International Journal of Law
ISSN: 2455-2194, Impact Factor: RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 01-11

International principles for resolving election disputes

Steve Bickerstaff

University of Texas School of Law, United States

Abstract
This article presents the principles of voting recounts and election contests worldwide. It concludes that similar rules apply in virtually every country for determining the winner of a democratic election and are successful only if they are trusted by the public. This article is designed to provide guidance about when and how to use these tools for both those who trail in the initial tally of votes and those who lead.

Keywords: International principles, election disputes

1. Introduction

The outcome of virtually all general and primary elections is decided when the votes are initially tallied. The difference in the number of votes between the winning candidate and the losing candidate or candidates is usually too great for the outcome of the election to be changed by any post-election recount or election contest. Sometimes, however, these post-election remedies become critical in protecting human rights by determining who actually won an election. [1]

Legal counsel and election advisors need to take precautions before the election and to watch for anomalies in the election results. Both winners and losers need to be able to knowledgeably assess the likelihood of any successful challenge to the election results and to understand all of the ins and outs of a post-election challenge if it happens. Sometimes this is merely a matter of knowing the applicable law. Other times it may involve quickly assembling evidence, or identifying witnesses, that could be important in any later proceeding.

Although the United States has over 100 years of case law about voting recounts and election contests, almost all democratic nations have some method of recounting votes and challenging the legality of certain votes when the outcome of the election is in doubt. There are recounts and occasionally election contests annually throughout the world. Others are requested, but denied. For example, in 2015, Myanmar conducted its first "fair" election. One of the biggest upsets occurred when former defense minister, U Wai Lwin, of the governing party lost to a poet, Tin Thit, who had spent seven years in jail as a political activist. Lwin lost by only 178 votes out of more than 55,000, but was denied a recount because recounts apparently were available under Myanmar law only if the candidates were actually tied. By contrast, a recount of 7,628 polling stations was necessary in Santa Fe Province, Argentina, to resolve the outcome of the 2015 race for governor.

For this article, I have cited primarily authorities in the United States, but I have also reviewed the post-election procedures of many other nations and have found that the post-election process is similar in most democracies. There are many similarities, but there is almost always something different, even unique, about every nation and state. Nothing in this article should be a substitute for knowing the legislative and court-made law in a particular nation or state.

All democracies have bodies responsible for canvassing votes and, sometimes, for certifying the results in elections. Under the U.S. Constitution, control over elections is almost entirely in the hands of state and local authorities. States generally provide for a bifurcated system by which the outcome of an election is certified and by which this outcome may be challenged in an election contest before an "impartial arbiter" (usually a local court).

In most nations, however, a national or regional electoral agency (often ostensibly independent of government influence) is the most important entity. It serves as the arbiter in the system and is responsible for investigating alleged irregularities and ordering a whole or partial "recount" or investigation of votes if warranted before declaring the final election outcome. Nations vary on whether a ruling by this electoral agency is final or can be challenged in court.

A warning upfront - As significant as proper use of these post-election actions may become, the most important post-election duties of a candidate's advisors are to put aside any prejudice generated by a hard-fought campaign, to objectively and correctly assess the utility of any post-election action, and to advise the candidate frankly whether any post-election efforts are likely to change the outcome. These duties are not nearly as easy as they may appear. Very often the losing candidate is caught-up in the emotion of an unfavorable outcome and is unwilling to immediately accept the result. He or she thinks that the opponent stole the election, or the election officials miscounted the votes, or election irregularities affected the outcome. Supporters (or campaign personnel) urge the candidate "to keep fighting". A contrary opinion may be unpopular, but it is the duty of the advisor to look realistically and knowledgeably at the results and advise the candidate accordingly. A failure to do so can prove costly.

At other times, a losing candidate may be tempted to immediately concede an election even when there are indications that the initial counting of votes has been affected by errors or wrongdoing which, if corrected, may change the outcome of the election. At such times, it is the duty of the candidate's advisor to know if post-election action might change the outcome and to advise the client accordingly. In

2000, candidate Al Gore initially conceded the outcome in Florida, and therefore the presidency of the United States, to George W. Bush. Advisors later convinced him to withdraw this concession and to aggressively pursue recount and election contest options that, if properly handled, would probably have made Gore the victor.

I will draw on the 2000 post-election conflict in the U.S. presidential election, George W. Bush v. Al Gore, to provide examples of how recount and election contests generally work and to illustrate some of the pitfalls that may plague any such post-election search for a remedy. [2] This post-election battle drew attention worldwide and continues to be the best known of such post-election fights. It has much to teach us.

The events in Florida in 2000 are somewhat limited in value today by the changes that have occurred in the United States, ironically, in response to what was seen as flaws in the election process in Florida. The most significant changes were enactment of the Help America Vote Act (HAVA), creation of the United States Election Assistance Commission (EAC), the EAC's adoption of testing and certification of voting equipment, the adoption of specific requirements for voting equipment used in federal elections, and the quick disappearance nationwide of the problematic "punch-card" voting equipment [3] that became notorious in the Florida recount. The manner in which some persons cast their vote has been changed (whether advanced or not is debatable) by technology in some states and nations. It is necessary to consider these changes, including this new technology, on the recount and election contest processes worldwide.

Despite these changes, the basic principles of recounts and election contests remain essentially the same as in 2000 for the United States and most other nations:

- International election principles contemplate the availability of a mechanism by which the ostensible outcome of elections can be validated. These remedies exist only if provided by law. They are not available at common law.
- Actual recounts are most common in first-past-the-post and majoritarian election systems. They are less common under proportional representation systems, but still exist as a potential remedy both in primaries to determine an open party list and in a general election to determine a party or individual's right to seats in a legislative body.
- The preferred means of recounting votes (and the means most likely to produce a change in the initial vote count) is a manual recount. The objective is to establish the voter's intent.
- In the U.S. recounts usually occur before the certification of the election results by the canvassing authority. The results are incorporated into the final vote tally. Once the body responsible for canvasing the election certifies that vote tally, the election is officially over.
- In some nations, however, a request for a "recount" is made to the electoral authority and encompasses both the physical retallying of votes to eliminate mistakes and a review of alleged irregularities. In this circumstance the election is not final until the electoral authority resolves any complaints and rules as to the election outcome.
- Any election contest in the United States comes only after certification of the election results. The action names the certified winning candidate as the defendant on the basis that he or she has no right to the office because invalid votes were counted or valid votes were left uncounted. [4]
- The specifics of law regarding a recount or election contest include the timeline for filing pleadings and being heard, who has standing to request the remedy, who has jurisdiction over a particular type of election dispute at a particular place in time, and what grounds must be shown for the requested remedy. These requirements vary by jurisdiction and must be met, or the remedy is defeated. There is little time after an election in which to learn the law. An advisor who fails to know these differences before the election itself may be doomed in the rapid-fire atmosphere of a post-election dispute.
- The objective of an election contest is to determine the will of the people in the election, not to determine the final vote count or to investigate alleged wrongdoing. Despite the public pleas "to count every vote" in Florida in 2000, the real issue was simply whether Gore or Bush had won the election and Florida's 25 electoral votes according to a timely counting of legal votes determined according to the rules previously laid down by law and the courts. The goal is to apply standards uniformly; not to manipulate the counting of votes to win the election. [5]
- In the U.S. an election contest proceeding is *de novo* before an impartial arbiter. The arbiter (e.g. a court) is not required, however, to repeat an otherwise proper partial count or recount that is uncontested. Even when review is technically *de novo*, the reviewing authority will validate the election results if possible. [6] Any attorney representing a losing candidate in a contest of the election results must be prepared for a difficult and costly fight to overturn these results.
- In some nations, if any challenge is allowed to the ruling of the electoral agency, it usually comes as an appeal from the agency's decision to a special court (Mexico) or the nation's highest court. Only a few states in the U.S. provide such an appeal relying instead on the election contest process through the normal state courts.
- The emphasis throughout these post-election processes is on expeditiously determining the election outcome. Recounts or election contests must not be the basis for protracted proceedings that interfere with the purpose of the election (e.g. to determine a political party's candidate in an upcoming election), or potentially destabilize the governance of the jurisdiction by leaving an elected office unfilled, or by leaving a cloud of illegitimacy over the office-holder. [7] Sometimes the search for truth becomes a victim of this need for expediency.

Pre-election Precautions

Winning any post-election battle must necessarily start before the votes are first tallied. The surest way of winning any post-election dispute (aside from avoiding it altogether by winning the initial vote count by a comfortable margin) is to take appropriate precautions before the election. Votes must not be wasted. Several egregious mistakes by Democrats before the 2000 election in Florida had unexpected consequences and provide examples of how pre-election mistakes or oversights cannot be undone after the election.

Beware of Overzealous Campaign Tactics That Can Backfire. Sometimes a campaign tactic intended to help a party or candidate can have an unintended effect. This occurred in Florida. In an effort to improve the likelihood that persons voting for Gore would also vote for Democratic candidates lower on the ballot, Democratic voters in some counties were urged to "Vote on Every Page" of the ballot. Unfortunately, the candidates for president took up two or more ballot pages in some counties. A person who voted for Gore, but also voted on the second page of the ballot had his or her vote nullified as an "overvote" (See below). This problem was exacerbated in Duval County where voters were also urged to vote for "Gore and Brown" in an effort to reelect black congresswoman Corrine Brown. Unfortunately, there was also a presidential candidate for the Libertarian Party named Harry Browne. Any vote for Gore was nullified if the ballot also contained a vote for Browne. Certainly most voters understood these admonitions and cast legal votes. On the other hand, apparently a few voters did not, or realized their mistake only after casting an invalid vote and had no time or legitimate alternative for correcting it. It is estimated that these two miscues caused a loss of 15,000+ net votes for Gore in Duval County alone – far more than enough to offset Bush's ultimate winning margin of 537 votes statewide. None of these votes could be recovered after the election.

Beware of Ballot Format and Content. Virtually all nations and states afford a candidate the opportunity to review and approve the ballot before an election. Take advantage of this opportunity. Do not make the review *de facto* and limit your review of the ballot to only whether the candidate's name appears properly (e.g. correct order, correct spelling, etc.). The infamous "Butterfly Ballot" episode in Palm Beach County, Florida could have been avoided with a more careful and thoughtful review by election officials or candidate representatives of the ballot format. The county's punch-card ballot lay-out was confusing – i.e. some voters intending to vote for Gore or Bush mistakenly punched the wrong hole and thereby voted for another candidate. Many tried to correct their mistake, but ended up with a ballot that contained more than one vote for president. Both Bush and Gore were affected, but by far the largest number of votes disallowed as overvotes in Palm Beach were those that had a vote for Gore (15,000) and someone else as compared to those that had a vote for Bush (3,500) and someone else. Neither a recount nor an election contest furnished a means for salvaging any of these votes.

Test Vote Tabulating Software and Voting Machine Algorithms and Capabilities. In most countries worldwide, votes are still cast using paper ballots. These ballots are then counted by hand. This counting process may be slow and has the potential risk of human error (e.g. misplaced ballot boxes, vote recording errors, etc.)

In some nations, however, the hand-counting of votes has been replaced by a faster computerized process. Electronic or computerized equipment is used either to count votes on paper ballots (e.g. optical scanning of paper ballots) or to allow voters to actually cast and to record a vote (e.g. Direct Recording [DRE] or e-voting equipment). Some of these systems are privately produced and marketed in a highly competitive environment. Some nations, however, have developed their own government systems allowing e-voting through a public network. [8] Although generally successful, these systems continue to be subject to frequent allegations that they are susceptible to fraud and manipulation.

The voting equipment testing and certification process of the EAS in the U. S. is intended to assure that electronic voting and counting equipment in that country meets standards of reliability. The EAS standards are voluntary, but certain federal funding for a state is tied to whether that state follows these guidelines. Section 301(a) of HAVA and EAC regulations set the following standards for voting systems used in the United States. The systems must:

- permit a voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;
- provide a voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and
- notify a voter of overvotes (votes for more than the maximum number of selections allowed in a contest) and provide the voter a chance to correct these errors.

Forty-seven states in the U.S. follow these federal guidelines or have adopted similar guidelines by state law. The regulations also now provide that a voting system must also produce a permanent paper record suitable for use in a manual recount. The final decision about which voting equipment to acquire and to use in the United States is usually left to the local government paying for the equipment. As a result, the actual type of equipment used in the U.S. may vary among jurisdictions even in the same election (e.g. a multi-county or statewide election), while in most countries the manner of casting votes is uniform nationwide.

Electronic or computerized tallying of votes through the optical scan of paper ballots is used by a majority (56%) of jurisdictions in the United States and many other jurisdictions worldwide. A person records his or her vote by appropriately marking the empty rectangle, circle, oval or incomplete arrow (based on the brand of equipment) next to a candidate's name on a paper ballot. These ballots are then scanned and recorded by the electronic equipment at the precinct or later at a central location. This equipment is widely accepted, largely because, if necessary, the result can be verified through a manual recount of the actual paper ballots.

DRE or e-voting equipment allows a person to actually cast his or her vote on electronic equipment. Each vote is recorded directly in a computer's memory. Some nations see a move to a DRE or other computerized system as less problematic than continuing to count ballots by hand. It is now used in parts of at least 31 states in the United States and 10 nations worldwide. The first versions of such equipment provided no means for testing the accuracy of the electronic system's numbers by comparing these numbers against any "paper trail". The EAS guidelines now require a paper record in the U.S. Many persons, however, doubt the meaningfulness of recounting votes in a DRE system because the "paper" is simply a reprint of the DRE machine's record of the vote.

DRE or e-voting is intended to give reliable vote counts immediately and to make recounts, especially manual recounts, unnecessary. Many jurisdictions have begun using such equipment, but others have hesitated or even changed back to

their prior method of casting votes in response to public concerns about the accuracy and security of relying solely on electronic means for casting and recording their vote. This debate over the reliability of casting votes on electronic equipment is still unsettled. A candidate's advisor cannot change the manner by which votes are cast in an election, but must take all necessary and available steps to assure that the official outcome is the real one.

A candidate's advisor should confirm that the electronic equipment meets applicable standards. Even though the brand and model of the equipment are certified by EAS in the United States or a similar federal agency in other countries, the specific devices being used may malfunction, be inadvertently mis-programmed, or (at least theoretically) be intentionally sabotaged. Testing the accuracy of the equipment by election officials before an election is generally required by law. A candidate's counsel should confirm that this testing occurs, that the results of the test tabulations are accurate, that the equipment has no possible connection to any outside source, and that the equipment remains secure from the time of testing through the actual election. Malfunctions have occurred. Stories about plots to steal elections through tampering with electric voting equipment abound, but they are unverified. [9] Nevertheless, such intentional or inadvertent mis-programming remains theoretically possible. [10] No candidate or advisor should ignore these possibilities.

Monitor Election Day voting as it happens. Virtually every state and nation allows candidates or political parties to have representatives ("poll watchers") at the polling stations when voting takes place. A candidate should take advantage of this opportunity. Such representatives should be instructed beforehand on what to observe and with the expectation that they could become witnesses in any post-election litigation. In reality, most serious candidates have a slew of volunteers willing to watch over polling stations and to report (usually orally or by text message) on activity at the stations. It is necessary to sort through these reports and to filter out the extraneous "noise", especially rumors of conspiracies by opposing candidates. [11] Too much time focused on the imagined misdeeds of the opposition can mean too little time focused on the vagaries of your candidate's own campaign. Monitoring Election Day events can also give you a needed head start on assessing whether there are any anomalies that suggest wrongdoing or errors that could affect the election outcome.

2. Recounts

Recounts are essentially an administrative process by which election officials identify and correct any mistakes in the process of finalizing the tally of votes in a race. Election night returns are notoriously incomplete and inaccurate. Election officials work to identify any errors and to correct them before any official numbers are verified and released. They ordinarily will do so without any formal petition for a recount. A candidate should observe (or arrange for the observation of) this counting process and help the election officials spot any problems. Nevertheless, despite the election officials' best effort, some errors may escape detection and persist. An official recount is a means for finding these errors.

Election Officials. Virtually all election officials meet their duties without any partisan or personal bias. Exceptions occur. In 2000 the chief election officer in Florida was Secretary of State Katherine Harris. She was also the co-chair in Florida for the George W. Bush campaign. Ms. Harris's attorney acknowledged to me that they did everything they thought legally possible to see that Bush prevailed in the subsequent recount and election contest. In some nations the opportunity for fraud by election officials is greater than in the United States especially when a candidate or political party controls administration of the election process. In many countries, international election monitors observe and audit elections and at least give their assessment of whether the elections were free and fair. [12]

Automatic Recount. Many jurisdictions have a law that automatically triggers a recount of votes if an initial tally of votes falls within a threshold. [13] This trigger for an automatic recount is usually expressed as a percentage of the total vote for the two candidates, is in a range of .05-1%, and can vary according to whether the election is local, statewide, or nationwide. Some jurisdictions also provide that an automatic recount occurs if the candidates are closer than a certain number of votes (e.g. 100). Usually an automatic recount is accomplished by simply rerunning the ballots through the same counting process as earlier as a test of the vote counting equipment. It seldom yields any material change in the election outcome. There are exceptions. [14]

Requested Machine Recount. In some jurisdictions a losing candidate may request a machine recount. As with an automatic recount, however, simply repeating the earlier counting process (e.g. running the ballots through the same counting equipment) is unlikely to produce any meaningful change. Nevertheless, since mistakes do happen, requesting a machine recount (when available) in a very close race is usually advisable.

