NALSAR

STUDENT LAW REVIEW

vol. 3 2007

student bar council | nalsar university of law

NALSAR
STUDENT LAW REVIEW
vol. 3 2007

EDITORIAL BOARD

This issue shall be cited as 2007 (3) NSLR <page no.>

Nalsar University of Law, Hyderabad
Justice City, Shameerpet, Hyderabad - 500 078, R.R. Dist., India
Tel : Office : +91-40-23498102 Res : +91-40-23498151
Fax : +91-8418-245161
E-mail : singhranbir@yahoo.com Website : www.nalsar.ac.in

Prof. (Dr.) Ranbir Singh
Vice-Chancellor

FROM THE VICE CHANCELLOR'S DESK

I am delighted to release the third issue of the NALSAR Student Law Review. The Review aims to foster the qualities that NALSAR seeks to inculcate in its students, namely critical legal research and writing skills. The issues of the Review are a testament to the scholastic aptitude of the students.

A law review is an academic tradition at law schools around the world and helps to nurture an intellectual environment. As a young law review at a young university, the NALSAR Student Law Review endeavours to encourage the spirit of argument and hone the abilities of reasoning and deduction. It is an instrument to mould students into thinking lawyers eager to venture into hitherto unexplored domains of thought.

The NALSAR Student Law Review is a periodical review, conceived, managed and edited by the students of NALSAR. This issue has been made possible in part by the efforts and intellectual inputs of the Editorial Board, which was selected after an exacting testing mechanism.

The diverse contributions in this issue demonstrate the students' keen grasp of emerging issues and an ability to scrutinize legal developments from varied angles. I wish the Review the very best and pray that it continues to achieve all that it sets out to do.

VICE-CHANCELLOR

10th July, 2007

Editorial

It is with great pride that we bring out the third edition of the *NALSAR Student Law Review.* This student-run initiative was set up in 2005 to encourage critical legal writing and thinking skills within the college, and to foster intellectual dialogue outside the classroom. Importantly, the purpose of this Journal is to assist students in developing and sharpening their legal writing and research abilities.

For this year's issue, we have had the luxury of selecting from a large number of submissions. The Review covers a broad range of topics in the collection of three articles, two case comments and a book review. From grappling with the intricacies of constitutional and administrative law to contemporary issues in international taxation and environmental law, this collection reflects student engagement in diverse areas of law.

First year law students were specially encouraged to contribute and we received an overwhelming response from them. Feedback and comments were provided to all contributors to encourage and guide them. Noting that there is a dearth of academic interaction between the various National Law Schools, this Editorial Board has set in motion the process of inviting contributions from other law schools across the country. It is hoped that this Law Review will become a forum that will allow for inter-University intellectual exchange and participation. As there is tremendous potential for better scholastic writing and dialogue in law schools , these initiatives will hopefully go a long way in realising this potential.

The Editorial Board is also extremely grateful for the unwavering support received from the University. It would like to place on record its immense gratitude towards both the Administration and the faculty as well as to all those who contributed in different ways towards this endeavour.

Contents

Articles

Case Comments

Book Review

AFFIRMATIVE ACTION IN INDIAN HIGHER EDUCATION: MYTHS AND REALITIES

*Dhananjaya Chak**

I. INTRODUCTION

Higher education in India has, of late, been at the heart of a tumultuous conflict of interests threatening the very fabric of the societal egalitarianism that the Constitution sought to weave since its adoption. The traditional disagreement in ideology between the defenders of meritocracy and the champions of social justice, on issues ranging from the Constitutional Amendment reserving seats in unaided non-minority educational institutions to the introduction of caste-based quotas in all institutions funded by the Central Government, reached dangerously volatile levels, as evidenced by vociferous protests against the government's uncompromising stance by the student community last year.

The topic at hand is complex and requires delicate handling- the proverbial 'prickly pear to pick' for a student of law or a legal practitioner. The argumentative Indian, however, has thus far failed to appreciate the nuanced nature of the debate. What has been opined in the media has largely been informed by a set of pre-conceived notions, acrimony, caste stereotypes and a pathological mistrust of the system of reservations. It may be clarified at the outset that this paper does not argue in favour of quotas for any particular caste or class but looks at reservations in higher education as a tool for redressing the larger issue of social disadvantage. In this regard, arguing in favour of the system of reservations in Indian higher education, this paper exposes fallacies of the arguments of merit and efficiency, rejects the import of American affirmative action into pluralist India and examines the 'creamy-layer' issue.

Preliminarily, however, given the chosen topic, the distinction between "reservations" that are prevalent in the Indian education system and "affirmative action" in America must be highlighted.

The framers of the Indian Constitution consciously applied what is now called 'Rawls' Substantive Theory of Justice' to create a social order based on justice wherein socio-economic equality was guaranteed, subject to the exception that inequality be permitted in cases where it produced the greatest possible benefit for those least well-off in a given scheme (the difference principle and equality of opportunity).[1] Accordingly, the

* IV Year Student, B.A., LL.B. (Hons), NALSAR University of Law, Hyderabad

1 Rawls, J., *A Theory of Justice*, (Cambridge, Massachusetts: Harvard University Press, 1971,Rep. 2000) 11.

programme of protective discrimination ensured that a fixed number of seats in government jobs, educational institutions and Parliament were reserved exclusively for specified groups. Thus, the combination of quotas and lower eligibility criterion marked the provisions of protective discrimination in India.

"Affirmative action", on the other hand, was a term first used by American President John F. Kennedy with regard to the Civil Rights Movement in 1961, eleven years after the adoption of our Constitution. Unlike Article 15 of the Indian Constitution, which sponsors reservations in higher education, the American Constitution has no such express enumeration of the policy of affirmative action. Individualized affirmative action is directed at race and gender, the guidelines not specifying which races are to benefit from such policies. Further, affirmative action rejects exclusive quotas and lower eligibility criterion[2], and voluntary adherents give preference to women and Afro-American candidates only when their qualifications are equal to other candidates This means that rather than being an overt measure for social correction, *ceteris paribus*, affirmative action only acknowledges existing status by way of preferential treatment. Thus, the *raison d'être* of reservations and affirmative action differs fundamentally; the former correcting historical inequalities and hierarchies, the latter finding compelling State interest in diversity. It is, therefore, submitted that as the two concepts are necessarily different, the term 'affirmative action' in the Indian context used to describe reservations in higher education is a misnomer.

It is with this background that this paper shall proceed to examine the familiar myths that surround the system of reservations in higher education in India and the corresponding truths.

II. MYTHS AND REALITIES OF RESERVATIONS IN INDIAN HIGHER EDUCATION

Coming to the crux of the matter, this section examines the common misconceptions that surround the model of reservations followed in Indian higher education. Although a large amount of literature and much time has been devoted to analyzing the form of protective discrimination practiced in India, it is unfortunate that reservations are still viewed with suspicion by much of the upper strata of society. Concerns that 'the Other' shall swamp elite educational institutions and a desire for the maintenance of the *status quo* are an indication of the latent casteism that argues against reservations. It must, however, be recognised at the outset that reservations aim at achieving social justice, which is characterized by the recognition of a greater good without deprivation or accrual of rights to anybody.

2 *Regents of the University of California v. Bakke*, 438 U.S. 912 (1978); *Grutter v. Bollinger*, 539 U.S.(2003).

The most common argument used against reservations is that they undermine merit. The first myth that this paper seeks to dispel is that merit is a static, absolute concept which is destroyed by following a policy of reservation, resulting in reduced efficiency and quality. For this, it would be pertinent to briefly investigate the concept of merit itself.

Merit is not easy to measure, quantify or compare. Nonetheless, merit in India is seen as having intrinsic value, deserving of reward. The concept of merit and its rewards, as theorized by Amartya Sen, however, depends upon the criteria a society uses to measure it successes and failures.[3] For example, a society that sees success in removing inequality, would recognise that rewarding merit has a propensity to generate economic and social inequality. In such a case, the rewarding of merit would not be done independent of its distributive consequences. Therefore, in seeing the rewards of merit as intrinsic entitlements or deserts, the idea of merit as an instrument of producing better overall results is being overlooked by the current debate.

In the particular context of Indian higher education, the most widespread gauge of merit is performance in entrance examinations conducted by institutions such as the IITs, IIMs and the National Law Universities. The question that begs to be asked is whether successfully qualifying in such an examination is a complete indicator of inherent aptitude and intellectual superiority that automatically translates into quality. The mushrooming of coaching centres which charge exorbitant fees is unequivocal acknowledgment that these tests, far from comprehensively assessing intelligence, are more a measure of skills that can be inculcated.

Merit being supreme in a society such as India, which is based on inheritance of private property and privilege related to birth, is clearly a disingenuous argument, simply because it is meant to measure the distance traversed by students from the same starting point to the end point. The argument in favour of quotas is that without reservations and a lower eligibility criterion to compensate, there is indisputably a wide chasm in the relative starting points of the general populace and the disadvantaged, the latter being unable to access mechanisms to gain such 'merit', owing to their socio-economic position. Thus, a merit-centric system of admission, while excluding the socially and economically disadvantaged, only creates a sort of reservation for the privileged class which can afford to spend the resources of time and money on ensuring streamlined preparation for entrance examinations.

Further, the merit so heavily relied upon, is not of the pioneering, revolutionary variety

3 Sen, A., "Merit and Justice", in Arrow, K., Bowles, S., Durlauf S. (ed.), *Meritocracy and Economic Inequality*, (Princeton: Princeton University Press, 1999) 14.

but is of the traditional rote-learning and regurgitation brand, illustrated by an acute scarcity of original path-breaking discoveries by Indian engineers on whose behalf such pitted battles are being fought! It is also strange that while reservations for backward castes and classes are seen as a massacre of merit, the upper caste/class phenomena of widespread donations, NRI quotas, capitation fee and hereditary businesses are seldom questioned.

Another myth related to merit, that of reservations producing professionals of reduced quality and efficiency, too, collapses on closer examination. It is often argued by anti-reservationists that following a policy of protective discrimination allows degrees and qualifications to be awarded to less than deserving aptitude and performance.

Firstly, this rests on the faulty and completely unfounded assumption that the institution of higher education does not contribute to development of the capabilities of the students gaining admission via reservations but is simply a mechanism to separate students who met the requirements of the entrance test from those who did not. Premier higher educational institutions are meant to inculcate merit, not quantify it through admission tests. The absurd implication of the anti-reservation line of thought is that students are neither taught nor tested once admitted to the premier educational institutions of our country!

Secondly, the experience of states in southern India, notably Karnataka and Tamil Nadu, which have a high percentage of reserved seats in institutions of higher learning, has not evidenced that reservations have reduced institutional standards. To the contrary, it is widely acknowledged that some of the finest minds in the country come from these institutions.

Thirdly, the 'economic theory of discrimination' asserts that in its ultimate outcome, a society which follows exclusionary practices, has lower economic efficiency (owing to factors such as labour immobility, occupational segregation, stigma attached to polluting jobs etc), than posited in the model of a perfectly competitive market.[4] As borne out by the example of Malaysia, which combined astonishing economic growth with drastic reservations for several decades, the logical corollary to the above proposition is that employing reservations which seek to correct market imperfections caused by class/caste based discrimination induces competitiveness and growth. In simple words, if the disadvantaged are included in mainstream higher education through the inclusive medium of reservation we would be moving towards a more efficient competitive economy!

4 Thorat, S., "Why reservation is necessary", paper presented at *Redressing Disadvantages: A symposium on reservations and the private sector*, May 2005; available at http://www.india-seminar.com/2005/549/549%20sukhadeo%20thorat.htm (last accessed on 10 July 2007).

Having examined and successfully discarded arguments related to the 'murder of merit', some thought must be devoted to misapprehensions regarding the aim of reservations in higher education institutions. In this regard, it is significant that in the recent furore over OBC quotas in institutions of higher learning, reservations were projected mainly as a method to eliminate poverty. Others contemplate reservations in education as an instrument for creating a middle class of dalits and OBCs. Although this view in itself is questionable, it is perhaps close to the truth. Reservations, as envisioned by our Constitution makers, were not a humanitarian measure involving relocation of economic resources or upliftment by way of charity, as the current debate would have us believe. Reservations, by assuring those who had been institutionally shut-out a certain standing in society, were seen by them not merely as a remedy for economic deprivation but as an instrument of creating an egalitarian society. Hence, rather than looking exclusively at the economic situation of downtrodden Indians, reservations were a means of addressing long-standing social practices of pollution and purity and inducting the oppressed into the mainstream. Thus, the chief endeavour of reservations is to sponsor social mobility by moderating the 'double disadvantage', i.e., the historical exclusion of persons from accessing education on the basis of class and caste. The reduction of poverty is, therefore, a happy spin-off indicative of the social-equalization process.

Another common refrain of anti-reservationists is that while quotas are unacceptable, the American policy of affirmative action should be imported into Indian education. Following this view, the creation of equal opportunity would be limited to anti-discrimination measures. Thus, while there appears to be some level of consensus as to the common goal – that of building a more socially inclusive education system – the most effective instrument for doing so is vehemently disputed.

Elaborating upon the conceptual differences between the American affirmative action model and the Indian reservation model highlighted in the introduction to this paper, it is opined that it is highly unlikely that the policy of affirmative action in higher education will work better than reservations in the Indian context.

Firstly, affirmative action is individualized rather than directed at groups. Indicators of social disadvantage such as income and wealth are skewed along caste lines in India.[5] This challenges the notion that disadvantage is randomly distributed between castes and thus, establishes a case for focusing on groups, rather than individuals, as targets for policy-making.

5 Deshpande, A."The Eternal Debate", *Economic and Political Weekly*, 17 June, 2006, 2444.

Secondly, an important factor contributing to America practicing affirmative action is that all persons applying for admission into Universities have had, irrespective of class, creed and colour, access to a primary and secondary public school system, both free and compulsory. In India, however, a poor public education system has meant that the number of school-going children in poorer and oppressed communities has continued to remain negligible. In such a scenario, it is not affirmative action which presupposes an opportunity to access primary/secondary education, but reservations that are unquestionably the better mode of correcting such social inequities.

Thirdly, affirmative action in American higher education draws its legitimacy from the idea that diversity improves the academic experience Although it is desirable that diversity be respected, what is imperative in India is the elimination of caste and class hierarchies and the attendant powerlessness of certain communities in society. Further, in a pluralist country such as India, the immense administrative costs of evolving comprehensive criteria for identifying denial of access to education, in order to ensure diversity, make the simple quota system attractive for policy-makers to adhere to.

Fourthly, while universities in America take it upon themselves voluntarily to follow a policy of affirmative action, universities in India have been averse to bearing the burden of increasing the representation of disadvantaged groups and have done so extremely unwillingly. This has been compounded by the recent trend of privatization of higher education. Hence, a constitutionally endorsed, state-imposed quota stands a better chance of improving the lot of the underprivileged than an approach dependent on the inclination of institutions.

In addition, it is a distinct possibility that the limited political imagination of political parties in India would refuse to sponsor the western concept of affirmative action in Indian higher education.

Thus, the core issue being how to level the playing field in order to give genuinely equal opportunity to the disadvantaged in higher education, it may be conclusively stated that the pragmatic machinery of reservations merits preference over the policy of affirmative action in the unique Indian situation of caste/class disparities.

