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Jurisperitus:: The Law Journal *is a non-annual journal incepted with an aim to provide a platform to the masses of our country and re-iterate the importance and multi-disciplinary approach of law.*

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We, at Jurisperitus believe in the principles of justice, morality and equity for all. We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you
Jurisperitus: The Law Journal.

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Digital Economy & Cyber Infrastructure – A Critical Analysis

- ***O.P. Harsh Singh Munday***[1]

Abstract

The presented paper deals with "The present position of cyber infrastructure in India and it's influence on the digital economy" in the cyber space. It aims at extensively examining the true state of cyber infrastructure and analyses that whether India is ready to take up the digital or the cashless economy with specific reference to notable instances in the recent past along with highlighting its present situation in India.

India had been planning for a digital economy since past many years but on 8th November 2016, the Demonetization policy bought a wide change into the domain. The nation emphasized on cashless/digital economy and more emphasis was laid on avoiding cash transactions. Without going much into whether the move was right or not, a substantial question pertains, that is, whether the nation is even ready for the digital economy or not?

Statistics reveal that India faced over **80,000 cyber-attacks** between 9th December 2016 to 12th December 2016 after the note ban policy. In October 2016, itself, **SBI** blocked over **6 Lakh ATM cards** to avoid one of the biggest and most destructive cyber attacks on the Indian economy. The qualitative extensive research lays down the background of the subject, its meaning and its relevance in the present time.

The research makes an attempt to analyses what are the true reasons behind such scenario. whether the laws need to be altered or the present laws need to be executed more stringently, is deeply discussed in the presented research paper.

The paper further lays down specific emphasis on the problems being faced, viz. what exactly amounts to a good and defensive cyber infrastructure to save the economy from cyber threats.

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The paper in the end briefly deals with upcoming problems and its implications in the present time. It also suggests some solutions for fruitful understanding of this concept, along with suggestions to ensure that the digital economy keeps working smoothly and without any flaws.

Introduction

The Digital India[2] programme is a flagship programme of the Government of India with a vision to transform India into a digitally empowered society and knowledge economy.

E-governance initiatives in India took a broader dimension in the mid 1990s for wider sectoral applications with emphasis on citizen-centric services. The major ICT initiatives of the Government included, inter alia, some major projects such as railway computerization, land record computerization, etc. which focused mainly on the development of information systems. Later on, many states started ambitious individual e-governance projects aimed at providing electronic services to citizens.

Though these e-governance projects were citizen-centric, they could make less than the desired impact due to their limited features. The isolated and less interactive systems revealed major gaps that were thwarting the successful adoption of e-governance along the entire spectrum of governance. They clearly pointed towards the need for a more comprehensive planning and implementation for the infrastructure required to be put in place, interoperability issues to be addressed, etc. to establish a more connected government.

The national level e-Governance programme called National e-Governance Plan was initiaited in 2006. There were 31 Mission Mode Projects under National e-Governance Plan covering a wide range of domains, viz. agriculture, land records, health, education, passports, police, courts, municipalities, commercial taxes, treasuries etc. 24 Mission Mode Projects have been implemented and started delivering either full or partial range of envisaged services.

[2] Ministry of Electronics and Information Technology, *ABOUT DIGITAL INDIA*, GOVERNMENT OF INDIA (January. 09, 2018, 06:21PM), http://digitalindia.gov.in/content/about-programme

Considering the shortcomings in National e-Governance Plan that included lack of integration amongst Government applications and databases, low degree of government process reengineering, scope for leveraging emerging technologies like mobile, cloud…etc, Government of India has approved the e-Kranti programme recently with the vision of "Transforming e-Governance for Transforming Governance".

All new and on-going eGovernance projects as well as the existing projects, which are being revamped, should now follow the key principles of e-Kranti namely 'Transformation and not Translation', 'Integrated Services and not Individual Services', 'Government Process Reengineering (GPR) to be mandatory in every MMP', 'ICT Infrastructure on Demand', 'Cloud by Default', 'Mobile First', 'Fast Tracking Approvals', 'Mandating Standards and Protocols', 'Language Localization', 'National GIS (Geo-Spatial Information System)', 'Security and Electronic Data Preservation'.

The portfolio of Mission Mode Projects has increased from 31 to 44 MMPs. Many new social sector projects namely Women and Child Development[3], Social Benefits, Financial Inclusion, Urban Governance, eBhasha…etc have been added as new MMPs under e-Kranti.

The Journey

Almost everyone on Facebook changing their profile pictures to support digital India but to make it reality here are list of challenges in the implementation of digital India. Challenges are in every sector right from policy making, changing the work flow up to changing the mentality of the government officers. It is technological change within the most diversified nation. Few of them have been listed below:

High level of digital illiteracy: Digital illiteracy is prevalent in most of the towns and villages in India. Cities have adopted digitalization but limited to certain extent. Full fledged digitalization is cashless transaction on daily basis, use of internet services to get government certificates. This requires administration changes, Taxation changes and change in public

[3] Ministry of Women and Child Development, *ABOUT US*, GOVERNMENT OF INDIA (January. 17, 2018, 06:41PM), http://www.wcd.nic.in/about-us/about-ministry

mentality. So it's a team work which includes citizen's responsibility and support to the new system

Connectivity to remote areas: It is a mammoth task to have connectivity with each and every village, town and city. The problem of connectivity is a complex issue because every state has different laws pertaining to its execution. Also it is challenging for the central authorities to make a database where such a huge information can be stored.

Compatibility with center state databases: Every state has different internet protocols because every state is diversified. Diversified not only in the sense of religion but also in language. Hence software compatibility with the center is a crucial issue. Information shall be saved carefully.

Cyber Crime: There is cyber threat all over the globe and digital India will not be any exception. Hence we need a strong anti cyber crime team which maintains the database and protects it round the clock

Inter Departmental Co ordination: Within the government there are various departments which should be integrated. Integration has technical as well as corporate issue. Corporate in the sense self ego of the officers and staff of our government services are hurdle in the change. Also the middle man policy will be eliminated completely because of digital India, hence there will be imminent resistance from the working staff.

Finance: Though there are resources with India but there is a huge capital cost which is to be invested and the fruits of the investment will be received after few years.

Net neutrality[4]: The issue is still on the table and we are blindly following the digital India. Net neutrality is must and we should make sure that digital India without net neutrality would be a great blow to entrepreneurs and citizens of India.

[4] New York Times, *NET NEUTRALITY*, The New York Times (January. 14, 2018, 09:41PM), https://www.nytimes.com/topic/subject/net-neutrality

Changing the mindset: This point will come into picture when you have allocated the required resources and material but when it comes to implementing them, most of them will be hesitant to change. People are accustomed with years of same of practice that they are not ready to change.

Exchange of information: The information stored should also be used by other government offices. For example police, surveillance and other security issues can be easily resolved with digital India but its co ordination is a mammoth task. It is not only a technological question but also deals with the question of privacy and security.

Cashless Economy In India

The financial technology industry would be unwise to ignore the rise of mobile transaction services, person-to-person networks and the whole range of digital disruption in the payments arena from the likes of Bitcoin, ApplePay and PayPal that undoubtedly is putting pressure on cash.

Cash is like water a basic necessity without which survival is a challenge. Nevertheless, cash use doesn't seem to be waning all that much, with around 85% of global payments still made using cash. One of the main reasons is that there is nothing to truly compete with the flexibility of notes and coins.

Of course, the digital era is something to embrace, and new methods of payments will continue to be introduced. But Indians need to recognize the risks and benefits of different payment instruments, the risks associated with electronic payment instruments are far more diverse and severe. Recently lakhs of debit card data were stolen by hackers; the ability of Indian financial institutions to protect the electronic currency came into question also an important reason why people favour cash.

In a courageous move to combat black money and counterfeit currency, Narendra Modi's government scrapped currency notes of INR 500 and INR 1000 denominations, which is seen as an unprecedented measure, though a giant leap towards curbing corruption and forged currency. The declaration created confusion across the spectrum, as these high-value notes form around 86% of total legal tender.

However, the whole isometrics of moving from cash-driven economy to cashless economy has somehow been assorted with demonetisation that was aimed to extract liquidity from the system to unearth black money. Prime Minister Narendra Modi acknowledged the fact in his monthly radio programme, 'Mann Ki Baat' on Sunday that making the transition to cashless economy is challenging, and hence has urged the public to move to 'less-cash' society.

