the case in Indian law.

Earlier section 52(1)(zb) dealt only with formats that were “special designed only for the use of persons suffering from visual, aural, or other disabilities”.<sup>22</sup> The Parliamentary Standing Committee was of the opinion that all physically challenged need to be benefitted by the proposed amendments. It would be very discriminating if envisaged benefit remains restricted to only visually impaired, leaving out persons affected by cerebral palsy, dyslexia and low vision. The Committee took note of fact that even regular Braille users complement Braille with other accessible formats like audio, reading material with large fonts and electronic texts. The Committee also observed that the modern day Braille production is dependent on the material being first converted into mainstream electronic formats such as MS Word because Braille translation software requires inputs in such formats.<sup>23</sup> Further Shamnad Basheer argues that “given that we now live in the so called “digital” era, what works best for most of the visually impaired are electronic versions of text that can be read out using a screen reader software (such as Jaws or Orca). Unfortunately, “electronic” versions that are created by scanning printed text will not necessarily qualify as “special formats”. For such electronic versions can be accessed by one and all. Indeed, that precisely is why offerings such as Kindle and Google books are a big commercial hit...for their major market comprises the not so differently-abled.”<sup>24</sup> The provision in its present form takes into account the concerns and no more limited to special formats.

While presenting its side before standing committee the department argued that for formats that are not covered by section 52(1) (zb) a compulsory licensing regime is envisaged under s. 31B. It may be mentioned that the amended provision

<sup>22</sup> “Analysis of the Copyright (Amendment) Bill, 2012”, Available at: <http://cis-india.org/a2k/blogs/analysis-copyright-amendment-bill-2012>

<sup>23</sup> Parliamentary Standing Committee, 227<sup>th</sup> Report on the Copyright (Amendment) Bill, 2010 at 38

<sup>24</sup> Shamnad Basheer, “De-Coding Indian Intellectual Property Law”, Available at: <http://spicyip.com/2010/11/special-copyright-victory-for-disabled.html>

does not limit the conversion of the work into special formats for print disabled thus in this context one may not say that provision contained in section 31B relates to formats that are not covered by section 52(1)(zb).

It is relevant to note that the Marrakesh Treaty address the issue of disables at two levels, first it limits the liability for lawful creation and distribution of accessible format copy and second, it legalizes the export and import of accessible format works made under national copyright exceptions. The first as discussed above may be achieved by creating the exception as required by the Treaty. It is the second aspect in relation to which the Treaty provides a global solution. Cross-border sharing could drive down costs per copy because accessible-format producers indifferent states would not necessarily have to repeat each other's work to produce the same title.<sup>25</sup> The provision shall also ensure reduction of duplicative production efforts and also that works of foreign language shall also become available in Indian market. Despite above it is difficult to say that the situation as regards export of accessible format copies is settled. The Indian law appears to be silent on the aspect and thus only the true right holder according to present Indian provision shall be allowed to export the accessible format copies and not anyone else.

The 2012 Amendment of the Indian Act introduced the concept of Digital Right Management (DRM) of Copyright<sup>26</sup>. Taking into account the apprehensions of content creators of unauthorized use of their content in the digital medium it appears to be a change in the right direction. Thus the content creators are allowed to protect their work by employing effective technological measure. The law shall punish those who circumvent the technological measure employed by the content creators.

Today digital works, such as e-books, provide a mainstream medium for persons with print disabilities. Some of these works make text-to-speech capabilities commercially available, while others make it easier for persons with print disabilities to employ assistive technologies to enjoy the work. Consequently, flexibility of digital media affords persons with print disabilities autonomy to access copyrighted materials. In effect, the evolution of accessible formats from Braille to e-books provides an opportunity for self-help to allow readers to individually tailor the digital content in the way that is most accessible.<sup>27</sup> As noted above with the advent of digital technology

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<sup>25</sup> Shae Fitzpatrick, "Setting its Sights on The Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities", 37(139) *Boston College International & Comparative Law Review*, 2014, at 158

<sup>26</sup> The Copyright Act, 1957, Section 65A: (1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

<sup>27</sup> Shae Fitzpatrick, *supra*note 25, at 153

now the authors employ technological measures making it difficult for the people with disability to make use of the protected work and converting the work in accessible format such as e-books. The use of technology by the authors prevent disabled from making positive use of technology.

Section 65 A (2)<sup>28</sup> further provides that the provision related to non-circumvention of effective technological measures shall not disentitle anyone including persons with disability to do anything in relation to the work which is not prohibited under the Act. Which means that circumvention is permitted for the purpose of giving effect to the objectives of section 52(1)(zb). However, it remains to be utilized by authorities mention in the provision other than disabled people themselves because as mentioned above people with disabilities mostly do not possess the means to circumvent.

A reference of the likely effect of moral rights on the working of the disability provision shall not be out of place. It is important in the context of copyright that a balance must be struck between the rights of authors and the public interest. It cannot be denied that over utilization of the provision may also go against the interest of the balance mentioned above. In the case of *Amar Nath Sehgal v Union of India and Another*<sup>29</sup> the Delhi High Court observed that in addition to moral rights of Authors mentioned in Section 57 of the Act, authors have an additional moral right of retraction which allows authors to decide as to when they want to retract their work from market. It is always possible that the author may retract his work from market in case he finds that the overuse of disability provision is going against his interest in a significant way. Further it is also relevant that the moral rights are of such importance that any assignment or licence of copyright has to be read subject to moral rights and not vice versa. Fortunately the situation does not seem to arise in Indian context as the law does not expressly recognize the right<sup>30</sup>. The fact that the list of moral rights is not same in different countries also makes it challenging for the copyright to evolve any solution for the same.

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<sup>28</sup> The Copyright Act, 1957, Section 65A: (2) Nothing in sub-section (1) shall prevent any person from,- ( a) doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or (b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or (c) conducting any lawful investigation; or (d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner; or (e) operator; or (f) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or (g) taking measures necessary in the interest of national security.

<sup>29</sup> 2005 (30) PTC 253

<sup>30</sup> The Copyright Act, 1957, section 57 only provides two moral rights viz. right to paternity and right to integrity.

## V. CONCLUSION

The discussion on the disability provision of Marrakesh Treaty and Indian Copyright Act only indicates that a step in the right direction has been taken. It remains to be seen as to what is the true implication of the working of these provisions. On the perusal of the provisions one gets the impression that certain terms need clarification in the form of definitions. The Indian law does not explain terms like 'accessible format' and 'person with disability' etc. which may make application of law difficult in future. These terms require authoritative interpretations. The issue of making intermediate copy needs attention. It may be suggested that the definition of the term 'accessible format copy' may include an explanation to the effect that the intermediate copy made for the purpose of making accessible format copy is also included in the definition. A similar approach is visible in explanation to section 52(1)(a) which provides that the storing of any work in any electronic medium for the purpose mentioned in this clause.....shall not constitute infringement of copyright, Further, it is also relevant to note that such intermediate copies are only incidental in nature and can be allowed to be made. Over emphasis on disability provision must not create an impression that the otherwise existing fair use provision in the list of exemptions is of no use. Further, the law on the point of export of accessible format also needs clarification. It is hoped that with the working of provisions better results will emerge for the community which has so far remained away from print version of the copyright protected works.