The picture of reservations in higher educational institutions painted thus far would be misleading without addressing the argument that the creamy layer of the lower castes corners all reserved seats, depriving both persons from the unreserved category of seats as well the lower levels of the lower castes, and, hence, does not benefit the real targets of the system. Even the latest "Central Educational Institutions (Reservations in

Admission) Bill, 2006" which was introduced in the Lok Sabha last year, does not exclude the creamy layer as has been done with reservations in employment[6].

It is not disputed that most of the beneficiaries of India's reservation policies in University admissions still come from the 'creamy layer'. However, evidence surveyed suggests that the average socio-economic status of SC, ST and OBC students is still significantly below that of other students even when the creamy layer is included.[7] The case made out by anti-reservationists, that of reservation policies benefiting upper levels of the lower castes/classes at the expense of lower layers of University applicants from the rest of the population, thus, appears to be a rather dubious one.

Further, although such a trend is not desirable, there is considerable writing on the indirect benefits that accrue to the general population of the disadvantaged through the creamy layer phenomenon. Most importantly, it is argued that it enables the relatively comfortable beneficiaries of reservations to play a stronger, more independent and participative role in upliftment of their communities. It has been observed by the eminent sociologist M. N. Srinivas that this is due to the sense of identification with one's own caste, and also a realization that caste mobility is essential for individual or familial mobility.[8] Such a phenomenon thus promotes effective representation of the interests of the socially disadvantaged. Expounded by Dworkin as the concept of "personal preference"[9], this serves the dual purpose of recognizing their standpoint as well as their status as participants in public life, which is the ultimate aim of having reservations in higher education. Although such an argument may be refuted by scholars, it is still worth careful consideration.

III. CONCLUSION

This paper thus examines the utility of all kinds of reservations in higher education as an instrument for social empowerment, dispelling some of the mist that surrounds the system to reach a conclusion that given the unique Indian situation, the judgment of our Constitution makers can still make for sound practice. A few concluding remarks as to the logical implications of the above discussion pertaining to reservation in higher education in India, may be appropriate.

---

6 *Indira Sawhney v. Union of India,* AIR 1993 SC 477 Para. 86.

7 Deshpande, A."The Eternal Debate", *Economic and Political Weekly*, 17 June 2006, 2445; See also Deshpande, S. and Yadav, Y, "Redesigning Affirmative Action", *Economic and Political Weekly*, 17 June 2006, 2419; Weisskopf, T.E., "Impact of reservations on Admissions to Higher Education in India", *Economic and Political Weekly*, 25 September 2004, available at http://www.epw.org.in/ (last accessed on 29 March 2007).

8 Srinivas, M.N., *Collected Essays*, (New Delhi: Oxford University Press, 2002) 196-197.

9 Dworkin, R., *Taking Rights Seriously*, (Cambridge, Massachussets: Harvard University Press.1977, 2nd rev. 1978) 194.

Firstly, the current exclusionary conception of merit and the importance being given to it is completely divorced from the vision of an egalitarian India that our forefathers nurtured. Merit, in order to gain universal legitimacy, must evolve from being a limited, marks-oriented idea to a concept that contributes to the nation's productivity and ensures participation of emancipated communities.

Secondly, if the recent imbroglio regarding reservations for OBCs is to be viewed in terms of their social disadvantage as argued in this paper, rather than being a contest between the victimized rich and the scheming, political poor, it would take on a completely different hue. It is acknowledged that reservations are influenced by vote-bank politics and flaws with reservations, it is submitted, lie in implementation, not in conceptualization. In this regard, given the current paucity of data, a systematic Government survey of the social condition of backward classes, would go a long way in forestalling claims of unjustified inclusion/exclusion. The exclusion of the creamy layer as a policy decision would also be desirable in educational reservations.

However, although reservations are theoretically the most pragmatic method of achieving substantive equality, they must be used cautiously and must necessarily be supplemented by other methods of laying the foundation for an egalitarian society; such as measures of agrarian reform, an improved public primary/secondary education system etc.

Therefore, rather than condemning reservations, Indians would be better served if they acknowledged their expediency in higher education, rectified lacunae in their implementation and worked towards making them successful – paradoxically, the path leading to eventual liberation from such measures.

REFERENCES

- Gupta, A. "Affirmative Action in Higher education in India and the US: A study in contrasts", *Research and Occasional Paper Series: CSHE*, June 2006, Available at http://cshe.berkely.edu/ (last accessed 10 July 2007).
- Ghosh, J., "Case for Caste-Based Quotas in Higher Education", *Economic and Political Weekly*, 17 June,2006.
- Chandoke, N., "Three Myths about Reservations", *Economic and Political Weekly*, 10 June 2006.
- Somnathan, R., "Assumptions and Arithmetic of Caste-Based Reservations", *Economic and Political Weekly*, June 17, 2006.

SOCIALISM AND THE NEW ECONOMIC ORDER: CONSTITUTIONAL PERSPECTIVES

Pratap Kumar and Aditya Swarup *

I. INTRODUCTION

India ordains itself to be a 'Sovereign Socialist Secular Democratic Republic'. The socialist agenda was a primary consideration in the minds of the Constitution makers as is evident from the Directive Principle of State Policy in Part IV of the Constitution which talks about socio-economic rights.

Socialism is a sacrosanct principle which is essential for the purpose of establishing an egalitarian society. This understanding assumes a lot of importance especially in the Indian socio-economic scenario which is ridden with gross inequalities. Although the word 'socialist' did not find mention in the original Preamble, the socialist agenda was looming large and the same was affirmed by the Constitution (Forty-Second Amendment) Act, 1976, by which the word 'socialist' was added to the Preamble thereby formally recognizing the constitutional goal.

The Indian Constitution makers opted for a path involving slow, regulated and planned growth as opposed to *a laissez-faire* economy.[1] This is evident from thoughts echoed by the Indian National Congress at its Avadi session before the Constitution was brought into force, where it had recognized and committed itself to the adoption of socialism as its goal.[2] Such an approach inevitably meant considerable State intervention in the functioning of the economy as a whole. The State had been asserting its socialist stand through various efforts at nationalization as is evidenced by a plethora of events in the 1970s and 1980s. However, with the advent of globalization, the State has sought to adopt a hands-off approach. In other words, the New Economic Policy being pursued aims at increased privatisation, more private sector industries, denationalization and decontrol of business and industry. The question that then arises is whether the economic policy of liberalization is violative of 'socialism', which has been held to be a basic feature of the Constitution. If it is so, even a constitutional amendment would not be adequate to sustain this economic policy because, as has been ruled in a number of cases, the basic features of the Constitution cannot be altered, damaged, destroyed or, in any way affected by any amendment.

---

* IV year and II year students respectively, B.A.,LL.B., NALSAR University of Law, Hyderabad

1 Constituent Assembly of India Debates, Vol. VII, 2 December 1948.

2 *ibid.*

This paper seeks to review the interplay between the constitutional goal of socialism and the presently pursued economic policy of privatization. It seeks to understand how the changing needs of the State and Society mould our understanding of the Constitution.

II. SOCIALISM: CONCEPT AND TREATMENT

The Preamble of the Constitution aims at making India a Sovereign, Socialist, Secular, Democratic Republic. The term 'socialist' indicates the incorporation of the philosophy of socialism in the Constitution.[3] In debates preceding the drafting of the constitution, KT Shah had proposed the inclusion of this word in the Preamble, but Pandit Jawaharlal Nehru had strongly opposed it because according to him, they had already provided for the substance of an economic democracy in the Constitution in the chapters on Fundamental Rights and Directive Principles of State Policy and that there was no need for the inclusion of additional terminology that was likely to be interpreted differently by different people.[4]

The Constitution does not define the term 'socialism'. However, it has been subject to scholastic and judicial interpretation. According to a former judge of the Supreme Court, Justice O. Chinnappa Reddy, Indian Socialism is about what the Constitution of India wants for the people of India, that is, the establishment of a welfare state. The Constitution makers, he says, were aware that mere adherence to an abstract democratic ideal was not enough and that it was necessary to secure to the people economic and social freedom in addition to political freedom. In addition, though the word 'Socialist' was introduced into the Preamble only by a later amendment of the Constitution, the fact that socialism has always been the goal is evident from the Directive Principles of State Policy and some of the Fundamental Rights.[5]

The Supreme Court has also made similar observations, stating that the philosophy of socialism existed in the Constitution even before the 42nd Amendment.[6] On one such

3 When the Constitution was framed, Dr. B. R. Ambedkar, declared that "there was 'complete absence' of one thing in Indian society - equality and that on the Economic Plane, we have a Society in which there are some who have immense wealth as against many who live in abject poverty." In India, "social" and "economic" justice cannot but mean justice to the weaker and the poorer sections of the society. Art. 38(2) now has specifically provided that the mandate is to "minimize the inequalities of income" and "eliminate inequalities in status". All these cannot leave any room for any doubt that the Directive Principles, which are declared in Article 37 to be "fundamental in the governance of the country", are socialist. Bhattacharjee, A. M., "The Constitutional dilemma – Liberal or socialist economy?" *The Hindu Business Line*, January 25, 2002.

4 Constituent Assembly of India Debates, Vol. VII, 15 November 1948.

5 Interview with former Justice O. Chinnappa Reddy on 09-08-06; on record with the authors of this paper.

6 *Akadasi Padhan v. State of Orissa*, AIR 1963 SC 1047.

occasion, it opined that "the mandate for a social order and securing the welfare of the people and the directions prescribed in Article 39[7] are nothing but the essential qualities of socialism in our Constitution."[8] In this sense, socialism is more of an economic doctrine that the Constitution prescribes for the State. The amendment, it held, was only to emphasize the need for ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends.[9] Further, it has been held that the word 'socialism' is inextricably related to state ownership and social welfare of the people and that nationalisation is a means of securing the goals enshrined in the Constitution and the social, economic and political rights of the people.[10]

What then is the position of 'socialism' in the present legal system? Does one look at it as a mere directive that is non-justiciable in nature or something that is essential in the making of the economic policy of the State? While socialism did exist in the Constitution before 1976, it gained in significance after its inclusion in the Preamble. The objectives specified in the Preamble constitute a part of the basic structure of our Constitution.[11] As a result, such principles and objectives cannot be amended under Article 368 of the Indian Constitution.[12] This further affirms the notion that the principle of socialism enshrined in our constitution is extremely significant and cannot be abrogated.

However, the point to be noted is that the social and economic goals enshrined in Part

---

7 Article 39 of the Constitution lays down, that the State shall, in particular, direct its policy towards securing - (a) that the citizens, men and women equally, have the right to an adequate means of livelihood, (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good, (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment, (d) that there is equal pay for equal work for both men and women, (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength, (f) the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

8 *Srinivasa v. State of Karnataka*, AIR 1987 SC 1518. In *Dharwad Employees Union v. State*, (1990) 2 SCC 396, the Court held that the right to equal pay for equal work enshrined in article 39 gives essence to the Constitutional goal of a socialist economy. It also stated that Article 39 in a sense prescribes directions for the achievement of a socialist ideal.

9 *Sanjeeva Coke Manufacturing Co. v. Bharat Coking Coal Ltd*, AIR 1983 SC 239.

10 *Akadasi Padhan v. State of Orissa*, AIR 1963 SC 1047.

11 *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461, *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299, *Minerva Mills v. Union of India*, AIR 1980 SC 1789. That socialism is a part of the basic structure of the Constitution has been acknowledged by the Supreme Court in the case of *Sanjeeva Coke Manufacturing v. Bharat Coking Coal ltd.*, AIR 1983 SC 239, where the Court opined that 'socialism' is no doubt a part of the basic structure of our constitution and acts as a fundamental directive in the policy of the State. It also affirmed that the principle of nationalization in Article 39 (b) echoes the notion of socialism in the Constitution.

12 Article 368, Constitution of India. See also, Sethi, Anuranjan "Basic Structure Doctrine: Some Reflections", October 25, 2005. Available at SSRN: http://ssrn.com/abstract=835165, Last visited: 18/06/2007.

IV are non-justiciable in nature. This means that, unlike the Fundamental Rights, these directives cannot be enforced in a court of law. Although there are many cases that have harmonized the Directive Principles of State Policy with the Fundamental Rights; by their very nature, the Directive Principles are only meant to act as mere directives that the State may consider in the formulation of a policy.[13] On the other hand, according to Article 13 (2), a law that violates any of the Rights mentioned in Part III of the Constitution is liable to be struck down. So, in theory, unless socialism can be inferred from Part III, State action that is against the goal of socialism is valid if no rights in Part III are violated since the Directive Principles are non-justiciable.

The issue of socialism vis-à-vis the State's policy of privatization was considered by the Supreme Court in the case of *Excel Wear v. Union of India*[14]. The Court, by adopting a *via media* approach, interpreted Article 39 in such a manner as to strike a balance between the competing claims of nationalisation and state ownership of industries on the one hand and privatization on the other. The court stated,

> *"The concept of socialism or a socialist state has undergone changes from time to time, from country to country and from thinkers to thinkers. But some basic concepts still hold the field. The amendment made by the Legislature in Article 19(6) shows that, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public."*[15]

The Court took note of the reality that the private sector occupied an overwhelmingly large sector of India's economic structure. It observed nationalization to be necessary ingredient in the economic development of the country as it has the objective of a public control over resources and greater accountability without a profit motive so that the economic inequality is reduced to the minimum and the goal of socialism is furthered.

Further, the underlying idea behind the issue of socialism was again considered in *D.S. Nakara and Ors. v. Union of India*[16]. In this case, the court was of the opinion that the basic framework of socialism is to provide a decent standard of life and security to the working people. The Court also underlined the role of the state in achieving the goal of socialism. It noted that the State shall direct its efforts towards equitable distribution of income and maximisation of production, which are the basic objects of

13 *Waman Rao v. Union of India*, AIR 1981 SC 271.
14 AIR 1979 SC 36.
15 *ibid*, Paras 24 and 25.
16 AIR 1983 SC 130.

socialism, to solve the problems of unemployment, low income and mass poverty and to bring about a significant improvement in the national standard of living. The same line of thought is also reflected in the Supreme Court's decision in *State of Karnataka v. Shri Ranganatha Reddy*[17]. In this case, the court considering the issue of nationalization of contract carriages, opined that the aim of socialism is the distribution of the material resources of the community in such a way as to subserve the common good.[18]

A common thread running through the above judgments is that the courts seek to underline the importance of deliberate and purposive action on the part of the State. However, the point to be noted is that in all the above cases, the violation of the goal of socialism in the Constitution was read as a violation of the Fundamental Rights enshrined in Part III of the Constitution. During the 1970s and 1980s when the State pursued a policy of nationalization, socialist ideals enshrined in Part IV were used to validate such State action.[19] However, the absence of socialism in Part III of the Constitution and the reluctance of the courts to interfere in economic policy matters has facilitated the government to pursue the goals of disinvestment and privatization by abrogating the socialist values underlying the Constitution.[20] This dichotomy is further pronounced by the recent Supreme Court judgment in *M. Nagaraj v. Union of India*[21], where the Court noted that constitutional principles can qualify as essential features only if it can be established that the said principle is a part of the constitutional law binding the legislature. In this context, it noted that federalism, secularism, reasonableness, socialism etc. were beyond the words of a particular provision. The Court further stated that these are systematic and structural principles underlying and connecting various provisions of the Constitution.[22]

In the light of the above observation, it can be argued that socialism is merely enshrined in the Directive Principles and is not binding on the legislature; and thus is not justiciable in a court of law. Thus, it is pertinent to look at the concept of socialism which arguably is one of the most essential principles of the Constitution, but in practice remains merely a directive that the State is not obliged to follow in an era of liberalization.