A report by Boston Consulting Group (BCG)[5] and Google India revealed that last year around 75 per cent of transactions in India was cash-based, while in developed nations such as the US, Japan, France, Germany etc. it was around 20-25 per cent. The depletion in cash due to demonetisation has pushed digital and e-transactions to the forefront; e-banking, e-wallets, and other transaction apps becoming prevalent.

Why Is Cash Required?

The magnificence of cash is that -- it just works; even in the isolated whereabouts of India, where the government might not be present physically with its paraphernalia, its injunction runs in the form of legal tender that public uses for business on an everyday basis. A large informal economy that supports a major part of Indian population and their livelihoods also runs in cash. This is why Cash is yet King.

The ground reality reveals, a majority of transactions in Kirana stores, the go-to shop for daily purchases in India are cash based transactions, because these are generally small ticket transactions. The customers, as well as Kirana store owners feel more comfortable in dealing with cash for small transactions, while these merchants also provide credit facility to customers.

However, the governments drive to incentivise consumers and merchants alike to move to electronic modes of payments has not found many takers because our cash driven economy is fuelled through rampant corruption in society and black money. The modus operations for corruption are cash so unless we rid our society of corruption at all levels this will be a huge task. Imagine paying a corrupt official through your e-wallet it will never happen.

Also another point to ponder on is why India has such less tax payers in a population of over 1.2 billion people. Is 98% of our population earning below 2.5 lakhs a year. This is one of the issues

[5] BCG, *REPORT 2017*, Boston Consultancy Group (February. 01, 2018, 11:51PM), https://www.bcg.com/

that needs to be addressed and hopefully with many more transaction moving electronic & records of the same being made available many more people should fall under the tax net be it small merchants, professionals etc. Will this segment of society adapt to electronic modes of payment so that the nation can benefit from a higher tax collection leading to better benefits to society at large?

The challenge to go digital

A major obstacle for the quick adoption of alternate mode of payments is mobile internet penetration, which is crucial because point-of-sale (PoS) terminal works over mobile internet connections, while banks have been charging money on card-based transactions, which is seen as a hurdle. The low literacy rates in rural India, along with the lack of infrastructure like internet access and Power make things extremely difficult for people to adopt e-transaction route.
The financial safety over the digital payment channels is important for pushing the cashless economy idea. Imagine losing your credit cards or being the victim of digital hackers can lead to a whole host of issues like denied payment, identity theft, account takeover, fraudulent transactions and data breaches. According to the digital security company Gemalto[6], more than 1 billion personal records were compromised in 2014.

Cash is Here to Stay

Despite the numerous State endeavors, India has always been driven by cash; while electronic payments are seen restricted to a small size of the population, compared to the cash transactions. Considering the demographics of India, two-thirds of the population live in rural areas, where farmers and poor people are still struggling to get their hands on their own money. As per Data in July this year, 881 million transactions were made using debit cards at ATMs and PoS terminals. Out of these, 92 per cent were cash withdrawals from ATMs. The sole purpose for

[6] GEMALTO, *DIGITAL SECURITY RECORDS*, Gemalto Digital Security Company (February. 03, 2018, 01:51PM), https://www.gemalto.com/

cards in Indian is to withdraw cash. Changing this mind set will be an uphill task. The last few days have clearly shown that the country is highly underpenetrated as far as ATMs per million

people and it's the ATM which will help the government fulfill its ambition of financial inclusion as the ATM will play a key role in the last mile towards customer fulfillment which is self-service 24*7 which even a Business Correspondent or Micro ATM cannot do.

Currently, there is a mix of cash and cashless transactions happening across the country, while many enablers are working towards turning the cashless economy dream into a reality. We have taken big strides towards becoming a cashless economy; however it will take more than a generation to change the habit from cash to no cash transaction. Rushing the economy into a cashless state without proper planning and infrastructure will be disastrous and its consequences will be everlasting. A gradual move towards less-cash society as said by the Prime Minister is the right way forward.

Also, important to note that if people start flocking to alternate currencies, governments could wind up losing much of their power to influence economic issues such as inflation and unemployment. The government can't set an interest rate for institutions lending in a currency it doesn't control.

Growth and Development of Environmental Policies in Indian Legislation

- ***Varun Agarwal***[7]

Abstract

Ever thing that surrounds us is Environment. This paper emphasizes upon determing the true meaning and nature of environment. Moreover it deals with the problems which are affecting the environment and also provides the measures which were taken to curb such problems. The main content of this paper highlights the growth and development of environmental policies in Indian Legislation. It provides for Pre independence Environmental Legislation during Ancient India, Medieval India and Mughal Period. Later on Post independence policies are discussed which were made during different Five Year Plans.

Lastly this paper analysis the in depth study of National Environment Policy of 2004 and 2006 and points out its objectives and its importance in the growth and development of Environmental Legislations.

Keywords

Pollution, National Environment Policy, Atmosphere, Organisms, Van Mohotsav

Introduction

The difficulty of defining environment is that it is term everyone can understand but no one is able to define it properly.

The word environment in its etymological sense means not only our immediate surroundings but also a variety of issues connected with human activity, productivity, basic living amenities and its impact on the natural resources such as land, water, atmosphere, forests, damns, habitat, health, energy resources, wildlife etc.

According to the statutory interpretation of word the 'Environment', Section 2(a) of the Environment Protection Act, 1986 and Section 2(c) of the National Green Tribunal Act, 2010 states that *Environment includes water, air and land, and the interrelation which exist among and between water, air & land and human beings, other living creatures, plants and micro organism and property*.

[7] Varun Agarwal – Amity Law School Delhi

The definition of Environment had been interpreted and given a wider meaning throughout the history of Indian Judiciary. In **T.N. Godavaram Thirumalpad v. Union of India**[8] Supreme Court observed that Environment is a difficult word to define. Its normal meaning relates the surroundings, but obviously that is a concept which is relatable to whatever object it is which is surrounded.

The environment, thus, is an amalgamation of various factors surrounding an organism that interacts not only with the organism but also among themselves. It means that aggregate of all the external conditions and influences affecting life and development of organs of human beings, animals and plants.

Environmental Policies during Pre-Independence Era

Policy means a plan of action agreed or chosen by a political party or a corporate body or government. It is a broad guideline for administrators to implement the pro-public decision more timely efficiently and effectively. Before starting with the actual special enactments and governmental policies regarding environment, let us see the historical traces of the environmental jurisprudence and rules in pre independence era starting from ancient India and medieval India up to the British India.

India was most environment friendly during the Vedic age. People worshipped water, air, tree etc. Under the ancient culture moral injunctions acted as guidelines towards preservation and conservation of Environment. The Mauryan period was perhaps the most glorious period from environment protection point of view. The detailed and prescriptive law provisions regarding environment are found in Kautilya's Arthashastra. Under the Arthashastra, the necessity of forest administration was realized and various punishments were prescribed for cutting trees, damaging forests and for killing animals. In Yajnavalkya Smriti, cutting trees and forests is considered as punishable offence and a penalty of 20 to 80 pana was prescribed. Also in Charak Sahmita, destruction of vegetation was treated to be the cause of ruin of state. Many instructions were prescribed under these books for the use of water and to maintain its purity. In Srimad-Bhagavatam, it has been appropriately said that, a man who with exclusive devotion offers respect to sky, water, earth and such other heavenly bodies like the living beings, rivers, trees, etc. and consider them as a part of the body of the Lord, attains the state of supreme peace and God's special grace. In Gupta period prohibition for forest destruction and animal killing were announced by Hindu Kings.

[8] AIR 2003 SC 724

From environmental conservation point of view, a significant contribution of Mughal Emperors has only been the establishment of royal gardens, monuments like Taj Mahal and surrounding gardens and water fountains, fruits orchards, green lawns, central and provincial headquarters, public places like Hamas, on the river banks and dales which they used as holiday resorts during summer seasons. From the Historical traces it can be seen that, the religious policies of Akbar based on principle of complete tolerance also reflects the concern for birds and beast in so much as endeavors were taken during his reign to stop their unnecessary killing. Almost a similar policy was adopted by Jahangir and Shah Jahan. However except few Mughal rulers, for most of them forests meant woodland where they could hunt. Thus, during Mughal period environment conservation did not receive much attention.