# **Maternity Benefits, Policies and Practices in India- A Critical Assessment**

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*Balwinder Kaur\**

## **I. INTRODUCTION**

Maternity is a condition which requires differential treatment to achieve genuine equality and, in this sense, it is more of a premise of the principle of equality than a dispensation. Special maternity protection measures should be taken to enable women to fulfill their maternal role without being marginalized in the labour market.

International Labour Office<sup>1</sup>

In India, women constitute nearly fifty percent of the population.<sup>2</sup> About 48.60% of the rural population is that of women and they are the vital labour force of the country. However, they remain amongst the most oppressed ones and are often denied the basic human rights. Maternity protection is a fundamental human right and an indispensable element of comprehensive work–family policies. Of all the rights of women, to be a mother is the greatest. It is crucial to promoting maternal and child health and preventing discrimination against women in the workplace.<sup>3</sup> Historically, maternity has been treated as a state of disability in women workers from undertaking any work during the few weeks immediately preceding and following child birth. With the emergence of the system of wage labour in the industrial undertakings, many employers tended to terminate the services of the women workers when they found that maternity interfered with the performance of normal duties by women workers. Many women workers, therefore, had to go on leave without pay during this period in order to retain their employment. Many others had to bear a heavy strain to keep their efficiency during the periods of pregnancy, which was injurious to the health of both, the mother and the child.<sup>4</sup>

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<sup>1</sup> “Fundamental Rights at Work and International Labour Standards”, *International Labour office*, at 76

<sup>2</sup> The Census of India, 2011

<sup>3</sup> “Maternity and Paternity at Work: Law and Practice across the World”, *International Labour Office*, 2014

<sup>4</sup> Available at: [http://www.vvgnli.org/sites/default/files/publication\\_files/099-2012\\_Shashi\\_Bala.pdf](http://www.vvgnli.org/sites/default/files/publication_files/099-2012_Shashi_Bala.pdf)

To remove this hardship of the women workers, the concept of maternity benefit came about in order to enable the women workers to carry on the social function of child; bearing and rearing without undue strain on their health and loss of wages. The cornerstone of women's right and gender equality is the enabling provision of maternity protection. Maternity protection is a fundamental labour right enshrined in key universal human rights treaties. The Universal Declaration of Human Rights, 1948 (UDHR) states that motherhood and childhood are entitled to special care and assistance, as well as to social security.<sup>5</sup> The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) includes special protection for mothers during a reasonable period before and after childbirth, including paid leave or leave with adequate social security benefits. The Convention for the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) calls for special measures to guarantee maternity protection, recognized as an essential right and addressed consistently in all aspects of the Convention. Maternity protection has been a major concern of the International Labour Organization (ILO) since its foundation, when the first Maternity Protection Convention, 1919 (No. 3) was adopted. The "provision for child welfare and maternity protection" is also listed among the core aims and purposes of the ILO (Article III, Declaration of Philadelphia, 1944). Since then, the International Labour Conference (ILC) has adopted two further Conventions, supplemented by Recommendations on maternity protection, the recent being the Maternity Protection Convention (No.183), in 2000. In 1952, the provision of maternity leave and cash benefits in case of maternity was also officially recognized as constituting one of the nine branches of social security established by the Social Security (Minimum Standards) Convention, 1952 (No. 102). The ILO Recommendation concerning National Floors of Social Protection, 2012 (No. 202) calls for maternity benefits to be provided as part of the basic social security guarantees that comprise national social protection floors: access to essential health care, including maternity care, and basic income security for persons in active age who are unable to earn sufficient income due, among other reasons, to maternity.<sup>6</sup>

In India, the Women's Indian Association was the first to insist on maternity benefits for women worker in the Jamshedpur Steel industry in 1920. The association

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<sup>5</sup> The Universal Declaration of Human Rights, 1948, Article 25 declares that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Article 25(2) provides that: Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

<sup>6</sup> *Supra* note 3

continued to focus on women worker's condition and their rights. Attempts to bring about maternity benefits in line with the ILO recommendations met with serious debates in the late 1920s. It is interesting to know that the first Maternity Benefits Act was passed in 1929 by the Bombay Government and as result of the recommendation of the Royal Commission on Labour in India (1931) the Maternity Benefit Acts were passed in other states like Madras (1934), Uttar Pradesh (1938), West Bengal (1939), Assam (1944). That shows the growing awareness of the administration due to the active role of the Trade Union movement at that times which compelled the authorities to make some protective laws for women workers which went on improving in their substance in favour of women workers as the years passed. The goal of maternity protection legislation is to enable women to combine their reproductive and productive roles successfully and to promote equal opportunities and treatment in employment and occupation, without prejudice to health or economic security.<sup>7</sup>

Granville Austin has described the Indian Constitution as first and foremost a social document.<sup>8</sup> Article 15(3)<sup>9</sup> empowers the State to make special provisions for women. The directives principles contained in Part IV of the Indian Constitution are the common man's pathway towards the attainment of socio-economic justice. Though not justiciable<sup>10</sup>, these principles are fundamental in the governance of the Country and State is duty bound to apply these principles in making laws. In a series of decisions on the subject, the Supreme Court has categorically held that the State has responsibility to protect the interests of workmen for establishing social and economic democracy in which every workman realize socio- economic justice assured in the Preamble. Article 42 of Indian Constitution provides that the State shall make provision for securing just and humane conditions of work and maternity benefits.

In order to regulate the employment of women in certain establishments for certain periods before and after childbirth and to provide for Maternity benefits and certain other benefits, the Indian Parliament enacted the Maternity Benefit Act, 1961. The Act of 1961 was enacted keeping in mind not only all those legislations related to maternity that existed from the pre-Constitution days, but also ILOs mandate regarding maternity protection.<sup>11</sup> According to the Act, every woman shall

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<sup>7</sup> *Ibid.*

<sup>8</sup> See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 2000)

<sup>9</sup> Nothing in this Article shall prevent the State from making any special provision for women and children.

<sup>10</sup> The Constitution of India, 1950, Article 37: Application of the principles contained in this Part- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

<sup>11</sup> The Maternity Benefit Act, 1961

be entitled to, and her employer shall be liable for, the payment of maternity benefit, which is the amount payable to her at the rate of the average daily wage for the period of her actual absence. The maximum period for which any woman shall be entitled to maternity benefit shall be 12 weeks in all whether taken before or after childbirth. However she cannot take more than six weeks before her expected delivery. Prior to the amendment of 1989, a woman employee could not avail of the six weeks' leave preceding the date of her delivery; she was entitled to only six weeks leave following the day of her delivery. However, by the above amendment, the position has changed. Now, in case a woman employee does not avail of six weeks' leave preceding the date of her delivery, she can avail of that leave following her delivery, provided the total leave period, i.e. preceding and following the day of her delivery does not exceed 12 weeks. According to the provisions of Maternity Benefit Act, 1961, if anyone has been working in any factory, mine or plantation (including those belonging to Government) and an establishment engaged in the exhibition of equestrian, acrobatic and other performances, irrespective of the number of employees, and to every shop or establishment wherein 10 or more persons are employed or were employed on any day of the preceding of 12 months.<sup>12</sup> As per the provision of the Act the State Government may extend the Act to any other establishment or class of establishments; industrial, commercial, agricultural or otherwise. However, the Act is not applicable to any such factory/other establishment to which the provisions of the Employees' State Insurance (ESI) Act are applicable for the time being. But, where the factory/establishment is governed under the Employees' State Insurance Act, and the woman employee is not qualified to claim maternity benefit under Section 50 of ESI Act, because her wages exceed Rs. 3,000 p.m. (or the amount so specified u/s 2(9) of the ESI Act), or for any other reason, then such woman employee is entitled to claim maternity benefit under the Maternity Benefit Act, 1961 till she becomes qualified to claim maternity benefit under the E.S.I. Act. According to the Act, every woman employee, whether employed directly or through a contractor, who has actually worked in the establishment for a period of at least 80 days during the 12 months immediately preceding the date of her expected delivery, is entitled to receive maternity benefit.<sup>13</sup> The qualifying period of 80 days shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of immigration. For calculating the number of days on which a woman has actually worked during the preceding 12 months, the days on which she has been laid off or was on holidays with wages shall also be counted. There is neither a wage ceiling for coverage under the Act nor there is any restriction as regards the type of work a woman is engaged in.<sup>14</sup>