Keeping the above as backdrop, the issue which actually forms the focus of this paper

17 AIR 1978 SC 215.

18 The principle embodied in Article 39(b) of the Constitution endeavours to bring about fair distribution of material resources. It gives full play to the concept of distributive justice and fulfils the basic purpose of re-structuring the economic order. Article 39(b), therefore, has a social mission.

19 *Excel Wear v. Union of India*, AIR 1979 SC 36, *D.S. Nakara v. Union of India*, AIR 1983 SC 130.

20 *All India ITDC Worker's Union v. ITDC Ltd.*, AIR 2007 SC 301, *BALCO Employees Union v. Union of India*, 2002 (2) SCC 333.

21 AIR 2007 SC 71.

22 *ibid*, Para 20.

is the seeming conflict between the concept of socialism *vis-à-vis* the economic policy of liberalization. This is an interesting question and before one deliberates on it, it is necessary for us to get a basic idea of the issues of liberalization, separation of powers and the extent of the power of judicial review because it is the latter that actually has the force to render the policy void as being violative of a constitutional prescription which is also a preambular goal.

III. CONCEPT OF LIBERALIZATION

The word "Liberalization" derives from liberty. It believes in the attainment of welfare goals with minimum external constraints[23]. Society is there to serve the individual and not the other way round as communism or socialism try to make out. In a sense, it refers to a relaxation in government restrictions in areas of social or economic policy.[24] Such policy seeks to secure the interests of private players and does not incorporate the interests of the poorer sections of society.[25] In an era where the general notion is that State industries are inefficient, loss-making and riddled with bureaucratic hassles, disinvestment and liberalization seem to be a ready answer. Liberalization was a solution to the removal of red-tapism and corruption that most industries are accused of in India.

Since 1991, India has sought to push forward economic growth through the practice of liberalization as an ideal. While this has been the attitude of the government, it is interesting to see how the courts have dealt with this concept. Justice AR Lakshmanan in *State of Punjab v. Modern Breweries*[26] stated that globalization has brought radical change in the economic and social landscape of this Country and that the policy of liberalization has a significant impact on it. The Judge also noted that it had a significant impact on aspects of Constitutionalism and the Constitution though he did not elucidate on the same.[27] In the decade since liberalization, the judiciary seems to have adapted itself to the values which are espoused by the dominant sections of society.[28] More recently, the Court in *Ashoka Smokeless v. Union of India*[29], held that policies formed to

23 Greenstone, JD, "Against Simplicity: The Cultural Dimensions of the Constitution", (1988) 55 *U. Chi. L. Rev.* 428.

24 *ibid.*

25 While this was the Classical view of liberalism as propounded by Adam Smith, later writers emphasize that one of the essentials of a liberalist economy is the goal of community good. This has to be read in light of Constitutional principles. See West, RL, "Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision", (1985) 46 *U. Pitt. L. Rev.* 673.

26 (2004) 11 SCC 26.

27 *ibid.*

28 In *Secretary HSEB v. Suresh,* AIR 1999 SC 1160, the Court held that in as much as liberalism is a part of Indian economic policy, social justice must not be compromised. Aspects of the Liberalist policy may also be seen in the cases of *BALCO Employees Union v. Union of India*, AIR 2002 SC 350 and *All India ITDC Worker's Union v. ITDC Ltd.*, AIR 2007 SC 301.

29 *Ashoka Smokeless v. Union of India*, (2007) 2 SCC 640.

meet the liberalization demands of the country in respect of selling coal would be valid. In 1996, the then Chief Justice of the Supreme Court in a lecture stated that "liberalization was consistent with socialism because equitable distribution first required wealth creation".[30] While the above statement seems surprising, the fact remains that in a series of cases[31], the Courts have stated that liberal goals are not violative of Part III and matters of economic policy are not subject to judicial review.

To explore this issue in detail, it is now pertinent to look at judicial attitudes towards the review of economic policy.

IV. JUDICIAL REVIEW *VIS-À-VIS* POLICY MATTERS

It is common knowledge that courts are hesitant to rule on policy issues. In fact, courts refuse to intervene in such matters lest they are accused of transgressing the boundaries within which they have to function.[32] There have been a lot of cases which have looked into this issue.[33] On a perusal of these cases, it can be aptly summarized that the courts would interfere with an administrative policy decision only if it is arbitrary, discriminatory, and mala fide or actuated by bias.[34] There is a plethora of case law and literature which go on to reinforce the ratio of the Court in this case.

It may be observed that judicial review of policy matters is concerned not with the ultimate decision or the merits of the case but the manner in which the decision has been made. It is not for the court to substitute one policy for another and substitute its own judgment for that of the administrative body, or it will be guilty of usurping power. The decision making process falls within the domain of judicial scrutiny. However, the Supreme Court has quashed policy decisions on the grounds of

---

30 Karat, Prakash, "The Supreme Court in Liberalised Times", available at http://www.countercurrents.org/hr-karat090803.htm, last visited: 1st April 2007.

31 *Fertilizer Corporation, Kamnagar v. Union of India*, (1981) 1 SCC 568, *BALCO Employees Union v. Union of India*, AIR 2002 SC 350, *All India ITDC Worker's Union v. ITDC Ltd.*, AIR 2007 SC 301. *Centre for Public Interest Litigation v. Union of India*, AIR 2003 SC 3277.

32 "Judicial review is a great weapon in the hand of the judges; but the judges must observe the Constitutional limits set by the Parliamentary system upon the exercise of this beneficial power"- Lord Scarman in *Nottinghamshire County Council v. Secretary of State for the Environment*, (1986) 1 All ER 199.

33 *Narmada Bachao Andolan v. Union of India*, (2000) 10 SSC 664 where it was held thus: "It is now well-settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision." Similar observations were also made in *BALCO Employees Union v. Union of India*, AIR 2002 SC 350 and *All India ITDC Worker's Union v. ITDC Ltd.*, AIR 2007 SC 301.

34 *M.P. Oil Extraction v. State of M.P.*, (1997) 7 SCC 592. In this case, it was held that the administrative bodies are entitled to pragmatic adjustments which may be called for by the particular circumstances. Therefore, for example, the courts have no authority to strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, logical, or wiser. Hence, the court can interfere only when the policy decision is arbitrary, discriminatory or mala fide.

unreasonableness[35] and arbitrariness in various cases demonstrating that it all depends on the facts and circumstances of each case.

It is worthwhile then to question the wisdom of non-interference when the consequences of a policy decision are potentially disastrous. Policy decisions may occasionally operate as a smoke-screen claiming immunity from violation of rights. It is a matter for the executive to decide the quantum and the shape of the policies and normally policy matters are not interfered with through writs.

The above attitude of the courts where it has refused to interfere in an economic policy is clearly illustrated in the case of *BALCO Employees Union v. Union of India*[36], wherein the Court held that the disinvestment policy of the Government cannot be challenged. Stating that the executive is the best judge in matters of economic policy, the court maintained that it would look into matters of economic policy only in case of a dereliction of constitutional or statutory obligations on part of the Government.[37] It further stated that Courts are not intended to conduct the administration of the country and that it should be highly reluctant in entertaining policy matters by way of a public interest litigation. In essence, the Court gave way to a policy of liberalization irrespective of whether it is against a constitutional mandate of socialism. In fact, the issue of socialism was not even considered by the Court in the case.[38] In this manner, judicial sanction has been given to a policy of liberalisation in recent times.

The issue that arises in the light of the above is whether the constitutional goal of socialism has been discarded and replaced with the economic policy of liberalisation. It is commonplace that polices that affect majority of the people in the country should be in tune with the democratic and socialist ideals that govern the very functioning and administration of the country. In the light of the above, the question that arises is whether the court can declare such a policy unconstitutional on the ground that the State is abdicating its basic duty of trying to further the constitutional goals.

---

35 The Wednesbury Principle of unreasonableness; *Associated Provincial Picture House Ltd., v. Wednesbury Corporation*, (1948) 1 KB 223.

36 AIR 2002 SC 350.

37 The Court cited *Narmada Bachao Andolan v. Union of India*, (2000) 10 SSC 664, where it was held that the Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.

38 The Court in *BALCO Employees Union v. Union of India*, AIR 2002 SC 350, also held that: "In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the Company is conducting its business, inasmuch as its policy decision may have an impact on the workers rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law."

There is another dichotomy in this matter. As mentioned earlier, the Court in *M. Nagaraj v. Union of India*[39] stated that for something to be a part of the basic structure it has to be shown to be binding on the legislature to follow. The Courts have specifically stated in *S.R. Bommai v. Union of India*[40] that Socialism is a part of this basic structure but on the other hand, a series of judicial dicta have ruled that socialism is not binding on the legislature. A lot of confusion then has arisen as to the place of socialism in the Constitution.

It is also noticed that this dichotomy may be used as a double edged sword. The goal of socialism embodied in the Constitution and Article 39(b) is used as justification by the Government to further a policy of nationalization and, on the other hand, it also becomes a convenient tool to pursue a policy of liberalization on the ground that the very same constitutional principle is not biding on the legislature. The latter approach is furthered by the courts refusing to interfere in a policy matter.

It is argued, in this background, that a balance needs to be struck to deal with the dichotomy; otherwise, the goal of socialism would acquire the nature of becoming a political tool to further specific policies of the Government. The solution does not lie in the judiciary invalidating an economic policy as being unconstitutional because it violates one of the fundamental Constitutional principles. It is not necessary to take an extreme view of the situation; it is essential to strike a balance. Considering the fact that efforts at nationalization in India have not been able to achieve the goals with which they had actually been introduced, it is after a series of continuous failures that the Indian government has found privatization to be the tool for achieving the required economic growth. Such a policy, it is submitted, is not antithetical to the concept of socialism. Socialism need not mean only state ownership and control of industries meant to raise the standard of living of the people. If the state feels that privatization, as a measure to boost economic growth and end red-tapism and corruption, will work better in a particular situation as opposed to nationalization, then in the larger interests of society, the move may be sound and rational. This then does not mean that the constitutional goal is demolished. The State, ultimately, has to work in accordance with the changing needs of society.

One of the possible mechanisms that could be adopted would be privatization with greater state control. Here, state control is not intended to mean ownership, but more in terms of governing the functioning of the privatized industry. For example, the state can formulate mandatory guidelines for the continuance of the pension schemes, security

39 AIR 2007 SC 71.
40 (1994) 3 SCC 1

of tenure of workers, avenues for growth and the like as part of the process of privatisation. The objective behind pursuing such a role is to see that the workers' rights are not jeopardized in any way; in other words, the workers should be entitled, as far as possible, to the same rights and entitlements that were available to them earlier under the State employer.

Furthermore, the State should be pro-active in its involvement with the industry post-privatization. This requires the State to take all necessary measures to ensure compliance on part of the acquirer and also carry out periodical checks on the activities of the privatised company. The State should also mandate that the acquirer submit detailed reports of the working and functioning of the industry at regular intervals. The purpose of this exercise is not only to make the State and the acquirer accountable for their acts but also instill a sense of confidence in the minds of the workers and the public at large. In this way, the state will have a hold on the functioning of the privatised company and may be able to achieve what it could not have directly by taking over the industries by way of nationalisation.

Thus, in the light of the above, it is argued that, in following a policy of privatisation, the underlying principles of socialism should not be compromised in a manner which detrimentally affects the interests of the stakeholders, in this case, being the employees. A fine balance has to be struck between the constitutional goal of socialism, the policy of nationalisation and privatisation. The state should, at each instance, sift and weigh out the pros and cons of each policy and then come to the most plausible solution. The Constitution is a living document that has to be interpreted according to the needs of the time. This is because, if the State cannot deliver the goods, then other constitutional goals will themselves be derogated. What is being foregrounded is the fact that adopting a policy of privatisation does not mean that the State is making a mockery of socialism. Socialism, in the Indian context, has various defining characteristics and the same can be modified to meet the needs of society.

REFERENCES

- Constituent Assembly of India Debates Bhattacharjee, A. M., "The Constitutional dilemma – Liberal or socialist economy?" *The Hindu Business Line*, January 25, 2002
- Greenstone, JD, "Against Simplicity: The Cultural Dimensions of the Constitution", (1988) 55 *U. Chi. L. Rev.* 428
- West, RL, "Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision", (1985) 46 *U. Pitt. L. Rev.* 673
- Karat, Prakash, "The Supreme Court in Liberalised Times", available at http://www.countercurrents.org/hr-karat090803.htm, last visited: 1st April 2007

ENVIRONMENTAL IMPACT ASSESSMENT: A REVIEW

*Shivaji Bhattacharya**

I. INTRODUCTION

With countries around the world running the rat race of development, the most tempting way to the finish line is through industrialisation. While governments of most developing countries around the world harp on industrialisation, somewhere along the way, these governments seem to have forgotten for whom they are developing the country. Besides industrialisation, there is a lot more to develop for the benefit of humans, significant examples being access to basic human rights and the protection of the environment. Using industrialisation as a tool for development can only give rise to incomplete and unsustainable development, without focusing on the people for whom it is meant.[1]

Although provisions may exist in law whereby such aspects of development are recognized, it remains to be seen as to whether these are adequate. In the process of industrialisation, there is an enormous impact on the environment, which in most cases, is neither accounted for nor taken into consideration. However, there are laws in place which follow a preventive approach by taking *a priori* cognizance of the impact industrial projects have on the environment. These provisions are called Environmental Impact Assessments (EIA).

It is possible to define Environmental Impact Assessment as an activity that aims at establishing quantitative values for parameters which indicate the quality of environment before, during, and after the proposed activities.[2] It is submitted that though such an endeavour appears to be a step in the right direction, there are more complexities that arise in practice than those that may be cursorily identified.

In the eyes of those seeking industrialisation, EIAs are considered to be procedural hurdles to be overcome in order to proceed with building industries. With industrialisation being the order of the day, EIAs are not taken seriously and conducted in very short periods of time, so as to give the green signal to projects - blind to the fact

---

* III Year Student, B.A.,LL.B. (Hons.), NALSAR University of Law, Hyderabad

1 "India's recent high growth accompanying the process of industrialisation answers unambiguously the question as to who is in charge of this process....In this context we are repeatedly reminded that industrialisation has its costs, but it is conveniently left unsaid that the cost must be borne by those who are least capable of bearing it, the poor and the most marginalised sections of the population."; Bhaduri A., "Alternative in Industrialisation", http://sanhati.com/wp-content/uploads/2007/05/alternatives_in_industrialisation_amit_bhaduri2.pdf as last accessed on 10th July, 2007.