The invasion by the British and the establishment of their rule in India ushered in an era of plunder of Natural Resources. At the same time this regime saw the beginning of organized forest management. However no particular legislation was made during this period because of lack of awareness. But, some legislation came after the Industrial revolution as there was pressing need of such legislation to fulfill their greed. However some of the laws acted as seed and paved the way for further legislation in Independent India. In the field of Noise, **Indian Police Act 1861** was framed. It tried to curb the noise pollution generated. It provides noise to be within reasonable limits. In the field of Forest Protection, **Forest Act 1865** came into force. The Act asserts the State monopoly right over the forests. The customary rights of rural communities to manage forests were curtailed by the Act. The act was modified in the year 1927 and was known by the name of **Indian Forest Act 1927**. It denied people living in forest any rights over the forest produce. This act was passed with the objective of conservation, protection and maintenance of forest area. In the field of Water protection, **Bengal Regulation VI of 1819, The Merchant Shipping Act 1858, Indian Penal Code 1860, Indian Easement Act, 1882 and Fisheries Act, 1897** were passed. Thus, the environment policy during the British rule was not towards the conservation of nature but was directed at the objective of earning revenue and had a narrow scope and limited territorial reach.

Environmental Policies Post Independence

The independent India has shown keen interest in protection of environment. The policy statement with respect to a particular issue pronounced by the government is kind of a promise given to the people. There is a direct link between the policies and environmental laws in India which is visible in the drafts and outlays of all five years plans.

During the First Five year plan (1951-1955) India adopted a national festival of tree planting- '**van mohotsav'** in 1950 , which was started with the objective of creating mass awareness about the value of forests in human beings. The Indian Government revised the Forest Policy of British in the year 1952 with a new title as '**National Forest Policy'.** The programs of consolidation of areas under forests continued, additionally, construction of forest roads and economic plantation received more emphasis during Second Five Year plan (1956-1960). Similarly a new scheme **Pre- investment Survey of Forest Resources** were started in collaboration with 'United Nation Special Fund' and 'Food and Agriculture Organization', with a view to investigate the availability of raw materials in the possible industrial catchment areas and further to determine their economic viability during Third Five Year plan (1961-1969). Every five year plan lead to some growth and development in the field Environment Legislation.

Major Environment Policies in India

The Ministry of Environment and Forests is primarily concerned with the implementation of policies and programs relating to conservation of country's natural resources including lakes and rivers, its biodiversity, forests and wildlife, ensuring the welfare of animals and prevention and abatement of pollution. These objectives are well supported by a set of legislative and regulatory measures, aimed at the preservation, conservation and protection of the environment.[9]

The *Policy Statement for Abatement of Pollution* was declared on 26th of February, 1992 to abate the pollution for preventing deterioration of the environment. To achieve this goal, the statement adopts fundamental guiding principles, namely (i) prevention of pollution at source, (ii) encourage, develop and apply the best available practical technical solution, (iii) the polluter pays principle and (iv) public participation in decision making. The policy seeks to effect implementation of pollution abatement techniques especially in the critically polluted areas.

The *National Conservation Strategy and Policy Statement on Environment and Development* was declared in June, 1992 covering various environmental problems and its regulatory and promotional measures, development of policies from environmental perspectives, international co- operation, policy and instrumental support for the implementation of the strategy etc. has been prepared and adopted by the Government of India, after extensive consultation at various levels at the Central and State Governments, Universities, academic institutions, nongovernmental organizations and informed individuals. This document adopts the policy of sustainable development and declares the Government's commitment to re-orient policies and

[9] Ministry of Environment and Forest, *ROLE OF MINISTRY*, GOVERNMENT OF INDIA (December, 08, 2017, 09:35PM), http://www.moef.nic.in/report/0506/ExecSummary.pdf

action in unison with environmental perspective and was considered as major policy instrument of the Government for dealing with various facets of environment and development in comprehensive manner. Besides providing a perspective, this will help in devising the norms and regulation for integration of environmental consideration in the developmental activities of the various sectors, thus paving the way for achieving sustainable development.

Draft National Environmental Policy – 2004

The Ministry of Environment and Forests released draft national environmental policy on 21st August, 2004 for comments.[10] It identifies the major environmental problems that India faces, and outlines their proximate and ultimate causes. The preamble of the draft environmental policy states that there is a need for a comprehensive policy statement in order to infuse a common approach to the various sectoral, cross sectoral, including fiscal, approaches to environment management. Further, as our development challenges have evolved, and our understanding of the centrality of environmental concern in the development has sharpened, there is also a need to review the earlier objectives, policy instruments, and strategies. The present national policies for environmental management are contained in the National Forest Policy, 1988, the National Conservation Strategy and Policy Statement on Environment and Development, 1992[11]. The National Environment Policy, 2004 is a response to our national commitment to a clean environment, mandated in the Constitution in Articles 48A and 51A (g), strengthened by judicial interpretation of Article 21 of the Constitution. It is recognized that maintaining healthy environment is not the state's responsibility alone, but also that of every citizen. A spirit of partnership should thus be realized throughout the spectrum of environmental management in the country. While the state must galvanize its efforts, there should also be recognition by each individual – natural or institutional, of its responsibility towards maintaining and enhancing the quality of the environment. The NEP, 2004 is also intended to be a statement of India's commitment to making a positive contribution to international efforts. The NEP, 2004 has been motivated by the above consideration and is intended to mainstream environmental concerns in all the development activities. It briefly described the key environmental challenges currently and prospectively facing the country, the objectives of environment policy, normative principles

[10] Ministry of Environment and Forest, *NATIONAL ENVIRONMENTAL POLICY, 2004*, GOVERNMENT OF INDIA (December, 09, 2017, 06:21PM), http://www.fbae.org/2009/FBAE/website/images/PDF%20files/Imporatant%20Publication/National%20environment%20Policy%202004%20(Draft%20for%20Comments).pdf

[11] Volume 2, K R Gupta, Environment : Problems And Policies (Encyclopedia Of Environment)

underlying policy action, strategic themes for intervention, the broad indication of the legislative and institutional development needed to accomplish the strategic themes, and mechanism for implementation and review. It has been prepared through a process of extensive consultation with experts, as well as diverse stakeholders, and this process is also documented.

National Environment Policy – 2006

Across the political spectrum of the country, there has been recognition of that natural resources play in providing livelihoods, and securing life support ecological services. In this perspective a need for a comprehensive policy statement has been evident for some time in order to infuse a common approach to the various, sectoral and cross sectoral, including fiscal, approaches to the environment management. The National Environment Policy was approved by the Union Cabinet on 18th May 2006. The dominant theme of this policy is that while conservation of environment resources is necessary to secure livelihood and well being of all, the most secure basis for conservation is to ensure that people dependent on particular resources obtain better livelihood from the fact of conservation, than from degradation of the resources. According to the NEP 2006 report, the proximate drivers of environmental degradation are population growth, inappropriate technology, consumption choice and poverty. The policy seeks to stimulate partnership of different stakeholders, inclusive of public agencies, local communities, academic and scientific institution, the investment community, and international development partners, in harnessing their respective resources and strengths for environmental management.

Existing Legislations

One of the first legislations, after the UN Conference on Human Environment that came into existence was **Water (Prevention and Control of Pollution) Act 1974**. The objective of the act was to provide for the prevention and control of water pollution and maintaining or restoring of wholesomeness of water and establishing Boards for the Prevention and Control of Water pollution for carrying out these purposes and conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

Similarly to curb Air Pollution, **Air (Prevention and Control of Pollution) Act, 1981** came into force. The objective if this act was to provide prevention, control and abatement of air pollution.

Further, **Environment (Protection) Act 1986** was enacted. It relates to protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property.

Conclusion

At the end it can be concluded that Environmental legislation had seen an immense growth with the passage of time. Many Policies had been made time to time to curb the effect of dynamic nature of Environment pollution. Strict rules, Heavy punishments, PILs etc. all played a very important role to protect the Mother Nature.

However due to lack of 'proper implementation' of policies and rules, there had been scenarios where the failure of legislation was visible. Steps had been taken earlier and also being taken in today's time. There is a need for the individuals to step up and work with the government to protect the Environment.

International Law- Sources, Development & Relation With Municipal Law

- *Dhruv Gaur*[12]

Abstract

Laws are the set of rules and regulations which serves the purpose of providing justice and maintaining discipline in the society. Laws can be intra state and interstate. Intra state laws are municipal laws or domestic laws. They govern the internal relations between the state and its people. On the other hand, interstate laws are known as international laws. These laws are meant to govern the relation between two or more states. Status of municipal laws is well defined in the society. They are considered as real laws which are prepared by the supreme authority and back by sanctions. However, International laws are quite different in comparison with municipal laws. Definition, interpretation, nature, development and sources of international law differ from Jurist to Jurist.

Meaning of International Law

'International law' term was first used by Jeremy Bentham in year 1780. This term was used in contraction to National law or Municipal law. He considered International law as a synonym to 'Laws of Nations'. International law defines the set of rules and regulation which regulate mutual affairs of state.