Manual Recount. A Manual Recount is one in which each ballot is reviewed and counted by hand instead of counted by machine. It is the type of recount most often used worldwide. It is also the type of recount most likely to change the vote count and the outcome because it allows the counting of overvotes and undervotes that were not counted by the electronic equipment (see below) or that were initially determined by election officials to not contain a valid vote. In some nations, local election officials will readily recount votes if asked to do so. In others, the law prescribes a formal process of asking for a manual recount. In those circumstances, a formal manual recount often comes at the expense of the person (general public or candidate) requesting the recount, can be costly and should be undertaken only where a legal counsel's assessment of the election returns discloses anomalies that, if corrected in a manual recount, might change the election result. In at least one country (Myanmar) a recount is possible apparently only if the candidates are tied. In others, a recount is possible only if the difference in votes is within a prescribed threshold.

Although many nations still manually count votes after an election, very few jurisdictions (<4%) in the United States do so. Such manual counts are labor intensive, slow (often taking days), and have a high error rate as the counters often must simultaneously tally votes in many races. On the other hand, a

manual review of those ballots for a single race in a highly structured recount process does not have the same short-comings and is the best means for arriving at the will of the people in a close election.

In many states and nations, the canvassing authority first conducts a partial manual recount to determine whether a manual recount of all precincts is justified. [15] In other jurisdictions anyone asking for a manual recount must show grounds for doing so. The local elections official in the U.S. oversees most recounts in partisan elections, but the secretary of a city, school district, etc. will usually oversee a recount for that political institution. In countries with a separate elections agency, the recount generally occurs under the auspices of that regional or national authority.

The recount process must be open and transparent. A manual recount process for paper ballots (including those that use optical scanners to count votes) is usually very straightforward. One election official manually reviews the ballot and announces the vote, while a second election official records each announced vote for the respective candidate. Sometimes a third election official is present to help the first two by making sure the process is fair and accurate. The candidates, or their representatives, also are present, can review the ballot, and can note their agreement or dissent from the decision of the election officials to count, or not to count a vote. A manual count of the paper records from a DRE or e-voting system is possible only if a paper trail exists for the votes. If one exists, the recount is conducted in much the same fashion, but, since the paper record is generated by the same equipment that recorded and counted the votes, there is not likely to be any difference in the recount tally or any issue of voter intent.

Sometimes the general public can observe. In Florida, the recounts in Palm Beach and Miami-Dade counties became circus-like affairs as protestors from both parties clamored for the canvassing authority to favor their candidate during the recount.

Looking for Anomalies. A candidate's counsel or advisor must look closely at the returns in an effort to spot any anomaly in those returns that might indicate a problem. Any political consultant worth his or her fee can usually immediately spot where a candidate is "underperforming" or "over performing". The candidate's advisor or counsel should not, however, rely solely on this consultant, but should independently look for anomalies such as:

- Whether the number of ballots given out in a precinct exceeds the number of registered voters in the precinct or is suspiciously high or low compared to other precincts. Be aware, however, that this apparent anomaly can be explained in many jurisdictions where Election Day registration is allowed or persons are allowed to vote in voting boxes other than the one in which they are registered (e.g. Iran).
- Whether there is any indication of voting by persons outside of the jurisdiction in question (e.g. outside of a representative district).
- Whether there is a significant difference between the numbers of votes cast in your candidate's race as compared to the numbers of votes cast in a voting box for other comparable races. Be aware, however, that a common mistake is to equate the number of ballots with the number of votes.
- Whether the number of overvotes or undervotes in your candidate's race could affect the election outcome.
- Whether there is any difference in the tally of votes recorded at the precinct and the tally shown at the central counting location. There should be no difference.
- Whether evidence shows that an ineligible person voted or a person voted more than once.
- Whether any unusual activities or irregularities at the polling stations may have intimidated or affected voting.
- Whether there are any irregularities in the treatment of early votes (e.g. lack of security).
- Whether there is anything suspicious in the treatment, security or results of absentee voting. Absentee voting is notoriously a possible source of fraud that can affect the outcome of a local race. It is usually the only time when a ballot officially can leave the custody of election officials. Every valid absentee ballot must have at least the voter's name, address, and signature (sometimes requiring notarization). In some jurisdictions, a voter must show a reason why he or she cannot vote in person on the day of the election. Even strict compliance with these requirements, however, does not guarantee that the absentee vote is legitimate.

This is not an exclusive list of possible anomalies. The presence of one or more of these or other anomalies does not necessarily indicate that something is amiss, but is the basis for further investigation. An election can often be surprising, with voter turnout (or other indicators) unexpectedly varying for legitimate reasons.

Rechecking Electronic Equipment. Law usually requires that electronic counting equipment must be retested after an election. The candidates' counsel should assure that the testing occurs and that the test shows no discrepancies.

Undervotes. It is common for persons to not vote in all races that they find on a ballot. The reason may be as grand as a protest against all of the candidates in a particular race (i.e. effectively saying "none of the above") or as banal as not knowing anything about the candidates in a race. These are undervotes – i.e. where the ballot is determined by the counting equipment or election official to not contain a vote in a particular race or races. Votes elsewhere on the ballot are counted in the appropriate races.

In some circumstances, however, the person may actually intend to cast his or her vote in a race, but the electronic equipment does not count the vote or the voter's intention is overlooked in the initial tally of votes. The Manual Recount is the means for finding and counting these votes. It was the search for such undervotes that caught the public's attention in Florida when election officials were seen eyeing the "punch-card" ballots in an effort to find hanging or dimpled "chads" that showed a voter's intent to vote for a particular candidate in the presidential election.

This problem of the undervote is not unique to punch-card voting. Most electronic counting equipment (e.g. optical scan of a paper ballot) records only those votes marked with the requisite instrument and in the requisite manner (like a scoring machine on a college entrance exam). Otherwise the equipment

records a non-vote. Thus, if a voter does not use the requisite pencil or places something other than the requisite mark alongside the desired candidate's name (e.g. checks the oval rather than filling it in) the vote may not be identified and recorded by the electronic counting equipment. In nations where the ballots are initially counted by hand, election officials may overlook a voter's intent.

Overvotes. An overvote occurs when a ballot contains two or more votes in the same race. In such a circumstance, voting equipment discards all votes in the race and records a non-vote for the ballot. This result seems reasonable because it is difficult at first blush to think of a legitimate reason why anyone would vote for two different candidates in the same race and expect his or her vote to be counted. The issue, however, is the occasional failure of vote counting equipment or manual vote counters to correctly discern a voter's intent. In Florida, some voters were so emphatic in their support for Gore that they both marked their ballot for Gore and put his name in the space for write-ins or made other incidental markings on the ballot to show their support for Gore. These voters probably did not realize that the electronic vote counter would read these markings as constituting an invalid vote even though, on manual review, the intent of the voter was clear. Gore's lawyers mistakenly opposed any recount of overvotes throughout the post-election proceedings. Later review of the ballots found that these overvotes statewide would have produced the greatest net gain for Gore. [16]

The Intent of the Voter. The intent of the voter controls whether his or her vote is counted. Therefore, merely because a vote is not recorded by the electronic voting equipment or in an initial manual counting of votes does not mean that some undervotes or overvotes should not be counted if the voter's intent is clearly evident on a manual review of the ballot. In the Supreme Court opinion in *Bush v. Gore* [17], however, Justice Rehnquist (joined by JJ Scalia and Thomas) indicated that these votes should be left uncounted because it was the voter's fault (i.e. failure to follow instructions) that his or her vote could not be read by the electronic counting equipment. [18] The suggestion was that if the vote was not detected by the electronic counting equipment, it should not be classified as a legal vote. I am unaware of any state or nation that follows this principle, but many struggle with how to objectively discern voter intent. The demonstrable intent of the voter is still the recognized standard in most states and nations.

Jurisdiction-wide Recounts. The cardinal rule for any recount is that it should be as broad as possible. The Gore lawyers in Florida violated this rule by seeking a recount of votes only in four of the state's 67 counties. This decision was a critical mistake because:

- It left the Democrats vulnerable to the Republican claim that Gore was trying to "cherry-pick" the election results in order to steal the election;
- It left the post-election process an equal protection nightmare, ended up dividing an otherwise friendly Florida Supreme Court, and legitimized the U.S. Supreme Court's intervention to stop the process; and
- It caused Gore to lose the election.

Gore's attorneys respond that there was no mechanism for a statewide recount. I do not agree. [19] Bush's attorneys avoided calling for a recount in the remainder of the state. [20]

Preparing for an Election Contest. A recount serves as a means of discovering or exploring any potential basis for an election contest. [21] At the most basic level, it serves to identify any specific ballots on which a vote is to be contested as a legal vote that was not counted or an illegal vote that was counted, and whether these contested ballots made a difference in the outcome of the election. On a broader basis it may show irregularities that can be challenged. A candidate's counsel should keep a record of each step or decision in the recount process and notify the recount administrator and canvasing board of any perceived errors.

Election contests

A recount and an election contest are distinct remedies in the United States. In some other countries this distinction is unclear. In such countries, what the media describes as a "recount" of votes is a petition asking the nation's electoral agency both to retally the votes and to determine a challenge to the manner in which the election was conducted (e.g. alleged widespread fraud). In some countries, a decision of this ostensibly independent electoral board appears to be final and cannot be challenged in court- thus there is no prescribed proceeding equivalent to an election contest for overturning the outcome of an election. In other countries, a court can annul an election. As shown in the 2004 election for president in Ukraine, an apparent bar to judicial review is not always effective.

In the United States, a contest of the election results becomes possible only after the vote in a race is certified as final by the canvasing authority. The action may be commenced by a losing candidate, or in some states, by any voter, but only during a specified time after the vote is certified. The decision to contest an election is not one to be taken lightly. Few contests are won. An election contest may be costly, evidence-intensive and may require an attorney's full attention for the weeks leading up to a final decision. In a recent case in Travis County, Texas, the losing candidate and her attorney were assessed over $100,000 in attorney fees and costs for bringing a frivolous election contest.

Changing the Outcome of the Election. Any person contesting an election in a court or before an electoral agency must plead and prove that the disputed ballots or voting irregularities or fraud are sufficient to change the outcome of the election or to make it impossible to determine the legitimate outcome. Merely showing that the number of such ballots or votes affected by the irregularities exceeds the number of votes separating the candidates is not sufficient in part because such votes may simply mirror the certified outcome.

An Impartial Arbiter. Issues affecting the legitimacy of an election outcome should be decided by a single impartial arbiter that assures uniformity in how the contested ballots are treated and the votes are counted in a close election. In that sense, the U.S. Supreme Court's *per curium* opinion got it right in *Bush v. Gore* when it explained that "when a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and

fundamental fairness will be met". [22] This obligation of equal treatment and fairness applies to all arbiters entrusted with resolving any disputes over any election outcome. The duty of the arbiter, including an electoral agency, is to decide who won the election and to apply uniform standards in doing so.

Find the Right Forum to Hear an Election Contest. The correct forum for an election contest varies enormously from nation to nation, state to state, and within a state according to whether the election is a primary or general election, and whether the election is strictly local, district-wide, statewide, a presidential election, a judicial election, a proposition, a state legislative election, a congressional election, etc. [23] In many nations a court has jurisdiction to hear petitions complaining of election irregularities, but often the jurisdiction is limited to a specific court or level of courts. Be sure of your forum or you may be embarrassed and miss your time for filing in the correct forum.

One of the most overlooked forum issues is set by U.S. federal elections. The U.S. Constitution leaves final resolution of a presidential election to Congress. It also provides that each house of Congress is the judge of the qualifications of its members. The law has evolved to allow state recounts and election contests in general congressional elections to proceed if not precluded by state law. Nevertheless, many disputed general elections (not party primaries) have ended up reaching the affected house of Congress – where usually the dispute is assigned to a committee, is ridden by partisan considerations, and languishes while the winner of the state proceedings occupies a seat in Congress. Many states have similar constitutional provisions making the respective house of the state legislature the ultimate judge of the qualifications of its members. In some states, the forum for an election contest over a state legislative seat actually is the state legislature. [24] The decision of the legislative body is final and cannot be appealed.

Only approximately twelve nations beside the United States make the nation's legislative body, or some part of it, responsible for judging disputed election outcomes. Most of these are in Europe. This power is mitigated in Germany because the decision of the Bundestag is appealable to the Federal Constitutional Court.

Specificity of Pleadings. The initial pleading in an election contest is required to be very specific about the ballots being disputed, or irregularities or fraud that is alleged to have occurred and how the election outcome would be changed if the arbiter found in the petitioner's favor. Some states in the U.S. bar any amendment of this pleading except for grounds that were discovered through the contest process. Pleadings to an electoral agency should also be specific.

Presumptions in Favor of Election Results. A challenge to an election is not an invitation for a "fishing" expedition. It must clearly set out the alleged wrongdoing and how correction of the wrongdoing would alter the election outcome. As mentioned earlier, the petitioner bears a very heavy burden of proof. Gore lost his election contest in Florida because he failed to carry this burden. [25] A similar fate occurred in other litigation challenging alleged irregularities in the Florida election. [26]

Expedited Proceedings. Both the law and practical circumstances dictate that any election contest or challenge to an election outcome must proceed expeditiously. There are many traps. For example, it is important whether the statutory timeframe for filing an action runs from the vote certification by the local canvassing board or, when applicable, by the national or regional electoral authority. Events move rapidly. In Florida, the extended recounts ended and the vote was certified by the state canvassing authority on November 26, 2000. Gore filed his election contest petition one day later. The evidentiary hearing on the contest began on December 3, but was dismissed by the trial judge on December 5 for Gore's failure to meet his burden of proof. The lawsuit was reinstated three days later by a divided (4-3) Florida Supreme Court. [27] The U.S. Supreme Court enjoined the election contest proceeding on December 9, and overturned the Florida Court's ruling on December 12, 2000 in *Bush v. Gore*.

Grounds for an Election Contest. The cases deciding an election contest can be generally organized as follows:

- Those alleging that the election outcome would be changed by the counting of specific votes that were disallowed by the canvasing authority or by the disallowance of specific votes that were counted by the canvasing authority;
- Those alleging that ineligible persons voted, or that eligible voters were prevented from voting and changed the outcome of the election;
- Those alleging election irregularities or illegal conduct by election officials that amounted to mistakes unintended to benefit a particular candidate, but that changed the outcome of the election; or
- Those alleging fraudulent or intentional misconduct by election officials, voters or the opposing candidate that changed the outcome of an election.

This separation of grounds is based on my own review of election contest cases and personal experience with actual election contest proceedings, not a specific court holding. Many election contests contain two or more of these grounds. These same grounds are the basis for remedies sought from electoral agencies worldwide.

Voting by Ineligible Persons. Election officials and voting procedure ostensibly prevent an ineligible person from voting. Sometimes, however, it occurs. The vote is illegal when the voter is unregistered or ineligible, registered in a jurisdiction outside the boundaries of the election district, voting more than once, or voting in the primaries of more than one party. If an ineligible person votes and could change the outcome of an election, there is one very big problem - how to discern how an ineligible person voted so that their illegal vote can be subtracted from a candidate total? [28] Proving that a person is ineligible is only part of the problem – maybe he voted for your candidate.

Another common problem in eligibility is that a person may appear to live outside an electoral district, but is registered at a precinct within the district. Should he or she be declared ineligible and their vote disallowed? This question raises the legally complicated issue of a person's residency. Some persons currently living outside of an electoral district deny that they ever intended to make this new location permanent

and that they kept registration within the electoral district because they intended to return (e.g. college students in the United States or expatriates where permitted to vote). An interesting extension of this problem occurs in the United States with persons who live in recreational vehicles and regularly travel around the country. They may be registered to vote at a location where they seldom are present. These persons may be eligible to vote where registered so long as they are not registered in more than one jurisdiction. Trying to disqualify an out-of-district voter is almost impossible if the voter is not registered elsewhere and claims that his or her intent was to remain a resident of the electoral district in question. Even if shown to be ineligible to vote, the problem remains of discerning how the ineligible person actually voted. These problems are enhanced when the country's election system is new or not well developed.

The claim that ineligible persons regularly vote in the United States by impersonating someone else entitled to vote is untrue. In my 40 years of litigating and observing election cases, I can recall only a single occasion when a person tried to vote by impersonating someone else (his mother). A favorite allegation in the United States is that disqualified felons have voted. When this issue has been raised in litigation, however, it has been disproven. In some instances, it was discovered that the person who voted was qualified, but had the same name as the felon, or that the felon had had his or her rights restored or had registered, but never voted. There is simply no benefit for an impersonator or felon that equals the risk of being caught. I doubt that any election outcome in the United States has been changed by such illegal voting.

Unintentional Voting Irregularities. Few major elections are flawless. Equipment may malfunction, election officials may take shortcuts instead of strictly complying with applicable law, candidates may violate regulations, voters may be given misinformation, ballots may be improperly handled, there may be too few ballots, etc. Very seldom, however, do such irregularities or violations of state law or election rules constitute an adequate reason for changing the outcome of an election. The effect of many of these irregularities or wrongs simply cannot be measured and usually cannot be shown to have changed an election outcome. The courts try to avoid interfering with election outcomes by often concluding that an election official was acting in good faith and that an irregularity or apparent violation of the law, even if proven, was only a "technical" or "insubstantial" violation of the law or occurred under a statute that was "directory", not "mandatory".