2 Leelakirshnan, P., "Environmental Impact Assessments: Legal Dimensions," (1992) 34 *J.I.L.I.*, 543.

that these projects may cause untold environmental damage.[3]

Besides environmental damage, these projects also affect human life in and around the project area. Ignoring these collateral effects can only lead to economic loss and a rise in safety and health concerns for the affected groups. Improper cognizance of these issues exposes major lacunae in these assessments.

In this paper, the author shall try and prove that these laws are not correctly implemented, and more importantly, how EIAs are normatively deficient with regard to the concerns of the affected members of society as it denies them the right of participation in the assessment procedure.

The paper has been divided into four segments. The first part deals with the procedural aspects of Environmental Impact Assessments and its inception in the country. The second part is concerned with the problems of implementation that plague EIAs. The next segment revolves around how the EIA structure is perhaps normatively deficient and comparisons are drawn with the impact assessment structures of other developing countries. The last part serves as a conclusion to the paper.

II. HISTORY OF EIA AND ITS PROCEDURAL ASPECTS

To begin with, it is best that we understand the origins of the concept of EIAs and what procedures are to be followed so as to get a basic understanding before criticizing it.

The concept of environment impact assessment started in the U.S.A., where the national Environment Protection Agency incorporated it under the National Environmental Policy Act (NEPA) enacted in 1969. In India, EIAs were introduced in 1980 when large industrial projects were made to undergo clearances from the environmental angle. Five years later, in the Guidelines for Environmental Assessment of River Valley Projects, the Department of Environment identified special studies for conducting environmental impact assessments.

In 1994 the first EIA Notification was issued.[4] This notification was heavily influenced by a 1988 conference titled the *International Conference on Environmental Impact Analysis for the Developing Countries* held at New Delhi. The conference circulated the idea that

---

3 The rationale behind this argument emerges from the fact that environment protection is seen as a 'cost' to most industries. Therefore industrialists, banks, law firms, etc. try their best to identify means to reduce costs in environment protection. See also, Marcks, Eric, "Avoiding Liability for Human Rights Violation in Project Finance", (2001) *Energy L.J.* 301.

4 Dubey, S., "EIA-The Foundations of Failure", http://www.indiatogether.org/2006/mar/env-eiafail.htm as last accessed on 4th April, 2006.

when assessing impacts of new industries, social costs also have to be taken into account.[5] The author will now focus on the procedure for the implementation of impact assessments in India and then examine the procedures followed in other developing countries.

1. Procedure for Implementation

Environmental impact assessments are conducted on the basis of technical and scientific information and data received and taken from the site of the industrial project. The procedure followed while conducting such impact assessments varies, depending upon local laws and practices. However, there is a generic format based on which such evaluations are carried out:[6]

- Project Definition- A project identification and definition exercise is undertaken, and based on this, an EIA clearance is sought to consider the feasibility of the project.
- Screening- At this stage, it is decided whether or not an EIA is to be conducted. If required, then the subsequent steps follow.
- Scoping- At this stage, a study is initiated by which areas of concern and impacts are identified. Agencies and representatives concerned with the project are consulted at this stage.
- Data Collection- Data is collected from primary and secondary sources to study the above areas of concern and impacts.
- Identification of Impacts- This is the most crucial stage where impacts of the project are deduced.
- Management Plan- With the identification of the impacts, mitigation measures in the form of modified basic alternatives have to be adopted in order to minimize adverse impacts.
- Publication of Reports- A complete EIA report is published, which is available to the public for giving inputs.
- Formal Approval- Thereafter, with the EIA report being approved, the project proposal is given the green signal to proceed with the project, subject to the conditions stated in the report.
- Monitoring and Follow-up- To ensure that the conditions and compliance with the provisions is being carried out, these projects are monitored. Besides, such monitoring is also conducted to gauge the accuracy of the predictions under the EIA.

---

5 Ibid.

6 "Environmental Impact Assessment- The Procedure", http://coe.mse.ac.in/eiaproc.asp as last accessed on 9th July, 2007.

In India, the entire process is to be completed within a period of 90 days from the receipt of requisite documents to conduct the assessment. The decision shall be conveyed after 30 days of the completion of the assessment.[7]

III. IMPLEMENTATIONAL FLAWS

With the State anxiously pushing for industrialisation, environmental impact assessments, rather than being considered a boon, are considered more of a hindrance to industrialisation. A major problem with EIAs is that there is a lack of baseline information, and even if information exists, it is either not in a useful form or reliable.[8] This not only delays the process of assessment of the impact of the proposed project but also increases the cost of conducting such assessments. Such problems only add to the lack of enthusiasm of the Ministry of Environment and Forests (MoEF) to conduct these assessments as they do the bare minimum to study the impacts of these proposed industrial projects.

This is evident from the fact that the original notification proposed that the comprehensive EIA be carried out from information gathered over a period of a year. However, subsequently, the MoEF amended this requirement, stating that a comprehensive EIA was not required for the clearance of such projects, but a diluted assessment where only data compiled over a single season would be adequate to compile a Rapid EIA. Further, a detailed report was not required to pass these clearances, but a summary report would be considered adequate.[9] There is also the severely criticized notion of conditional clearance,[10] which allows approval for most major projects despite the absence of ecological clearance.

Not only is this a very short term and blind way of looking at development, it also does not allow for equitable development for all sections of society. By paying no heed to the ecological impact of these projects, there is also a failure to recognize the impact these projects have on people who live in proximity of these projects or who are directly affected by the negative impacts on the environment in which they live in.

---

7 Clause 3 (5) of Schedule II of the Environmental Impact Assessment Notification, 1994 states-" The assessment shall be completed within a period of ninety days from receipt of the requisite documents and data from the applicant and decision conveyed within thirty days thereafter."

8 Chong C.K., Et al., "Review of Literature on Values of Inland Capture Fisheries and Dams Construction at the Lower Mekong and Ganga Basins", http://www.iwmi.cgiar.org/assessment/files_new/research_projects/Paper_Chong%20et%al_ICLARM.pdf as last accessed on 9th July, 2007.

9 Divan, S. and Rosencranz, A., *Environmental Law and Policy in India* (New Delhi: Oxford University Press, 2001), 418.

10 Conditional clearance is a concept whereby a project is given the green signal to continue with the project, provided that adequate measures are undertaken in the future to mitigate possible environmental damage. See also, XI Parliamentary Debates, Lok Sabha Session IV (Budget), 1997, http://www.parliamentofindia.nic.in/lsdeb/ls11/ses4/2712059701.htm as last accessed on 10th July, 2007.

An appropriate illustration would be the case of the Sardar Sarovar Project (SSP) on the Narmada River. The Sardar Sarovar Project is the biggest and most ambitious river valley project to date and is also by far the most controversial. The project involves the construction of a dam approximately 111 metres high, creating a reservoir that will submerge lands in the three states of Gujrat, Maharashtra and Madhya Pradesh.[11] The dam will submerge a stupendous 37,000 hectares of land in these three states, and divert 9.5 million acre-feet of water from the Narmada River into a canal and irrigation system and deliver drinking water to drought-prone areas of Gujarat.[12] The aggregate length of the distribution network is 75,000 km.[13] It will require approximately 80,000 hectares of land, more than twice as much land as the submergence area.[14] Since the project covers such a large area, it will affect an enormous number of people. The worst hit segment of people will be the tribals in the area. More than 100,000 people from over 245 villages will be displaced by the project as their lands will be submerged. An additional 140,000 people will be displaced by the water distribution system.[15] Another significant impact will be the absolute destruction of the ecological system of the Narmada River, destroying the habitat of many species of animals and migratory birds.[16]

Despite the potential of such an enormous negative impact, there has been no comprehensive EIA with respect to the Sardar Sarovar Project. Despite the fact that guidelines have been issued by the Central Water Commission (CWC) since 1975, that insist that all major hydro-electric and irrigation projects are to be subject to comprehensive EIAs, not one project in the last 31 years has followed the guidelines.[17] A project of such magnitude has been granted a conditional clearance to go ahead with the project, without addressing the critical environmental issues of the project. If the country's largest river valley project, which will displace 240,000 people or more from their homes,[18] for which they will not be adequately compensated and will leave them without a home or livelihood, is not subject to a comprehensive EIA, then it can

---

11 "Dams, Rivers and People", http://www.sandrp.in/drp/april_may2006.pdf as last accessed on 10th July, 2007.

12 Ibid.

13 "Dams, Rivers and People", http://www.sandrp.in/drp/april_may2006.pdf as last accessed on 10th July, 2007. See also Morse, B. Et al., "Sardar Sarovar: The Report of the Independent Review", (1992) *Resource Futures International.*

14 Sadler, B., Et al., "Environmental and Social Impact Assessment for Large Dams", http://www.dams.org/docs/kbase/thematic/tr52main.pdf. As last accessed on 2nd April, 2006.

15 Ibid.

16 Sadler, B., et al., "Environmental and Social Impact Assessment for Large Dams", http://www.dams.org/docs/kbase/thematic/tr52main.pdf. As last accessed on 2nd April, 2006.

17 Kothari, A., et al., "The Lack of an Environmental Impact Assessment", http://www.narmada.org/ENV/eia1.html as last accessed on 1st April, 2006.

18 Dubey, S., "EIA-The Foundations of Failure", http://www.indiatogether.org/2006/mar/env-eiafail.htm. As last accessed on 31st March, 2006.

safely be assumed that there is something gravely wrong with the implementation of EIAs in the country.

To problematise the issue further, let us see which section of the population benefits from these industrial projects. Since the people living in the vicinity of the project area do not receive much benefit, it is pertinent to note who the beneficiaries are. These projects see to be made for people living in urban areas and faraway agricultural lands who derive benefit from energy generation and the water diversion.

A suitable example of this is the case of the Nagarjuna Sagar Dam in Andhra Pradesh, where irrigational facilities became available only after 40 long years![19] Countless people were rendered homeless and impoverished by the construction of the dam, whose objective was, for all practical purposes, never fulfilled.

It is the rural poor who are inevitably the worst hit of all the people affected. Having no property of their own, traditionally these communities depend upon open access resources[20] to eke out an existence for themselves.[21] These industrial projects pollute the environment and upset the ecological balance- thereby causing immense harm to these open access resources, rendering them unusable. The net result is the denial of basic subsistence rights to the people dependent on these properties. Alongside displacement, affected groups are left without their traditional means of survival.

The Government's record in attempting to rehabilitate these people has been abysmal. Of all the people displaced because of dams in Orissa and Andhra Pradesh, only 27.69% and 25.85%, respectively have been rehabilitated.[22] With the government unable to provide for the basic entitlements of the displaced people, the very basis for dams to be considered as 'the temples of modern India' is put under very serious scrutiny.

IV. NORMATIVE DEFICIENCIES OF EIA

However, the implementation drawbacks of environmental impact assessments are only one side of the story. How far do the people who are directly affected by the impacts of industrial projects have a right of participation in these assessments programs?

---

19 Bandopadhyay, J., "Draft Report on Policy Dialogue on Dams and Development," www.iimcal.ac.in/centers/cdep/Final%20ReportD_D.doc. As last accessed on 28th March, 2006.

20 It is possible to define the term open access resources as natural resources accessible to anyone, with no restriction on their use; http://research.amnh.org/biodiversity/symposia/archives/seascapes/glossry.html as last accessed on 10th July, 2007.

21 For further reading refer to Hardin, Gareth, "Tragedy of the Commons", (1968) Vol. 162, No. 3859, *Science*, 1243.

22 Bandopadhyay, J., "Draft Report on Policy Dialogue on Dams and Development," www.iimcal.ac.in/centers/cdep/Final%20ReportD_D.doc. As last accessed on 28th March, 2006.

1. Public Participation and EIA: Perspectives of Developing Countries

Prior to the advent of environmental impact assessments, there was a tendency to disregard social interests, leaving displacement and other relevant impacts to be dealt with by government institutions in charge of social assistance, public services and natural resource protection.[23]

The concept of public participation was introduced into the EIA process to ensure communication between the EIA assessment team and the individuals likely to be affected by the project. The goals sought to be achieved by way of public participation revolved around the promotion of public understanding and acceptance by minimizing perceived impacts of the project through education and open discussion. In return, public feedback could be used as a constructive input in improving the project design. It therefore stressed on the importance of communication between the affected communities and the project planners.[24]

In developed countries like the United States of America, legislation like the National Environmental Policy Act, 1969 ensured that active public involvement was the main feature of the environmental decision making process. This has evolved into the most powerful weapon in the hands of the public against any environmental assault.[25]

While it has become a mandatory component of EIAs for most projects supported by the developed countries, the picture is not quite so rosy in developing or third world countries. The problem that arises with public participation is the assumption of an educated public. This fatal assumption made by developed countries causes impact assessment reports to be made in such a manner that it caters only to the educated sections of society.[26]

In third world countries, in most circumstances, the affected people are uneducated or insufficiently educated to engage in efficacious dialogue with either the impact assessors or the people responsible with the project. The developed countries' notions of public

---

23 Verocai, I., "Environmental and Social Impact Assessment for Large Dams -Thematic Review from the Point of View of Developing Countries", http://www.dams.org/docs/kbase/contrib/ins221.pdf. As last accessed on 9th March, 2006.

24 "Asian Development Bank: EIA for Developing Countries," 35, http://www.adb.org/Documents/Books/Environment_Impact/default.asp As last accessed on 3rd April, 2007.

25 Leelakirshnan, P., "Environmental Impact Assessments: Legal Dimensions," (1992) 34 *J.I.L.I.*, 545.

26 Verocai, I., "Environmental and Social Impact Assessment for Large Dams -Thematic Review from the Point of View of Developing Countries", http://www.dams.org/docs/kbase/contrib/ins221.pdf. As last accessed on 9th March, 2006.

participation can never succeed in such a scenario.

An apt example of this could be the case of the Bangladesh floods of 1988. With the aid of development agencies, the Government initiated the Flood Action Plan (FAP) whereby extensive embankments were to be created alongside the rivers for flood control.[27] This involved extensive land usage in one of the most densely populated countries of the world. The EIAs that were conducted under the scheme of the FAP came under heavy flak because of the lack of public participation. As a consequence, the locals did not fully understand why they had to give up ancestral farmlands and become unemployed, or why squatters were being asked to leave and made homeless.[28]

This problem has been evident in India from the very beginning. In the conference which initiated EIAs into India, the discussion with regard to public participation was foregrounded, however there was no representation of the interest groups themselves at the conference.[29] This has unfortunately come to characterize the treatment of public participation in EIAs.

A pertinent illustration is the case of the Sethusamudram ship canal along the eastern coast of India. The Central Government passed this proposal, without adhering to any of the norms of public participation or consultation, knowing that the project would affect the lives of over 6,00,000 fishermen living along the coast.[30]

In India, the inclusion of public participation into Environmental Impact Assessments was extremely inadequate. According to the procedure laid down in the 1994 EIA Notification, public participation came into the picture only at the stage of the publication of the report. The public was allowed to access and give opinions on the report. Such opinion could be accepted or ignored by the people assessing the prospective industrial project, at their discretion. The procedure did not allow public participation to be initiated in the phases of scoping where the identifications of impacts are carried out.