According to the Traditional Jurist L.F.L Oppenheim, *International law is the name for the customary and conventional rules which are considered as legally binding in civilized states in their intercourse with each other.*

Professor Hans Kelsen stated that *International law is the body of rules, which according to regular definition conducts the affair of states in their intercourse.*

Professor Oppenheim and Kelsen tried to define the international law as rules which are made specifically to govern the states only. However, in criticism of traditional definition, Modern Jurists believed that "states" are not the only subject matter of international law. International laws also include individuals, body corporate and international organizations. [13]

Jurist Starke who gave the modern definition of International law considered it as a body of law which is composed of principles and rules which state themselves bound to observe. In his definition, he included non state entities as well as a subject matter of international law.

[12] Dhruv Gaur – Fairfield Institute, IP Univeristy
[13] INTERNATIONAL COURT OF JUSTICE, *ABOUT US*, Permanent Court of International Justice (March. 09, 2018, 06:21PM), http://www.icj-cij.org/en/statute

Whiteman interpreted International laws as a "standard of conduct" for states and its subject matters.

Nature of International Law

In the formative years, the nature of international law quite clear. According to Natural school of Jurisprudence, International law is just like municipal laws and they shared common basis and sources. They both were considered equal in terms of enforcement. But after the emergence of Positivist school of Jurisprudence in the late 17th and early 18th century, they divided both the laws into two different categories. Positivist jurist Austin did not consider International law even as a law. Others believed International law was inferior to municipal law. Now question arises whether International law is a "real law" or not?

Positivist believed that International law is a "Positive Morality". Modernist believed that International law is a "Real Law"

International Law is Not True Law

Austin who is considered as founding father of analytical school of jurisprudence after Jeremy Bentham, defined law *as a command of sovereign which is backed by sanction.* He believed that common essentials of a law are – Sovereign, Command, Duty and Sanction. According to Austin, International law lacks all the common essential of a law. Therefore it cannot be even called as law. There are no terms like 'International Legislature, International Judiciary and International Executive'. It is just a "**Positive Morality**". It is called positive because it is made by man and it is definite. It is called morality because these are not binding upon the states.

According to Austin, International law is only in existence because of the mutual consent of the states. It is at the option of the states to get them binding by the international regulations. Without the consent of the states, international law has no binding effect.

On the basis of the theory propounded by the Austin, another positivist jurist Holland defined International law as *vanishing point of jurisprudence.* Holland believed that International law is standing upon the pillar of 'Consent' and 'Courtesy' of the states. International laws are merely moral codes which are voluntarily followed by the states

Concept of Positive Morality and Vanishing Point of Jurisprudence are highly criticized with regards to International Law. Positivist believed that only customary rules are the source of international law. However According to Article 38[14] of the ICJ statute, International Treaties, Conventions, Customs, General Principles and Judicial decisions all are the part of International

[14] INTERNATIONAL COURT OF JUSTICE, *ABOUT US*, Permanent Court of International Justice (March. 09, 2018, 06:21PM), http://www.icj-cij.org/en/statute

Law's sources. Moreover decisions made by the International Court of Justice are backed by sanctions[15]. Therefore it is not right to consider international law as positive morality.

International Law is Real Law

While contradicting the positivists, modernistic alleged that positivist jurist were trained and groomed under municipal law only. Positivist believed that no parallel system to municipal law can exist. Modernistic considered the analogy of positivist very narrow and backward.

Municipal Law relation with International Law

International law deals with the relation of state with other states. Municipal law is confined to the internal matters of the state i.e. domestic affairs.

Relation between International Law and Municipal law is both practical and theoretical. Problems of both laws is confined to - Status of Municipal law in International Tribunals, Status of International law in domestic court and Which law will supersede in case of conflict?

This may be put in another way, the first and second problems turned upon the theoretical questions as to whether international law and municipal law is a part of a single legal order, or whether they compromise two distinct systems of law. The third aspect turns upon the practical question as to what is to happen if there is a conflict in a situation where a case has been brought either before an international tribunal before a municipal court.

Now to deal with relation of both the laws, few theories were propounded by different jurists.

Monistic Theory

This theory was consolidated in the early 20th century by Kelson, who holds that there is a unity of law between municipal law and international law. Monists have a unitary concept of law and see all laws as an integral part of the same system. This theory holds that both the legal systems are part of a single legal structure. The monistic theory provided an answer to the points of difference regarding the relations, sources and substance of the two legal systems as follows- Both Municipal and International laws have a common underlying legal basis and it derives its origin from the law of nature which binds equally the state and individuals. They are intrinsically the same and form the part of the science of law which binds all human beings alike. They contended that both not only resemble each other but also, at the same time, spring from a single grund norm or standard which is the foundation head of all laws. They regarded law as single unified field of knowledge, consisting of rules whether binding on states, individuals or on entities other than states. Both ultimately regulate the conduct of individuals, one mediately and

[15] UNITED NATIONS, *ABOUT US*, United Nation Charter (March. 17, 2018, 02:29PM), http://www.un.org/en/charter-united-nations/

other immediately. Both are part of universal body of legal rules binding all human beings, collectively or singly. In both the systems the substance of the law is same i.e. a command binding upon the subjects irrespective of their will. Therefore the question of superiority or primacy of one system over the other doesn't arise. The fact that the national organs do not act according to the rules of international law is manifestation of weakness, but it doesn't invalidate the theory, since the state will incur international responsibility for the breach of the international legal rules. Exponents of monistic theory rejected the alleged differences between the two systems regarding sources, substance and subjects as laid down by dualist. Both are species of one genus and that is law. Law is seen as a single entity of which the national and international versions are merely particular manifestations.

Criticism – It is very difficult to disprove the view of Kelson that man lies at the roof of all law. But in actual practice states are in negation of this theory and they do not follow this theory and treat international law and municipal law as two separate systems of law. States do not like to compromise their sovereignty and they contend that they follow international law simply because they give their consent to be bound and due to other practical reasons.

Dualist Theory

In the 19th and 20th centuries, partly as a result of philosophic doctrines emphasizing the sovereignty of the state will and partly as a result of the rise in modern state legislature with complete internal legal sovereignty, there developed a strong trend towards the dualist view. The chief exponent of dualism has been positivist writers, Triepel and Anzilotti. Positivist philosophy emphasized on the will of the state as the sole criterion for the creation of rules of international law. According to this doctrine the difference between international law and municipal law is fundamental and these two systems are separate and self contained to the extent that the rules of one are not expressly or tacitly received into the other's system. Both laws are two different systems and independent of each other. They do not get the authority or validity from each other. Oppenheim observes that the law of nations and the municipal law are essentially different from each other. Dualist emphasized that these two are separate bodies of legal norms, emerging, in part, from different sources compromising different subjects and having applications to different objects. The area and method of their operation is also different.

Criticism – Firstly it is not correct to contend that *pacta sunt servanda*[16] is the only basis of international law. It fails to explain the binding force of customary rules of international law in regard to which states have not given their consent. Secondly it is not correct to contend that international law is binding only upon the states. It ignores other subject matter of the international law like individuals, international organizations and other non state actors.

[16] OXFORD DICTIONARIES, *PACTA SUNT SERVANDA*, Oxford Living Dictionaries (March. 19, 2018, 09:29PM), https://en.oxforddictionaries.com/definition/pacta_sunt_servanda

Harmonizing Theory

This theory tries to solve the differences between Monistic and Dualistic theories. According to this theory if there is a conflict between the subject matter of international law or municipal law, such matter should be solved with harmony. Proper principles of Equity, Justice and Morality must be applied.

Moreover states should not form such municipal laws which are contrary to the spirit of international law. Municipal laws must be consistent with International laws.

Sources of International Law

Article 38 of the ICJ Statute doesn't specifically use the words 'Sources' for International law, however it provides the tools which should be applied to solve the disputes relating to international matters. It states that –

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. ***international conventions****, whether general or particular, establishing rules expressly recognized by the contesting states; b.* ***international custom****, as evidence of a general practice accepted as law; c.* ***the general principles of law*** *recognized by civilized nations; d. subject to the provisions of Article 59, [.e. that only the parties bound by the decision in any particular case,]* ***judicial decisions and the teachings*** *of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*[17].

Now this Article highlights 4 important sources of international law, i.e. Treaties, Customs, General Principles and Judicial Decisions.

Treaties

Treaties are also known by the names of convections,[18] declarations, agreements etc. Treaties referred to an agreement between the participating states through which they bind themselves legally to act in particular way.