There are circumstances, however, when an irregularity is so systematic and egregious that it affects the integrity of an election even though the official's action was not intended to benefit one candidate over another and the effect of the irregularity cannot necessarily be measured in specific votes. Under these circumstances, a court may require a new election. These circumstances are rare.

Fraud by an Election Official. One of the worst circumstances that may be disclosed by an election contest is that an election official or candidate intentionally violated the law. There are many election contest cases involving alleged lost ballots, intentional miscounting of ballots, forged signatures, stuffing of ballot boxes, bribery, etc. Even in such cases the person bringing the election contest is expected to show that the fraud or intentional misconduct actually occurred and actually affected the outcome of the election. In reality, however, while the standard of proof technically may remain the same as in cases involving unintentional irregularities, an arbiter is far more likely to rule with the petitioner if fraud or intentional wrongdoing is shown. This tendency is explained in part by an impartial arbiter's fear that, if fraud was proven to exist in one aspect of the election, it might also exist elsewhere although not yet discovered. Gore never alleged fraud in the Florida election.

The Defendant's Rights. A defending candidate can, of course, be expected to use the many favorable presumptions and evidentiary burdens to contest and dismiss a petitioner's claims, and to contest facts alleged by the petitioner to constitute any irregularity or fraud that can change the election outcome. Often overlooked, however, is the right of the defendant (winning candidate) to present allegations that, if proven, will add to his or her own total of votes or subtract from his or her opponent. In Florida, Bush's attorneys presented 18 affirmative defenses to Gore's election contest claims. Some were legal; some were factual, such as challenges to the handling and security of certain ballots that Gore wanted counted. The lawsuit ended before any of these defenses was litigated.

Relief. The arbiter in an election contest or at a national electoral agency can:

- Dismiss the claims;
- Conduct a whole or partial recount of the votes;
- Affirm the election outcome as shown in the original tally of votes;
- Find that legal votes were uncounted or illegal votes were counted, change the vote tally accordingly, and declare the outcome of the election; or
- Find that fraud or irregularities make it impossible to determine the outcome of the election, annul the election result and declare that a new election must be held.

Often a candidate who has lost an election grasps at the possibility of winning a new one. This hope inspires a losing candidate to want to ask for a second chance (i.e. new election). The candidate's counsel must look realistically at the possibility for such a ruling and dispel any unfounded hopes. Many factors weigh against a new election, including the costs to the jurisdiction, inconvenience for the voters, instability in governance, uncertainty whether a new election will resolve the dispute, and the reality that the losing candidate can always try again in the next election. As indicated above, courts have generally refrained from overturning election results. New elections are very rare. [29]

For a prescribed recount or election contest process to work, it must have the public's confidence as to its fairness and adherence to the law. Often street protests show public discontent with the process. In some nations, such as Mexico, confidence in the integrity of the recount process resolves such protests. In other nations, however, extraordinary steps have been taken to build public confidence. For example, in Ukraine in 2004, the Supreme Court resolved the disputed presidential election between candidates Yanukovych and Yushchenko by televising the court hearing to build public trust in the fairness of the court proceeding. In Iran, the reelection of President

Ahmadinejad in 2009 was confirmed through a recount process despite the claims of fraud and public protests ("the green revolution"). A limited recount took place and was televised. In an attempt to avoid similar allegations of fraud in the future, the administration of elections was removed from under the president and placed with an independent board of election experts.

In some instances, violence or the threat of violence has led to an accommodation between the two leading candidates. Such an accommodation was reached in the 2007 presidential election in Kenya [30] and the 2014 presidential election in Afghanistan [31].

3. Conclusion

The availability of impartial voting recounts and election contests is essential for assuring that an election reflects the will of the qualified voters voting in the election. These procedures are intended to protect the efficacy of elections, while also safeguarding the stability of governance. It is the duty of a candidate's advisor or legal counsel to assure that this mechanism is not abused.

It is a tribute to the effort to eliminate fraud in elections that in most developed countries the frequency of recounts and election contests has declined as voters and candidates have gained confidence in the fairness of the ballot-counting process. A recount may still be routine in a close race, but an actual challenge of election results is less common. Such a challenge requires evidence that the election outcome is in doubt. Hopeful thinking, fishing for wrongdoing, or harboring an unwillingness to give up a losing campaign is never sufficient reason. When real evidence exists, the presence of a fair and transparent process trusted by the public is essential. Effective use of these post-election remedies requires pre-election precautions, a knowledgeable legal counsel, and the ability to gather and to effectively present evidence.

4. References

1. See, generally, Young (Ed.) International Election Principles: Democracy & the Rule of Law at Chapters 9 and 10 (2009) and Vickery (Ed), Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections at 230 et seq (2011) citing the UN resolutions - Universal Declaration of Human Rights, art 21 (1948) available at www.un.org/en/documents/udhr and the Covenant on Civil and Political Rights, 999 UNTS 171 (1966) available at www.ohchr.org/en. See also, Resolving Election Disputes in the OSCE Area: Towards a Standard Elections Disputes Monitoring System, OSCE/ODHIR (Warsaw 2001) and Handbook for Domestic Election Observers, OSCE/ODHIR (Chapter 4, 2003) available at http://www.osce.org/odihr/elections.
2. The specific sources for the information on the 2000 presidential election are set out in Bickerstaff, Counts, Recounts and Election Contests: Lessons of the Presidential Election in Florida, 29 Fla. St. U. L. Rev 425 (2001) and Bickerstaff, Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory, 34 Loy. U. Chi. L.J. 149 (2002). I have not repeated them in this chapter.
3. Readers may never have seen "punch-card" voting equipment. It made its appearance in 1964 as the first computer system used to count votes in the United States. By the late 1980s, it was the most popular voting equipment nationwide. At a polling station, voters were given a computer card with perforated rectangles (later notorious as "chad") corresponding to the various candidates for which the voter was eligible to vote. In the voting booth, the voter inserted the card into (behind) a clip-board sized, multi-page device that had a hole alongside the name of each candidate for each race. Voters used a stylus to punch the hole for the preferred candidate and, by doing so, to punch out the corresponding perforated rectangle for that candidate in the underlying computer card. These cards were collected and, after the election, run through a computer. The system made results quickly available, but had a high error rate. Often the stylus did not fully detach the chad. The computer read the ballot as containing no vote when the chad was not cleanly detached. During recounts (such as in Florida), officials tried to discern a voter's intent by examining the computer card. This process is difficult and was immortalized by the search of Florida officials for votes on ballots not counted by the computers, the coining of phrases such as "hanging or dimpled chad" and the image of officials peering intently at the computer cards from Miami-Dade and Palm Beach Counties to discern voter intent. Punch card systems are now <1% of voting systems nationwide in the United States.
4. The election contest developed as an alternative to a quo warranto proceeding in which a person's right to office could be challenged, but only through, or with the permission of a state attorney.
5. In Florida in 2000, the recounts in Palm Beach and Miami-Dade Counties became ensnarled in a partisan fight in which both sides were attempting to maximize the votes for their candidate while minimizing the votes for the opponent. As a result, neither of these recounts was actually finished. By contrast the recount in Volusia and Broward counties went relatively smoothly and netted over 600 votes for Gore even though many of the election officials were Republican.
6. See, e.g., Gooch v. Hendrix, 851 P.2d 1321, 1327 (Calf. 1993) ("A primary principle of law as applied to election contests is that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal"); Jackson v. Maley, 806 P.2d 610, 615 (Okla. 1991) ("Courts indulge every presumption in favor of the validity of an election and, where possible, the validity will be sustained. . . Mere possibilities will not suffice to carry this initial burden").
7. See, e.g., In re Contest of the Election for the Offices of Governor and Lieutenant Governor Held at the General Election on Nov. 2, 1982, 444 N.E.2d 170, 178 (Ill. 1983) (Concluding that "Until such an election contest is resolved, the political turmoil surrounding it . . . could effectively prevent the legislative and executive branches of government from dealing with the urgent problems facing this State. The State of Illinois should not be forced to endure these consequences on the mere suspicion of defeated candidates or on their belief or hope that an election contest would change the results".) But see, Justin Levitt, Resolving Election Error: The Dynamic Assessment of Materiality, 54 WM. & MARY L. REV. 83, 143–44 n. 196 (2012) (suggesting that declaring the wrong

person the winner is worse than leaving a seat vacant even after the person is supposed to take office especially in the case of a multimember body that can still function while the election contest is resolved).

8. E.g. Australia, India, Brazil, and Venezuela. Iran says it is planning an e-voting system for 2015 or 2016. 248545
9. E.g. Organizers of the referendum to remove President Chavez in Venezuela lamented the lack of a reliable audit when two apparent statistical anomalies showed that the machines allegedly had been subject to tampering.
10. The Delhi High Court has said that the India e-voting system is "not tamper-proof". See Security Analysis of India's Electronic Voting Machines (2010); available at https://jhalderm.com/pub/papers/evm-ccs10.pdf. See also, Daniel P. Tokaji, The Paperless Chase: Electronic Voting and Democratic Values, 73 FORDHAM L. REV. 1711 (2005); Roy G. Saltman, U. S. Dept. of Commerce, Accuracy, Integrity and Security in Computerized Vote-Tallying (August 1988) (National Bureau of Standards Special Publication No. 500-156).
11. I recall the Texas presidential primary in 2008. I was representing Obama; one of my law partners was representing Clinton. We both were constantly fielding accusations (especially during the Election Day precinct meetings) of misdeeds by the other candidate's followers; none proved true.
12. See, Democracy International, Election Audits, and International Principles that Protect Election Integrity (2015).
13. In Florida, an automatic recount was triggered in the 2000 presidential election because the initial tally showed a difference of only 1,784 votes between Bush and Gore out of the approximately six million (a difference of .03%).
14. In Florida, the automatic recount reduced Bush's lead from 1,784 votes to only 327 votes. (The reason for this change is a story itself). Once in a South Texas congressional primary, the automatic recount netted approximately 200 votes for my client and made him the winner. In a subsequent contest proceeding, the opposing counsel said that in his 35 years of experience in election matters he had never seen such a large change and that the change could only be a result of fraud. The change was due to honest human error. On election night a software malfunction forced the election officials in a small South Texas county to count all ballots by hand (using the high school's honor government students called out near midnight for the task). The students inadvertently overlooked the ballots from one precinct – so the tally for every candidate in every race was short the precinct's votes. The addition of the precinct's results in the recount gave my client victory in the multi-county congressional primary.
15. The canvassing authorities in all four counties asked by Gore to manually recount their ballots went through this process and decided in favor of a full manual recount. A partial recount of ballot boxes selected at random from across Iran failed to warrant a nationwide recount in the 2009 presidential election.
16. A subsequent review of ballots statewide by the National Opinion Research Center (NORC) found that Gore would have won if all valid votes (both undervotes and overvotes) had been counted statewide.
17. 531 U.S. 98 (2000) (per curium).
18. 531 U.S. at 119.
19. My first recount experience came in the 1978 gubernatorial race in Texas. At the time there was no fax or express package delivery, much less an Internet. We utilized telephones, buses, commercial airline package services, and personal friends throughout the state to timely obtain recounts in 219 of the state's 254 counties. Only the smallest, least populated counties were not reached. The Gore team's failure to reach across the state meant their candidate's defeat.
20. Bush's lawyers reasoned that in general the Gore voters were less educated and more prone to mistakes in casting their votes. As a result, they feared that even if a majority of the counted votes in a county had been for Bush a majority of the uncounted ballots might be for Gore. It turned out that they were right.
21. See, Miller v. Boone County, West Virginia, 539 S.E.2d 770 (West Va. 2000) (indicating that a recount gives candidates the opportunity (1) to observe the manner in which the recount is conducted, (2) to notify the canvassing board of their intentions regarding requesting a recount in precincts not requested by the candidate originally requesting the recount, and (3) to identify ballots that may be challenged as irregular or illegal in an election contest).
22. 531 U.S. at 109. I personally prefer the statement by Justice Stevens in his opinion in which he agrees that the remedial scheme devised by the Florida Supreme Court was flawed, but favored letting the election contest to go forward because "Those concerns are alleviated – if not eliminated – by the fact that a single impartial magistrate will adjudicate all objections arising from the recount process".
23. For example, if the Florida dispute over the presidential vote had occurred in Texas, any contest of the electors had to be filed with the governor (who at the time was, of course, George W. Bush) not in state court.
24. If so, a committee of the respective house sometimes takes evidence, hears argument, and recommends a winner to the whole house or senate in accordance with the general rules of an election contest. The final decision rests with the legislative body.
25. Gore's election contest focused on the approximately 9,000 punch-card, undervote ballots from Miami-Dade County that had not been manually reviewed. The Gore legal team, however, could not show that these ballots had valid votes or could have changed the election outcome. Bush's lawyers countered that these ballots came from the precincts that had voted for Bush and that, if they contained any valid vote, it was probably for Bush. A subsequent examination of these ballots showed that the Bush lawyers were correct.
26. The threshold requirements applicable to an election contest proved too great for several lawsuits filed to challenge perceived irregularities in the Florida presidential election. See, e.g. Fladell v. Palm Beach County Canvassing Board, 772 So. 2d 1240 (2000) (Concluding as a matter of law that the Palm Beach [butterfly] ballot did not constitute substantial noncompliance with statutory requirements); Jacobs v. Seminole County Canvassing Board, No. CV No. 00-2816 (Fla. 2d DCA Dec. 8, 2000) (Rejecting a challenge to

absentee balloting in Seminole and Martin counties on the basis that plaintiffs' evidence failed to support a finding of fraud, gross negligence, or intentional wrongdoing by election officials); Taylor v. The Martin County Canvassing Board, No. CV No. 00 2850 (Fla. 2d DCA Dec. 8, 2000) (Rejecting a challenge to absentee balloting in Martin County despite irregularities because the election in Martin County was a full and fair expression of the will of the people). On the same day as the Supreme Court decision in Bush v. Gore, Leon County Circuit Judge Terry Lewis dismissed a challenge to voting in Duval County, Florida on the basis that "The problem here is simply one of time and the resultant lack of due process that could be afforded in resolving the issues raised by the Complaint in a meaningful way". Order of Dismissal, Congresswoman Corrine Brown v. John Stafford, CV 00-2878 (Fla. 2d Cir. 2000) in Congresswoman Brown v. Stafford, No. CV 00-2878 (Fla. 2d DCA Dec. 13, 2000).

27. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).
28. This dilemma is shown in an election contest that arose in 1992 in the Democratic primary for Texas Congressional District 29. The Democratic general primary race went to a runoff. At least 431 persons who had voted in the Republican general primary then voted in the Democratic runoff. This number was enough to have changed the runoff election result and was illegal under state law. The identity of these voters was determined by comparing the sign-in sheets from the Republican general primary and the Democratic runoff. The quandary was "How did they vote?" in the runoff. Since they voted illegally, Texas law allowed these persons to be compelled to testify as to how they voted, but failed memory, failure to respond to questioning, obstacles to service, and the lack of any means for challenging the veracity of a witness made the judge's search for a winner futile. Ultimately the judge gave up the process of trying to determine the outcome of the runoff, rejected the petitioner's request to allocate (subtract) the votes among the candidates, and ordered a new election. Green v. Reyes, 836 S.W. 2d 203 (Texas Court of Appeals [Houston] 1992).
29. In Florida, the circumstances of the presidential election were particularly complicated. Should any new election occur only in one county? One state? Nationwide? Should one county or state be allowed to determine who will become the nation's president? There was no simple and fair answer. A new election was not a reasonable alternative.
30. In the Republic of Kenya, incumbent president Mwai Kibaki claimed reelection on December 30, 2007 according to official results. Unofficial polls showed that his adversary, Raila Odinga, had won. Violence erupted – with over 1,000 persons killed. In the aftermath, the two candidates agreed to a power sharing agreement. In 2013, Odinga ran again for President, but lost the election.
31. The runoff election between Abdullah Abdullah and Ashraf Ghani took place on June 14, 2014. Final voting results were expected by July 22d, but were delayed amidst accusations of widespread fraud. Incumbent president Hamid Karzai remained in office pending a resolution. Finally in September Ghani was declared the winner, but within hours a power-sharing agreement was signed by the two candidates in which Ghani was named president and Abdullah assumed an important role in the government.

International Journal of Law
ISSN: 2455-2194, Impact Factor: RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 12-18

The class action suit: A challenge for protection of interest of investors

Dr. Gyanendra Kumar Sahu

Lecturer, P.G. Dept. of Law, Utkal University, Vanivihar, Bhubaneswar

Abstract
Capital market has emerged as a powerful tool of socio- economic growth in the post globalised world. It has attracted the investors from socio-economic groups, big and small. Historically, the ups and downs in the securities market has always played a significant role in shaping the life and economy of the nation. Thus, investors' confidence in the capital market which is ought to be based on a sound financial system of transparency and efficient system of protection and justice has assumed an important role for any developed / developing economy .To strengthen the securities market and to gain investors' confidence, the past decade witnessed wide ranging legislative interventions. So as to protect investors ' interest in securities, promote development and regulate securities market. Class action law suits as a convenient mode of realisation of securities interest and protection thereof has gained currency in western countries like USA and UK. As securities investment is a largely growing feature of Indian economy and society, it is imperative that India shapes it's legal framework to make class action suit a reality for securing the interest of Indian investors.