---

27 Selim, S., "Public Participation during Environmental Impact Assessment Studies," http://www.alochona.org/magazine/2002/february/TOTM6.htm As last accessed on 3rd April, 2007.

28 Ibid..

29 Dubey, S., "EIA-The Foundations of Failure", http://www.indiatogether.org/2006/mar/env-eiafail.htm as last accessed on 4th April, 2006.

30 Campaign for Environmental Justice in India: Why was a Death Certificate filed on the Ministry of Environment and Forests?", http://www.phmovement.org/en/node/78. As last accessed on 3rd April, 2006.

31 2.2 of Appendix IV of the EIA Notification, 2006 states- "The Applicant shall enclose with the letter of request, at least 10 hard copies and an equivalent number of soft (electronic) copies of the draft EIA Report with the generic structure given in Appendix III including the Summary Environment Impact Assessment report in English and in the local language, prepared strictly in accordance with the Terms of Reference communicated after Scoping (Stage-2). Simultaneously the applicant shall arrange to forward copies, one hard and one soft, of

However, with the advent of the new EIA Notification in 2006, the scope of public participation evolved considerably for the better. As per Appendix IV of the Notification, the process of public participation was to be undertaken at the stage of scoping.[31] The entire process entails a relatively wider scope for any member of the community to seek clarifications from the assessors and the assessees.

This may be contrasted with the Environmental Impact Assessments carried out in countries like Brazil where public participation is an essential to the entire process. A negotiation forum consisting of the developer, members of the local municipalities, representatives of the state and community representatives discuss the impacts together and by means of negotiation come to a consensus. This sort of public participation ensures the right to participate and guarantees that the concerns of the community are taken into consideration.[32]

Like Brazil, high priority is given to public participation in impact assessments conducted in the Philippines. After fifteen years of EIA experience, the Philippines has recognized that most failures can be traced to a lack of communication and an inadequate regard for social, cultural and political factors of the affected people. Therefore, the EIA process now includes participation as a mandatory component. It also entails that such consultations should be initiated at the earliest stage possible and the inputs that are provided have to be incorporated into the project plan as a compulsory feature.[33]

If one is to compare the EIA structures adopted in countries like Brazil to that of India, it can be observed that even with the new notification, India remains substantially behind. The public participation measures adopted in Brazil allow for indigenous people to negotiate with the representatives of the State over matters of grave importance to them.[34] This reflects proper notions of public participation, where the interest groups truly have a say, unlike India, where public participation merely involves the seeking of clarifications by affected parties. In order to achieve affective public participation,

---

the above draft EIA Report along with the Summary EIA report to the Ministry of Environment and Forests and to the following authorities or offices, within whose jurisdiction the project will be located:
(a) District Magistrate/s
(b) Zila Parishad or Municipal Corporation
(c) District Industries Office
(d) Concerned Regional Office of the Ministry of Environment and Forests."

32 "Campaign for Environmental Justice in India: Why was a Death Certificate filed on the Ministry of Environment and Forests?", http://www.phmovement.org/en/node/78. As last accessed on 3rd April, 2006.

33 "Asian Development Bank: EIA for Developing Countries," 36, http://www.adb.org/Documents/Books/Environment_Impact/default.asp. As last accessed on 3rd April, 2007.

34 Verocai, I., "Environmental and Social Impact Assessment for Large Dams -Thematic Review from the Point of View of Developing Countries", http://www.dams.org/docs/kbase/contrib/ins221.pdf. As last accessed on 9th March, 2006.

the potentially affected groups should be able to enter into dialogue with other interest groups and to negotiate and arrive at a mutually agreeable position.[35]

In India, however, no such steps have been initiated. In fact, EIAs were introduced in the country by means of an executive order, without any legislation being passed or with the Parliament being involved. Subsequently, when changes were introduced in the notification, these changes were made furtively, without any public participation or notice.[36] In addition to all this, the MoEF also submitted an explanatory note stating that the reports of environmental impact assessments were to be only available to the 'bona fide' residents of the area in the form of summaries.[37] Also, such reports were only available in English, thus depriving large sections of this group of people from accessing the information. Further, the reports are full of technical jargon, remaining incomprehensible to the layman. This attitude adopted by the MoEF, seems to depict it as an agency created to help industries and developers overcome environmental regulations rather than safeguard the environment.[38]

With the 2006 EIA Notification, these problems have been remedied to an extent. The reports are now mandatorily available in English and the local language for anyone seeking clarifications on the report.[39]

It can be argued that the powers of public participation in countries like Brazil are purely *de jure* in nature and it may not really be effective at all. Problems of implementation cannot take away the fact that the scheme for EIAs in Brazil do not have to face problems of normative deficiency. It is a system where public participation is encouraged and is considered to be integral to the process. The success of the system goes beyond its normative scope into practical application.

---

35 Kandaswamy, S.V., "Public Participation within Environmental Impact Assessment in India", 63, http://hdl.handle.net/1880/26325 as last accessed on 10th July, 2007.

36 "Campaign for Environmental Justice in India: Why was a Death Certificate filed on the Ministry of Environment and Forests?", http://www.phmovement.org/en/node/78. As last accessed on 3rd April, 2006.

37 Dubey, S., "EIA-The Foundations of Failure", http://www.indiatogether.org/2006/mar/env-eiafail.htm. As last accessed on 31st March, 2006.

38 Kothari, A., et al., "Why is the Government Systematically Undermining the Environment?", http://www.kalpavriksh.org/f1/f1.3/document.20050711.07593476 40/view?searchterm=environmental%20impact%20assessment. As last accessed on 2nd April, 2006.

39 2.3 of Appendix IV of the EIA Notification, 2006 states- "On receiving the draft Environmental Impact Assessment report, the above-mentioned authorities except the MoEF, shall arrange to widely publicize it within their respective jurisdictions requesting the interested persons to send their comments to the concerned regulatory authorities. They shall also make available the draft EIA Report for inspection electronically or otherwise to the public during normal office hours till the Public Hearing is over. The Ministry of Environment and Forests shall promptly display the Summary of the draft Environmental Impact Assessment report on its website, and also make the full draft EIA available for reference at a notified place during normal office hours in the Ministry at Delhi."

However, the same cannot be said of the process adopted in India. Here, the concept of public participation is flawed as in does encompass any real participation, whereby the interest groups can engage in proper dialogue and not merely involve seeking clarifications of the technical jargon of assessment reports. The EIA scheme in India needs to remedy its conceptually flawed system, before it proceeds to tackle issues of implementation.

V. CONCLUSION AND SUGGESTIONS

The notifications of 1994 and 2006 with regard to Environmental Impact Assessments are fairly inconclusive and need to be amended, for the EIA to fulfil its objective. The author would like to make a few suggestions as to how it may be improved.

First, there has to be increased participation of the people, involving those sections of society which face the brunt of the impact of these industrial projects. This can be incorporated by including responsible members of the community in different workgroups, making it compulsory for them to draft their opinions as per the views of the whole community. With the help of the Gram Panchayats, organizing meetings to discuss with the developers, in the presence of local representatives and a State officer.

Increasing the number and quality of technical officers of the MoEF, who will be willing to conduct such assessments and the creation of stronger clearance schemes and the abolition of conditional clearances will also be useful. Strengthening of the monitoring procedures which would take place every six months are another suggestion.

Amending the provisions of the EIA Notification to provide for access to full reports written in a way so that it is easy for the layman to comprehend in both English and the vernacular would be vital.

India may be a developing country, but clamouring for industrialisation may prove to be to her detriment in the long run. In order to provide for a more holistic growth of the country, claims of sustainable development simply cannot be sidelined. For the nation to forge ahead in this direction, the voices of the marginalized and the destruction of the environment must be taken seriously. And the only way to do this is to give Environmental Impact Assessment the due regard it deserves.

REFERENCES

- Bandopadhyay, J., "Draft Report on Policy Dialogue on Dams and Development,"
- www.iimcal.ac.in/centers/cdep/Final%20ReportD_D.doc. As last accessed on 28th March, 2006.

- Bhaduri A., "Alternative in Industrialisation", http://sanhati.com/wp-content/uploads/2007/05/alternatives_in_industrialisation_amit_bhaduri2.pdf as last accessed on 10th July, 2007.
- Chong C.K., Et al., "Review of Literature on Values of Inland Capture Fisheries and Dams Construction at the Lower Mekong and Ganga Basins", http://www.iwmi.cgiar.org/assessment/files_new/research_projects/Paper_Chong%20et%al_ICLARM.pdf as last accessed on 9th July, 2007.
- Divan, S. and Rosencranz, A., *Environmental Law and Policy in India* (New Delhi: Oxford University Press, 2001).
- Dubey, S., "EIA-The Foundations of Failure", http://www.indiatogether.org/2006/mar/env-eiafail.htm as last accessed on 4th April, 2006.
- Hardin, Gareth, "Tragedy of the Commons", (1968) Vol. 162, No. 3859, *Science*, 1243.
- http://www.narmada.org/ENV/eia1.html as last accessed on 1st April, 2006.
- Kandaswamy, S.V., "Public Participation within Environmental Impact Assessment in India", 63, http://hdl.handle.net/1880/26325 as last accessed on 10th July, 2007.
- Kothari, A., et al., "The Lack of an Environmental Impact Assessment",
- http://www.narmada.org/ENV/eia1.html as last accessed on 1st April, 2006.
- Leelakirshnan, P., "Environmental Impact Assessments: Legal Dimensions," (1992) 34 *J.I.L.I.*, 543.
- Marcks, Eric, "Avoiding Liability for Human Rights Violation in Project Finance", (2001) *Energy L.J.* 301.
- Morse, B. Et al., "Sardar Sarovar: The Report of the Independent Review", (1992) *Resource Futures International.*
- Sadler, B., Et al., "Environmental and Social Impact Assessment for Large Dams",
- http://www.dams.org/docs/kbase/thematic/tr52main.pdf. As last accessed on 2nd April, 2006.
- Selim, S., "Public Participation during Environmental Impact Assessment Studies,"
- http://www.alochona.org/magazine/2002/february/TOTM6.htm As last accessed on 3rd April, 2007.

Verocai, I., "Environmental and Social Impact Assessment for Large Dams - Thematic Review from the Point of View of Developing Countries", http://www.dams.org/docs/kbase/contrib/ins221.pdf. As last accessed on 9th March, 2006.

JUDICIAL APPOINTMENTS - AN EXCUSE FOR ARBITRARY ACTION?

- *Lakshmi Kruttika Vijay**

In an attempt to understand the nature of administrative law, what is conceivably most essential to judge is the arbitrariness with which discretion is conferred or exercised. While students of administrative law aim to evaluate the correctness of a decision, ensuring a sense of accountability from the legislative or executive authority, it is interesting to note that scholastic opinion in this regard also extends itself to the realm of judicial arbitrariness and accountability.[1]

Perhaps, the most blatant example of the Judiciary usurping powers from the Executive is the appointment of judges to posts in the Indian Judiciary. It is interesting to note that in three important cases- *S.P. Gupta v. Union of India*,[2] *Supreme Court Advocates on Record Association v. Union of India*[3] and *In re: Presidential Reference*[4] - the Honourable Bench of the Apex Court of India has chosen to exhibit a fine instance of interpretation of Constitutional provisions to assert the independence of the Judiciary. Unfortunately, however, the interpretation though logical, is a seemingly glaring manifestation of the "exchange of Executive arbitrariness with judicial arbitrariness"[5]. "The selection process is a dubious secrecy confined to a few Supreme Court judges, keeping the people, the Bar, the academia, and the Cabinet without a voice in the choice of those whose pronouncements bind every person."[6] It is in line with this string of decisions that one must venture to examine the case of *Union of India v. Kali Dass Batish and another*[7].

It is to be noted that the issues considered in this case do not aim to deal with the complexity of arbitrary exercise of power by the Judiciary, such has been dealt with by the Honourable Bench in the present case in their attempt to justify the judgment thus decreed.

I. THE CASE: A RUNDOWN OF THE PARTICULARS

In the present case, the Department of Personnel and Training by an order laid down directions for the selection of a Judicial Member by a committee to comprise of a

* III Year Student, B.A., LL.B. (Hons.), NALSAR University of Law, Hyderabad.

1 Baxi, U., "Introduction", I.P. Massey, ADMINISTRATIVE LAW, 6th ed. 2005, XIII- XLI.

2 AIR 1982 SC 149.

3 AIR 1994 SC 268.

4 AIR 1999 SC 1.

5 Baxi, U., "Introduction", I.P. Massey, ADMINISTRATIVE LAW, 6th ed. 2005, XXXV.

6 Iyer, V.R.K., "Opinion: Law and justice in an independent nation", THE HINDU, September 21st 2006, http://www.hinduonnet.com/2006/09/21/stories/2006092103171100.htm as accessed on 6th October, 2006.

7 AIR 2006 SC 789.

sitting Judge of the Supreme Court and other members as specified by the Order.

Accordingly a list of short-listed candidates (including the names of Respondent 1 and 2) was sent by Justice Patnaik to the other members of the Committee for their opinion. On an examination of the Intelligence Bureau report,[8] the Director (Ministry of Personnel) and the Joint Secretary (Ministry of Personnel and Training) awarded the first Respondent in the present case the benefit of the doubt since the candidate had been recommended by the Selection Committee headed by a Judge of the Supreme Court and additionally, held that none of the observations in the report reflected adversely on the Respondent. On the other hand, the Secretary (Personnel) underscored the poor performance of the candidate and therefore, did not recommend the appointment of the candidate. These reports were subsequently forwarded by the Intelligence Bureau to the Chief Justice of India for his effective consultation. On the receipt of the above mentioned, the Chief Justice recommended to the President the appointment of all the candidates except Respondents 1 and 2. This was petitioned against by the Respondents by way of writs in the Jharkhand and Himachal Pradesh High Courts.

While the Jharkhand High Court dismissed the petition by the Second Respondent, the Himachal Pradesh High Court recommended a reconsideration of the appointment of the first respondent. This was appealed against by the Union of India and clubbed with the Civil Revision Petition filed by the second respondent.

The Supreme Court held that the two Respondents did not have basis for demanding the appointment on the following grounds:

- The respondents did not have a guaranteed right to be appointed if their names were included in the list.
- Further they agreed that the integrity and previous political affiliations of such candidates had necessarily to be checked since the post was one of immense importance.
- The High Court of Himachal Pradesh erred in holding the Central Government in the wrong since the recommendation of the Chief Justice was of the nature of effective consultation.

---

8 As per established procedure, the Intelligence Bureau reported findings of the antecedent records of the candidates wherein the following observations were made as regards Respondent 1-

§ Average calibre of the Respondent as an advocate;

§ His past political records as a member of the BJP showed incidents of misbehaviour;

§ The Respondent was transferred by Justice Khurana who was unhappy with his presentation of cases in the Court. Vide AIR 2006 SC 789 at Paras 5-6.

- The Supreme Court was (in a very strongly worded statement) also abhorred by the allegations of the Himachal Pradesh High Court that implied that the Chief Justice had made a substantive or procedural error.
- There was no *mala fide* on the face of the facts, and thus there was no merit in that contention.