Article 2 of the Vienna Convection state that treaties are the agreements whereby 2 or more states establish relation between them and govern by International law.

Treaties can be classified under two categories i.e. Law making treaties and Treaty contracts. Law making treaties involve large number of participation from the states and it creates universal

[17] ICJ – Article 38 (1)
[18] UNITED NATIONS, *ABOUT US*, United Nation Charter (March. 17, 2018, 02:29PM), http://www.un.org/en/charter-united-nations/

norms. They are just municipal legislation at international level. For example - UN Charter, Vienna Convention[19], Geneva Convention etc

Treaty Contracts is between the two parties for a specific purpose and exclusively between those two states.

Validity of a treaty is bases upon the oldest principle of International law i.e. ***Pact Sunt Servanda.*** According to this principle, treaties are binding upon the parties and they must be performed in the good faith. States are bound to perform their duty. Process of completing a treaty takes a long time. Every state has the time to sign the treaty and ratify the same at diffremt point of time.

Customs

Customs are the oldest source of international law; however it has lost its significance after the growth and development of treaties in the modern era as a source of law. Customary rules are the obligations which state follows out of their own conscience. Establishing a custom in an international arena is a tough task. It must be proved that custom is being followed by large number of people and there is no conflict between customs and general principles of law. Customs are not being cleared defined in a set language. In the Asylum case of 1950, ICJ states that customs are recognized as a habit by states for a long period of time and they are backed by law. Custom starts where usage ends. Customs creates the fundamental norms. They are uniform and consistent throughout the lifespan.

General Principles

Some writers believe that general principles are affirmation of natural law concept. Some believes that general principles are the subhead of treaties and customary laws and they are incapable of adding anything new.

In reality, International law is derived from some advance legal systems. Most common principles which are being universal in nature form the part of International law. General principles which are universally accepted are as follows- Compensation to the victims, Act in Good faith, Res Judicata, Equity and Estoppels.

Judicial Decisions

Judicial decisions refer to the decisions taken by the judges when any dispute is presented before them. It works as quasi precedent in international law. Judicial decisions are based upon the facts

[19] VIENNA CONVENCTION, *DIPLOMATIC RELATIONS BEWTEEN STATES*, Optional Protocol 1961 (March. 11, 2018, 02:51PM), http://www.mfa.gov.tr/data/Kutuphane/MultilateralConventions/ViennaConventiononDiplomaticRelations.pdf

and circumstances on the case. After the careful study of the matter, judges implement the principle of law and take the decisions.

Such decision of judges is an important part of different sources of International law

Conclusion

At the end of this paper it can be concluded that in the recent time period, international law had shown immense growth. It has not only been recognized but is being properly implemented throughout the world. After comparing the monistic and dualistic theory, it is also affirmed that International law is different from Municipal law and Municipal law are being framed keeping in mind the international rules and regulations. Sources of International law are now being clearly defined in ICJ statute and with the penultimate growth of International treaties; future of international law is very bright.

Protecting Innocence- The POCSO Act

- *Gayatri Virmani*[20]

Abstract

The research paper deals with the theme of "Protection of Children from Sexual Offences Act (POCSO)". It aims at extensively examining the legislation with specific reference to the landmark judicial pronouncements in this regard, and highlighting its loopholes and challenges with respect to the present scenario in India.

The POCSO Act has been in India since a while now and even in 2017 we face various instances where the efficiency and execution of the legislature comes into question. The legislation has a number of loopholes which are being extensively dealt in the paper, primarily focusing more on the execution part.

The qualitative extensive research lays down the background of the subject, its meaning and its relevance in the present time. The much-debated infamous instances of child abuse in Delhi and various parts of the country are being dealt with in the presented research paper keeping in mind their relevance to the POCSO Act.

The paper further lays down specific emphasis on various aspects of the act, viz. what exactly amounts to sexual abuse and challenges the relevance of this piece of legislation.

The paper in the end briefly deals with upcoming problems and its implications in the present time. It also suggests some solutions for fruitful understanding of this concept, along with suggestions to ensure that its implementation is just & fair and is not ambiguous.

Key Words: POCSO; Loopholes; India; Legislation; Abuse

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Introduction

The POCSO or The Protection of Children from Sexual Offenses Act, 2012 has been a landmark piece of legislation in dealing with sexual abuse against children. Though it has several loopholes but it is the first substantive legislation followed in pursuance of the nation's child protection policies. This qualitative extensive research aims at critically analyzing the act as well as mentioning the loopholes in it with the help of certain judicial pronouncements.

Objective of the Act as mentioned is the Act is, [21]"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto."

Constitutional backing to the validity of POCSO Ac is found in Article 15(3) which provides that the State has the power to make special provisions for women and children. This provision in our Constitution thus makes the Act Constitutionally valid.

Child Sexual Abuse Laws in India

A large proportion of children in India (Fifty three percent) face some form of child sexual abuse. The need for stringent laws had been felt many times but it was only in 2012 that a law on the same was actually passed. The Parliament of India passed the 'Protection of Children against Sexual Offences Bill, 2011' regarding child sexual abuse on May 22, 2012 formulating it into an Act. Its implementation began with a notification issues in November 2012. This was the first legislation protecting children against sexual offences and to be applied uniformly across India.

Laws before the POCSO Act

Goa Children's Act, 2003 was the only specific piece of child abuse legislation before the 2012 Act. Child sexual abuse was prosecuted under the following sections of Indian Penal Code:

- I.P.C. (1860) 375- Rape
- I.P.C. (1860) 354- Outraging the modesty of a woman
- I.P.C. (1860) 377- Unnatural offences

[21] The Protection of Children from Sexual Offenses Act, 2012 (No. 32 OF 2012)

However, the IPC could not effectively protect the child due to various loopholes like:

- IPC 375 doesn't protect male victims or anyone from sexual acts of penetration other than "traditional" peno-vaginal intercourse.
- IPC 354 lacks a statutory definition of "modesty". It carries a weak penalty and is a compoundable offence. Further, it does not protect the "modesty" of a male child.
- In IPC 377, the term "unnatural offences" is not defined. It only applies to victims penetrated by their attacker's sex act, and is not designed to criminalize sexual abuse of children.

Unique Features of the POCSO Act

Firstly, setting up of Special Juvenile Courts and appointment of Special Public Prosecutor- In the past, it has been observed that the trials took unnecessarily long time to dispose of the matter, but the new bill suggests disposing the case within one year. The essence of the bill lies in the fact that it is more child-friendly while recording of evidence, reporting and during investigation and trial.

Secondly, a support system from Police administration- Under this act, the statement of the girl child is to be recorded by a woman police officer who is not below the rank of sub- inspector. The presence of parents and other relatives during medical examination of the victim is allowed under the act. In the case of a victim girl, a medical examination is to be conducted by women doctor.

Thirdly, this act provides an arrangement for victim child for their special protection and care.

Fourthly, the act has an implication of the point that the person, who has attempted to commit the crime under the act, is liable for punishment. Just like in rape cases where the burden of proof is on the accused, here also the burden of proof of his innocence is on the accused. It should be noted that the act provides punishment for false accusation as well.

POCSO Act and Jurisprudence

According to the author, applicable school of thought for "Prevention of Children from Sexual Offences Act 2012" is Positivist School of Law. The main thinkers of positivistic school law are Jeremy Benthem (The father of English Positivism), John Austin, H L A Hart and Kelsen.

Jeremy Benthem defines law as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state. He gave the concept of utilitarian individualism based on pleasure and pain in which he stated that any act which increases the overall quantum of pleasure or happiness is justified. If we take into consideration "Prevention of Children from Sexual Offences Act 2012", then the concept of utilitarianism of Bentham can't be justified because the act itself can't be justified because of its nature, no matter what is the quantum of happiness that the act is responsible for.

Under the scheme of Austin, the law is the rule of guidance laid down for one intelligent being by another intelligent being who has power over the former being. POCSO Act 2012 can be explained under Austin's scheme as Austin has described the positive law as "aggregate of rules set by man politically superior for men who are politically inferior." 'Sanctions' under the scheme of Austin can easily be compared to some of the punishments mentioned in the POCSO Act 2012. However, Austin's view that Positive law includes rules set by those who are not political superiors is an undue extension.

In Hart's view, there is no necessary logical connection between the content of law and morality. He asserts that the existence of legal rights and duties may be devoid of any moral justification. According to the author, Hart was correct in stating that there is no logical connection between law and morality, and if there is any connection, it is very difficult to identify that connection because the concept of "morality" in itself is very vague and don't appeal to reason.