A woman employee entitled to maternity benefit may give a notice in writing.

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<sup>12</sup> *Id.*, Section 2(1)(a)&(b)

<sup>13</sup> *Id.*, Section 5A

<sup>14</sup> *Id.*, Section 5(2)

The notice may be given during the pregnancy or as soon as possible, after the delivery. On receipt of the notice, the employer shall permit such woman to absent herself from work after the day of her delivery. The failure to give notice, however, does not disentitle the woman to the benefit of the Act.<sup>15</sup>

As per provisions of the Act the restriction has been imposed on employer not to employ Pregnant Women.<sup>16</sup> When a pregnant woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during,<sup>17</sup> or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her services.<sup>18</sup> Dismissal or discharge of a pregnant woman shall not disentitle her to the maternity benefit or medical bonus allowable under the Act except if it was on some other ground. In case of miscarriage or medical termination of pregnancy, a woman shall, on production of the prescribed proof, be entitled to leave with wages at the rate of maternity benefit, for a period of 6 weeks immediately following the day of her miscarriage or medical termination of pregnancy.<sup>19</sup> In case of tubectomy operation, a woman shall, on production of prescribed proof to be entitled, in addition to the period of absence allowed to her under section 6, or, as the case may be, under section 9, to leave with wages at the rate of maternity benefit for a maximum period of one month.<sup>20</sup> Leave for a maximum period of one month with wages at the rate of maternity benefit are allowable in case of illness arising out of pregnancy, delivery, premature birth of child, miscarriage or medical termination of pregnancy or tubectomy operation.<sup>21</sup> Every woman entitled to maternity benefit shall also be allowed a medical bonus of Rs. 1000, if no pre-natal confinement and post-natal care is provided for by the employer free of charge.<sup>22</sup> Some of the important rights of employees under the Maternity Benefit Act, 1961 include:

- To make a complaint to the Inspector and claim the amount of maternity benefit improperly withheld by the employer.<sup>23</sup>

<sup>15</sup> *Id.*, Section 7

<sup>16</sup> *Id.*, Section 4: 1. No employer should knowingly employ a woman during the period of 6 weeks immediately following the day of her delivery or miscarriage or medical termination of pregnancy. Besides, no woman should work in any establishment during the said period of 6 weeks. 2. Further, the employer should not require a pregnant woman employee to do an arduous work involving long hours of standing or any work which is likely to interfere with her pregnancy or cause miscarriage or adversely affect her health, during the period of 1 month preceding the period of 6 weeks before the date of her expected delivery, and any period during the said period of 6 weeks for which she does not avail of the leave.

<sup>17</sup> *Id.*, Section 12(1)

<sup>18</sup> *Id.*, Section 12

<sup>19</sup> *Id.*, Section 13

<sup>20</sup> *Id.*, Section 9A

<sup>21</sup> *Id.*, Section 10

<sup>22</sup> *Id.*, Section 8

<sup>23</sup> *Id.*, Section 17

- To appeal against an order of the employer depriving her of the maternity benefit or medical bonus or dismissing or discharging her from service, to the competent authority, within 30 days of the service of such order.<sup>24</sup>

The Act also impose penalties for contravention of Act by Employer

- For failure to pay maternity benefit as provided for under the Act, the penalty is the employer shall be punishable with imprisonment which shall not be less than three months but which may extend to one year and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees.<sup>25</sup>
- The employer shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

**The Employee's State Insurance Act 1948**<sup>26</sup> is a piece of social welfare legislation enacted primarily with the object of providing certain benefits to employees in the event of sickness, maternity and injury at the site and during employment. The Act tries to attain the goal of socio-economic justice enshrined in the Directive Principles of State Policy under Part IV of the Constitution, in particular Articles 41, 42 and 43. The ESI covers the organized private sector of different sizes and production capacities as well as shops and establishments. As per provisions of ESI Maternity Benefit is payable to an insured woman (or pregnant mother) in the following cases subject to contributory conditions: Confinement is payable for a period of 12 weeks (84 days). Miscarriage or MTP (Medical Termination of Pregnancy) is payable for 6 weeks (42 days) from the date following miscarriage. The case of Sickness or complications arising out of Pregnancy, Confinement and Premature birth is payable for a period not exceeding more than one month. In the event of death of an insured woman during confinement leaving behind a child, Maternity Benefit is payable to her nominee Maternity benefit rate is double the Standard Benefit Rate or is roughly equal to the average daily wage.<sup>27</sup> The Employee's State Insurance Act provides for periodical payment to an insured woman at the prescribed rate and for a prescribed period in case of confinement, miscarriage, sickness arising out of pregnancy or premature birth of a child.

**The Central Civil Service Rules 1972**<sup>28</sup> also provides for maternity protection. The scope of application and quantum of relief in the Rules differ vastly

<sup>24</sup> *Ibid.*

<sup>25</sup> *Id.*, Section 21

<sup>26</sup> The Employee's State Insurance Act, 1948

<sup>27</sup> Available at: <http://www.medindia.net/patients/health-regulations/employee-state-insurance-corporation-benefits.htm#ixzz4BQ2RAX78>

<sup>28</sup> The Central Civil Service Rules (Leave), 1972

from the other two legislations: Maternity Benefit Act, 1961 and Employee's State Insurance Act, 1948. This rule will be applicable to women government employees and the maternity leave will be for 180 days and admissible only to employees with less than two surviving children. In case of miscarriage/abortion (induced or otherwise): total of 45 days in the entire service leave can be provided. However, any such leave taken prior to 16.6.1994 will not be taken into account for this limitation admissible irrespective of number of surviving children. The maternity leave is not debited to leave account and full pay is granted. It cannot be combined with any other leaves and counted as service for increments and pension. Woman employees having minor children may be granted Child Care Leave by an authority competent to grant leave for a maximum period of 730 days (2 years) during their entire service for taking care of up to two children, whether for rearing or to look after any of their needs like examination, sickness, etc..