II. ACCEPTABLE DECREE, SKEWED LOGIC: JUDGING THE JUDGES

Appropriate exercise of administrative discretion, as has been aptly stated by the Supreme Court, must not only be done, *but must also be seen to be done*[9]. In the present case it is interesting to note that while the Apex Court has ultimately reached a decision that is seemingly right, the logic behind this decision has been skewed by the observations of the Bench.

It must be highlighted that there have been several decisions in other spheres wherein high-ranking authorities have made decisions based solely on their whims and fancies[10] and in each of these cases, the Judiciary has checked the exercise of power by such authority. Arguably, the Chief Justice of India has various levels of recommendation and reports on which his decision of appointment of judicial members is based. Unfortunately, while members of the Selection Committee are bound to give reasoning for the recommendation of the candidate, the Chief Justice by way of effective consultation has (in effect) the power to override any such recommendation without any articulation of the logic behind such decision.

In the matter of entitlements, it must be noticed that when one person is chosen over the other – as in the case above – there must be a belief that one person fulfils the objective of that post better than the other candidate. Here, the officials who forwarded their recommendations backed their opinion with reasons in writing; thereby ensuring that the opinion thus arrived at was not arbitrary. The same however cannot be said about the final decision of appointment taken by the Chief Justice of India.

Additionally, it must be emphasized that in the Administrative Tribunal Act, 1985, the

---

9 *J. Mohapatra & Co. v. State of Orissa*, AIR 1984 SC 1572 at para (per Madon, J.)

10 *Rameshwar Prasad v. Union of India, AIR 2006 SC 980.* In the present case, both the High Court of Bihar and the Supreme Court held that the Governor's report could not be based on conjectures appearing in newspapers and that Emergency could not be imposed on such *whims and fancies*. Similarly in the case of *Special Land Acquisition Officer v. G.C. Paramraj*, ILR 1991(2) Karnataka 1109, the District Judge held that no officer was entitled to act on his own *whims and fancies* even if the Statute authorising his action does not specify guidelines. Also, in the case of *Union of India & Anr v. Mohan Pal,* AIR 2002 SC 2001, the Court in reference to the removal of casual labour, instructed that even if the labour were not permanent employees, none of them could be removed at the *whims and fancies* of the employer.

relevant provision[11] that provides for qualifications for the members to be appointed to the Tribunal, in no way deters such impending appointment on account of prior political affiliations or any of the other objections raised by members of the Selection Committee.[12]

Perhaps, in line with the opinion expressed in precedents decreed[13] (including the present), the Benches of the Honourable Courts in our country repeatedly reiterate that people in high places entrusted with power and discretion, are incapable of misusing the same.[14] *Kali Dass Batish*'s case goes even further to state that "even assuming that the Secretary of the concerned department of the Government of India had not apprised himself of all necessary facts, one cannot assume or impute to a high constitutional authority, like the Chief Justice of India, such procedural or substantive error."[15]

III. Appointments: Precariously Treading The Line Between Independence And Arbitrariness

What is perhaps more interesting is that in placing the case in the line of cases of Judge's appointments, the judgment falls in perfect sync with the stance that the Judiciary has sought to resort to. When scrutinized in the larger perspective, it is evident that the Judiciary has (as far as has been possible) tried to assert its independence and further, the correctness of such decision taken by one of its members. For instance, in the cases of the appointment of Judges to the Supreme Court and High Court, authority was legitimately conferred on the President (in effect, the Executive) through the paramount parchment of the nation- the Constitution. An unfortunate turn in the activist role of the Judiciary led to the interpretation of the aforementioned relevant provision by Benches of the Apex Court in a way so as to seize the control of any lawful exercise of Executive power on the ground of undue political interference.[16]

---

11 Section 6: Administrative Tribunal Act, 1985.

12 In the opinion of the researcher, previous political affiliations are a strange inclusion as a ground of disqualification since several Supreme Court Judges, most notably Justice Krishna Iyer, have even been Ministers in the Central Government. Further in the present judgment itself, the only mention made of the political record of Respondent 1 was by the Joint Secretary (AT & A), Ministry of Personnel and Training who ultimately recommended the candidate's name. Interestingly, the noting made by such member merely stated, "Shri Batish has strong political affiliations and was a contender for the Shimla AC seat in 1982 and 1985 from BJP;" *Union of India v. Kali Dass Batish*, AIR 2006 SC 789 at para 5.

13 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

14 While the researcher does not allege, in the present case, that there is such abuse of the power by any authority, a nagging resentment is expressed as to the colonial hangover of the maxim *'The King can do no wrong'*.

15 *Union of India v. Kali Dass Batish & Anr.*, AIR 2006 SC 789 at Para 17.

16 *S.P. Gupta v. Union of India*, AIR 1982 SC 149; *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268; *In re: Presidential Reference*, AIR 1999 SC 1.

Scholastic opinion also lends a hand to the strengthening belief that judicial independence first and foremost 'refers to the existence of judges who are not manipulated for political gain.'[17] While it is entirely possible that such interference was ongoing in the appointment of the judges in India, it is far more unreasonable for a lay person, as well as for us (students of administrative law) to reconcile the exchange of Executive authority with one that is judicial. It is noteworthy in the situation at hand that peer recommendation, though desirable for the fact of better understanding of a candidate's aptitude, can also lead to a situation of *quid pro quo* (especially in the appointment to the Supreme Court).

The Supreme Court has held it "unthinkable that in a democracy governed by the rule of law, the Executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the Executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement."[18]

In placing *Union of India v. Kali Dass Batish* within the numerous judgments as regards appointment, it is undeniable that the scope of judicial authority with respect to appointments has only widened. Yet a subtle difference is also evident. In the case of appointment of judges to the High Court or Supreme Court, the power has been given (through judicial pronouncement) to the collegiums of judges and the Chief Justice for effective consultation.

However, as can be observed in the given case, the Executive by issuing an order has (of its own volition) handed the power of effective appointment to the Chief Justice himself. Perhaps, an aspect to worry about- as the abdication of powers of the legislative in favour of the Executive, is probably as precarious as the abdication of Executive powers in favour of the Judiciary.[19] What is in effect being questioned by the researcher, is no way reflective of the integrity of the Judges, but is a basic question of infallibility of individuals that all of us, as human beings, are prone to.

IV. JUDGING ONE'S OWN CAUSE

Considerable interest may arise in the given set of circumstances with the champions

17 Larkins, C., "Judicial independence and democratization: A theoretical and conceptual Analysis", 44 AMJCL 605, 609.

18 *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.*, AIR 1979 SC 1628 at Para 10 (per Bhagwati J.). Reiterated in *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 at Para 41.

19 Senior Advocate of the Supreme Court, Abhishek Singhvi in context of judicial appointments has rightly said, "A lot can be said about the dangers inherent in substituting absolute Executive authority with absolute Chief Justice authority." Singhvi, A., "Independence of Judiciary and Judging the Judges", JUDGING THE JUDGES, Mahesh, K., and Bhattacharya, B., Ed.(s), 124.

of natural justice themselves abrogating one of its fundamental principles. No man must be a judge in his own cause – this principle of natural justice applies equally to the exercise of quasi-judicial and administrative action.[20]

In barefaced abandonment, the researcher would like to point out that the three Judge Bench that has delivered the judgment in the present case, conspicuously comprises of the Chief Justice of India himself. While it is also pointed out that the decision to not appoint the two respondents was taken by the predecessor of Hon'ble Chief Justice Y.K. Sabharwal, an argument can definitely be made out protesting the validity of this decree with respect to future repercussions.[21]

When the Judiciary has exhibited complete intolerance even in cases where a person judging his own cause retires from making such a decision[22], conceivably the Supreme Court may benefit from the reconsideration of this decision at least on the basis of the Chief Justice's presence on the Bench (if not on the grounds of usurping powers of the Executive, or possible abuse of discretion).

V. CONCLUDING REMARKS

Once again it must be reiterated that there is no ultimate fault with the decision reached by the Judiciary in this case. However, when contextually understood, the procedure as well as the reasoning behind the decree is what a critic of the Courts and students of administrative law must worry about.

At core, the dynamics of power and accountability in every decision of administrative discretion must be reconciled with. In this decision, the conferral of power though legitimate is extremely contentious and the levels of accountability from the Chief Justice himself, as per the judgment itself, are minimal. It must be understood, that any justification given as to the decision in this case must be necessarily grounded on discretion, rationally conferred – with an eye on prospective decisions taken by such authority. The conferral of discretion, even if legitimate, cannot be an invitation for the authority to do as it pleases.

---

20 This has been recognised time and again as one of the most essential principles of natural justice by all judicial authorities including the Hon'ble Supreme Court in cases such as *J. Mohapatra & Co. v. State of Orissa,* AIR 1984 SC 1572 (per Madon, J.).

21 The researcher finds it difficult to believe that the Chief Justice would decree any decision by his predecessor as arbitrary or founded on irrelevant considerations as any such pronouncement could curb the existent powers conferred on both the present and future Chief Justices of the nation as well as most importantly, raise questions as to the legitimacy of their decisions.

22 *A.K. Kraipak v. Union of India*, AIR 1970 SC 150; *J. Mohapatra & Co. v. State of Orissa*, AIR 1984 SC 1572.

REFERENCES

- Baxi, U., "Introduction", I.P. Massey, ADMINISTRATIVE LAW, 6th ed. 2005, XXXV.
- Iyer, V.R.K., "Opinion: Law and justice in an independent nation", THE HINDU, September 21st 2006, http://www.hinduonnet.com/2006/09/21/stories/2006092103171100.htm as accessed on 6th October, 2006.
- Larkins, C., "Judicial independence and democratization: A theoretical and conceptual Analysis", 44 AMJCL 605, 609.
- Singhvi, A., "Independence of Judiciary and Judging the Judges", JUDGING THE JUDGES, Mahesh, K., and Bhattacharya, B., Ed.(s), 124.

A CONTINUUM OF TRANSFER PRICING METHODS

*Adarsh G**

Besides equality, administrability andefficiency, the fact of certainty is recognized as one of Adam Smith's four maxims of taxation.[1] The Organisation for Economic Co-operation and Development (OECD) Framework lists neutrality, efficiency, certainty, simplicity, effectiveness, fairness, and flexibility as the principles of international tax policy.[2] Commentators have categorically observed that "without a measure of uniformity and predictability in the tax treatment of international operations, such operations will fail to achieve their maximum potential, and to a parallel extent, the potential prosperity of nations will be tempered."[3]

Consequently, the tax framework of every country should endeavour to create, formulate and enact laws that lead to *certainty* and *predictability* for the corporate tax payer.

In this paper, the author seeks to comment on the case of *Sony India v. Central Board of Direct Taxes*[4] ("*Sony India*") and examine whether the existing law on transfer pricing in India conforms to the aforementioned tenets of tax laws. For the purpose of this paper, the case comment has been divided into the following parts:

(i) The first part introduces the legal framework as reflected in Indian tax legislations on transfer pricing and defines the concept of transfer pricing;

(ii) The second part analyses the case of *Sony India* which hints at the glaring loophole present in the existing framework on transfer pricing guidelines;

(iii) The third part gives a critique of the case and exposes the limitations of the judiciary in dealing with fiscal and economic policy matters;

(iv) The fourth part provides a discourse on the two methods of analyzing the transfer price which are recognized by the relevant rules; and

---

* IV Year Student, B.A, LL.B., (Hons.), NALSAR University of Law, Hyderabad

1 Smith, Adam *An Inquiry into the Nature and Causes of the Wealth of Nations*, (R.H. Campbell & A.S. Skinner eds., Liberty Classics: 1981), 825.

2 OECD Committee on Fiscal Affairs, Electronic Commerce: Taxation Framework Conditions 4 (1998). In this report the OECD indicates that its members prefer the extension of international tax principles and concepts to electronic commerce as well.

3 Weiss, Arnold H. and Molnar, Ference E., *Tax Policy in the Twenty First Century,* (Herbert Stein Ed., 1988), 108.

4 [2007] 288 ITR 52 (Del).

(v) In the final part of the paper, the author has discussed an unconventional alternative to determine the transfer price so as to achieve predictability and certainty about the ensuing tax treatment for international transactions between the associated enterprises.

I. DEFINITIONAL AND LEGISLATIVE ASPECTS OF TRANSFER PRICING

1. Fundamentals of Transfer Pricing Laws

A transfer price is the price charged for a cross-border transfer of goods, assets, rights, money and services etc., between one part of an organization and another part of the same organization.[5] In other words, the price involved in a controlled international transaction is regarded as transfer pricing.

In an international transaction between two unrelated enterprises, the prices of the transaction get determined on the basis of market forces. Given that both enterprises work for the maximization of their respective interests, tax administrators treat such a transaction as the norm.[6]

However, a majority of international transactions happen between associated enterprises. As a synergistic measure, companies foray into outside markets by merging or acquiring entities, establishing wholly owned subsidiaries and by entering into joint ventures. A parent company having its units in one jurisdiction can transact in goods or services with its own branch or subsidiary placed in other parts of the world.

As tax treatments differ substantially from one jurisdiction to another, associated enterprises tend to price the transaction in a manner which results in a reduction of their tax liability. To maximize their collective interests, many associated enterprises often indulge in pricing transactions in such a way as to erode the tax revenues to the concerned countries which facilitates controlled international transactions. Clearly therefore, it is understandable that transfer pricing manipulation is one of the most common techniques of tax avoidance.[7] Consequently, one can conclude that the transfer

5 Neighbour, John Owens, Jeffrey "Transfer Pricing in the New Millennium: Will The Arm's Length Principle Survive?", (2002) 10 *Geo. Mason L. Rev.* 951; Kanga, Palkhivala, Vyas, *The Law and Practice of Income Tax,* (New Delhi: Lexis Nexis – Butterworths, 2004) 1532: Gopalakrishnan K.C., *Text Book on International Taxation,* (Mumbai: Snow White Publications, 2002), 115.

6 Lester, Eugene E, "International Transfer Pricing Rules: Unconventional Wisdom", (1995) 2 *ILSA J. Int'l & Comp. L.* 283, 285.

7 DiMattero, Larry A., *The Law of International Business Transactions,* (London: Thomson

pricing problem is one of the major international tax policy challenges.

2. Law of Transfer Pricing in India

It was only in 2001, that the Indian government realized the need for regulating international transactions between associated enterprises.[8] Thus, in 2002 certain amendments were introduced to Section 92 of the Income Tax Act (the "Act"). Owing its allegiance to the OECD Guidelines,[9] Section 92 was modified to categorically state that *any income* arising from an international transaction *shall be computed* having regard to the *arm's length price.*[10] Section 92 F of the Act stipulates that arm's length price means that price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in *uncontrolled conditions.*

Section 92 C of the Act stipulates Comparable Uncontrolled Price, Resale Price Method, Cost Plus Method, Profit Split Method and Transactional Net Margin Method as different ways through which the transfer price of a controlled international transaction

---

Publishers, 2003), 363: Avi-Yonah, Reuven S., "The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation", (1995) 15 *Va. Tax Rev.* 89, 90.