Loopholes in the POCSO Act

The POCSO Act, which branded itself as a piece of legislation for protecting children from undue harassment has come with certain loopholes which need to be taken care of at the war

footing. The primary loophole in the legislation is the executive machinery and the execution part.

The Police, NGOs and media should be cautious while dealing with the cases involving child rights and sexual abuse. Despite the Act making it mandatory that the abused or assaulted child has to be produced before the CWC, the police skips this process at times. Even when the Committee approaches the police, they show lethargic attitude. They show disrespect to the quasi-judicial body, making CWC a toothless bird. Even the NGOs violate child rights by revealing the identity of the child.

Presently, the POCSO recommends a punishment of six months' imprisonment to a policeman who does not record a complaint of sexual offence by a child victim. Though, the increase in the punishment could backfire, but stringent measures need to be adopted. Sensitization in the executory bodies is the key of getting maximum benefit out of the legislation.

Judicial Pronouncements involving POSCO Act, 2012

Various aspects of law and issues related to POCSO Act were dealt with in these judicial pronouncements which gave it a more detailed judicial interpretation.

1. **Shankar KisanraoKhade v. State of Maharashtra**[22]

Hon'ble Supreme Court have held that relying on several judgments by the Apex Court, present Court applied "crime test", "criminal test" and the R-R Test and not "balancing test" to award death sentence. To award death sentence, "crime test" has to be fully satisfied, i.e. 100% and "criminal test" 0% i.e. no Mitigating circumstances favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused not a menace to the society no previous track record etc. Rarest of rare case test depends upon the perception of the society i.e. "society centric" and not "Judge Centric" i.e. whether the society will approve the awarding of death sentence to certain 22 types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual

[22] (2013)5 S.C.C. 546

assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Supreme Court have also pleased to elucidate some judicial principles for awarding death penalty.

2. State of Maharashtra v. Dattatraya @ DattaAmboRokade[23]

Hon'ble Bombay High Court have dealt with various legal aspects in respect of circumstantial evidence, in respect of test identification parade, in respect of recovery under Section 27 of the Indian Evidence Act, 1872, from any open place, in respect of extra judicial confession. In para No.17 all these citations the Lordship pleased to elucidate, aggravating and mitigating circumstance to be considered while confirming death penalty.

3. State of Uttar Pradesh v. Munesh[24]

"It is held that the primary concern both at National and International level is about the devastating increase in rape cases and cases relating crimes against women in the world. India is no exception to 23 it. Although the statutory provisions provide strict penal action against such offenders, it is for the Courts to ultimately decide whether such incident occurred or not. The Courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds. In the instant case, the accused had committed rape, which repels against moral conscience as he chose a girl of 11 year to satisfy his lust and subsequently murdered her. The incident took place in the year 2002. Punishment of life imprisonment was awarded."

4. Deepak Gulati v. State Haryana[25]

"It is held that rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces women to an animal, as it shakes the very core of her life. By no means can a rape victim be called an

[23] 2014 ALL M.R. (Cri.) 2078
[24] 2013 Criminal Law Journal 194 (S.C.)
[25] 2013 Criminal Law Journal 2290 (S.C.)

accomplice. Rape leaves a permanent scar on the life of the victim, and therefore, a rape victim is placed on higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated 24 crime, rape tantamount to serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks."

5. Narendra Kumar v. State of (NCT) Delhi[26]

"It is held that conviction can be based on sole testimony of prosecutor provide it lends assurance of her testimony."

6. Salil Bali v. Union of India[27]

"It is held that juvenile justice (Care and protection of children) Act, 2000 is in tune with provisions of Constitution and various declarations and convention adopted by World Community represented by United Nations. Said Act cannot be held to be ultra vires Constitution nor it can be struck down."

7. Joginder Singh v. State of Maharashtra[28]

It is held that applicant preferred an application for seeking anticipatory bail - The offence was punishable under Section 354(A) of the Indian Penal Code, 1860 - The question was, whether applicant 25 was entitled for anticipatory bail - It is held that applicant had co-operated with the investigation agency - Custodial interrogation of applicant would not be necessary - Registration of offence against applicant had exposed him to social obloquy and that he had been humiliated in society as well as at work place - Registration of offence was sufficiently deterrent factor - Therefore, bail was granted to the applicant."

[26] AIR 2012 S.C. 2281
[27] (2013)7 S.C.C. 705
[28] 2014(3) Bombay C.R. (Cri.) 91

8. Nishu v. Commissioner of Police, Delhi and Ors.[29]

Facts- Petitioner is a minor who was kidnapped on 25.10.2013 by a group of nine persons who had kept her confined up to 8.11.2013. The accused persons, in different combinations, had repeatedly raped her and that one of the accused, named, Pradeep is a constable in Haryana Police. After being recovered, medical examination of the girl was done, but neither the copy of the report was not furnished nor any FIR under Section 376 D of the Indian Penal Code or the provisions of the POCSO Act registered against the accused persons. Petition under Article 32 has been filed seeking directions from the Court for registration of FIR under above mentioned sections; for the arrest of the accused. Also the appropriate actions against the officers of the Delhi and Haryana police by way of departmental proceedings for their refusal/failure to register the FIR under the aforesaid sections of the Indian Penal Code as well as the provisions of POCSO.

Decision- In view of the arguments asserted by the counsels of both the respondents, court held that no order or direction to the first Respondent would be justified in view of the fact that the case has been registered by the Haryana Police and has been investigated by the authorities of the State of Haryana. The Hon‟ble Court also find out that as the charge sheet has been filed against all the nine accused and the trial has commenced in the meantime it will be wholly inappropriate to exercise our jurisdiction under Article 32 of the Constitution.

9. Ashish Kumar and Ors. v. State of U.P. and Ors.[30]

Facts- FIR was lodged by the victim's father Deesaa Police Station at P.S. Rauja, district Shajahanpur under sections 147, 354 A, 352, 323 and 506 of IPC and Sections 7/8 of POCSO. After investigation, the police laid charge-sheet under Sections 352, 323 and 506 IPC only. As a result, Victim‟s father filed an affidavit alleging therein that on the date of the incident that is 30th October, 2014, the victim's age was about 16 years and as she had alleged molestation, etc. in her statement, offences punishable under sections 147 and 354A of IPC and sections 7/8 of POCSO Act were also made out. Upon receiving such affidavit, the learned Magistrate perused the police report and passed the impugned order dated 19.03.2015 thereby directing return of the

[29] 2014 (3) ACR 2516 (SC)
[30] MANU/UP/0439 /2015

charge-sheet for being laid before the Special Court constituted under POCSO Act. In the order impugned it was observed that from the material available in the case diary offences punishable under Sections 323, 353, 354 and 506 IPC and Sections 7/8 of POCSO Act were prima facie made out, but as it was not empowered to take cognizance of the offences punishable under the POCSO Act, therefore, the charge sheet is to be returned for presentation before the Special Court.

Decision - Court observed that as the instant matter arises out of case which is based on a police report and not on the complaint, after submission of the charge-sheet, the matter goes to the Magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial or not. The Magistrate cannot exclude or include any section into the charge-sheet after investigation has been completed and charge-sheet has been submitted by the police. The same would be permissible by the trial court only at the time of framing of charge under Sections 216, 218 or under Section 228 CrPC as the case may be which means that after submission of the charge sheet it is open for the prosecution to contend before the appropriate trial court at the stage of framing of charge that on the given state of facts the charge of certain other offences should also be framed. The Hon‟ble High Court held that in a case which is triable by a Court of Session though the Magistrate cannot add or alter a charge but he is empowered by sections 209 and 323 of the Code to commit the case to a Court of Session. Since under Section 31 of the POCSO Act a Special Court constituted under the said Act is deemed to be a Court of Session, the Magistrate, if he finds that offences triable by a Special Court under the POCSO Act are also made out, he is empowered to commit the case to the Special Court by taking aid of the provisions of section 209 of the Code. But such commitment arises after the Magistrate takes cognizance of the offences laid in the charge sheet.

10. Vijaykumar v. The State of Karnataka[31]

Facts- The petitioner has been working in the Girls Hostel attached to the Kittur Rani Chennamma Residential School and he has been ill-treating, harassing and sexually exploiting the girl students in the said Institution. Another accused Smt. Jyothi (A- 2) has been giving

[31] MANU/KA/044 3/2015

assistance to the said person in order to facilitate the petitioner. The Principal of Kittur Rani Chennamma School, Almel has lodged an FIR for such act. The Police have investigated the matter and submitted the charge sheet. They have recorded the statements of the girl students, Head Master and others during the course of investigation. Petition is filed before this Court by A-1 for grant of bail on the ground of parity as A-2 has been granted bail by the Court.