**The Factories Act, 1948** also have provisions related to maternity benefits. Section 79 talks about Annual leave with wages in the case of a female worker, maternity leave for any number of days not exceeding twelve weeks; and in every factory wherein more than thirty women workers are ordinarily employed there shall be provided and maintained a suitable room or rooms for the use of children under the age of six years of such women.<sup>29</sup> Such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants.<sup>30</sup>

**The Mines Act 1952** also has provisions regarding maternity leave. Section 52 (explanation) (Annual Leaves) provides for maternity leave for any number of days not exceeding 12 weeks in case of female employees. Section 58 provides for power of Central Government to make rules. The Central Government may, by notification in the Official Gazette, make rules consistent with this Act for all or any of the following purposes, namely: for requiring the maintenance in mines wherein any women are employed or were employed on any day of the preceding twelve months of suitable rooms to be reserved for the use of children under the age of six years belonging to such women, and for prescribing either generally or with particular reference to the number of women employed in the mine, the number and standards of such rooms, and the nature and extent of the amenities to be provided and the supervision to be exercised therein.

<sup>29</sup> *Id.*, Section 48

<sup>30</sup> The State Government may make rules-

(a) Prescribing the location and the standards in respect of construction, accommodation; furniture and other equipment of rooms to be provided, under this section; (b) Requiring the provision in factories to which the section applies, of additional facilities for the care of children belonging to women workers, including suitable provision of facilities for washing and changing their clothing; (c) Requiring the provision in any factory of free milk or refreshment or both for such children; (d) Requiring that facilities shall be given in any factory for the mothers of such children to feed them at the necessary intervals.

## II. SCHEMES FOR MATERNITY BENEFITS

In order to widen the scope of maternity benefits, the Central government has introduced various schemes such as National Maternity Benefit Scheme (NMBS) in 2001. Later on NMBS was merged with *Janani Suraksha Yojna* (JSY)<sup>31</sup> which was initiated in 2005 to encourage institutional deliveries. The government also launched more comprehensive scheme called *Indira Gandhi Matritva Sahyog Yojana* (IGMSY)<sup>32</sup>. The Conditional Maternity Benefit Scheme (CMBS) was introduced in 2010 on a pilot basis across 52 districts in India. These schemes covered maternity protection irrespective of the labour status of women (working or not-working) through conditional cash transfer.

## III. JUDICIAL RESPONSE WITH REFERENCE TO MATERNITY BENEFITS

Indian Judiciary has played significant role in the evolution of Industrial Jurisprudence. It has not only made a distinct contribution to laws relating to industrial relations, social security and minimum standards of employment but has innovated new

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<sup>31</sup> *Janani Suraksha Yojana* is a conditional cash transfer scheme that integrates financial assistance with antenatal care during pregnancy and institutional care during and immediately after delivery. The goals of the scheme are to decrease maternal and infant mortality, and to increase institutional deliveries in below the poverty line families. The amount of benefit is 500 rupees for home delivery and additional 200 rupees (total of 700 rupees for rural areas) or 100 rupees (total of 600 rupees for urban areas) for institutional delivery. The benefits are available both for deliveries in government hospitals and deliveries in recognized private institutions. In cases where Government health specialists are not available to manage complications or for Caesarean Section in the Government's health institution, 1500 rupees can be utilized by the health institution for hiring specialists from the private sector. To be eligible for the benefits under the JSY, a woman should be of the age of 19 or above or belong to BPL category or be a SC/ST woman or be pregnant for the first or second time. (In low performing states a woman who gives birth after the second time is eligible if she agrees to undergo sterilization immediately after delivery).

<sup>32</sup> *Indira Gandhi Matritva Sahyog Yojana* (IGMSY) is a central government scheme that is operational on pilot basis in 52 districts among all States/UTs in India. It aims to provide partial compensation for wage loss for pregnant women, so that they are not under compulsion to work in the last stage of pregnancy or shortly after delivery. The logic behind this compensation is that women who rest before delivery will to a larger extent be able to avoid giving birth to low birth weight babies, and women who rest after delivery will be able to recover as well as breastfeed their babies. The basic objective of the scheme is to improve the health and nutrition status of pregnant and lactating women and their children. This shall be done by supporting women with nutrition and enhancing early infant nutrition and survival through protection and promotion of early and exclusive breastfeeding during the first six months of a child's life. The amount of benefit is 4000 rupees, and shall be provided in three installments between the second trimesters of pregnancy till the infant completes six month of age. Women enrolled under IGMSY will be encouraged to avail JSY package and vice versa. To be eligible for the benefits under the IGMSY, a woman should be of the age of 19 or above or be pregnant for the first or second time. In addition, *Anganwadi* workers and *Anganwadi* helpers at *Anganwadi* Centres (focal points of implementation of the scheme), will receive cash benefits if they encourage women to Participate in the scheme and service the women efficiently. The amount of benefit is 200 rupees for *Anganwadi* workers and 100 rupees for *Anganwadi* helpers per pregnant and lactating woman.

methods and devised new strategies for the purpose of providing access to justice to weaker section of society and especially women. In the landmark judgment of *Neera Mathur v. Life Insurance Corporation of India*,<sup>33</sup> the petitioner's employment with the Life Insurance Corporation (LIC) was terminated after she returned from maternity leave. The reason given was that she had withheld information about her pregnancy in a questionnaire she had filled out at the time of her appointment. After a perusal of the questionnaire, the Supreme Court found that it required female candidates to provide information about the dates of their menstrual cycles and past pregnancies. The Court held that the questionnaire was an invasion of privacy and directed the LIC to reinstate the petitioner and delete the offending columns from its future questionnaires. In case of *Air India v. Nargesh Meerza*<sup>34</sup> constitutional validity of Regulation 46(i) (c) of Air India Employees Services Regulations was in question; the regulation was that the services of the Air Hostesses would stand terminated on first pregnancy. Justice Fazal Ali while declaring clause "c" of the above provision is violative of Article 14 observed that, "It seems to us that the termination of the services of an Air Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood -the most sacrosanct and cherished institution." The judges were constrained to observe that such a course of action is extremely detestable and abhorrent to the notion of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Thus, such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution.

In case of *Ram Bahadur Thakur (P) Ltd. v. Chief Inspector of Plantations*,<sup>35</sup> a female worker employed at the Pambanar Tea Estate was denied maternity benefits on the grounds that she had actually worked for 157 days instead of the 160 days required to qualify for them. The Supreme Court, however, held that for the purposes of computing maternity benefits, all days including Sundays and unpaid holidays must be taken into consideration. In *Municipal Corporation of Delhi v. Female Workers' (Muster Rolls) and Another*,<sup>36</sup> the Municipal Corporation of Delhi stated that it granted maternity leave to its regular female workers but not to the daily wage ones, that is, the ones on the muster rolls. The respondents argued that the practice was unfair as there was hardly any difference in the work allotted to female workers who were regular and those who were on daily wage. Accepting the contention, the Supreme Court upheld the right of female construction workers to be granted maternity leave by extending the scope of the Maternity Benefits Act,

<sup>33</sup> 1991 SCR Supl. (2)146

<sup>34</sup> (1981) 4 SCC 335

<sup>35</sup> (1989) II LLJ 20 Ker

<sup>36</sup> (2000) 3 SCC 224

1961 to daily wage workers. In another landmark case *Kakali Ghosh v. Chief Secretary, Andaman & Nicobar Administration and Others*,<sup>37</sup> the main question was whether a female employee of the Central Government could ask for 730 days of uninterrupted child care leave under the Central Civil Services (Leave) Rules, 1972. The Supreme Court held that a female employee of the Central Government is entitled to two years uninterrupted leave for childcare, which may also include illnesses and schoolwork. Focusing on the situation of women workers and the significance of the Maternity Benefit Act, 1961 the court opined. “To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. Maintaining proper mental health is as important as maintaining physical health during and post pregnancy. At least one out of every six women in developing countries experience mental health issues during pregnancy, and at least one in five women suffer from depression and other illnesses after childbirth.<sup>38</sup> It is emotionally, mentally and physically difficult for the mother to adjust herself to the work atmosphere after a break. Instead of lending a helping hand, co-workers end up judging the mother for her decisions. Another problem is that unless pre-negotiated, many women have to accept a lower job role and pay with no guarantee of when they would be back on the track, just because of the maternity gap. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honorably, peaceably, undeterred by the fear, of being victimized for forced absence during the pre or post-natal period.