8 In his speech for the budget year 2001 the Finance Minister observed as under: *"The presence of Multi National Enterprises in India and their ability to allocate profits in different jurisdictions by controlling prices in intra-group transactions has made the issue of transfer pricing a matter of serious concern."*

9 The OECD took the initiative to contain the possible tax avoidance involved in controlled international transactions. In 1979, the OECD Committee on Fiscal Affairs formulated its first report on Transfer Pricing and Multinational Enterprise (the "Report"). This Report generally described agreed practices in determining transfer prices for tax purposes. The Report stated that, as a matter of general principle, transfer prices established for fiscal purposes should accord with those which would have been paid between independent enterprises *acting at arm's length.* Finally, in 1995, the OECD announced new transfer pricing guidelines (the "New Guidelines"). The New Guidelines indicate expressly, for the first time, that Article 9, Paragraph 1 of the OECD Model Tax Convention is the "authoritative statement of the arm's length principle". See Horner, Frances M., "International Cooperation and Understanding what's New about the OECD'S Transfer Pricing Guidelines", (1996) 50 *U. Miami L. Rev.* 577, 578.

10 Section 92 of the Income Tax Act, 1961. It is necessary to observe that the rules as specified in the 1995 and 1999 guidelines (collectively, the "OECD Guidelines") have been the source upon which countries have developed domestic tax law jurisprudence and bilateral treaties to regulate and compute the transfer price of controlled international transactions. See Lepard, Brian D., "Is The United States Obligated To Drive On The Right? A Multidisciplinary Inquiry into the Normative Authority of Contemporary International Law Using the Arm's Length Standard As A Case Study", (1999) 10 *Duke J. Comp. & Int'l L.* 43, 83.

has to be determined.[11] Consequently, for the purpose of Section 92 (1) the arm's length price will be determined in one of the methods as mentioned above. Rule 10 B of the Income Tax Rules, 1962, lays down the procedure in which each such method of calculation can be utilized to compute and determine the arm's length price of controlled international transactions.

II. CASE ANALYSIS

1. Contentions Raised by the Petitioner

Sony India (P) Limited (the "petitioner") is a wholly owned subsidiary of Sony Corporation of Japan. The petitioner imported high end products from its associated enterprises. For the assessment year 2002-03, the petitioner had filed its annual return declaring an income of Rs. 8,67,46,730. Following the mandate under the Instruction, the Assessing Officer (the "AO") referred the international transactions of the petitioner to the Transfer Pricing Officer (the "TPO"). The TPO recommended that the total income should be enhanced to Rs. 42,41,40,934. Subsequent to this finding, the AO issued the assessment order assessing the income of the petitioner at Rs. 59,92,40,000.

Section 92 CA (4) of the Act stipulates that the AO, where he, "considers it necessary or expedient so to do", *may* refer the computation of the arm's length price of any international transaction[12] between associated enterprises to the TPO. In 2003, the Central Board of Direct Taxes (the "CBDT") issued Instruction No. 3 (the "Instruction") stipulating that, wherever the aggregate value of international transaction exceeds Rs. 5 crore, such transactions *should* be referred to the TPO. On the basis that, the Instruction fettered with the discretion of the AO, it was challenged in a writ petition before the Delhi High Court (the "High Court") in the case of *Sony India.*

Before the High Court, the petitioner argued, *inter alia*, that:

(i) The classification of international transactions in to two categories, i.e., those of the value exceeding Rs. 5 cores and those of a lesser value is not based on an intelligible differentia and has no nexus with the object sought to be achieved. Hence, the Instruction is violative of Article 14 of the Constitution of India; and

(ii) The petitioner also contended that the discretion of the AO under Section 92 CA of the Act has been taken away by the Instruction. Consequently, the impugned Instruction is illegal and *ultra vires* the Act.

---

11 Moghul, S.I., "How to Comply with India's Transfer Pricing Rules", (2002) 12 *Int'l Tax Rev* 43, 44.

12 Section 92 B of the Act provides the meaning of 'international transaction' in the context of transfer pricing.

2. Judgment of the Court

The High Court stated that the classification stipulated in the Instruction is based on a straightforward recognizable basis. The Court rightly observed that the objective of introducing transfer pricing provisions was to curb tax avoidance by determining the arm's length price. Efficient examination of such intricate commercial transaction may not be possible at the level of the AO. Thus, in the opinion of the High Court, the Instruction endeavours to achieve the objective of curbing tax avoidance, as there will be a specialized determination by the TPO. Consequently, the classification bears a nexus with the said objective, and hence the Court rejected the petitioner's objection on the basis of violation of constitutional principles.

Moreover, the High Court pointed out that the Instruction was only a guideline to the AO.[13] Further, it was observed that that the TPO's order would help the AO exercise his discretionary power in a knowledgeable and intelligible way.

III. QUEST FOR CERTAINTY: JUDICIARY'S LIMITATION IN POLICY CHANGE

The rationale behind the Instruction can be said to be two fold:

(i) Firstly, it is a means to considerably reduce the revenue loss arising from evasion since as per the Instruction all transactions above Rs. 5 crores shall be scrutinized by the TPO, an authority which is specially equipped with the relevant technical knowledge for computation; and

(ii) Secondly, it also has the effect of ensuring some amount of certainty as the threshold limit for reference to scrutiny is laid out in clear terms.

By upholding the Instruction, which stipulates that any controlled international transaction worth of Rs. 5 crore will be referred to the TPO, the Court has therefore, at one level assisted in ensuring certainty. In that, if there were to be a controlled international transaction worth Rs. 5 crore or more, then the tax payer is certain that their transactions get referred to the TPO and would take measures accordingly.

However, from the tax payer's standpoint it would be ideal if certainty is realised in a

13 In *Sony India* the High Court had also declared that the opinion of the TPO is not binding on the AO. According to the Finance ministry, the TPO is an expert in matters concerning the determination of the arm's length price. Consequently, it observed that the opinion given by the TPO should be binding on the AO. To this effect, the Finance Act, 2007 amended Section 92 CA (4) of the Act. Hereafter, the AO would have no discretion to apply his mind to the report of the TPO. To this extent, the legislative change has annulled the decision in *Sony India's* case.

fuller measure at other levels as well. As shall be subsequently explained, the existing law which governs the transfer pricing methods, especially the arm's length principle, suffers from an inherent loophole which leads to uncertainty in ensuing tax treatment and this aspect goes beyond what came up in question in *Sony India.*

The Court, in *Sony India*, limited its examination to the relevant constitutional and administrative law principles. There is, however, one facet of this case that has been overlooked. According to the petitioner it had an income of Rs. 8,67,46,730. Subsequent to computation by the TPO the total income of the assessee stood at Rs. 59,92,40,000. One notices that there is a whopping difference of more than Rs. 50 crores. Though the case of *Sony India* does not specifically examine the soundness of the method that is followed, it is clear that, Section 92 of the Act, which provides for the arm's length principle to compute the transfer price, may not lead to certainty and predictability for all controlled international transactions.

In this regard several crucial questions emerge. What are the inherent problems of the arm's length principle that does not lead to certainty and predictability? Other questions also need to be surfaced - for example, what are the alternative methods of computing transfer price apart from arm's length principle and which method of computation leads to more certainty and predictability?

Even if the Court had an occasion to examine these questions, it is very likely that the same would have been summarily brushed aside following the ratio in *Azadi Bachao Andolan-*[14] that policy matters are beyond the competence of the Courts. In view of the inherent complexity of these fiscal adjustments, the Courts have given greater discretion to the Legislature and Executive in the matter of its preferences of economic and social policies to effectuate the chosen system in all possible and reasonable ways. So, it can be inferred that there are limitations in the extent to which the Courts can contribute to certainty in the matter of transfer pricing involved in a controlled international transaction. Clearly therefore, the required changes in transfer pricing policy framework will have to be effected through other means whether legislative or executive.

IV. CRITICAL ANALYSIS OF THE TWO METHODS

On a general note, the transfer pricing rules recognize two methods of taxing controlled international transactions. One is the Arm's Length Price method (the "ALP method") and other one is Global Formulary Apportionment method (the "GFA method"). The OECD Guidelines endorse the usage of ALP methods to compute the transfer price in

14 *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1: MANU/SC/0784/2003.

controlled international transactions. Similarly, Section 92 (1) of the Act reflects this position and stipulates that income arising from an international transaction shall be computed having regard to the *arm's length price.*

It is submitted that, consideration of other methods are required to ensure greater degree of certainty while computing true transfer price of controlled international transactions.

1. Critique of the Alp Method

A price at which independent enterprises deal with each other should be reckoned as the arm's length price.[15] A bare perusal of the New OECD Guidelines reveals that the ALP method follows the approach of treating the members of a Multi-National Corporation group ("MNC group") as operating as separate entities rather than as inseparable parts of a single unified business. The OECD Guidelines state that by incorporating the separate entity concept, the ALP method places related and unrelated enterprises on an equal footing for tax purposes. This avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity.[16]

According to the OECD, this principle is sound in theory since it provides the closest approximation of the workings of the open market in cases where goods and services are transferred between associated enterprises. Therefore, advocates of this method argue that the ALP method reaches a comparable uncontrolled market price that is reasonably reliable for standard transactions where the price range is narrow and the market price is certain.

It is submitted that notwithstanding all this, the ALP method has an inherent loophole which adversely affects the computation of transfer price for controlled international transactions, thereby making the tax treatment of associated enterprises uncertain and unpredictable. The OECD itself acknowledges that the ALP method is "inherently flawed" since it does not account for the economic realities created by associated enterprises in their respective international transactions.[17] Similarly, the OECD also concedes that following the ALP method may result in an administrative burden for both the tax payer and the tax administration of evaluating significant numbers and types of cross-border transactions. Additionally, if one were to follow the ALP method,

15 Lal, B.B., Vashisht, N, *Direct Taxes – Income Tax, Wealth Tax and Tax Planning,* (Delhi: Pearson Education, 2006), 770.

16 Para 1.7 of the New OECD Guidelines, 1995.

17 At para 1.9, of the New OECD Guidelines, 1995.

the uncertainty prevailing over the possible tax liability actually affects the competitive position of the associated enterprises.

Furthermore, if one were to analyze the true character of many international transactions between associated enterprises, we can observe that enterprises structure transactions in such a manner that there can be no comparisons. Consequently, the ALP method which is based on the premise of comparable uncontrolled transactions becomes inapplicable for such transactions. For instance, the applicability of the ALP method becomes impractical in transactions which involve the integration of highly specialized goods, unique intangibles or specialized services, new technology and business structures.

Therefore, adopting the ALP method to compute the transfer price of complex commercial controlled transactions might become difficult, if not impossible. Such difficulties in determining the true price will always impact the predictability and certainty about the possible tax liability.

2. Constructive Alternative - Global Formulary Apportionment Method

The New OECD Guidelines have also provided an erudite discourse on another method which can be followed to identify the transfer price of controlled international transactions. The OECD has reserved a part in Chapter III of the New OECD Guidelines to discuss and discard the GFA method. Under this method, first, the associated enterprises involved in an international transaction, are treated as a *single business unit*. Subsequently, on the basis of a predetermined formula, which is based on the relative proportions of property, payroll and sales,[18] the global profits of such associated enterprises are allocated.

The GFA method recognizes the actual contribution of the units of associated enterprises which are involved in the international transactions. It allocates or apportions the computed profit depending upon the identifiable involvement of the concerned units of the MNC group. The GFA method, unlike the ALP method, acknowledges the synergies which exist between the controlled entities. For international transactions which involve trading in intangibles, specialized technology and specialized services, the GFA method enables the assessee as well as the tax administrators to compute the actual and true transfer price. As the computation takes place prior to the finalization

18 McDaniel, Paul R., "Formulary Taxation in the North American Free Trade Zone", (1994) 49 *Tax L. Rev.* 691.

of the transaction, the units of associated enterprises can predict the tax treatment and accordingly structure the transactions.

The major difference between the ALP method and the GFA method is that the former starts with treating each entity in an affiliated group as a separate taxpayer, i.e. hypothetically considering a transaction between related enterprises in the group at arm's length. Conversely, the GFA method starts with the entire affiliated group as one unitary enterprise.[19]

It is submitted that the GFA method is not merely a theoretical construct. States in the USA have to follow the GFA method under the Uniform Division of Income for Tax Purposes Act (the "UDIPTA").[20] It is believed by the advocates of GFA method that this method reduces compliance costs for taxpayers since in principle only one set of accounts would be prepared for the group for domestic tax purposes. There are also commentators who argue that in order to implement the GFA method, it is essential to create an international organization which would fulfill, in the taxation field - a role equivalent to that of the World Trade Organization in international trade.[21]

V. CONCLUSION

An analysis of the foregoing leads to the conclusion that both the ALP method and GFA method fail to provide steps for identifying the true transfer price for all kinds of controlled international transactions. The ALP method conveniently ignores the aspect of economies of scale and synergistic operations which are inherent part of any given transaction. Conversely the GFA method is plagued with its own loopholes, in the sense that it does not take into account the market conditions involved, fluctuation of foreign currency rates etc.

Further, as detailed above, by upholding the Instruction the Court in *Sony India* has therefore, at one level assisted in ensuring certainty, in that, if there were to be a controlled international transaction worth Rs. 5 crore or more, then the tax payer is certain that their transactions get referred to the TPO and take measures accordingly.

---

19 Avi-Yonah, Reuven S., "The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation", (1995) 15 *Va. Tax Rev.* 89, 93.

20 UDIPTA was formulated by the National Conference of Commissioners on Uniform State Laws in 1957.

21 Celestin, Lindsay C., "The Formulary Approach to the Taxation of Transnational Corporations: A Realistic Alternative", Submitted to University of Sydney, October 2000. Available at <http://ses.library.usyd.edu.au/handle/2123/846?mode= full&submit simple=Show+full+item+record > last visited on 03-07-2007

Keeping in mind the nuances involved in a transaction between the associated enterprises, acknowledging the judiciary's limitation in effectuating policy changes and recognizing the inherent loophole in endorsing only one method to ascertain the transfer price involved in controlled international transactions, the law makers can consider following unconventional alternatives to provide certainty in a fuller measure for the stake holders involved in the international controlled transactions:

(i) The Indian transfer pricing law can be revaluated to change its position of endorsing only the ALP method as the mechanism to identify the transfer price; and

(ii) Section 92 (1) of the Act, which stipulates that income arising from an international transaction shall be computed having regard to arm's length price, can be suitably amended to accommodate the GFA method of computation.

In the opinion of the author, such an integrated and intermediate approach is the most productive, appropriate and constructive alternative to determine the true transfer price. Such a holistic approach, providing fuller measure of *certainty*, will ensure that the tax payers are given an alternative to opt for the best method to determine their transfer price and true revenues can be realized by the tax administrators.