Keywords: securities**,** Depositories, Class Action

Introduction

Capital market is the backbone of any country's economy. It facilitates conversion of savings in to investments. Capital market is classified as primary and secondary market. The fresh issue of securities takes place in primary market and trading among investors takes place in secondary market. Primary market is also known as new issues market. Equity investors first enter in to capital market through investment in primary market. In India, common investor's participation in the equity primary market is massive. The number of companies offering equity through primary markets increased continuously in the post-independence period till the year 1995. After 1995, there is a continuous slump experienced by the primary market offering equity. The main reason assigned is lack of investor's confidence in the primary market. So it is imperative to understand the causes and measures of revival of investor confidence leading to capital mobilization and investment in right avenues creating, economic growth in the country. Globally, there are increased evidences to suggest that investor confidence has assumed an important role in the economic development of a country). A lot of issues need to be addressed to make capital markets safer. [1] Transparency, strengthening financial system and managing crises are the issues, which cannot be quickly fixed but they add up to a stronger system. Lee Hsien Loong [2] while addressing Financial Institutions in Bangkok stressed the importance of rebuilding investor confidence for prosperity of ASEAN countries. He indicated that for investor confidence, rebuilding of sound fundamentals, dealing with capital account risks, economic co-operation among ASEAN, corporate restructuring, banking sector reforms and improvement of political and social conditions are important. Joseph. J. Oliver [3] in his presentation to the senate standing committee on banking, trade and commerce, suggested that close to half of all Canadians have investments in equities and their confidence is essential for a healthy and dynamic capital market. Deep bear market [4], corporate scandals, insider trading, high levels of executive compensation and inaccuracy of published financial statements are cited as reasons for lack of investor confidence in Canadian capital markets. He indicated that regulators, the accounting professionals, analysts, brokerage firms, public companies, shareholders and Government must contribute to ensure good corporate governance and reduce corporate failures. McCall [5] (2002) in his testimony before the committee on financial services of United States house of representatives, observed that integrity of the financial markets and economic well-being of the country depend on corporate accountability and investor confidence. Revival of confidence of the investors is necessary to make the securities market more efficient means of converting savings to investment.

In India Investors are the backbones of the securities market. Protection of their interest is essential for sustenance of their interest in securities and hence development of market The authorities have been quite sensitive to requirements of the development of securities market, so much so that the last decade (1992-2003) witnessed nine special legislative interventions, including two new enactments, namely the Securities and Exchange Board of India (SEBI) Act, 1992 and the Depositories Act, 1996. The Securities Contract regulation Act, the SEBI Act and the Depositories Act were amended six, five and three times respectively during the same period. The developmental need was so urgent at times, that the last decade witnessed five ordinances relating to securities laws. Besides, a number of other legislations (the Income Tax Act, the Companies Act, the Indian Stamps Act, The Bankers' Book Evidence Act, The Benami Transactions (Prohibition) Act etc.) having bearing on securities markets have been amended in the recent past to complement amendments in securities laws.

There was no legislation for the regulation of capital market till the Bombay Securities Contracts Control Act was enacted

in 1925. This Act was, however, deficient in many respects. After the constitution came into force in January 26, 1950, stock exchanges and forward markets came under the exclusive authority of the Central Government. [6] The Government appointed the A. D. Gorwala Committee in 1951 to formulate legislation for the regulation of the stock exchanges and of contracts in securities. Following the recommendations of the Committee, the SCRA was enacted in 1956 to provide for direct and indirect control of virtually all aspects of securities trading and the running of stock exchanges and to prevent undesirable transactions in securities.

The two exclusive legislations of post world war period that governed the securities market till early 1992 were the Capital Issues (Control) Act, 1947 (CICA) and the Securities Contracts (Regulation) Act, 1956 (SCRA). The acts were retained after the war with some modifications as means of controlling the raising of capital by companies and to ensure that national resources were channeled into proper lines, i.e., for desirable purposes to serve the goals and priorities of the government, and to protect the interests of investors. The previously existing Capital Issues (Continuance of Control) Act in April 1947. Was made permanent in 1956 and enacted as the Capital Issues (Control) Act, 1947. Under the Act, the Controller of Capital Issues was set up which granted approval for issue of securities and also determined the amount, type and price of the issue. This Act was, however, repealed in 1992 as a part of liberalization process to allow the companies to approach the market directly provided they issue securities in compliance with prescribed guidelines relating to disclosure and investor protection.

The legal reforms began with the enactment of the SEBI Act, 1992, which established SEBI with statutory responsibilities to (i) protect the interest of investors in securities, (ii) promote the development of the securities market, and (iii) regulate the securities market. It empowered SEBI to appoint adjudicating officers to adjudicate wide range of violations and impose monetary penalties.

To provide protection to the investors in an effective way besides all these regulatory and penal measures, class action suit emerge as a new form of remedy.

Class Action lawsuits have recently been made the front page news, more particularly in western countries. The reason being the sudden fall (bankruptcy) of financial industry and the consequent losses suffered by large number of investors amounting to millions of dollars.

The class action has developed in the twentieth century as a way of managing complex, multiparty litigation. It may be traced to the “bill of peace,” [7] a proceeding that originated in England's equity courts in the seventeenth century. The bill of peace was used when the parties to a dispute were too numerous to be easily managed and when all parties shared a common interest in the issues. It permitted the case to be tried by representative parties, with the judgment rendered binding all. This was more efficient than trying each case individually and was more consistent with equity's goal of doing complete justice.

English courts would allow a bill of peace to be heard only if the number of litigants in a single issue are so large that joining their claims in a lawsuit was possible and practical. The members of the group possessed a joint interest in the question to be adjudicated and the parties named in the suit could adequately represent the interests of persons who were absent from the action but whose rights would not be affected by the outcome. If a court allowed a bill of peace to proceed, the judgment that resulted would bind all members of the group.

Justice Joseph Story advocated the development of the bill of peace in the United States. He was of opinion that in equity courts, "all persons materially interested, either as plaintiffs or defendants in the subject matter of a bill ought to be made parties to the suit, however numerous they may be," so that the court could "make a complete decree between the parties and prevent future litigation by taking away the necessity of a multiplicity of suits" [8] The bill of peace, and later the class action, provided a convenient and efficient vehicle for resolving legal disputes affecting a number of parties with similar claims. Common issues that could have similar outcomes did not have to be tried piecemeal in separate actions, thus saving the courts and the litigants’ time and money.

Class Action

In law, an action in which a representative plaintiff sues or a representative defendant is sued on behalf of a class of plaintiffs or defendants who have the same interests in the litigation as their representative and whose rights or liabilities can be better determined as a group than in a series of individual suits. ‘Class Action’, which is also known as ‘Representative Action’, is actually a form of lawsuit where a large group of people collectively bring a claim to the court through a representative. This form of lawsuit finds its origin in United States and is predominantly tried in their federal / state courts. In United States, such claims are governed by Federal Rules of Civil Procedure, more particularly Rule 23 [9]. Later on Class Action Fairness Act of 2005 [10] was introduced which expanded federal jurisdiction over many large class action lawsuits (where amount in controversy exceeds $5 Million) and mass actions started taking place in the United States. It is pertinent to note here that Class Action Fairness Act contains provision, for shareholder class action lawsuits which are covered by Private Securities Litigation Reform Act, 1995 which imposes new Rules on securities Class action lawsuits are filed either by a large number of consumers who suffer losses due to some illegal claims made by companies about their products (which we may term as “Consumer Class Action”) or by employees of a Company adopting discriminating hiring or illegal salary practices (which may be termed as “Employee Class Action”) or by large number of investors who suffer losses due to erroneous decisions or actions taken by the management of a Company wherein they had invested their hard earned money (which may be termed as “Shareholder Class Action”).

Advantages of class actions

Class action lawsuits offer a number of advantages because they aggregate a large number of individualized claims into one representational lawsuit in western countries.

First, aggregation can increase the efficiency of the legal process, and lower the costs of litigation [11]. Second, a class action may overcome "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. [12] " "A class action solves this problem by aggregating the relatively paltry potential

recoveries into something worth someone's (usually an attorney's) labor [13]." In other words, a class action ensures that a defendant who engages in widespread harm – but does so minimally against each individual plaintiff – must compensate those individuals for their injuries. For example, thousands of shareholders of a public company may have losses too small to justify separate lawsuits, but a class action can be brought efficiently on behalf of all shareholders.

Secondly, more important than compensation is that class treatment of claims that may be the only way to impose the costs of wrongdoing on the wrongdoer, thus deterring future wrong doings.

Third, class action cases may be brought to purposely change behavior of a class of which the defendant is a member. *Landeros v. Flood* [14] was a landmark case used to purposely change the behavior of doctors, and encourage them to report suspected child abuse. Otherwise, they would face the threat of civil action for damages in tort proximately flowing from the failure to report the suspected injuries. Previously, many physicians had remained reluctant to report cases of apparent child abuse, despite existing law that required it.

Fourth, in "limited fund" cases, a class action ensures that all plaintiffs receive relief and that early-filing plaintiffs do not raid the fund (*i.e.*, the defendant) of all its assets before other plaintiffs may be compensated [15]. . A class action in such a situation centralizes all claims into one venue where a court can equitably divide the assets amongst all the plaintiffs if they win the case.

Finally, a class action avoids the situation where different court rulings could create "incompatible standards" of conduct for the defendant to follow [16]. A court might certify a case for class treatment where a number of individual bond-holders sue to determine whether they may convert their bonds to common stock Refusing to litigate the case in one trial could result in different outcomes and inconsistent standards of conduct for the defendant corporation. Thus, courts will generally allow a class action in such a situation [17]. Whether a class action is superior to individual litigation depends on the case, and is determined by the judge's ruling on a motion for class certification. The Advisory Committee Note to Rule 23 [18], for example, states that mass torts are ordinarily "not appropriate" for class treatment. Class treatment may not improve the efficiency of a mass tort because the claims frequently involve individualized issues of law and fact that will have to be re-tried on an individual basis [19]. *Castano v. Am. Tobacco Co* [20] ruled that Mass torts also involve high individual damage awards; thus, the absence of class treatment will not impede the ability of individual claimants to seek justice.

Impact on investment portfolio

In United States, mutual funds may file class action lawsuits on behalf of its investors, with an option given to them to opt in or out of the participation in the lawsuit. If a company goes bankrupt or goes bust due to any reason suddenly, the stock price of that company falls drastically and if a portfolio holds the shares or securities of that company, then the return on investment obviously gets impacted, since the portfolio value drops to an extent of the quantity of the units held in the portfolio, going by the logic that more weight age the security has in the portfolio, the more will be loss of return. Mutual Funds have no control over this situation and have to report the 'understated' rate of return which is caused due to the fall in price of the security. Now here, two scenarios arise. When the stock price falls drastically, as explained above, the portfolio gives a low rate of return in that particular month or period of months. Now since the class action lawsuit takes long time to reach the settlement, it happens that when the shareholders get compensated for their losses, there is an inflow of funds into the portfolio, which may be huge. Now this un-expected flow of funds causes the return of the portfolio to shoot up, since the portfolio value increases as compared to the previous month or period's portfolio value. This flow of funds causes the portfolio to get overstated. Therefore, due to class actions there emerge two scenarios: One, which makes the return to quote 'understated' and second, which makes the return to quote 'overstated' The mutual fund industry is in a debate, whether to include and use this inflow of funds arising out of the result of the settlement, for performance of the portfolio or to give the funds, back to the investor.

Investors Class Action' suits

Generally it is observed that when a Company's management plays fraud or take erroneous policies with malafide intensions and consequently, the share prices falls or the Company becomes bankrupt; the worst hit class of people are its shareholders who losses and to recover such losses they collectively file Class Action. Most class actions seek to recover Investors losses relating to falling share prices or, in the worst case in the scenario of, insolvency. History has witnessed that shareholder class action litigation results more from a company's stock price movements than from the actual commission of fraud by the corporation. It is interesting to note here that it's not necessary that such Class Actions are filed only against the Companies; sometime they are also initiated against the errant management including the Directors and other officers. But the class of shareholders must comprise of those shareholders that have suffered common injury or injuries. When one joins a class action suit, he / she have to forgo his / her right to file an individual suit against the Company.

One may find that Shareholder Class Action may either become jury trials or may be settled prior to trials through mediation and settlement. In mediation, the damages and compensation are agreed to by the defendant company. In Jury Trials, the compensation is awarded through a judgment wherein if the compensation is a huge amount the defendant company may opt for appeal. The appeal process may take years and then the concerned plaintiffs have to wait for long to get compensation and in such cases if the Company is declared bankrupt the plaintiffs may never get compensation.

In India "The shareholders of a Company, which is in administration, can make claims against the administrator for continuous breach of disclosure guidelines and misleading and deceptive statements and conduct of the Company and such shareholders can be ranked equally with the unsecured creditors rather than making them stand in the queue after the creditors. Accordingly, the shareholders who buy shares in a Company, which becomes bankrupt shortly, relying on the misleading statements or incomplete disclosure by the Company will have an action as a creditor against the liquidator or administrator for any loss suffered as a result of that reliance." – Federal Court of USA in *Sons of Gwalia Limited (Administrators Appointed) v Margaretic* [21]. *Known*

as the famous Satyam Computer Services case, twelve class action suits have been filed so far and more are expected against the Company and the Managing Director including the other members of errant management of the Company by US Law firms on behalf of purchasers of Satyam's American Depository Receipts. In the same fiasco, the global audit firm Price Waterhouse coppers, along with its international and India unit, was also charged with class action for having "recklessly disregarded" a multi-national massive fraud by the management of Satyam Company. The suit was filed on behalf of the purchasers of the American Depository Receipts of Satyam company between January 6, 2004 and January 6, 2009. Some recently seen Class Action suits are on Freddie Mac [22], Wachovia [23], Fannie Mac. In United States, all these Class Action suits are under "Class Action Fairness Act of 2005".Recently the Class action suit on Satyam reached on out of court settlement with nearly $125 million to end a set of class action suit removing a measure road block of its merger with Techmahindra on its efforts to relist on the NYSE. More than twelve class action suits were filed by scores of investors in the US against the Hyderabad based Satyam Company. All the suits were clubbed into one suit at Southern District court of Newyork. The $125 million deal was signed on 18th February 2011 which pass the statutory approval in India and get assent from the US court.

The $125 million out of court settlement announce by the Mahindra Satyam was a moment of happiness for the US investors but it could not bring cheer to Satyam's investors in India. They are not supposed to get anything by way of compensation. [24]

Types of Class Action Suits:

In general, the class action rule is in effect to improve the legal system's effectiveness by permitting large groups of people with similar claims to join together into a single lawsuit. These large groups can be comprised of consumers, small businesses or injured people. One or more of the affected then represents the harmed group in court, and if those representatives meet specific criteria, they are granted permission to prove and settle not only their own claims, but also the claims of each individual of the larger affected group as well.

Insurance Claims

Insurance companies that misrepresent policies, do not pay valid claims, deny coverage to classes of individuals, fail to make prompt investigations or payments are all vulnerable to class action lawsuits.

Class actions are typically brought on behalf of a group of investors who have been injured as a result of a company's improper conduct, such as misstating earnings, concealing or misrepresenting risks, or otherwise engaging in activity detrimental to the company. Other securities actions are brought as direct result of a financial advisor or broker's, or group of advisors, repeated misrepresentation, negligence, dishonesty or fraud.

In addition to these industry class actions there are many other potential class actions that can be entered into the legal system if a large group of people have suffered or been harmed by the same person, company or entity in the same manner. A law firm that handles these types of cases can provide the guidance necessary to proceed with a class action lawsuit. Most fees are paid by the class action settlement.

Apart from share-holder Class action suits, there are some other types as well. Class Action lawsuits may be filed for matters relating to Dangerous consumer products, Unauthorized telephone charges, Unpaid overtime, Unauthorized Web loyalty charges, Unauthorized disclosure of credit card information, Illegal debt collection practices, Predatory lending practices, Excessive loan servicing charges, Unfair credit reporting, Pharmaceutical liability, Product liability etc.

Scenario in India

Decisions of the Indian Supreme Court in the 1980s loosened *strict standi* requirements to permit the filing of suits on behalf of rights of deprived sections of society by public minded individuals or bodies. Although not strictly "class action litigation" as it is understood in American law, Public Interest Litigation arose out of the wide powers of judicial review granted to the Supreme Court of India and the various High Courts under Articles 32 and 226 of the Constitution of India respectively [25]. The sort of remedies sought from courts in Public Interest Litigation go beyond mere award of damages to all affected groups and have sometimes (controversially) gone on to include Court monitoring of the implementation of legislation and even the framing of guidelines in the absence of Parliamentary legislation. [26]

However, this innovative jurisprudence did not help the victims of the Bhopal Gas Tragedy who were unable to fully prosecute a class action litigation (as understood in the American sense) against Union Carbide company due to procedural rules that would make such litigation impossible to conclude and unwieldy to carry out. Instead, the Government of India exercised its right of *parent patria* to appropriate all the claims of the victims and proceeded to litigate on their behalf, first in the New York courts and later, in the Indian courts. Ultimately, the matter was settled between the Union of India and Union Carbide (in a settlement overseen by the Supreme Court of India) for a sum of Rs. 760 crores (about 400 million dollars) as a complete settlement of all claims of all victims for all time to come. The Bhopal gas tragedy gave rise to a number of litigation concerning issue on environmental erosion, criminal negligence and labiality etc. The case which was negotiated and settled is reopened again on various legal issues, mostly concerning the payment of compensation and damage.