#### IV. CONCLUSION AND SUGGESTIONS

To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. Adequate and sufficient maternity leaves are essential to women’s physical and psychological wellbeing after giving birth. Further; there is a large section of working women not cover under the maternity coverage. It is thus recommended that there must be universal availability of maternity benefits and child care facilities to all women workers across different sectors of the society.

<sup>37</sup> Civil Appeal No. 4506 OF 2014 (arising out of SLP (C) No. 33244 of 2012), 2014 SCC

<sup>38</sup> *Gender and Women’s Mental Health, Gender Disparities and Mental Health: The Facts*, World Health Organization, 2001

# Historical Perspective of Law and Economics

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*Sanghamitra Acharya*<sup>2</sup>

## I. INTRODUCTION

According to Samuelson, “Economics is the study of how men and society choose, with or without money, to employ scarce productive resources which could have alternative uses, to produce various commodities over time and distribute them for consumption now and in future among various people and groups of society.”<sup>3</sup> So we can easily infer that the basic study of economics will make you understand how there will be proper allocation of scarce resources, how production can be done and last but not the least, how can we distribute those final products between various segments of the society i.e. the basic question of what to produce, how to produce and for whom to produce.

Again law is nothing but some articulation of rules and regulations so that everybody in this society can be made better off. These rules are made to bring the society in order.<sup>4</sup> Now to find out the historical importance of law in achieving the basic tenants of economics, first we have to differentiate positive and normative economics. Where positive economics tells us the actual condition of the situation, the normative part gives the idea of what should be and what ought to be. Thus, it is obvious that the target of normative economics, i.e. welfare state cannot be achieved without the help of legal rules, i.e. law. Here in this paper, an attempt has been made to find how law is playing an important role historically in achieving the basic tenants of economics and vice versa.

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<sup>3</sup> See, Paul. A Samuelson, *Economics* (McGraw Hill Education India Private Limited, 2010)

<sup>4</sup> The fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail. The entitlement to make noise versus entitlement to have silence, to pollute versus to breathe clean air... these are the first order of legal decisions.... Having made its initial choice, society must enforce that choice. A minimum of state intervention is always necessary. See, Samuels, “Interrelations between Legal and Economic Processes” *14 J. LAW & ECON*, 1971, at 435

Now if we discuss the dynasty of economics in its historical sense, classical economists will come first in our mind. Adam Smith (father of economics) was the so called founder of classical economist. His famous 'absolute cost advantage' theory in international trade still is a matter of great debate. Apart from him, again in international trade, David Ricardo, with his comparative cost advantage theory will definitely secure the second position in this school of thought. Say, Schumpeter, Leibenstein etc. were the other believers of this part of school. These classical economists, always believed in the theory of '*laissez faire*,' i.e. there should not be any government intervention in the market to maintain the equilibrium stable. Free market would be there. Say's law of demand says that supply will create its own demand.<sup>5</sup> Classical Economics always gave more importance to the supply side of the economics and ignored the demand side. With perfect competition, the market will always ensure equilibrium as it is the responsibility of '*Invisible Hand*' to maintain it like that. All classicalists regard capital accumulation is the key to progress. But profit will not increase continuously, rather after certain point of time it will decrease and they visualize a stationary state which is the end of capital accumulation. But everything can be done without any government intervention, without any rules and regulations which indicates without any law, the economy can achieve market equilibrium only with the help of *Invisible Hand*.

This theory of development has been criticized later due to many reasons like, ignoring of middle class people of the society, neglecting the public sector, giving least importance to the demand side of the economy or by assuming an unrealistic growth process. But these very characteristics of classical economics got validated on its own with the *great depression* which came in 1930. Ante classical were of the belief that great depression was the outcome of *laissez faire* policy. In reality, it was just the effect of neglecting the government to enact its laws. From the view point of different school of thoughts in economics, great depression in the year of 1930 was so crucial that there was a complete regime change from classical economics to Keynesian economics. It was because of the fact that, during great depression, the famous economist, Keynes came with his own economic thought of full government intervention was likely necessary in the market. He said that, without government intervention it is not at all possible to achieve equilibrium in the market, neither stable, nor unstable. Government should appear with best possible outcomes of law and bring the economy in equilibrium position and it is the duty of the society

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<sup>5</sup> "It is worthwhile to remark that a product is no sooner created than it, from that instant, affords a market for other products to the full extent of its own value." (*J.B. Say, 1803*, pp.138–9). Say's law states that the production of goods creates its own demand. In 1803, John Baptiste Say explained his theory. This view suggests that the key to economic growth is not increasing demand, but increasing production. Say's views were expanded on by classical economists, such as James Mill and David Ricardo.

to follow the orders of government to make the society better off. Absence of law will only make the society worse.<sup>6</sup> Keynes also said that, to achieve stable equilibrium, we should be more focused on the demand side of the market, i.e. the total spending of the economy, not the supply side which represents the total productive capacity of the economy. To remove the confusion regarding this matter, he gave his famous theory of *digging hole and building pyramid* i.e. government should undertake the control of the market and should increase the value of effective demand by employing few people to dig a hole and later they should again employ few others to fill up that hole. By doing this effective demand of the economy would definitely increase as employment generation leads to increase in the individual demand due to increase in the earning capacity of the people in the society. This way of increasing effective demand then became a way out, a tool for the government to tackle the ill effects of the great depression. Though, few post Keynesian economists, like Milton Freidman etc. later criticized this theory of Keynes, but Keynesian era always believed in full government intervention in the market to make the equilibrium stable.

Now it is time for the Neo Classical economists to come into the picture. Economists like Pareto, Samuelson, Coase, Pigou etc. were the founder of the Neo Classical School of thought. This was the era of basic normative economists. They were of the view that government intervention is not required always. Government should intervene in the market to make the economy better off when it is likely to be necessary. Here in the context of neo classical economics, we can easily identify through different theories given by several economists that how government intervention is likely to be necessary only when it is required. Wilfred Pareto was one of them who propounded the optimality theory in economics, i.e. *Pareto Optimality* and the details of this theory will definitely lead to the understanding as to how and when government should intervene. By definition, Pareto Optimality is making someone better without making somebody worse, i.e. someone is increasing his/her welfare position without decreasing the welfare of others in the society. But the moment the optimality point comes, it's not possible to make someone better without making someone worse. Once this theory came into the picture of economics, everyone in this society started making themselves better off irrespective of others.