Decision- In the instant case, Court observed that none of the girls have stated as to whether any one of them has been exploited by anybody. Every student has stated that some students were called by the petitioner and he used to exploit her every day except that nothing has been stated in the statements. Even the other witnesses have also stated in the similar fashion that they received information that the accused has been exploiting the girls in the said hostel. But nobody has stated that who was the girl actually exploited out of the girls examined by the Police. Therefore on the basis of lack of strong reasons, the court has not rejected the bail application and held that petitioner is entitled to be enlarged on bail.

Conclusion

After the extensive study, it can be clearly said that the piece of legislation aims at bringing positive changes in the society, but the approach towards the same must be changed. The legislation is a bit ahead of its time and in order to get the best out of it, mass sensitization is the only way out.

Privacy under The European Convention of Human Rights & The European Charter

- ***Archit Gaur***[32]

The European Convention of Human Rights ('Convention') states as follows:

*"**Article 8***
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In **Aycaguer v. France (2017)**[33]**,** The European Court of Human Rights decided on an application which claimed a breach of the applicant's right to respect for his private life on account of the order to provide a biological sample for inclusion in the national computerised DNA database (FNAEG) and the fact that his refusal to comply with that order had resulted in a criminal offence. The court observed that:

"The mere fact of storing data on a person's private life amounted to an interference within the meaning of Article 8. DNA profiles contained a huge amount of unique personal data…"

"… The respondent State overstepped its margin of appreciation in this sphere. Mr Aycaguer's conviction for having refused to undergo biological testing the result of which was to be included in the FNAEG amounted to a disproportionate infringement of his right to respect for private life, and therefore could not be deemed necessary in a democratic society."

In **Figueiredo Teixeira v. Andorra** [34] **(2016),** The European Court of Human Rights examined the application claiming violation of Article 8 when the applicant's telephone call details were stored and communicated to the judicial authority, suspecting him to be involved in the serious offence of drug trafficking. The court observed that:

[32] Archit Gaur – Amity University
[33] Application no. 8806/12
[34] Application No. 72384/14

"Article 87 of the Code of Criminal Procedure in force at the relevant time had detailed the conditions under which interference with the right to respect for private life was authorised."

"The impugned interference, which had been geared to combating drug trafficking, had pursued one of the legitimate aims listed in the second paragraph of Article 8 of the Convention, that is to say the prevention of crime. As regards the proportionality of the measure, impugned interference had been authorised for a shorter period than that originally requested by the police. Moreover, the offences charged had been committed at most six months before the period covered by the impugned measure… The Andorran authorities had thus respected 'proportionality between the effects of the use of special investigation techniques and the objective that has been identified", and that they had used an unintrusive method to "enable the offence to be detected, prevented or prosecuted with adequate effectiveness'.

The Court therefore found that there had been no violation of Article 8.

In **R.E. v. The United Kingdom[35] (2015),** the applicant was arrested and detained on three occasions in relation to the murder of a police officer. He claimed violation of Article 8 under the regime of covert surveillance of consultations between detainees and their lawyers, medical advisors and appropriate adults sanctioned by *The Regulation of Investigatory Powers Act 2000* and *The Covert Surveillance Code of Practice* before The European Court of Human Rights. The court observed that:

Background

In 2006 a solicitor in Northern Ireland was arrested and charged with a number of offences, including inciting paramilitaries to murder and perverting the course of justice. The case arose out of the covert recording of his consultations with clients at Antrim police station. As a direct consequence of the criminal proceedings, solicitors in Northern Ireland became aware that their private consultations with detainees in police tations and prisons could be the subject of covert surveillance. Thereafter, solicitors attending detainees in police stations and prisons began to seek assurances from the police that their consultations would not be the subject of such surveillance.

When the police refused to give assurances, judicial review proceedings were initiated on the basis that there had been a breach of the common law right to legal and professional privilege, the statutory right to a private consultation with a lawyer, and Articles 6 and 8 of the Convention.

In the case of Re C & Others [2007] NIQB 101A the Divisional Court of the High Court of Justice in Northern Ireland found that, despite the express statutory right to private consultations, the covert surveillance of lawyer-client consultations was permitted by the Regulation of

[35] Application No. 62498/11

Investigatory Powers Act 2000 ("RIPA"). However, RIPA provided for two principal surveillance schemes: intrusive surveillance and directed surveillance.

The applicants in these judicial review proceedings appealed against the court's ruling that the surveillance was permitted by the domestic legislation. The appeal went to the House of Lords, where it was referred to as Re McE (Northern Ireland) [2009] UKHL 15. The House of Lords agreed with the Divisional Court that although the provisions of RIPA could override, inter alia, legal professional privilege, the higher level of authority necessary for an intrusive surveillance warrant was required rather than the directed surveillance warrants that had, until then, been issued.

Facts of the present case:

On 15 March 2009 the applicant was arrested in connection with the murder of a Police Constable believed to have been killed by dissident Republicans. When first arrested the applicant was assessed by the Forensic Medical Officer as a "vulnerable person" within the meaning of the Terrorism Act Code of Practice. Pursuant to paragraph 11.9 of that Code of Practice, he could not be interviewed, save in exceptional circumstances, in the absence of an "appropriate adult". In the case of a person who was mentally vulnerable, an appropriate adult could be a relative or guardian, or a person experienced in dealing with mentally disordered or mentally vulnerable people.

"The provisions of domestic law which govern the interception, acquisition and disclosure of communication data (including Part I of the Regulation of Investigatory Powers Act 2000 ("RIPA") together with the relevant sections of the Code) are set out in Kennedy v. the United Kingdom, no. 26839/05, §§ 25 – 61, 18 May 2010."

"The applicant complained that the regime for covert surveillance of consultations between detainees and their lawyers, medical personnel, and appropriate adults was in breach of Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

"The Government accepted that the applicant could claim to be a victim of an alleged violation of Article 8 in relation to his legal consultations with his solicitor between 4 May 2010 and 6

May 2010. It also noted that it did not appear to be in dispute that the surveillance pursued a legitimate aim for the purposes of Article 8 § 2 of the Convention."

"The Government argued that any interference was "in accordance with the law": it had its basis in domestic law; the law in question was accessible as it took the form of primary and secondary legislation and a published Revised Code (the Government accepted that it could not rely on the PSNI Service Procedure in the present case as it was not issued until 22 June 2010); and finally, the law was sufficiently foreseeable."

"Insofar as the applicant's complaints concern the regime for conducting covert surveillance of consultations between detainees and their legal advisors, the Government have accepted that he can claim to be a victim of the alleged violation."

"In this regard, it is now well-established that an individual may under certain conditions claim to be the victim of a violation occasioned by the mere existence of legislation permitting secret measures without having to demonstrate that such measures were in fact applied to him (Klass and Others v. Germany, 6 September 1978 § 34, Series A no. 28)."

"Consequently, the Court will proceed on the basis that there has been an "interference", within the meaning of Article 8 § 2 of the Convention, with the applicant's right to respect for his private life."

"In order to be justified under Article 8 § 2 of the Convention, the interference must be "in accordance with the law", in pursuit of a legitimate aim, and "necessary in a democratic society"… In respect of Part I of RIPA the Court considered that the interception regime pursued the legitimate aims of the protection of national security and the prevention of disorder and crime."

"The Court considers that the surveillance regime under Part II of RIPA pursues the same legitimate aims and this has not been disputed by the parties. It therefore falls to the Court to consider the remaining two questions: was the regime "in accordance with the law", and was it "necessary" to achieve the legitimate aim pursued?"

"The requirement that any interference must be "in accordance with the law" under Article 8 § 2 will only be met when three conditions are satisfied: the impugned measure must have some basis in domestic law; the domestic law must be compatible with the rule of law and accessible to the person concerned; and the person concerned must be able to foresee the consequences of the domestic law for him."

"The present case concerns the surveillance of legal consultations taking place in a police station, which the Court considers to be analogous to the interception of a telephone call between a lawyer and client. The Court has recognised that, while Article 8 protects the confidentiality of

all correspondence between individuals, it will afford "strengthened protection" to exchanges between lawyers and their clients, as lawyers would be unable to defend their clients if they were unable to guarantee that their exchanges would remain confidential. The Court therefore considers that the surveillance of a legal consultation constitutes an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence; higher than the degree of intrusion in Uzun and even in Bykov. Consequently, in such cases it will expect the same safeguards to be in place to protect individuals from arbitrary interference with their Article 8 rights as it has required in cases concerning the interception of communications, at least insofar as those principles can be applied to the form of surveillance in question."