In India, class action lawsuits may be compared to Public Interest Litigations (PIL) allowed under Civil Procedure Law, wherein an individual or a group of individuals are allowed to file a civil suit. Such litigations are mainly used in consumer complaints and rising environmental & cultural concerns; generally limited to protection of fundamental rights and are meant for protection of public interest. Such litigations can be initiated either by the Court itself or by public spirited individuals that represent the victims. In such cases, generally victims are unable to approach courts due to financial disability or otherwise. One may find that in India, though the principles of class action suits by shareholders against managements have been upheld by various Courts [27] in the past, these are yet to be reflected in law.

Class Action vs. Mass action

Interestingly, though both Class Action lawsuits and Public Interest Litigations allow a large number of plaintiffs to bring

collective suits that relate to same cause of action by way of representations opposed to conventional lawsuit wherein the plaintiff represent himself only; still these both differ from each other. Like in Class Action lawsuits the plaintiff's attorney charges contingency fees; which means no fees in case of failure and in case of success it is directly related to the amount of compensation / award (whether awarded in a judgment or received through settlement) and hence the risk of success or anxiety to succeed gets shifted from plaintiff to his Attorney, which is not so in Public Interest Litigations since as per Indian law, lawyers are not permitted to charge contingency fees. 2010

Another difference is in Class Action lawsuits, US Law requires each party to bear its own cost of litigation irrespective of the result of the lawsuit and hence even if plaintiff losses, he is not required to pay the defendant his cost of litigation. However, as per Indian law the courts may ask payment of such cost by the losing party. Actually, these differences alone acts as a deterrent to use class action mechanism in India, the way it is used in US and other European Countries. Further, PILs can only be filed against public bodies / regulatory bodies / state in High Court or Supreme Court under Article 226 or 32 of the Constitution respectively however; the Class Action lawsuits can be filed even against the private bodies. For establishment of Class Action litigation there must be a legal injury to the plaintiff however in PIL such injury / damage is not necessary.

Shareholder Class Action and Indian Body Corporate

In India, the need to codify class action litigation in Indian law had been recommended by J J Irani Committee which submitted its report to Ministry of Company Affairs on May 31, 2005. One may find that after the Satyam Fiasco, the greater need to encourage class action litigations has been felt in India. The provisions contained for representative suits in Section 397 and 398 in the existing Companies Act, 1956 [28] for oppression and mismanagement may be termed alike US Class Action.

However, there is no specific provision for class action litigations under existing Indian Companies Act.1956 Interestingly the proposed Companies Bill 2009 however contains few provisions for class action lawsuits. Clause 32 of the Bill states that "A suit may be filed or any other action may be taken under Section 30 or Section 31 by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus." Similarly Clause 215 and Clause 216 propose to provide for a class action mechanism. Once enacted, these provisions will enable the shareholders of a Company to hold the errant companies and their management responsible for the wrong-doing. Recently, on May 19, 2009 the Securities and Exchange Board of India (SEBI) also notified SEBI (Investor Protection and Education Fund) Regulations, 2009 according to which SEBI will establish an Investor Protection and Education Fund which will be used inter-alia, for "aiding investors' associations recognized by the Board to undertake legal proceedings in the interest of investors in securities that are listed or proposed to be listed" [29] –Such aid will be subject to certain conditions as stipulated under Regulations. This verifies amendment is a path-breaking one and is believed to set shareholder activism in India. This would provide impetus to class action litigations. Though the regime is onset yet much is needed to make such litigations successful in India. In order to make the system functional lot of issues need to be settled which pertains to procedural as well as legal aspects. The procedure need to be clearer in terms of approach. Several amendments are still expected in Securities Law of the country so as to avoid abuse of process.

SEBI's Efforts

Given the current disposition under Indian law that carries disincentives against class actions, SEBI has recently taken steps to create a class action mechanism. In the recently issued SEBI (Investor protection and education Fund) Guidelines, 2009 [30], SEBI has the retained the power, in rule 5(2)(d) to aid investors' associations recognised by SEBI to undertake legal proceedings in the interest of investors in securities that are listed or proposed to be listed. The expression "aid" in this context is quite wide, and this could include the provision of funding to investors' association to initiate class actions. A report [31] in Business Standard indicates that SEBI proposes to fund class actions on behalf of investors utilizing this legal provision. The report also contains some details regarding SEBI's thought process on the types of actions that will be funded as well as other modalities. Apart from procedural aspects, there may have to be changes in securities laws if class actions are to be successful. The current rules on several fronts, particularly in areas such as price manipulation and insider trading require plaintiffs to discharge a fairly high burden of proof. Encouraging class actions alone may not be enough, and it may be necessary to address some of the substantive and evidentiary issues as well.

Conclusion

The Class Action Lawsuits are subject to several criticisms as well. One among them is the large fees for attorney who normally charge conditional / contingency fees which is proportionate (normally a higher percentage of compensation / award money) leaving behind very small portion of money with class members and the second being the time taken for a final judgment, which may take years. At the outset, it is necessary to deal with a misconception that class actions are not possible in India. That is not at all true. The civil procedure law allows combination of suits that relate to the same cause of action, and hence it may be possible for plaintiffs to bring suits similar to class actions in the U.S. However, the difference lies in the economics: the incentives that trigger class actions do not exist. Indian rules on legal practice do not permit lawyers to charge contingency fees. Therefore, there is a complete absence of a plaintiff bar. Plaintiff themselves (especially small shareholders) do not find it worthwhile to initiate class actions as there is neither a certainty of recovery nor of obtaining a net benefit from the suit (after taking into account the costs incurred). Further, India tends to follow the British rule whereby courts can award costs in favour of the successful party, which have to be paid by the losing party. Hence, if plaintiffs are to lose in a class action lawsuit, not only do they end up without any compensation, but they may even have to bear the costs of the defendant company. This would maxmaise the amount of risk that plaintiffs may be willing to take. For these reasons, it is not possible to have a market-based class action mechanism in a manner that exists in U.S. and perhaps certain other countries as well.

As funding has been identified as the key incentive to the creation of a class action mechanism, SEBI's proposal may help create that incentive in India. However, there could be several issues that could arise in the implementation of such a proposal. Which type of class actions would be funded? Who would determine that, and on what basis? Will the amounts available in the investor protection fund be sufficient to cater to a vast number of class actions? Will regulators have a role in determining who the plaintiff lawyers will be, and how their fee would be fixed? These and other questions need careful consideration before any system is established.

References

1. David Bullard, Business Times (Sunday times) has indicated that in the are the big losers in South African listings scam. Companies with no earning record and with inexperienced private investor's directors got listed on stock exchanges. Their only objective was profit making out of inflated market price. The net result is private investors lost confidence in the market, 1998, 25.
2. ASEAN post-crisis - rebuilding confidence and prosperity (Central Bank Speeches, 2000, 30.)
3. Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Second Session Thirty-Seventh Parliament, 2002.
4. A market condition in which the prices of securities are falling, and widespread pessimism causes the Negative sentiment to be self-sustaining.
5. McCall testimony before the financial service committee on Corporate and Auditing Accountability, Responsibility and Transparency Act of, 2002, 20.
6. The constitution of india, Article, vii Schedule, union list (List1), entries. 48, 246.
7. Bill of Peace was an English court practice used in the 17th and 18th centuries for legal disputes Involving multiple parties that shared common aspects. It allowed the English Court of Chancery to settle the rights of parties, a group known as the "multitude", in one suit, in equity court.
8. *West v. Randall*, 1820; 17-424. 29 F. Cas. 718, 2 (C.C.R.I. Mason) 181
9. Federal rules of civil procedure of 9.Rule 23 Class action One or more members of a class may sue or be sued as representative parties on behalf of all members.
10. Class Action Fairness Act of''.s.5 assure fair and prompt recoveries for class members with legitimate claims, 2005.
11. In cases with common questions of law and fact, aggregation of claims into a class action may avoid the necessity of repeating "days of the same witnesses, exhibits and issues from trial to trial." Jenkins v. Raymark Indus. Inc., (granting certification of a class action involving asbestos), 1986; 782 (2):468-473

12 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 388, 344 (7th Cir. 1997)).

13. Amchem Prods., Inc., 521 U.S. at 617 (quoting Mace, 109 F.3d at 344).
14. Cal. 3d 399, 551 P.2d 389 97 ALR 3d 324
15. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)
16. Fed. R. Civ. P. 23(b)(1)(A).
17. . Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966).
18. Rule 23. Class Actions

A. Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf
of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or
(4) defenses of the class; and

the representative parties will fairly and adequately protect the interests of the
class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1). prosecuting separate actions by or against individual class members would create
a risk of:

(A). inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the
class;

19. *Castano v. Am. Tobacco Co* 84 F.3d 734 (5th Cir. 1996) (rejecting nationwide class action against tobacco companies)
20. 12 bid
21. Gwalia Ltd v Margaretic [2007] HCA 1; 23 ALR 232; 81 ALJR 525
22. Civil Action NO. C2-03-711.In Freddie Mac case judge Sargus and Judge Abel amended class action complaint for its violation of the securities laws.
23. Civil action NO.06-cv-00955-JG Filed 03/02/2006; United states District court Eastern District of Pennsylvania Ralph Brooks.
24. The Hindu, Business Line, Mahindra Satyam setteles US Lawsuits for $125 million Viskhapatnam, Friday February, 2011, 1
25. Article 32 of the Indian constitution: The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. Article 226 power of high courts to issue certain rights
26. Khatri v. State of Bihar II [(1981) 1 SCC 635] (the Bhagalpur Blinding case)
27. Aekta Ben Patel & other shareholders Vs Satyam Computer Services Limited, 6th jan 2009 in the federal district court of the Southern District of New York.
28. Any member of a company who complain that the affairs of the company [are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members (including any one or more of themselves) may apply to the [Tribunal] for an order under this section
29. Sebi cir-5/2009 nov.26 2009 clause 5 (2) (d) of the Regulations.
30. Investor Guidance oct 25 2010, Investor Awareness program/workshop on oct 27,2010 Investor Guidance oct

18 2010,Investor Awareness program/workshop on oct 22 and 23,2010.
31. Anindita Dey Sebi proposes to fund class action suits, Business standard Mumbai June 01, 2009, & Friday, Oct 29, 2010.

International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 19-23

The legal regime and pragmatism of international conflict and the use of force in international law

[*1] Leonard C Opara, [2] Hillary O Nwaechufe, [3] Ogundare Olatunde Esq

[1] Esq., LLB (Lagos), BL, LLM (Ife), ACTI, Doctoral Candidate. Head & Notary Public, Department of International Law and Jurisprudence, Faculty of Law, Nigeria Police Academy, Wudil, Kano State, Nigeria.

[2] Esq., LLB (IMOSU), BL, LLM (LASU), Adjutant Lecturer, School of Law, National Open University of Nigeria (NOUN) Lagos, Nigeria.

[3] LLB(Jos), BL, LLM(Jos), Lecturer, Dept of Public Law, Nigeria Police Academy, Wudil-Kano State, Nigeria.

Abstract
International peace is the basic norms of any state to control the affairs and maintain internal control over its governance on the sovereignty of the state. Regional institutions play a vital role in the maintenance of international peace and conflict resolution in their regions. However, this paper intends to look at the legal regimes addressing the basic issue of controlling and regulating violence between states and increasingly within states. It shall also consider the use of force and the principles governing the use of force, armed conflicts and the actors involved in collective security in order to bring about peace within its regions by international institutions. The paper recommends that regional and sub-regional organizations such as AU, ECOWAS has contributed human capital and peace keeping operations in order to resolve conflicts within the region through the Peace and Security arm of the African Union Commission.

Keywords: International Peace, Use of force, Conflict Resolution, Collective Security, International Conflict, UN Charter, Peace and Security Council (PSC),.AU Constitutive Act

Introduction

The use of force as a strategy of containing violence in the globe and the use of weapons of mass destruction (WMD) currently where there is conflict between the states has led to the sober assessment of the state of human beings that it has intention of self-destruction. This is against the backdrop of legal norms governing the use of force between states. The UN Charter prohibits the use of force and the broader principle of non-intervention recognized by customary international law [1].

In International law, the term the use of force has always being concerned with the relationship between states not regarding the use of domestic force by state authorities on the civilian citizens. Furthermore, acts such as the latter may be ruled by treaties on human rights and on the rights of minorities. Thus the use of force in International law relates only to a very specific sector of perils to human life.

Conflicts of all sorts are common occurrences in the Africa continents. Such conflicts can be grouped as ethnic, social and religious conflicts. Most of these conflicts are recurring. They are attacks and reprisal attacks by different ethnic and religious sects. These do not promote human security and sometimes the actors of these conflicts resolve to the use of force to checkmate the conflicts in order to maintain global peace.

The African Union and its sub-regional organization ECOWAS use conflict resolution and conflict management mechanism to put conflicts in check. This entails the method and process of negotiation, arbitration and institution building which promote the peaceful ending of social conflict and war.

In order to ensure the survival of the global peace, the actors' main concern is to establish the basic conditions for the control of violence. Without controlling and containing violence in international relations, it would not be possible to establish a stable international political and legal order [2].

In international law, the aim is to reduce the level of violence and conflicts between states and within states and against the civilian in order to achieve peace and co-existence among states.

Prohibition by the United Nation on the Use of Force

After the Second World War and the creation of United Nations Organisation (UNO), member states wanted to prevent war by a system term collective security and to avoid old deficiencies. Article 2(4) of the UN Charter establishes a ban on threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with the provisions and purpose of the UN. The approach comprises not only war but also measures short of war and has been confirmed by other several international institutions treaties. Now, with all most every state becoming members of the UN the use of force has been prohibited and regarded as a general rule of international law, although still express as subject to right of self-defense [3] In the prohibition of the use of force, the UN clearly stated the tradition of the Westphalia Peace Treaty on the state domestic affairs which subjects the UN to the Non-intervention principles [4]. The legal regime of

[1] Article (4) of the UN Charter, 1945

[2] Nigel D. White: Advanced Introduction to International Conflict and Security Law (2014) Edward Elgar, Pg. 1.
[3] Article 39 of the UN Charter
[4] Article 2(7) of the UN Charter

enforcement in international law as regards war in form of operation is to ensure that states or actors obey what is described as jus contra bellum in international law (laws against the waging of wars) only with respect to the aim of belligerent changing of national boundaries. It is important to state that the UN charter does not give any hint of prerequisite of a certain level on armed force, thus even minor violation of national boundaries is forbidden.

Legal Framework of International Conflict and the Use of Force

In examining the subject, the paper attempt an exposition of the role of Regional Institutions (AU) and sub-regional organizations (ECOWAS) and the importance of peace and non-use of force in international law to achieve collective security and settlement of disputes.

The UN Charter laid foundation to international law principles and architecture designed for the peaceful conduct of international relations. Thus the law and moral order according to which states would willingly give up some of their rights and sovereignty for the sake of world peace. Thus in Article 2 and Article 4 of the UN Charter, every member state is to honour the Charter values in good faith and to accept the obligation of settling disputes by peaceful methods or means. The main principle and goal of international law as enshrined in the UN Charter is the maintenance of global peace and order. While Article 2(3) of the UN Charter obliges member states to settle their disputes by peaceful means; Article 2(4) stipulates all members to "refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".

However, there are exceptions to this threat or use of force. The exceptions in the Charter were for the rights of states to individual and collective self-defense in the face of an armed attack as contained in Article 51 and military measures undertaken by the UN Security Council under Article 42, in response to a threat to the peace, breach of the peace or act of aggression.

Essentially, the external aspect of the use of force, which was under the monopoly of states, was brought within the framework of the UN Charter and it is being regulated by the UN Security Council.

Collective Security: Collective security is whereby all states will contribute normally through an international institution, collectively to combat aggression and threat to peace and security. It also involves collective military security or action undertaken to maintain world peace through a collective security mechanism. The UN adopted collective security mechanism in dealing with international disputes.

According to the UN Charter, chapter 6 and 7 empowers the Security Council under Articles 33 to 38 of the Charter, when Peaceful Conflict Resolution Mechanisms fail to restore peace between conflicting parties, the UN empowers the Security Council to investigate the dispute and recommend means or terms of settlement.

The Security Council has certainly adopted an expansive interpretation of "threat to peace" to include not only threat to force and threat to inter-state security but also to cover internal violence and conflicts which have the potential to spill over into neighbouring states as well as threats from terrorists and pirates.

It is wordy of note that the Security Council has more powers and this led to arguments of where competence lies, if at all. Where the Security Council is unable to act due to collective actions or as was the case during the cold war, due to the issue of voting powers. Currently, the United Nation peace support operations, peace missions have come to be known as part of the United Nations Conflict Management Mechanism but also of the various regional institutions and sub-regional organizations such as African Union (AU) and ECOWAS (Economic Community of West Africa States) has played a vital role in collective security to attain peace in the continent.