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<sup>6</sup> Keynes was an influential policy analyst and economist who lived from 1883 to 1946. His seminal work, *The General Theory of Employment Interest and Money* became a founding force behind modern macroeconomics after it was published in 1936. Keynes supported government intervention during times of economic turmoil. Among the theories he presented in "General Theory" was that economies are chronically unstable and that full employment is only possible with a boost from government policy and public investment. Keynes believed that it was up to the government to bridge the gap between the economy's potential and its actual output during a financial crisis, even if that meant taking on debt.

At this point conflict started arising which is nothing but ‘externality’ in the language of economics.<sup>7</sup>

The basic concept of ‘externality’ talks about the conflict between two or more. If the work done by someone affects the others, it will create externality. Now definitely externality can be of two types: Positive externality and Negative externality. If the work done by A, affects positively B, then it is an example of positive externality. If it hampers B negatively, it is negative externality. Thus in a same case, equal probability for the occurrence of any of the above two events are there. Let’s take an example, suppose person A is setting up a firm just adjacent to a pond owned by person B where he/she is having his/her fishery business. Now the wastage product of firm A is disposed in the pond of B and affects the growth of fishes in that pond.

Now there might be two chances viz., maybe the wastage product is acting as an accelerator for the development of the fishes in the pond, then it is the case of positive externality and if the wastage product is hampering the growth process of the fishes, this is an example of negative externality. Now let’s try to find out the situation of how and when government should intervene. In the above example, in the first case, person B will never call for any third party intervention as B is getting the profit. A will also not ask for compensation as it is definitely not known to him/her. But consider situation 2, where A is creating negative externality to B, B will definitely ask for compensation. Conflict will arise between them regarding the wastage product of the firm. Another Neo Classical economist, Ronald Coase said, this time government should intervene if and only if the above conflict is not resolved between them internally. This is famous ‘*Coase theorem*’ in the subject of economics.<sup>8</sup> In this theorem Coase said that whenever a conflict would arise, both parties should sit together and try to solve the conflict internally. Otherwise government should intervene and tax the person who is creating externality, i.e. person A according to the above example and should provide subsidy to that person who is affected by the externality, i.e. person B according to the above example. The amount of tax and subsidy would be determined here according to the ‘Pigouvian tax subsidy scheme.’ This scheme is named according to another Neo Classical economist, Pigou as he calculated and showed a general formula of what amount of tax and subsidy should be there if government would enter in a conflict between two or more individuals and try to resolve that. This is also known as *Potential*

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<sup>7</sup> In economics, an externality is the cost or benefit that affects a party who did not choose to incur that cost or benefit. An externality can be either positive or negative. Pollution emitted by a factory that spoils the surrounding environment and affects the health of nearby residents is an example of a negative externality. An example of a positive externality is the effect of a well-educated labor force on the productivity of a company. Buchanan, James and Wm. Craig Stubblebine “Externality”, 29(116) *Economica* 1962, pp.371-384

<sup>8</sup> See, Glenn Fox, “The Real Coase Theorems”, 27(3) *Cato Journal*, at 2007

*Pareto Optimality*.<sup>9</sup> But in real life, whenever this kind of conflict arises and government intervenes, then the government definitely taxes the person who is creating the externality and whereas providing the subsidy is concerned, whether they will give or not, there is a small doubt on that. This part of the story is also known to them who used to suffer from externality. This is the obvious reason why the people like B according to the above example always tries to solve the conflict internally. This is how Neo Classical economists made their point of government intervention in the market or the society to make everyone in the society better off and or to make the market a stable equilibrium market.

Later as the time passed other different schools came with their own thought of whether government intervention is questionable or not. In recent times, monetary economist Milton Friedman proposed his remarkable view on law and economics. In one side, while he supported for government intervention, other side he criticized Keynes for his *digging hole and building pyramid* theory and multiplier theory as unrealistic as monetarist provide micro based formulation of demand for money and distinguished real and nominal variables of economics for different use of both micro and macro level. After that, another school of thought is New Classical which is different from Classical and Neo Classical economist. Recently Noble Prize winner Mankiw has extended his full support to Keynes for absolute government support in the economy.<sup>10</sup>

So what we see as per the history of economics is a concern, after the regime of Classical economist, for almost every school of thought either primarily or secondarily opted for government intervention in the society as well as market to make both the things better. It means, without government intervention or in other words, without any basic rules and regulations, i.e. law, it is a distant dream for any society around the world to achieve equilibrium or betterment of that. Classical believed in the *laissez faire* policy for the market and the outcome was the ‘Great Depression.’ This does not mean we did not face any other market failure or economic recession previously, but if the society is giving the responsibility to the government; they can handle the situation in a better way. And here lies the success of the law. Without law, it’s not possible to make everyone in the society better off though economics is saying every individual to maximize his or her own utility subject to the respective constraint present, and behave rationally not selfishly. Here lies the true relationship between law and economics which is having its own historical importance in respect to solve the basic primary question raised in the beginning by every economist. Allocation of resources should be properly done between every individual to eliminate inequality in the society. Without proper law it’s not possible

<sup>9</sup> “Economic Efficiency: Positive vs Normative”, Available at: [http://www.daviddfriedman.com / Academicv/Price\\_Theory/PThy\\_Chapter\\_15/PThy\\_Chap\\_15.html](http://www.daviddfriedman.com / Academicv/Price_Theory/PThy_Chapter_15/PThy_Chap_15.html)

<sup>10</sup> Available at: [http://www.encyclopedia.com/topic/Consumption\\_\(Economics\).aspx](http://www.encyclopedia.com/topic/Consumption_(Economics).aspx)

at all. Production should be done by the best producers in this society for the best possible outcome. This is also not possible without government intervention. Most importantly proper distribution of the final product is also not possible without the help of law to make an egalitarian society where equality among individuals is present.

Last but not the least; still at the outset of twenty first century, we cannot say which will come first, whether law or economics. But what we can easily infer is that both are having their own importance in their respective areas but if we incorporate law into economics or the other way round, we can increase the overall welfare of the society and keep every individual in this society in a far better off position and possibly this was the ultimate goal of the different economist though they varied in terms of their theories.

## **BOOK REVIEWS**

Vol. 2, No. 2, NUSRL JLP (2015) 121-124

Dr. S Sivakumar

***Press Law and Journalists: Watchdog to Guidedog***

Universal Law Publishing (2015). Price. Rs. 895/-

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The book<sup>1</sup> under review has come at a time when it is needed, more than ever before, to analyse and debate the roles played by the press, legal regulation thereof besides endeavouring to decipher the normative justifications of the new *avatar* of the press (media) witnessed so frequently these days. Of late, media (press) and journalists have become so influencing a factor that one cannot but wonder at the way they have seeped into the lives of people imperceptibly moulding the way we think and live our lives. For the good or the bad, our life is always under surveillance of this twenty first century omnipresent Peeping Tom!!! There is a paradigm shift now in the role of the media and journalists. They no longer are concerned with passing on of information and *news*; they now 'impose' their *views*. The shift has been a swift one. Last ten years or so has seen a recasting of the way we would view press. Ethical journalism has given way to journalistic adventurism, *to great extent*, that allows intrusion into some of the spheres of individual and social life in an unprecedented manner with results that are often laudatory but sometimes they do impinge upon the constitutionally, or at least ethically, guarded spheres of people's lives. This has led to a situation where feel askance as to how should we analyse the transition that the press and the journalistic approach has undergone in recent times, especially in the preceding decade or so.