"Bearing in mind the fact that intrusive surveillance under Part II of RIPA concerns the covert surveillance of anything taking place on residential premises or in private vehicles by a person or listening device, the Court accepts that it will not necessarily be possible to know in advance either on what premises the surveillance will take place or what individuals will be affected by it."

"Insofar as the applicant complains about the regime for conducting covert surveillance of consultations between detainees and their appropriate adults, the Government have accepted that he can claim to be a victim of the alleged violation."

"The Court has already noted that in order to be justified under Article 8 § 2 of the Convention the interference must be 'in accordance with the law'."

"As with the regime for surveillance of lawyer/client consultations, the Court considers that the regime in question pursues the legitimate aims of protection of national security and the prevention of disorder and crime"

"That being said, the surveillance was not taking place in a private place, such as a private residence or vehicle. Rather, it was being conducted in a police station. Moreover, unlike legal consultations, consultations with an appropriate adult are not subject to legal privilege and do not attract the "strengthened protection" accorded to consultations with lawyers or medical personnel. The detainee would not, therefore, have the same expectation of privacy that he or she would have during a legal consultation. Consequently, the Court does not consider it appropriate to apply the strict standard set down in Valenzuela-Contreras and will instead focus on the more general question of whether the legislation adequately protected detainees against arbitrary interference with their Article 8 rights, and whether it was sufficiently clear in its terms to give individuals adequate indication as to the circumstances in which and the conditions on which public authorities were entitled to resort to such covert measures"

"…Surveillance of "appropriate adult"-detainee consultations were not subject to legal privilege and therefore a detainee would not have the same expectation of privacy.…The relevant

domestic provisions, insofar as they related to the possible surveillance of consultations between detainees and "appropriate adults", were accompanied by "adequate safeguards against abuse", notably as concerned the authorisation, review and record keeping. Hence, there is no violation of Article 8."

In **Sõro v. Estonia**[36] **(2015),** a seven-judge bench at the European Court of Huan Rights examined the application claiming violation of Article 8 (Right to Respect for Private Life) when the information about his employment during the Soviet era as a driver of the Committee of State Security of the USSR (the KGB) was printed in the Estonian State Gazette in 2004. The court in majority observed that:

"The publication of information about the applicant's employment as a driver of the KGB had affected his reputation and therefore constituted an interference with his right to respect for his private life. The lawfulness of that interference – which had been based on the Disclosure Act – was not in dispute between the parties. The Court also considered that the interference had pursued a legitimate aim for the purpose of Article 8, namely the protection of national security and public safety, the prevention of disorder and the protection of the rights and freedoms of others."

[36] Application No. 22588/08

Constitutionality of Section 13 of SARFAESI ACT, 2002

(MARDIA CHEMICALS V. UOI)

- ***Ravi Narwal***[37]

Abstract

The finance sector has been one of the key drivers in India's efforts to achieve success in rapidly developing economy. While the banking industry in India is progressively complying with the banking and financial prudential norms and accounting practices, there are certain areas in which the banking and financial sectors don't have a level playing field as compared to other participant in the financial market in the world. There are no legal provisions to facilitate securitization of financial assets of banks and financial institutions. Further, unlike International banks, the banks and financial institutions in India don't have the power to take possessions of the securities and sell them. They have to approach civil court for the recovery of dues, which was time consuming. There were huge arrears of cases before civil courts. Civil Courts also failed to deliver both in ascertainment of dues and execution of decree even after judgment.

Failure of Civil Courts led to promulgation of Recovery of Debt Due to Banks and Financial Institutions Act (RDDBFI)[38] w.e.f. 27th August 1993. This act provided summary procedure for the settlement of dues towards the banks and certainly brought down the time of adjudication in such matters. Banks and Financial Institutions are the custodian of the public money and there was need to rotate the money for the Public good. Non Performing Assets is a loss to the country.

By the late 90s rising level of Bank NPAs raised concerns. Government constituted Narsimhan Committee for the purpose of examination of banking sector reforms. The Committee suggested that there is a need to enact a new law for the purpose of securitization and empowering banking legislations. Acting on these suggestions, The SARFAESI Ordinance 2002, was promulgated on 21st June, 2002, to regulate securitizations and reconstruction of financial assets and enforcement of security interest. The provisions of the ordinance would enable banks and financial institutions to realize long terms assets, mange problem of liquidity, assets liability mismatches and improve recovery by taking possession of the securities, sell them and reduce nonperforming assets by adopting measure for recovery or reconstruction. Later on Ordinance was replaced by bill, which was passed by both the houses of parliament and receive the assent of the President on 17th December 2002, and came into force same day.

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[38] MINISTRY OF LAW AND JUSTICE, *RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT*, Government of India, (March 09, 2018, 7:10PM), http://www.drat.tn.nic.in/Docu/RDDBFI-Act.pdf

Section 13 of SARFAESI

This sections deals with the enforcement of security interest. According to subsection 1, the secured creditor can enforce his right without the intervention of the court. According to subsection 2, the secured creditor need to send a notice of at least 60 days to the borrowers stating his intention to enforce the security interest. If the borrower is unable to clear the debt, the creditor will be entitled to take the actions as specified under Section 13(4). Section13 subsection 3 talks about disclosures which are required in the notice. Section 13 (3A) which was added after the case of Mardia Chemicals v. UOI, will be discussed later on. Section 13(4) talks about different measures which can be taken by the secured creditor to enforce the security interest. Like taking possession of the property, taking over the management, appoint any person or recover his debt from the debtor of the borrower. Remaining subsections from 5-12 deals with procedure relating to security enforcement[39].

Case Analysis

In Mardia Chemicals v. Union of India, 2004(4) SCC 311, the Apex Court had the opportunity to consider the constitutionality of Section 13 of the Act. In the case petitioner contended that the sale of secured asset for the enforcement of secured interest is an exception to the common law principle and Section13 empowers the borrower with the unchecked arbitrary powers since "before any action is taken under section 13, there is no forum or adjudication mechanism to resolve any dispute which may arise in respect of alleged dues or the Non Performing Assets. The Court rejected the intention of the petitioner and observed that "NPAs due from industrial units is a serious issue. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recover of debts.

Court held that it cannot be said that a step taken towards securitization of the debts and to evolve means for faster recovery of the NPA's was not called for or that it was super imposition of undesired law since one legislation was already operating in the field namely "Recovery of Debts due to Banks and Financial Sectors".

The court further held that, "NPAs problem is an important issue regarding the growth in particular, the fact that the financial sector in particular, the fact that NPA's have reached an alarming proposition was noted by several committees and institutions dealing with financial sector. Court also held that any law which doesn't give the the other party to represent his case would be stuck down of Article 14 of the Indian Constitution.

There should be some internal mechanism which provides safeguard for a borrower, before a secured asset is classified as Non Performing Asset. It held that such internal mechanism must be

[39] MINISTRY OF LAW AND JUSTICE, *SARFAESI ACT*, Government of India, (March 19, 2018, 9:10PM), http://www.drat.tn.nic.in/Docu/Securitisation-Act.pdf

included in the Act by mandating that the creditor must apply its mind to the objections raised in the reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply of the notice.

In accordance with the observation of the Supreme Court in this case, Section 13(3A) was inserted in the Act through an ordinance in 2004.

Now According to Section 13(3A), if on receipt of any notice under Section 13(2) of the Act, the borrowers makes any representation where he mentions the reason that why he was unable to pay the debt, then in that case, the secured creditor must response within 15 days of such representation.

Creditor can either accept the contentions of the borrower or reject it. Rejection of representation under this section doesn't entitle the borrower to file an appeal to the DRT under Section 17 of the Act.

Conslusion

With the enactment of SARFAESI Act, the powers of the secured creditors have increased significantly. Now creditors need not to worry about the recovery of their debt. Filing an application under SARFAESI is more than sufficient to recover the debt. Act also provides that such matters must be solved in an expeditious manner.

Validity and Constitutionality of Section 13 was justified by Supreme Court in the case of Mardia Chemicals v. UOI[40]. Court correctly observed that Securitization and Reconstruction of Financial Assets are important for the growth and development of any economy. SARFAESI is a powerful legislation which is being successful in fulfilling its objective.

[40] 2004(4) SCC 311