Settlement of International Disputes: International Law has been in the front of maintenance of international peace [5]. Although its pre-occupation stimulated its development and informed its growth, international law has been regarded by the international community primarily as a means to ensure the establishment and preservation of world peace and security [6]. The pacific settlement of international disputes is a cardinal principle of international law and international relations. Thus, the United Nations Charter provides for the need for states to live in peace with one another as global neighbours and the prohibition of the use of force except in the common interest. Article 2 (3) of the United Nations Charter requires states to 'settle their international disputes by peaceful means in such manner that international peace and security and justice are not endangered'' [7].

Basically, the method of settlement of disputes as directed by the Charter is provided in Article 33 that parties to a dispute that might endanger peace should first 'seek a resolution through negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of choice''. By the very act of joining the world body all members `confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

It is important to state that most disputes are settled through negotiations with or without the assistance of third parties. However, some disputes may be more problematic than regional institutions such as Africa Union has played a major role in settlement of disputes or conflicts within the region through early warning mechanism, peace building and peace enforcement, etc.

Diplomacy operates in an interdependent world where the actors and inclinations of one country affect others. The method by which one state negotiate with another determines a degree to which its foreign policy is achieved, thus the interpretation of a state of the idea of international peace and security, determine the method of the conduct of its diplomacy as an important instrument in establishing peaceful relations with other states.

Diplomacy has been defined by Oxford English Dictionary as

[5] Merrills, J.G (1998) International Dispute Settlement, 3rd Edn, Cambridge.
[6] Shaw, M.N (2004) International Law.
[7] U.O.Umozurike (1993) Introduction to International Law, 1st edn., Spectrum Law

`the management of international relations by negotiating the method by which these relations are adjusted or managed by ambassadors and envoys, the business and art of the diplomatist, international discourse and (negotiation' [8].
Ian Brownlie define it as, 'Any means by which states establish or maintain mutual relations, communicate with each other, or carry out political or legal transactions in each case through their authorized agents [9].
A broad definition of diplomacy was thus:
`Diplomacy is a peaceful political process between nation states that seeks to structure, shape and manage over time a system of 'international relationship secure a nation's interest utilized in the pursuit of many kinds of objectives, political, economic, national, trade, aid, human rights, arms control, scientific, cultural and academic enrichment, diplomacy is both a peace building and peacemaking activity [10].

International Court of Justice (ICJ): The International Court of Justice (ICJ) is the principal judicial organ of the United Nations [11]. The ICJ was established to replace the Permanent Court of International Justice (PCIJ) of the League of Nations in 1945 but started operational in 1946 [12]. The jurisdiction of the ICJ is to settle disputes between member states and giving advisory opinions to the agencies and organs of the United Nations [13]. The aim of the ICJ as the judicial arm of the United Nations is to bring about of settlement of disputes by peaceful means and in conformity with the principles of justice and international law.

The Role of Regional Organizations: The regional organizations or institutions have the responsibility of maintaining peace where there is conflict within their jurisdiction and beyond. The place of regional bodies in peacekeeping in African continent cannot be regulated or supplant the United Nations. The essence of collective security within the region can serve as a protective device against major power excesses or intrusions, a critical analysis of experience so far suggests that regional security cooperation has contributed effectively in the peacekeeping or preventive diplomacy or deterrence.
For instance the role of ECOMOG in ECOWAS and present AU in bringing about peace in the conflict war zones of Liberia, Sierra Leone, Sudan and others just to mention but a few.
Furthermore, the United Nations Charter is in support of regional arrangements, Article 39 gives the Security Council power to determine when a threat to or breach of peace or act of aggression has occurred while article 53 of the same UN charter makes the UN security council in the first place, the agent for enforcement of peace and security even where there is regional institutions. The same Article 53 makes a proviso which envisages the possibility of utilizing regional arrangement or agencies for this purpose once there is conflict. Similarly, charter VII of the UN charter which deals with regional arrangements establishes the premise that agencies relating to maintenance of peace and security may be appropriate for regional institutions actions. From the above analysis regional institutions can themselves initiate measures and procedures for conflict resolution and collaborate with the UN as a cost effective and efficient mechanism.

International Legal Framework for Regional Security Arrangements
The United Nations Charter recognizes the importance of regional organizations in maintenance of international peace and security. Thus in Charter VII it made detailed provisions for the involvement of regional organization in the maintenance of international peace and security.
Article 52(1) of the United Nations Charter clearly stated that nothing in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security, as are appropriate for regional actions provided that such actions are consistent with the purpose and principles of United Nations.
The above provision allowing for regional arrangements has been responded to variously by the formation of organizations like AU (African Union), ECOWAS(Economic Community of West African States), SADC(Southern African Development Cooperation), EU (European Union, etc. These International Institutions in their various ways have been helping to fulfill the objectives of the United Nations especially as regards peace and security as well as conflict resolutions. It is also from the above provisions that the regional organizations derive legal recognition regionally and in the globe.
Article 53 however provides that no such regional enforcement action shall be undertaken without the authorizations of the Security Council. All measures taken by the regional arrangements in maintaining international peace and security shall at all times be duly reported to the Security Council.
A combined reading of the provisions of Charter VII indicate an unambiguous mandate to regional organizations to use all pacific means to settle disputes within their regions, but all enforcement actions by regional organizations must be with the authorization of the Security Council.

Peace and Security Council of the AU (PSC): As provided in Article 5, paragraph I, of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union. 'the Peace and Security Council shall be comprised of 15 Members elected on the basis of equal rights, in the following manner (a) ten Members for a term of two years and (b) five Members elected for a term of three years in order to ensure continuity. Article 5 (2) provides that 'in electing the members of the Peace and Security Council, the Assembly shall apply the principle of equitable regional representation and rotation.
Africa is divided into five regions namely Northern African, Western African, Central African, East African, and Southern African region. Each region is allocated three seats on the PSC and it is the responsibility of each regional organization to determine who represents it in the PSC. The determination of the Representative is required to be informed by the criteria provided for in Article 5 (2) (a-i) of the Protocol of the AU-PSC. The major criteria include the commitment to uphold the principles of the Union; contribution to the promotion and

[8] [80]The Oxford English Dictionary, (1970) London: Oxford Press, P. 160
[9] Ian Brownile, Principles of Public International Law, (1979) London, Oxford Press 3rd ed. P.34.
[10] Baba, E. A; Concept and Procedure for Negotiations in International Diplomacy, unpublished seminar paper presented at the University of Jos, Nigeria, March 2004.P.2
[11] Article 92 of the UN Charter.
[12] Ibid.
[13] ICJ Statute, Articles 34-38, June 26, 1945.

maintenance of peace-making and peace building regional and continental levels; willingness and ability to take up responsibility regional and continental conflict resolution initiatives; contribution to the Peace Fund and! or Special Fund created for specific purposes; respect for constitutional governance in accordance with the Lome Declaration, as well as the rule of law and human rights, have sufficiently staffed and equipped Permanent Missions at the headquarters of the Union and the United Nations to be able to shoulder the responsibilities which go with the membership; and commitment to honour financial obligations to the Union. In the context of the West African region, an agreement was reached sometimes in 2003 that Nigeria should be a Permanent Representative of the West African region while the other two seats are to be occupied by any other member States of the region on rotational basis. The principles and objectives enshrined in the Constitutive Act of the African Union more rigorous in asserting the importance of peace for the Continent's development. It even provides for collective intervention on a member country in case of massive violation of human rights such as genocide, war crimes or crimes against humanity. Among the 18 organs provided for in the Constitutive Act are the African Peace and Security Council. This instrument, which replaces the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, has been more revitalized and strengthened to cope with the challenges of peace and security in the Continent. It designated to be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in the Continent. In its operationalisation, the Commission of the African Union, a Panel of the Wise, a Continental Early Warning System, an African Standby Force has been used to checkmate conflicts. At this juncture I would like to observe that the Protocol relating to the establishment of the Peace and Security Council has so far been signed by 43 member States of the African Union. It has been ratified by 16 States out of the 27 countries required for its entry with force. With a view to accelerating the process for the early entry into force of the Protocol and the operationalisation of the Peace and Security Council, the Chairperson of the AU Commission the former President of Mali, Alpha Oumar Konare last Friday (September 19) dispatched special envoys to several African countries that are yet to sign and/or ratify the Protocol to undertake consultations at the highest level with the authorities of these countries. In this connection, it would be recalled that its last Session, the Tanzania National Assembly (Bunge) had The principles and objectives enshrined in the Constitutive Act of the African Union are more rigorous in asserting the importance of peace for the Continent's development. It even provides for collective intervention.

Article 3 of the AU's Constitutive Act of 2000 specifically identifies the promotion of peace, security and stability as a prime objective of the AU. Peace and stability have remained elusive to large parts of Africa, compelling the AU and Africa's regional organizations to assume the responsibility of resolving conflicts in the continent. This new responsibility has been necessitated by developments within and beyond Africa. The Balkan wars in the early 1990s did not help Africa either. The US and its North Atlantic Treaty Organization (NATO) allies became deeply involved in ending the Balkan wars and hardly had the time or the inclination to attend the seemingly unending conflicts in Africa. And, so far the AU is still in the process of establishing its African Standby Force (ASF) which is to be ready for development by 2010.

The addition to Article 4 (h) of the Constitutive Act was adopted with the sole purpose of enabling the African Union to resolve conflicts more effectively on the continent, without ever having to sit back and do nothing because of the notion of non-interference in the internal affairs of member states. It should be borne in mind that the Peace and Security Council was intended, and should be able, to revolutionize the way conflicts are addressed on the continent.

The Peace and Security Council (PSC), a new organ, is intended to provide a more robust mechanism than its predecessor, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution. The PSC was established by the Protocol adopted in Durban in July 2002, which is responsible for dealing with the scourge of conflicts that has forced millions of Africans, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope. The PSC, which operates at the levels of ambassadors, ministers, and heads of state and government, is composed of fifteen members, five elected for two years and five others for three years. It is expected to consider the right to intervene when a situation so warrants and make appropriate recommendations to the Assembly of the union for possible intervention. In accordance with the provisions of the Constitutive Act, the Assembly will decide on intervention at two levels: on its own initiative [14] and at the request of a member state [15]. This approach will facilitate decisions on intervention, since the Assembly is not obliged to wait for the consent of the Member State concerned, as is now the case with the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of Conflicts. Article 4 (j) refers, unlike Article 4 (h), to member states and not to a member state, and therefore does not expressly restrict the right to request intervention of the union to the member state concerned. It should be noted that the PSC Protocol provides for the establishment of an African Standby Force, composed of multidisciplinary contingents with civilian and military components, to carry out peace support operations under Article 4 (H) and (J) of the Constitutive Act.

Article 4(h) Protocol on Amendment to the Constitutive Act of the African Union provides thus:

"the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;' and sub (j) provides 'the right of member States to request intervention from the Union in order to restore peace and security".

The Force will operate at three possible levels: as an African Force under the AU; as a Regional Brigade at the level of a Regional mechanism for conflict prevention, management and resolution; or at the level of a lead nation intervening on behalf of the African Union. A lack of political will could make itself

[14] Article 4 (h) of the Constitutive Act.
[15] Article 4 (j) of the Constitutive Act.

felt at all three political levels of intervention. The full functioning of the AU's 15 member Peace and Security Council (PSC), an organ with functions similar to those of the UN Security Council, as well as the African Standby Force, may enhance Africa's stability to deal speedily with conflicts and insecurity. In its bid to discharge the responsibilities for which it was constituted, the African Union Peace and Security Council has been strongly involved in efforts directed at ending the conflict in Darfur. This was achieved by the creation of a new sovereign state called Southern Sudan as an independent state and old Sudan being sovereign state. The Peace and Security Council of AU through its Mechanism has resolved conflicts in Uganda, Mali, Somalia, Burundi, etc.

Conclusion

Despite the challenges in the re-establishment of peace within a conflict or war torn area or state by whatever means are necessary, the operations of peace support mission and peace building have become the fundamental part of international politics and the efforts of the UN and or the regional and sub-regional international actors or bodies in this direction should be sustained.

Peace agreements, representing the focal points of efforts to bring a settlement about by peaceful means in accordance with Article 1 (1) of the UN charter, should be the basis of bringing into post conflict state applicable in international law. However, interstate peace agreements are still negotiated in the modern trend, the vast majority of peace agreements concern the establishment of peace within a conflict torn state. The practice tends to suggest that these interstate peaceful agreements are increasable being shaped by international law.

Finally, the international community has realized the importance of partnership or the concept of joint ventures between the UN and regional institutions such African Union as a vehicle for political stability and humanitarian interventions for effective conflict resolution and peacekeeping in Africa.

References

1. Arend AC, Beck RJ. International Law and the Use of Force beyond the UN Charter Paradigm, London, 1993.
2. Brownile I. International Law and the Use of Force by States, Oxford, Clarendon Press, 1963.
3. Ian Brownile. Principles of Public International Law, London, Oxford Press 3rd ed., 1979, 34.
4. The Oxford English Dictionary, London: Oxford Press, 1970, 160.
5. Baba EA. Concept and Procedure for Negotiations in International Diplomacy, unpublished seminar paper presented at the University of Jos, Nigeria, March 2004, 2.
6. Umozurike UO. Introduction to International Law, 1st edn., Spectrum Law, 1993.
7. ICJ Statute, June 26, 1945.
8. The AU Constitutive Act 2000.

International Journal of Law
ISSN: 2455-2194, Impact Factor: RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 24-26

Cyber crimes and legal implications

Dr. Jetling Yellosa

Associate Professor, Head and Principal, University College of Law, Telangana University, Dichpally, Nizamabad, Telangana. India.

Abstract
The world has taken dramatic transformation after advent of computers, there is no one in the world who is not touched by information technology. Almost every activity of us is guided and regulated by the computers. There is hardly any facet of our lives that is not touched by the information technology revolution. As the world is depending upon the information technology there is same amount of cyber illegal activities taking place around the world. The Government of India on par with international obligations and statues of comity of nations has enacted a comprehensive enactment called the Information Technology Act of 2000. This Act covers all gamut of information technological matters including curbing of cyber crimes in our country. The Act empowers judiciary to play an important role in curbing the cyber crimes by awarding suitable punishments.
My paper deals with the meaning, details of various types cyber crimes, development of cyber legislation in our country and some important judgments delivered by various courts with matters concerning the cyber crimes and finally I have mentioned suggestions which we have to incorporate in effective curbing of cyber crimes in our country.

Keywords: Transformation, revolution, computer, terrorism, fraud, convention, optical impulses, strategies, jurisdiction, investigation, orthopedist, Pandora box, trafficking, juvenile, gullible

Introduction
Before embarking upon it I would like to deal with meaning of cyber crime: Cyber crime means "unlawful acts wherein the computer is either a tool or a target or both [1]." As name reflects it involves criminal activities that are traditional in nature, such as theft, fraud, forgery, defamation and mischief, these kinds of crimes are also subject to the Indian Penal code of 1860. The classification of cyber crimes are concerned it can be classified into two kinds, i. the computer as a target, this process the attacker uses a computer to attach another computer, such attacks are commonly known as hacking, virus or worm attacks, disk operating system attacks etc. and the other kind of crime is known as the computer as a weapon, in this process the attacker uses a computer to commit real world crimes which include cyber terrorism, intellectual property law violations, credit card frauds, electronic mail transfer frauds, pornography etc.

Types of Computer Crimes
The computer crimes are classified into different types they are:

1. Trojan horses attack.
2. Back Doors/Trap Doors.
3. The Salami Technique.
4. Logic Bomb.
5. Fraud.
6. Forgery.
7. Hardware/Software Theft.
8. Data Manipulation.
9. Reproduction of a Program.
10. Telemarketing Fraud.
11. Cyber terrorism.

Combating of Cyber Crimes
The world nations have lately awakened to overcome commission of cyber crimes. In international sphere as there is no binding convention or protocol is available to try cyber criminals. But the United Nations made number of attempts to have laws and much persuasion prepared a model law that is endorsed by the General Assembly of the United Nations on 30th of January 1997 and this is only covenants which regulating affairs of cyber crimes.

Cyber Law in India
Until 2000 in our country there is no legislation pertaining to cyber matters. Our country in 2000, has legislated the Information Technology Act of 2000 on par with the model law framed by the United Nations Commission on Trade. The Act is encompasses into thirteen chapters and divided into ninety four sections.
The Information Technology Act 2000 provides a detail meaning of computer and computer network and under section 2(2) it goes on to say that it means an electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, processing, storage, computer software or communication facilities which are connected or relates to the computer in a computer system or computer network.
The Information Technology Act 2000 under chapter XI under section 65 provides the meaning of computer tampering with computer source, it means Who ever knowingly or intentionally conceals, destroys or alters intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer

programmes, computer system or computer network, shall be punishable with imprisonment up to three years, or with fine which extend up to two lakh rupees, or with both. Section 66 of the act prohibits hacking with computer system and Section 67 prohibits publication of obscenity in any form in the computer related activities. The Act also gives wide powers to police officers not below the rank of Deputy Superintendent of Police to any public place and search and arrest without warrant any person found therein committed or committing offences.