More than seeking justifications for journalistic adventurism, we need to look out for the *ethical legitimacy*, especially for acts done by the press and the media where some of the basic rights/ ideals *sine qua non* for a life of dignity (and privacy) in a democratic and constitutional set-up are put to risk of being violated.<sup>2</sup> Another aspect of press law that needs to be analysed in some greater

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<sup>1</sup> S. Sivakumar, *Press Law and Journalists Watchdog to Guidedog* (New Delhi: Universal Law Publishing, 2015)

<sup>2</sup> See, Ruth Redmond-Cooper, "The Press and the Law of Privacy", 34 *The International and Comparative Law Quarterly*, 1985, pp.769-785. As Justice Bipin Sanghi of Delhi High Court in one of his judgments said: "Considering the immense impact that the press and media has over the polity, in my view, it cannot be said that they do not perform a public function or discharge a public duty, inter alia, when they perform the act of reporting news. Their functions touch the lives of practically everyone. Their reach is very deep and pervasive. In fact, the audio-visual media creates an even greater impact in today's time with deeper & wider penetration all across

detail is the idea of free press itself and its regulation through a legal mechanism. We need to figure out both the *content* and *contours* of “free press”. What constitutes the idea of “free press”? How is the content of free(dom) to be determined through legal mechanism as regard the question of freedom of press? The book, in view of the above, generates a great deal of curiosity as how much and to what extent it engages with the varied issues and challenges concerning press and the journalist, and the legal regulatory mechanism. The author makes a prefatory declaration that the book is an endeavour “to evaluate the conflicting trends in the contemporary Indian context” and “to conceptualise the role of the press in modern democracy.”<sup>3</sup>

The book under review is divided into 28 chapters besides having lengthy appendices of around 270 pages. The book discusses at the outset the concept of freedom of expression and freedom of press. The author emphasises the fact that “A deliberation is required on the freedom of press as to whether it should include its own freedom to choose when it wants to inform the people and also its freedom to ventilate the views and grievances of other people who choose to select it as a vehicle of expression.”<sup>4</sup> The book covers varied aspects of the subject that it deals with. It begins with freedom of expression, freedom of press, state intervention in the inaugural chapters. The crux of these chapters may be summarised by quoting a comment that the author makes thus: “...it is the duty of the state to create circumstances in which the Press is accessible to all who want to exercise the freedom of expression.”<sup>5</sup> As stated at the outset, the press (and media) has undergone a sea change both in term of their *role* and the *manner* in which they perform the role. Therefore, it becomes crucial to see how state should respond to this. In the *fifth* chapter, there is an elaboration, though a short one, of the constitutional restrictions that may be imposed on various grounds as is provided under Article 19(2) of the Constitution. Emphasising the point that “reasonable restriction” is “an ever changing concept”, the author says that “the court has to strike a proper balance between the freedom and public interest for which the restriction was imposed. Thus, the proper balancing becomes the redeeming feature of reasonableness.”<sup>6</sup> Freedom of the press often finds intervention in the form of

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the State. They command immense power of making, moulding, sustaining or even changing public opinion. The functions performed by the press & media are recognised by the State which, consequently, accords various rights & privileges to them.” In the instant case, the Delhi high court directed *Aaj Tak* news channel to pay Rs. 5 Lakhs as compensation to the rape victim about whom certain details were shown by the channel. *See also, ABC v. Commissioner of Police & Ors* (2013), available at: [www.indiankanoon.org](http://www.indiankanoon.org) (last accessed on 19.08.2016).

<sup>3</sup> *Supra* note 1 at ix.

<sup>4</sup> *Id.*, at 37

<sup>5</sup> *Id.*, at 18

<sup>6</sup> *Id.*, at 60

legislative intervention.<sup>7</sup> However, it is the executive intervention that has had profound impacts upon the freedom of the press. Post constitutional history of India archives instances of grave intervention and imposition of unreasonable restriction upon the press.<sup>8</sup>

Chapter XI of the book is an interesting and illuminating one as it deals with “Privacy and Press” in some detail. While dealing with issues of privacy, it often becomes a tad difficult to adjudicate given the fact that “privacy is culture-specific”.<sup>9</sup> Right to privacy is one of the time-honoured attributes of any civilised society that cares for the protection of human dignity and fundamental rights. Emerson says:<sup>10</sup>

The right of privacy is clearly a vital element in any system of individual rights. Essentially it is designed to support the individual, to protect the core of individuality, in the relations of the individual to the collective society. As such it is designed to mark out a sphere or zone in which the collective may not intrude upon the individual will. It thus differs from time to time, and from society to society, depending on where the line is drawn between individual autonomy and collective obligation.

However, there are instances where journalists tend to breach the privacy of people only for the purpose of selfish gain. One of the troubling instances of violation of privacy is the way “Paparazzi” tend to intrude into the private spheres of people without caring for the damage<sup>11</sup> such acts entail.<sup>12</sup> Agony faced by people when their privacy is breached may be expressed in the word of Robert Browning thus: “I give the fight up: let there be an end, privacy, an obscure nook for me. I want to be forgotten even by God”. Surprisingly, this aspect of “Privacy and Press” remains unexplored in the book.

Other chapters of the book deal with issues of “rights to Information and Press”<sup>13</sup>, “Journalist’s Rights, Duties and Ethics”<sup>14</sup> and “Press Ombudsman”<sup>15</sup>. In

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<sup>7</sup> *Id.*, pp.62-79

<sup>8</sup> See, Soli J.Sorabjee, *The Law of Press Censorship in India* (Bombay: N.M.Tripathi, 1977)

<sup>9</sup> James Michael, “Privacy” in Christopher Me Crudden and Gerals Chambers (ed) *Individual Rights and Law in Britain*, 1993, at 266

<sup>10</sup> Thomas I. Emerson, “The Right of Privacy and Freedom of the Press”, 14 *Harvard Civil Rights-Civil Liberties Law Review*, 1979, at 337

<sup>11</sup> Ann Swardson & Charles Trueheart, “Princess Diana and Boyfriend Are Killed in Paris: Car Crashes With Photographers in Pursuit”, *Washington Post*, August 31, 1997

<sup>12</sup> Patrick J. Alach, “Paparazzi and Privacy”, 28 *Loyola of Los Angeles Entertainment Law Review*, 2008, 205; See also, Aastha Mehta and Himaja Bhatt, “Click-Me Not: The Never-Ending Affair of Shutterbugs and Celebrities”, 1 *CMET*, 2014 at 59

<sup>13</sup> *Supra note 1*, pp.171-186

<sup>14</sup> *Id.*, pp.187-230

<sup>15</sup> *Id.*, pp.288-296

the “Epilogue”<sup>16</sup>, the author concludes that “New jurisprudential principles have to be evolved to protect the rights of citizens and to conserve the institution of public debate.”<sup>17</sup>

The book under review therefore is a laudatory effort. Overall, the book will be a useful companion for judges, lawyers, teachers, scholars, students of law, and anyone who is interested in press law and its varied facets.