REFERENCES

- Avi-Yonah, Reuven S., "The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation", (1995) 15 *Va. Tax Rev.* 89
- Celestin, Lindsay C., "*The Formulary Approach to the Taxation of Transnational Corporations: A Realistic Alternative*", Submitted to University of Sydney, October 2000. Available at <http://ses.library.usyd.edu.au/handle/2123/846?mode=full&submit_simple=Show+full+item+record> last visited on 03-07-2007
- DiMattero, Larry A., *The Law of International Business Transactions,* (London: Thomson Publishers, 2003)
- Gopalakrishnan K.C., *Text Book on International Taxation,* (Mumbai: Snow White Publications, 2002)
- Horner, Frances M., "International Cooperation and Understanding what's New about the OECD'S Transfer Pricing Guidelines", (1996) 50 *U. Miami L. Rev.* 577
- Kanga, Palkhivala, Vyas, *The Law and Practice of Income Tax,* (New Delhi: Lexis Nexis – Butterworths, 2004)
- Lal, B.B., Vashisht, N, *Direct Taxes – Income Tax, Wealth Tax and Tax Planning,* (Delhi: Pearson Education, 2006)
- Lester, Eugene E, "International Transfer Pricing Rules: Unconventional Wisdom",

(1995) 2 *ILSA J. Int'l & Comp. L.* 283

- McDaniel, Paul R., "Formulary Taxation in the North American Free Trade Zone", (1994) 49 *Tax L. Rev.* 691
- Moghul, S.I., "How to Comply with India's Transfer Pricing Rules", (2002) 12 *Int'l Tax Rev* 43
- Neighbour, John Owens, Jeffrey "Transfer Pricing in the New Millennium: Will The Arm's Length Principle Survive?", (2002) 10 *Geo. Mason L. Rev.* 951
- Smith, Adam *An Inquiry into the Nature and Causes of the Wealth of Nations*, (R.H. Campbell & A.S. Skinner eds., Liberty Classics: 1981) Weiss, Arnold H. and Molnar, Ference E., *Tax Policy in the Twenty First Century,* (Herbert Stein Ed., 1988)

WE ARE POOR BUT SO MANY*
A BOOK REVIEW:

*Gruhalakshmi Kumar and Yashasvini Kumar***

A must read. Acknowledging this to be a statement usually located at the conclusion of a book review; in the context of this book one feels compelled to mention it not only at the start of the said review but to repeat it at regular intervals. "We Are Poor but So Many" is not just the story of self employed women in India as declared by the author, but in fact a prelude to the saga of the oft ignored workers of India, trade unions, labour law, and their increased politicization and consequent inefficiency. Ela R. Bhatt traces the background, inception, growth and the flourishing of the Self Employed Women's Association (SEWA), in the context of the workers who are its main constituents and the trials and tribulations they face.

Written simply, without pretension, bias or bitterness, the book provides an account which is poignant in its accuracy. In two hundred and nineteen pages the author successfully spans a range of topics, beginning with her own growth and concluding with the spread of her creation to shores abroad. Bhatt's understanding of a trade union as an entity merged with the identity of individuals it seeks to serve and not as a personality divorced from them is an obvious breathtaking revelation.

The simplicity of the writing of the book is striking when understood in the context of the complexity of the issues it seeks to address. Bhatt speaks extensively of not SEWA or its members alone but also of its genesis which lay in the divisive politics of the Textile Labour Association (TLA) and its problems rooted in age old employer-employee hierarchies and domination. This spare clarity is one which can be recognized as an integral part of the manner in which Bhatt comprehends the obstacles which lie before her; for the same overarching theme of simplicity extends from her writing to her methods of problem solving; a method of understanding which resonates from her firm belief in Gandhi's ideas on work and economics.

An extension of this belief is her fundamental conviction that "adding complexity is not progress ... that nothing that compromises a person's humanity is acceptable, and that poverty is wrong as it strips a person of their humanity and takes away their

** III Year Students, B.A.,LL.B.,(Hons), NALSAR University of Law, Hyderabad.

Title: *We Are Poor but So Many – The Story of Self Employed Women in India*
Author: Ela R. Bhatt
Pages: 219
Price: Rs 595
Publisher: Oxford University Press

freedom."[1] On this premise she has based a movement, and a phenomenon which rewrote common assumptions of the capabilities of poor, illiterate women.

SEWA is a trade union registered in 1972 to provide support to poor, self-employed women workers who compose the unprotected, 'unorganized', 'informal' labour force of our nation. Refreshingly, the author uses none of these terms in her book – insisting on terming these women 'self employed' ensuring no other jargon is used to pigeon hole them into categories inherently derogatory due to the nature of their nomenclature. This is indicative of a mindset, which does not unconsciously view self employed women as objects of pity, but of a perspective which attributes dignity to their struggles. Bhatt recognizes the limitations of labour law with regard to its unhealthy involvement with such terminology and rightly calls for a removal of such "conceptual blocks".

Dealing with women who hold myriad jobs that are performed in manners not addressed by most Indian labour legislations, Ela Bhatt has fought such unfair classifications over an extended period of time. It is her belief that this rigid categorization makes extending protections to the vulnerable impossible.[2]

The book explores the fascinating concept of a hybrid union: part trade Union, part Co-operative and wholly welfare measure. The book talks about the working of such a model and yet of the problems that come with failing to find a place for it within the legal framework.[3] In light of the judicial discourse in understanding the functions and rights of a trade union, and the legislature's understanding of what constitutes a union or an assembly, the place for something like SEWA would be interesting to explore.

SEWA as an organization is an entity that both the law and judiciary have not envisioned nor dealt with. The provisions of the Industrial Disputes Act, 1947, the Trade Union Act, 1926, or rather the reading of these Acts by the judiciary in having merely a procedural rather than a conceptual understanding of a Union has had two problems for the labour movement; one, the definition of what a union is, and two, the purposes for which it exists. The meaning and scope of a union has been restricted to refer to an organization dealing with workmen that are part of the organized sector and that functions as merely a facilitator to solve dispute of Workmen.

In that regard SEWA clearly falls out the scope of the law on both counts. SEWA focuses on the rights of women belonging to the informal, unorganized, marginalized

1 Bhatt, R.,Ela, *We Are Poor But So Many*, (New Delhi: Oxford University Press, 2006), 8.

2 *ibid,* 10.

3 SEWA has been fighting for the last 5 years to be a registered union under the Trade Union Act, 1926. Despite having the largest membership in the country of over 700,000 women the Union has not been able to get a legal status. Bhatt, R., Ela, *We Are Poor But So Many*, (New Delhi: Oxford University Press, 2006), 16.

sections of labour which immediately disqualifies them from registration by a wrongful reading and understanding of the law[4], and two, the functions that extend protection to these women beyond the workplace.

It is a principle of interpretation that statutes enacted for different purposes are not meant to be read together and though holding the same in *TTD v. Commissioner of Labour*[5], the courts have gone on to read the Trade Unions Act, 1928 and the Industrial Disputes Act, 1947 together. It must be realized that the Industrial Disputes Act does not require a Union in order to raise an Industrial Dispute (refer to the Industrial Disputes Act, 1947, Sections 2(j) and 10). At the same time, the Trade Union Act, 1928 under Section 2(h) does not require the members of a trade union to be able to raise an industrial dispute. The Trade Union Act only focuses on the formation, Registration and Rights of a Union. Both acts serve different purposes and seek to achieve different goals and yet in a plethora of cases the courts have committed the mistake of reading their goals together, E.g., *Non-Gazetted Officers Union v. Registrar of Trade Unions*[6]; *Rangaswamy v. Registrar Trade Unions*[7]. The decision in *TTD v. Commissioner of Labour*[8], is an exception to the general trend that has been followed by the judiciary. In the aforementioned case the Supreme Court held that the workers of the Tirumala Tirupathi Devasthanam could form a Union and that it was not necessary that they had to be able to raise an industrial dispute before they could form one.

SEWA is truly an extra- judicial mechanism. This has both its benefits and fallouts. The functioning of SEWA and the fulfillment of its objectives has been made easier by the lack of legislation and rules concerning the methods it employs. The organization itself has fought against several attempts to pigeon hole SEWA into an understanding of the Industrial Disputes Act, 1947.[9] At the same time, recognition by law would have meant greater impetus for the labour movement; legal recognition would mean that the efforts of SEWA would not simply be a single occurrence but something that the State and the law strove towards which would only be in consonance with our own constitutional goals and only aid the process of making these invisibles visible.

---

4 AIR 1995 SC 1292.

5 AIR 1962 Mad 234.

6 AIR 1962 Mad 231.

7 AIR 1995 SC 1292.

8 The organization has gone to the courts on several occasions when allegations that because the members of the organization had worked for institutions on the basis of a contract, that made them employers of the Institution and subject to the confines of the ID Act. SEWA fought the case in the Labour Court and the High Court arguing that it was the Co-operative and the Institution that had a contractual relationship and not the members and the Institution. The attempt of this exercise was to reduce the bargaining power of the women and subject them to the Union politics of the respective institutions. Bhatt, R.,Ela, *We Are Poor But So Many,* (New Delhi: Oxford University Press, 2006), 56.

9 Bhatt, R.,Ela, *We Are Poor But So Many*, (New Delhi: Oxford University Press, 2006), 56.

The advantages of not featuring in the legislative framework is manifold: firstly, the focus is on the substantive issues raised by the Union and not the procedural aspects which has plagued the fight of many unions in providing better service conditions to its members in their respective work places. Secondly, because SEWA does not confine itself to strictly Union activities and its role extends to the formation of Co-operatives, the functioning of banks, provision of health schemes and in some instances the activities of the Co-operatives involve applying for tenders there have been accusations of it being an employer itself which might prove problematic in the set up of the Industrial Disputes Act. The Industrial Disputes Act, 1947, Section 2(g) does not contemplate the existence of a primary and secondary employer and the relationship that is contemplated is a direct one. If the members of SEWA were to fall under this categorization, then the various benefits that the Act provides to the workmen, which the organization has achieved outside the act would be subject to the procedural requirements of the Act and would be lost to the women.

While initially there may be apprehensions with regard to the fallouts of a trade union specifically oriented towards women – these are wiped away with the holistic manner in which women's issues are broached. SEWA is inspiringly independent – the community of workers who face a dilemma, are allowed to recruit leaders from themselves and choose their own solutions. This decision making power, empowers women to make braver decisions, both at work and at home, for the support of others who are similarly placed, proves to be a source of great strength.

The organization conducts its own surveys – a methodology which is accurately given great importance by Bhatt who insists that, for the effective recognition of the nature and scope of a problem, a series of preliminary and more detailed surveys are required. In this manner there is no question of a majority dominating or intimidating other members of the union.

When addressing the power structures inherent in any association due to the prevalence of the caste system, Bhatt with characteristic maturity states that non discrimination, unity and the concomitant power of the collective is a transformation which cannot be forced, and the futility of caste barriers have to be removed only through an *'internal process of realization'*.[10] It is this faith which she has placed in these women that has propelled SEWA to success; for with full confidence in the organizational capacity of these women she has allowed them to express their own needs in their own way.

In fact, the chapter dedicated to banking provides an incredible account of how a

10 Bhatt, R.,Ela, *We Are Poor But So Many*, (New Delhi: Oxford University Press, 2006), 118.

collection of uneducated women from Naranghat, Gujarat started a bank with their own meager savings and went on to run it so effectively that year after year since its inception in 1973 SEWA Bank shareholders have received dividends without fail – a feat accomplished without the aid of any subsidy and in the face of a condescending bureaucratic mindset.[11]

What makes this book striking is Bhatt's ability to bring into focus all the individuals who populate the background of our lives – those who form the backbone on which all our pretensions of development rest. She insists on repeating the manner in which their days progress, their habits and the ways in which they accommodate the limitations imposed on them. Returning, over and over again to the real life stories of these women gives the book the biting edge of reality, while their endurance and success with SEWA infuses optimism.[12]

These descriptions are invaluable and no number of statistics can take their place in ensuring that the reader not only acknowledges and understands but truly empathizes with these women. What is truly remarkable is, not only does the author empathize completely with lives so different from hers, but also that she manages to transfer this empathy to the reader by offering a lucid description of exactly what goes on in the lives of the subjects of the book. Combined with the presence of a few, well placed statistics regarding the exact wage rates, savings, expenses and economics of these women Bhatt's arguments prove to be emotionally and logically well placed.

Also, this combination of heart and head is what is so different about SEWA. Again we find both in Bhatt's perspective, in the functioning of SEWA and in the book, a feeling of completion and unity which comes from the manner in which Bhatt identifies and addresses each concern that may arise in the mind of a reader. When speaking of herself, she provides an account which begins with her family, her college life, her relations with her husband and the turns in her career which led her down the path she chose. Similarly when discussing labour law, she examines in detail the ground level situation and then goes into the failings and exploitation on the level of the middleman who takes a cut, the government official who takes a bribe to ignore the unfavourable laws and the legislators who create a legal situation so antagonistic towards the needs of the people it seeks to represent.[13]

Yet, the most striking feature of the struggle of SEWA is that hostile external perspectives have not jaded the drive of its members or creator. The organization caters to the financial and work related needs of its members while providing them with support

11 Bhatt, R.,Ela, *We Are Poor But So Many*, (New Delhi: Oxford University Press, 2006), 16-17.
12 *Ibid*, 69.
13 Bhatt, R.,Ela, *We Are Poor But So Many*, (New Delhi: Oxford University Press, 2006), 69.

during times of crisis through their own collective strength. Commendably, despite the vastly successful nature of the programmes carried out, and the wide support base created at the grassroots level, the organization has always maintained a distance from local, regional and national politics.

A trade union without political affiliations is a rare occurrence these days, but learning from how increased political influence resulted in the dissociation of TLA from its members, SEWA has maintained a staunchly apolitical stance often at great cost to itself.

The truth is that with a political association comes greater bargaining power, a more cooperative government structure and greater access to resources. Yet admirably, they have maintained their distance from such acts, and proved that despite the juridification of labour relations and the corruption of the state, the voice of the people cannot be drowned.

Similarly, they have followed a clear policy of staying away from commercial profit oriented activities; although, they have facilitated capability expansion amongst workers by allowing them access to methods of improving their own livelihood. These principles have maintained the credibility of the institution and stood them in good stead.

By way of criticism, one has little to offer but there are things to take note of in the book. Firstly, the author has a tendency to get repetitive with stories which are so numerous that they lose their impact eventually. Secondly, although numerous intelligent questions are raised by the author there is no attempt to answer them in full. Thirdly, in the chapter dedicated to reforms, one wishes that there was more by the way of suggestions, both for individuals and the state to implement, to ensure the amelioration of the situation of such women. An account of Bhatt's journey, though, a learning experience in itself; a further elucidation of her ideas for change would have made the book more thought provoking, as often it sinks into being a log of incidents in the lives of women, families and SEWA organizations. Lastly, with regard to the layout of the book, the pictures could have been used in a manner much more effective.

In conclusion, one feels compelled to comment on the inadequacy and often barbaric nature of the laws, and the manner in which they are implemented against the vulnerable. This forms a recurring theme in the book where most commonly the greatest obstacle to achieving equity between employer-employee relations is an uncooperative legislature and judiciary. This was specifically brought out with the story of the vendors, who are the main source of groceries to cities but who are considered illegal salespeople, encroachers and consequently penalized for the same. This sort of lack of understanding on the part of the state administration is disturbing

and begs for change. However, what must be changed before the laws is the mindset of the people who frame and follow them and this can be done through the effective dissemination of information with regard to the plight of the oppressed through mediums like this book.

In that manner, this book is a valuable teaching tool for those who need to learn more about the working conditions of the unorganized sector, for those who need the unorganized sector to be made visible to them and also for those of us who feel a need to initiate change but don't know how. A must read. Definitely.