Though the proper law is enacted by the parliament which covers every aspect of computer crimes but in our country due to lack of knowledge every minute innumerable computer crimes have been taking place every corner of the country. From recent past in every organization whether private or public all are depending upon the computers and their services, due to which there is alarming growth of crimes.

International Aspects

With the growth in the use of computer networks and the Internet, international aspects of computer crime have received the attention of officials. Computer crime has recently been seen as a global problem. The global nature of computer crime makes domestic solutions inadequate. The identities of perpetrators are often initially unknown, and the space and time dimensions of the intrusions may be unclear. Computer systems can be accessed or destroyed from anywhere and by anyone in the world. This results incomplex jurisdictional issues. These issues require immediate solutions in the international arena. In other words, global issues require global strategies.

Jurisdictional Issues

Jurisdiction is one of the biggest challenges to law enforcement in the information age. "Jurisdiction is the lawful ability of a government to subject a person to that Government's legal processes [2]. Many computer crime incidents involve more than one jurisdiction, which makes it difficult to determine the locus delicti. The crime is committed across the globe it there is issue of conflict of law and which laws have to be applicable trying such offences [3].

Judicial Response to Cyber Crimes in India

The Information Technology Act of 200o clearly stipulates that the cognizance of cases should be taken by the appropriate courts and it is governed by the principles of Criminal Procedure Code. In spite of the act there is not much cases have been filed and tried by the courts in India because of number of factors like ignorance of filing cases, pendency after filing, jurisdictional conflicts, improper investigations on part of law enforcement agencies, lack of knowledge on part of law enforcement and interpretation agencies etc.

Case No. 1: First Case conviction given in the Cyber Crimes

The first case which is filed given of conviction in our country is reported in 2001, in Sony India Private Limited case, brief facts are the Company runs website called sony sambandh targeting nonresident Indians to send different products to friends and relatives in India from foreign countries through online payments. One some in name of Barbara Campa and ordered a television and cordless head phone and the said Barbara had given credit card number requested the products should be delivered to one Arif Azim of Noida. When the payment is to be made the Credit card Company that the card is unauthorized transaction and real owner is denied of transactions. It was revealed that Barbara obtained credit card number of one American and fraudulently availed it. The police filed a case under Section 418,419 and 420 of Indian Penal Code.

The Metropolitan Magistrate court in New Delhi, had felt that as the accused was a young boy of 24twenty four years and a first-time convict, a lenient view needed to be taken. The court therefore released the accused on probation for one year [4].

Case No. 2: First case convicted under Information Technology Act 2000 of India

The case related to posting of obscene, defamatory and annoying message about a divorcee woman in the yahoo message group. E-Mails were also forwarded to the victim for information by the accused through a false e-mail account opened by him in the name of the victim. The posting of the message resulted in annoying phone calls to the lady in the belief that she was soliciting.

Based on a complaint made by the victim in February 2004, the Police traced the accused to Mumbai and arrested him within the next few days. The accused was a known family friend of the victim and was reportedly interested in marrying her. She however married another person. This marriage later ended in divorce and the accused started contacting her once again. On her reluctance to marry him, the accused took up the harassment through the Internet.

The Charge was filed u/s 67 of IT Act 2000, 469 and 509 IPC before The Hon'ble Addl. CMM Egmore by citing 18 witnesses and 34 documents and material objects. The same was taken on file in C.C.NO.4680/2004. On the prosecution side twelve witneeses were examined and entire documents were marked.

The Defence counsel argued that the offending mails would have been given either by ex-husband of the complainant or the complainant herself to implicate the accused as accused alleged to have turned down the request of the complainant to marry her. Further the defence counsel argued that some of the documentary evidence was not sustainable under Section 65 B of the Indian Evidence Act. However, the court based on the expert witness of Naavi and other evidence produced including the witness of the Cyber Cafe owners came to the conclusion that the crime was conclusively proved.

The court has also held that because of the meticulous investigation carried on by the investigating Officer, the origination of the obscene message was traced out and the real culprit has been brought before the court of law

The Additional Chief Metropolitan Magistrate, Egmore, Chennai, delivered the judgement on 5-11-04 as follows:

"The accused is found guilty of offences under section 469, 509 IPC and 67 of IT Act 2000 and the accused is convicted and is sentenced for the offence to undergo RI for 2 years under 469 IPC and to pay fine of Rs.500/-and for the offence u/s 509 IPC sentenced to undergo 1 year Simple imprisonment and to pay fine of Rs.500/- and for the offence u/s 67 of IT Act 2000 to undergo RI for 2 years and to pay fine of Rs.4000/- All sentences to run concurrently [5]."

Case No. 3: Well-known orthopedist in Chennai got life imprisonment

Dr. L Prakash stood convicted of manipulating his patients in various ways, forcing them to commit sex acts on camera and posting the pictures and videos on the Internet. The 50-year-old doctor landed in the police net in December 2001 when a young man who had acted in one of his porn films lodged a complaint with the police.

Apparently the doctor had promised the young man that the movie would be circulated only in select circles abroad and had the shock of his life when he saw himself in a porn video posted on the web.

Subsequent police investigations opened up a pandora box. Prakash and his younger brother, settled in the United States, had piled up close to one lakh shots and video footages, some real and many morphed. They reportedly minted huge money in the porn business, it was stated.

Fast track court judge convicted all the four in Feb 2008, also imposed a fine of Rs 1.27 lakh on Prakash, the main accused in the case, and Rs 2,500 each on his three associates - Saravanan, Vijayan and Asir Gunasingh.

The Judge while awarding life term to Prakash observed that considering the gravity of the offences committed by the main accused, maximum punishment under the Immoral Trafficking Act (life imprisonment) should be given to him and no leniency should be shown.The Judge sentenced Prakash under the Immoral Trafficking Act, IPC, Arms Act and Indecent Representation of Women (Prevention) Act among others [6].

Case No. 4: Juvenile found guilty for sending threatening email

A sixteen year old student from Ahmedabad who threatened to blow up Andheri Railway station in an email message was found guilty by the Juvenile Court in Mumbai.

A private news channel received an email on 18 March 2008 claiming sender as Dawood Ibrahim gang saying a bomb would be planted on an unspecified train to blow it up. The case was registered in Andheri Police station under section 506 of IPC and transferred to cyber crime investigation cell. During Investigation CCIC traced the cyber cafe from which the email account was created and threatening email was sent.

Cafe owner told police about friends which had come that day to surf the net. Police summoned them and found that the system which was used to send email was accessed by only one customer. On 22nd March 08, police arrested the boy a Class XII science student who during interrogation said that he sent the email for fun of having his prank flashed as "breaking news'' on television [7].

Case No. 5: Two Nigerians sentenced seven years RI for online fraud

A local court in Malappuram district in Kerala sentenced two Nigerians to five years rigorous imprisonment on July 20, 2011 in a cyber-crime case. The two had cheated a doctor in the district of Rs 30 lakh about two years ago. Johnson Nwanonyi (32) and Michel Obiorahmuozboa (34), both hailing from Anambra state in Nigeria, were sentenced each under sections 420 (cheating)-5 years, and 468(forgery)-5 years of IPC and section 66(D) (phishing) of Information Technology (Amendment) Act 2008 -2 years and a fine of Rs 1.25 lakh by a Chief Judicial Magistrate V Dileep in Manjeri in Malappuram district. The sentence would run concurrently.

According to the charges filed by the Karipur police, the duo had cheated the doctor Dr. C Thomas, hailing from Valluvambram in Malappuram district after they sent an e-mail asking to pay Rs 30 lakh as processing fee. But a planned move by the police and the doctor succeeded when the Nigerians were lured into Kerala in March 2010. They were then arrested by the Karipur police. The strong evidence based on which the prosecution presented the case became crucial in the first verdict against financial fraud under the Information Technology Act [8].

Conclusions and Suggestions

These above are some of the judgments delivered by the respective courts across in our country. As the incidence of the cyber crimes have increasing by day by day we are seeing filing of more cases across in our country and delivery of innumerable judgments. But in practice if we observe the courts are flooded with number of different kinds of litigations and the adding of cyber crimes to its jurisdiction also causing a strain upon it. The judges and law enforcement officials have not properly well versed with technical spheres of law and they should be trained properly. As the cases have been increasingly manifestly more number of specially trained cyber courts should be established to deal the matters. It is also high time to clearly resolve the jurisdictional matters in the cyber space by suitably amending the Information Technology Act of 2000. The victims of cyber crimes are gullible public and they are not aware of the rules or Act and they should be created of awareness programmes so that they can easily approach the law enforcement agencies for redressal of their grievances.

References

1. www.wikipedia.org
2. Carter and Katz, 2000, Osman N.Sen, Criminal Justice Responses to Emerging Computer Crime Problems, University of North Texas, Page No.59.
3. Supra.
4. http://www.alertindian.com/node/18#gsc.tab=0.
5. http://www.alertindian.com/node/18#gsc.tab=0
6. http://www.alertindian.com/node/18#gsc.tab=0
7. Supra.
8. Supra.

International Journal of Law
ISSN: 2455-2194, Impact Factor: RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 27-30

Status of women in modern reproductive clinics: Legal and ethical issues

Mrs. Pyali Chatterjee

Assistant professor, Disha Law College, Amlidy Raipur, Chhattisgarh, India.

Abstract

Whenever we talked about modernization and urbanisation somewhere we overlooked the negative impact of it in the entire world. Modernization and Urbanisation not only helped in the development of the society but it has increases crime also. Because somewhere poverty, increased with modernization and Urbanisation. And it is also found that behind many crimes poverty is one of the causes which forced the poor people to commit crime and sometimes they themselves become the victim of the crime committed by well educated person of our society. One of such crime is trafficking of women for surrogate mother and egg donor for Reproductive Clinics.

We all know about Commercial Surrogacy as this topic has become one of the burning topics for discussion and research in 21st Century. As through this technique not only single parents can have their own baby but lesbians and Gay people also can have their own baby through this process. Now the question is if this technique is really good for the society then why this technique is not free from negative impact? The answer is that, there is no doubt that this technique is one of the best invention of science and technology but this technique has also increased crime against women in entire world because women were used in the reproductive clinic or Reproductive Industries as a fuel and the end product of this Reproductive Industries is the baby born from this technique. Trafficking of women for Surrogacy can be found from the cases of Baby 101, death of Susma Pandey, case of SABYC Clinic in Romania etc lots of examples are their which proves that Commercial Surrogacy has increased crime against women in entire world which need to control through strong law.

Keywords: Egg donor, Surrogacy, Commercial, Reproductive Clinics, ART Bill

Introduction

The American Law Reports [1], defined the term "Surrogacy" in the following manner:

"…a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's".

According to the Black's Law Dictionary [2] "surrogacy means the process of carrying and delivering a child for another person".

Black Law Dictionary [3] divides surrogacy into two categories:-

1) Gestational Surrogacy- Here the genetic mother and father gives her eggs and sperms to another women (surrogate mother), which after fertilization is inserted into the womb of the surrogate mother and she carries the fetus till birth.
2) Traditional Surrogacy- Here the eggs belong to Surrogate mother and by artificial insemination, fertilization took place. In addition, she will carry the fetus until birth of the child.

The first case of gestational surrogacy was reported in India was at Dr. Nayna Patel's Akanshka Fertility Clinic in Anand, Gujarat in 2004, where Rhadha Patel aged 47 years, became surrogates mother for her UK based daughter. After that case, the Dr. Nayna Patel's Akanshka Fertility Clinic was highlight in media there by attracting numbers of foreign Couples.

It was after the case of Baby Manji Yamada versus Union of India & Anr. [2008] INSC 1656 [4]. where by Supreme Court in its judgment mentioned that Commercial Surrogacy is legal in India and asked the Legislature to pass a Law to govern the Surrogacy. According to that, Legislature has prepared a bill called assisted reproductive technologies (art) regulation draft bill 2010, which is still pending for its approval.

Commercial surrogacy agreement

Like any other legal agreement, Commercial Surrogacy is a written agreement between the Genetic parents and the Surrogates mother that the surrogate mother will give birth to the child of the genetic parents and in return, she will get money from Couple, and all the medical expenses will be borne by the genetic couples or by the clinics. And after giving birth to the Child, the Surrogates mother will relinquish her right over the child born.

Problems relating to commercial surrogacy

- **Economic exploitation**

For commercial Surrogacy, both the parties have to sign an agreement with each other i.e. Intended couple with the Medical Clinic and Medical Clinic with the Surrogate mother and this agreement is known as Commercial Surrogacy Agreement. It is to be noted here that in practice the agreement signed between intended parents and medical clinics contains about the terms and conditions of the Commercial Surrogacy including the fee payments for the entire procedure, which also includes the medical expenses of the surrogate mother. But in reality, Hospital authority never gives the actual payment which they take from the intended parents for the surrogate mother. Even there is no fixed fee for Commercial Surrogacy. Thus, the Reproductive Clinics charges very large amount from the intended couples. And the fees vary from couple to couple depending on the status and nationality of the couple. But the

amount which surrogate mother receives from the clinics is very less in compare to service which she is giving to the clinics and off course to the intended parents by renting her womb. Thus, by this way the right of the Surrogate mother were violate and they were economically exploit by the clinics. As the surrogate mother, hardly get 1-2 lakhs fees from the clinics for delivering the child of the intended couples, where the Clinics charges more money from the intended couples for the surrogate mother.

For Commercial Surrogacy, the surrogate mother from the poor families is in danger because broker and the clinics exploit their rights and even sometimes they were forced to become the surrogate's mother. As the surrogate mother were not aware of the fact that how much amount the

Clinics use to charge from the intended parents for surrogate mothers, so this is a positive point for the clinics to exploit the surrogate mother.

Ranjana Kumari [5]. Director of Social Research said that in most of the cases relating to Commercial Surrogacy it is found that the surrogates mother are being exploited. And according to her it's a high time to introduce the Assisted Reproductive Technologies (ART) Bill, to protect the surrogates mother, child and the genetic parents. Thus, the pending ART Bill, 2010 should be passed immediately.

It was mentioned in the Report No-228 of Law Commission of India [6], that the price fixed for the Commercial Surrogacy Agreement, between the Intended parents and the surrogate mothers in India, is near about $25,000-$30,000 that is around 1/3 from the other countries [7].

In India because of the absence of surrogacy law it is found that, sometimes during pregnancy due to any complication if the surrogate mother dies or she had a miscarriage in that case neither the hospital and nor the genetic parents will be liable to pay them for that. Since, the payment, which was agreed for commercial surrogacy, was for the entire term period of pregnancy to still the birth of the child. So, in between this if anything wrong happened to the surrogate's mother then no one will be liable for it and the women will also not get any payment. In this way, the medical clinics and the brokers exploit the economic rights of the surrogate mothers.

As in India still now we had no rule and regulation for Surrogacy, so the surrogate mother in India are to sufferer a lot both mentally, physically and financially. Sometimes for the payment, she has to depend on the mediator and to doctors also.

This is all about the economic rights of the surrogate mother, which are exploits by the Reproductive Clinics and by the brokers also.

- **Trafficking**

In a recent study done by the National Rapporteour on Trafficking in Human Beings of Dutch [8]. And also the report submitted by the same, raised a question about the Commercial Surrogacy, that whether the women for commercial surrogacy were coming voluntarily or forcefully to become a Surrogates mother? "Jyotsna Gupta, a senior lecturer in gender studies and diversity at the University of Utrecht, argues that Indian surrogate mothers are usually under enormous pressure from their husband and family" [9].

In countries, where most of the population belongs to poor society, rights of women's from that society were infringed and violated by the intermediary and the clinics for the money which was agreed to be paid to the Surrogate mother for the purpose of Commercial Surrogacy. Because most of the money which she is about to receive from this surrogacy agreement were taken by the Reproductive clinics and the broker.

In fact, we can say that, For Commercial Surrogacy, the illiterate surrogates mother from the poor background are in danger. Because brokers and the clinics exploit their rights and even sometimes they are force to become the surrogate mother or egg donor.

Dr. Roel Schats [10] chief medical officer of the IVF centre of the VU Medical Centre, argued against Commercial Surrogacy, "It is a form of modern slavery to use an Indian woman as a breeding machine without the benefit of any form of care". Moreover, slavery system is the violation human rights.It was submitted in the report [11] that in case of Commercial Surrogacy, if a woman was forced, Coerced and exploited to become Surrogates mother in that case it will be considered as a crime. Thereby, it will fall under trafficking.

There is a huge demand of Surrogate mothers in the Medical Clinics or in the Reproductive Industries, by the needy couples for the Gestational Surrogacy as well as for Commercial Surrogacy. As the demand of surrogates mother and egg donor is too high in the current scenario, for the Reproductive Industries, so to meet the demand, supply of the surrogate's mother and the egg donor is required in the same ratio. Thus, it has increases the trafficking of women in the global black market of Reproductive trade to meet the demand of Surrogates mother and egg donor as well.

According to the definition of the United Nations, "trafficking is any activity leading to ecruitment, transportation, harbouring or receipt of persons, by means of threat or use of force or a position of vulnerability" [12].