***Dr. Rabindra Kr. Pathak\****

<sup>16</sup> *Id.*, pp.308-312

<sup>17</sup> *Id.*, at 312

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## **BOOK REVIEWS**

Vol. 2, No. 2, NUSRL JLP (2015) 125-128

Rajnish Kumar Singh,

*Neighbouring Rights under Copyright Law*

Satyam Law International, New Delhi, 2015, pp. i-xxviii + 468, Rs. 1200/-

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The rights of authors of literary, dramatic, musical and artistic works are, in the common law system, covered by copyright and in the civil law system by author's right. The rights of performers, phonogram producers and broadcasters, who bring author's works before the public, are often described as related or neighbouring right.<sup>1</sup> Neighbouring rights subject matter refer to works created by entrepreneurs and typically derivative in the sense that it uses or develops existing authorial works. They are a product of technical and organizational skill rather than authorial skill.<sup>2</sup> The genesis of neighbouring rights lies in the technological developments. The concern of international community to create a separate category of rights, a category separate from the copyright, can be traced to certain developments at the end of nineteenth century and the beginning of the twentieth century. It is also relevant to mention that till 1996 WIPO Performances and Phonograms Treaty the general opinion was that the beneficiaries of neighbouring rights only perform, record or broadcast copyright works. The new treaty by including expression of folklore in the definition of performers clarifies the situation that the underlying content in performance, phonogram or broadcast may be non- copyright also. The book under review covers all the traditional beneficiaries of neighbouring rights namely performers, phonograms procedures and broadcasters in detail.

The book titled *Neighbouring Rights under Copyright Law* consists of 9 Chapters, VI Annexures, and subject index, which make it a comprehensive epiece of writing on the subject. Chapter 1 introduces concept of neighbouring rights, theoretical issues and its different approaches. Chapter 2 traces the evolution and growth of neighbouring rights at international and national levels. It looks at various international instruments to understand different subject matters and scope of these rights in general. It also examines Indian Copyright Law in particular, in the context of neighbouring rights. It focuses on several changes brought by the Copyright

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<sup>1</sup> J.L.A. Sterling, *World Copyright Law: Protection of Author's Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*(London: Sweat & Maxwell, 1998) at ix.

<sup>2</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (New Delhi: Oxford University Press, 2001) at 29.

(Amendment) Act, 2012 which has been done to bring the law in conformity with WIPO Performances and Phonograms Treaty, 1996. The prime reason for delay in evolving an international framework for neighbouring rights is the opposition by the Author's group. Author's group apprehended that their share of royalty will decrease if space is given to new beneficiaries within copyright system. The chapter argues that the law of neighbouring rights has evolved against external pressure of technology. Chapter 3 brings to fore discussion on protection of rights of performers in particular. Performer stands in the midway position between the author of creative work and the person who records the performance. The question whether performer should be awarded same rights as author of creative work has been discussed in detail in this chapter. Several economic rights in fixed as well as unfixed performances and moral rights of performers have also been discussed in this chapter. This chapter also discusses recent issue concerning audiovisual performances and briefly analyses draft of the Proposed WIPO Audiovisual Performances Treaty and protection of performances of expressions of folklore. The Draft Provisions of WIPO and of the Model Law, 2002 of the Pacific Community has been examined.

Chapter 4 highlights the difference between creative contribution and technical and organizational contributions in making of a phonogram. These two contributions need different types of protection. Creative contributions are to be protected by an author's rights of the same nature as that ascribed to traditional categories of literary and dramatic works, and technical and organizational contributions to be protected by a related or neighbouring rights. The ownership issue in phonogram between producer and performer has also been dealt with in this chapter. This chapter discusses in detail protection accorded to producers of phonogram, its criteria, term of protection and rights under international and national instruments. It also brings to fore discussion on changes brought by the Copyright (Amendment) Act, 2012 so far as protection of phonogram producer is concerned. Broadcasting opens great opportunity of relaying performances to truly mass audiences. The modern innovation in this field increases channel capacity and thereby the opportunity for broadcasting organizations to offer a much larger choice of content over a multiple number of channels. Chapter 5 focuses on new delivery techniques and legal issues relating to broadcasting. It examines international and national legal frameworks and describes rights of such organizations under the Brussels Convention, TRIPs Agreement and WIPO Performances and Phonogram Treaty. It is argued that the rights of broadcasters have taken a new dimension with easy accessibility of technology to the world at large and the present chapter presents a relevant discussion on the Broadcaster's Treaty in this context.

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<sup>3</sup> Digital rights management refers to a situation where the content is protected in online medium by employing effective technological measures. These are self-enforcing. See Sections 65A and 65B of the Copyright Act, 1957

Neighbouring rights protect interest of certain persons and legal entities who contribute towards making works available to the public. Chapter 6 explains the ways neighbouring rights can be exploited. Apart from individual administration it also examines the importance of the role performed by the collective societies in administration of these rights and the future of collective administrations in the light of modern technological development like Digital Right Management<sup>3</sup>. There are risks related to the infringement of neighbouring rights on an unprecedented scale by using protected property without the consent of authorized entities or by manipulating the content of the works distributed in digital format. Chapter 7 is devoted to the discussion on infringement of neighbouring rights and related public interest issues. It explains the concept of primary infringement and secondary infringement; and exceptions in an intelligent manner and points out various remedies available against such infringements. It also analyses Indian law on infringement of such rights and its exceptions.

Digital technology enables transmission and use of most of the protected materials in digital form. It is argued that legal rules must be set and applied appropriately to ensure that digital technology does not undermine the basic tenets of copyright in general and neighbouring in particular. In this context, chapter 8 covers issue of protection of neighbouring rights in the digital environment. This chapter analyses the response of WIPO and also contains discussion on certain other related issues of ISP liability, digital rights management, fair use in digital environment and remedies for internet piracy. Chapter 9 analyses the present status of neighbouring rights protection and argues *inter alia*, that exercise and enforcement of neighbouring rights needs different approach rather than the approach adopted to protect copyright. The need of redefinition and conceptualization of neighbouring rights has also been discussed in the context of digital environment.

For the purpose of reference the present book provides VI Appendices. These appendices contain all the relevant documents having bearing on the subject on neighbouring rights. It contains the copyright Act, 1957, which is the main law in India to deal with issue of neighbouring rights. The recent amendment in the Indian law is also provided. Besides this, it also contains the Rome Convention, 1961; The Geneva Convention, 1971; the Brussels Convention, 1974; the TRIPs Agreement, 1994; and the WIPO Performances and Phonogram Treaty, 1996 with their recent revisions. Apart from the above, the discussion of Indian and foreign case laws are important contribution of the author. Subject index makes it easy for the user to handle the book.

It seems that the book is slightly over prices. The paperback edition with lesser price will make it a popular book. The book *Neighbouring Rights under Copyright Law* is a useful and comprehensive contribution in this new subject. This book is

useful for teachers, researchers in particular and students in general. Finally considering the relevance of subject matter, paper quality and binding *etc.* one comes to conclusion that the present book has been presented in best possible manner and the author and publisher deserves appreciation for the same.

*Digvijay Singh\**

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