Status of women

From the from the above discussion, we find that how the Reproductive clinics were becoming multi-millionaire baby production industry in today's world and the women from the poor society were used as a raw material for these baby production industries. And the end product of this industry is available only to the Rich section of the society. One more interesting thing about these industries is that like any other industries here also one has to give advance for purchasing the raw materials i.e. surrogate mother and egg donor to start the process of production. In the process of Commercial Surrogacy, Women body as well as her reproductive organ i.e. ova is used here for commercial purpose, which is a violation of basic Human Rights. Ethically and legally Human body and organ both cannot be used for commercial purpose.

Cases of trafficking

- Another incident of human trafficking in 2011 was report, where 14-15 Vietnamese women were rescue from Thailand and they were trafficked and forced to become Surrogate mother for Commercial Surrogacy by a company named BABY 101 [13].
- In the year 2009, another case of Commercial Surrogacy involved with trafficking known as Romanian Scandal [14] was exposed. In that case, eggs from the minor girls were trafficked by the Israeli Doctors in one of the clinic named SABYC Clinic in Romania. Even a girl of 16 years was

rescue in a serious condition, left after the eggs removal procedure.

- In India, a 26 years woman named Yuma Sherpa from Delhi, died during the egg removal procedures and a 17 years Girl named Sushma Pandey from Mumbai, died after two days of egg removal procedures. Because of the absence of law and guidelines regarding how many eggs can be removed from the body at a time and the dosage of injection Gonadotropin that is used for producing multiple of eggs has increased a great concern for the doctors, lawyers and Human rights activist in respect of the health and life of the women [15].
- Recently, the Thailand Military Government [16], after the case of BABY GAMMY, has given approval for a drafted bill by which Commercial Surrogacy in Thailand will amount to be a criminal offence and thereby making it banned. Because of the problems related to Commercial Surrogacy.

Suggestion

For Legal Issue: There is a need of strong law for the protection of the women in cases of Commercial surrogacy. And the ART Bill should be passed immediately with proper necessary amendments.

For Ethical Issue: Women's body and human organ are not for sale. Ethically and legally it's wrong. Though the technique of ART Bill is very help full for the person who cannot have there own baby but this technique has raised so many ethical question especially due to this technique women were used as fuel for the reproductive Clinics. So tom protect women from this we should motivate other to go for adoption or this technique should be banned like Thailand.

Kathleen Sloan [17], in his article said that, In Surrogacy process, surrogates mother acts like a Commercial Industry and the product of this Industry, is the baby born through this process. Women from the poor section were exploits, and there health is on risk throughout this process.

Conclusion

आपदर्थे धनं रक्षेद् दारान् रक्षेद्धनैरपि।
आत्मानं सततं रक्षेद् दारैरपि धनैरपि।।

This is one of the famous neeti of Chanakya [18].

The meaning of this neeti is "For bad days one should save money. Women should be protected even if it takes the money saved. But for self- preservation, the money and the women should be sacrificed, if required [19]."

From this statement we find that in ancient India women were treated like animal and husband can sale there wife in case of need of money. That was the status of women in ancient India where they were treated as item.

Thus from the above discussion, we find that with modernisation and urbanisation the status of the women has not changed even though we had law to protect women rights. Earlier women body were used for entertainment i.e. for prostitution and now they were used as commodity or item or fuel for earning money and for the production of baby in the Reproductive industries. Women's were not only exploited in past but still now they are facing this same problem with new version in this technical and modern world.

References

1. American Law Reports, Validity and Construction of Surrogate Parenting Agreement, 77 A.L.R. 4 70, 1989.
2. Law Commission of India in Report No-228, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, August 5, 2009. http://lawcommissionofindia.nic.in/reports/report228.pdf
3. Ibid.
4. Kari Points, Commercial Surrogacy And Fertility Tourism In India The Case Of Baby Manji, INSTITUTION IN CRISIS, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf
   Nita Bhalla, Manshi Thapliya, India seeks to regulate its booming' rent-a-womb' industry,(Mon Sep 30, 2013,1:01pm) REUTERS, http://www.reuters.com/article/2013/09/30/us-india-surrogates-idUSBRE98T07F20130930.
5. Law Commission of India in Report No-228, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy**,** August 5, 2009. http://lawcommissionofindia.nic.in/reports/report228.pdf,
6. Id. at11.
7. National Rapporteur on Trafficking in Human Beings, Human trafficking for the purpose of the removal of organs and forced commercial surrogacy, THE HAGUE: BNRM,2012, 18.
8. http://www.dutchrapporteur.nl/reports/organ-removal-forced-commercial-surrogacy.
9. Id., at 19.
10. Id. at 20.
11. National Rapporteur on Trafficking in Human Beings, Human trafficking for the purpose of the removal of organs and forced commercial surrogacy, THE HAGUE: BNRM, 2012. http://www.dutchrapporteur.nl/reports/organ-removal-forced-commercial-surrogacy/
12. Rita Biswas, Human Trafficking - A Burning Problem In India,2(4)ONLINE JOURNAL EPISTEME, (March,2014), http://www.bharatcollege.in/PDFs/human-trafficking---1394774411.pdf.
13. Weena Kowitjwani. Thai Organization Involved in Trafficking in Vietnamese Surrogate Mothers Uncovered, ASIANEWS.IT Mar. 2, 2011. http://www.asianews.it/news-en/Thai-organisation-involved-in-trafficking-in-Vietnamese-surrogate-mothers-uncovered-20916.html
14. Hedva Eyal. Reproductive Trafficking, genewatch http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=313
15. Womens eNews, Donor Deaths In India Hightlight surrogacy perils, thomson reuters foundation, (jun.16, 09:16 gmt) 2014. http://www.trust.org/item/20140617101347-iu0x4/
16. Reuters in Bangkok, Thailand To Band Commercial Surrogacy In Wake Of Gammy Scandal, THEGURDIAN (Aug.13, 20.01 BST) 2014, http://www.theguardian.com/lifeandstyle/2014/aug/13/thailand-ban-surrogacy-gammy

17. Kathleen Sloan, Inconvenient Truths about Commercial Surrogacy, TWIN CITIES, Apr.1, 2014. http://www.geneticsandsociety.org/article.php?id=7663
18. Vishwamitra Sharma, Complete Chanakya Neeti,10, Manoj Publications,(16th ed) 2013.
19. Id.

International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 31-33

Cyber arbitration through lenses of Indian legal system: An analysis

Vikrant Sopan Yadav

Asst. Professor, Modern Law College, and PhD Research Scholar, Dept. of Law, SPPU, Pune, Maharashtra, India.

Abstract
Remarkable development in information and technology has drastically changed the mode of business, nature of disputes and manner of settlement of these disputes. The traditional mode of arbitration, wherein all the parties to disputes and arbitrators sit across the table and resolve their differences, has slowly been replaced by online/cyber arbitration. The added flexibility and expeditious nature of cyber arbitration over traditional form of arbitration, has started attracting parties to dispute opt for same. Though cyber arbitration gaining popularity, it too suffers from many issues.
This research article is an attempt to analyse the need and issues involved in cyber arbitration. Researcher has also made brief analysis of process of cyber arbitration in the light of relevant provisions of Indian laws.

Keywords: Cyber, Arbitration, Laws

Introduction

Conceptual understanding of cyber arbitration

Cyber

The word Cyber is derieved from word 'Cybernetics' which originates from Greek word 'Kubernetes' which means 'pilot or steersman'. With inceptions of computers, the term associated with it as it controls/steers many control systems.

Arbitration

Various institutions have defined arbitration in following words;

Halsbury's laws of England

"...the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by application of law by one or more persons (the arbitral tribunal) instead of by a court of law [1]."

International Law Commission

"…the procedure for the settlement of disputes between the states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted [2]."
From above definitions it can be concluded that, arbitration is that mode of settlement of disputes wherein, the parties at dispute settle the same amicably with the help of third person who is an expert in relevant area. The result of this process of amicable settlement is arbitration award which is final and binding on the parties to arbitration agreement.

Cyber/Online/ Electronic/Virtual Arbitration

In light of above definitions of Arbitration it can stated that, cyber arbitration is nothing but a process of arbitration carried on with the help of computer and internet, wherein only virtual presence of parties is required (not the physical presence). For ex. First party resides in USA, Second in India and the arbitrator is a NRI residing in USA. In cyber arbitration, parties can participate in arbitration proceedings from their place of residence or the place of work though virtual participation. As the physical presence is not required, it will save both time and money.

Need for Cyber Arbitration

Following factors have contributed towards advent and extensive recognition of Cyber/Online Arbitration;

- Overburdened, time consuming traditional court system.
- Specialization, speed and flexibility available in Cyber Arbitration [3].
- Advent of newer, faster technology and its legal recognition.
- Simultaneous translation software facilitates dialogue between parties' speaking different languages. It save money as translator need not be appointed.
- Non requirement of physical presence, saving the time and money (especially in case of trans-border disputes)
- Current traditional practice of international arbitration is mainly restricted to resolving the commercial disputes. With Cyber arbitration, all forms of civil disputes between transnational peoples/entities can be easily resolved.
- Storage, transportation of bulky data has become easier and cost saving. Numerous dta can be stored in a CD-DVD.

Arbitration clause

A clause in contract/e –contract, providing for cyber arbitration in case of dispute, is a valid clause u/s 7 of the Arbitration and Conciliation Act of 1996. Cyber arbitration may also arise out of standard form of contracts containing term of reference to cyber arbitration [4]. The e-commerce laws and regulations have legitimized the cyber arbitrations.
Article 7(2) of the UNCITRAL Model Law and Article 1 (2) of the Geneva Convention allow electronic arbitration agreement provided the evidence of such an agreement be provided.

Seat of Arbitration

In case of Cyber Arbitration, the biggest problem is to find out seat of arbitration. The jurisdictional issue in case of traditional offline arbitration (especially in case of International

Commercial Arbitration) becomes compound in case of Cyber Arbitration. The only solution in this case is unanimous choice of seat by the parties [5]. Failing to this, the arbitral tribunal/ arbitrator has to decide seat with due regard to the *circumstance of the case and the convenience of the parties* [6]. According to one thought, [7] the parties to an *online arbitration* usually "involuntarily choose" the location of a given arbitration institution as the place of arbitration.

Procedure

As per the territorial principle and generally accepted practice, procedural law will be that of the seat of arbitration. Subject to the parties´ agreement, the arbitrators may collect online evidence and substitute an oral testimony by written evidence in order to shorten the proceedings [8].

Award under Cyber Arbitration

Section 31 of the Arbitration and Conciliation Act requires every arbitration award to be in writing. However, whether an award in form of a video (by arbitrator), or in any other electronic form will amount to an award in writing or not is not clear.

Section 31 (5) requires every award to be signed by each party. An electronic signature is legally recognized in India [9].

Sec. 5 of the IT Act 2000 is relevant here which provides that,

Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

The UNCITRAL Model Law on Electronic Commerce [10] has given consideration to the possibility of dealing with impediments to the use of electronic commerce posed by such requirements in national laws by way of an extension of the scope of such notions as "writing", "signature" and "original", with a view to encompassing computer-based techniques" [11]. This Model Law stresses on "functional equivalent approach", which is based on an analysis of how the purposes or functions of the traditional paper-based requirements could be fulfilled with the use of electronic techniques [12].

Article 6(1) of the Law provides also a new definition of "in writing" by stating that "*[w]here the law required information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference*"

Hence, an award in electronic form bearing electronic/digital signature of all the parties may be deemed to be an award in writing, thus enforceable under laws in India.

Enforcement of Cyber award

The New York Convention has described enforceability of arbitral award as "the single most important pillar on which the edifice of international arbitration rests [13]" in case of Cyber Arbitration, place of enforcement will depend upon the nature of the dispute. Place or seat will have no role to play. Its enforceability will depend on adherence to the principle of party autonomy.

Issues involved in Cyber Arbitration

Apart from above issues, parties and arbitrator to cyber arbitration has to face following issues/challenges;

- Cost incurred and expertise required in arranging equipments for cyber arbitration.
- Absence of faster, interruption free network facilities (which is often a problem in developing and underdeveloped countries).
- Data protection and high cost involved for protection of same. Almost all the web communications done through open networks, which makes them vulnerable to ever-growing data security threats.
- Confidentiality of proceedings, documents, evidences etc. (Personal Data Protection Bill 2006 failed to become a law and there is no proper comprehensive legislation governing data protection (only law in India in this regard is Sec. 72 of IT Act, 2000)).
- In case of electronic standard form of contract containing Cyber arbitration clause, party may be forced to go for cyber arbitration (in case of dispute) just by click on 'I accept.' This may go against basic principle of arbitration i.e. *consensus ad idem* [14].
- Cyber arbitration requires the parties to be technologically sound and literate. Failing to this may lead to violation of Sec. 18 of the Arbitration and Conciliation Act and Art. 18 of UNICITRAL Model Law (equal treatment principle) as the party not good at technology may fail to represent itself properly.

Suggestions

- Promotion and development of institutional cyber arbitration.
- Developing the curriculum and training involving techno-legal aspects cyber arbitration.
- Cyber threats and cyber security awareness
- Promoting faster, affordable and interruption free web services.
- Enacting a comprehensive national as well as international data protection statute.

Conclusion

The combine effect of IT Act 2000 and Arbitration and Conciliation Act, 1996 gives legal recognition to the Cyber/Online Arbitration in India. The emergence of cyber arbitration is no doubt more expeditious and useful that traditional arbitration practice. However, as pointed herein above, it too faces some techno-legal issues. In order to make cyber arbitration a primary mode of amicable settlement of disputes, these issues needs to be addressed by the state authorities, business entities and arbitral institutions.

References

1. See D Rautray. Master Guide to Arbitration in India', (Wolters Kluwer (India) Pvt. Ltd, New Delhi, 2008, 19.
2. Report of the ILC concerning the work of its Tenth Session, 1958, GAOR, 13th session, Supp. No. 9 [A (3859)].
3. Generally, it is expected that the online disputes should be resolved within maximum period of ten to thirty days; see, www.intellicourt.com/procedures.html

4. Most often the user has to fill out a standard form agreement or complete a few blank fields, whereas an arbitration clause remains "buried" among numerous other general terms and conditions. Hill argued that this is analogous to the transmission that takes place when an e-mail or fax is sent, the only difference being that the recipient initiates the transmission in the case of the website, whereas the sender initiates the transmission in the case of e-mail or fax. He concluded that this difference has no impact on the validity of the exchange. See, R. Hill, On-line Arbitration: Issues and Solutions, 1999. Int'l. 199, available on: http://www.umass.edu/dispute/hill.htm
5. Sec. 20 (1), the Arbitration and Conciliation Act, 1996
6. [1] Sec. 20 (2), the Arbitration and Conciliation Act, 1996
7. H Yu, M Nasir. Can Online Arbitration Exist Within the Traditional Arbitration Framework? 20 J. Int'l Arb. 455 at, 2003, 463
8. Yu H, Nasir M. Can Online Arbitration Exist Within the Traditional Arbitration Framework? Journal of International Arbitration, 2003; 20(5):463.
9. Sec. 15, Information Technology Act, 2000.
10. adopted by the General Assembly Resolution 51/162 of 16 December 1996, and amended in 1998; complete text available at, http://www.uncitral.org/en-index.htm
11. Section 15, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, available at, http://www.uncitral.org/en-index.htm
12. Ibid., Section 16
13. J Wetter. The Present Status of the International Court of Arbitration of the ICC: An Appraisal, 1990. 1 Amer. Rev. of Int'l Arb. 91 at 93.
14. In each case, the absence of a "clear and conspicuous reference" to an arbitration clause could lead to objections concerning the validity of the arbitration agreement "on the basis of lack of informed consent by the buyer"- see supra note 4

International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 34-39

The role of Sunnah in promoting socio-economic conditions in Nigeria

[1] Malam Yusuf Muhammad Yunus, [2] Dr Sulaiman Olayiwola Rabiu

[1] Government Technical College, Binji - Sokoto, Nigeria.
[2] Faculty of Law, Usmanu Danfodiyo University, Sokoto, Nigeria.

Abstract
Nigerian society is multi-religious in search of a viable solution to its problems which posed threats to her since almost fifty-two years of her independence. Over the years, various policies have been introduced by the Federal, state and local governments in an attempt to address the many problems confronting Nigeria socially, economically and politically. Some of the policies during the Military era led to the establishment of Directorate for Food and Rural Infrastructure (DIFRI), Mass Agency for Mobilization and Socio-Economic Recovery (MAMSER), Poverty Reduction Programme and Poverty Alleviation Policy to mention but a few. However, these policies have failed to tackle the problems of Nigeria. Sunnah as a designed path by Allah with instructions from Him to His beloved Prophet to teach mankind so that in the society there will be peaceful co-existence. The ignorance of Sunnah of the Prophet in our society hinder our development. Hence, this paper presents the beautiful picture of the life of the Noble Prophet and his practice i.e. his Sunnah for our generation to emulate.

Keywords: Directorate for Food and Rural Infrastructure (DIFRI), Mass Agency for Mobilization and Socio-Economic Recovery (MAMSER), Sunnah

Introduction
This paper analyses some ways by which the social and economic sectors of Nigerian society can be reformed through the application of the Sunnah of the prophet Muhammad (SAW). The Nigeria society is a multi-religious society which comprises non-Muslims such as religion may ask that why Sunnah of the prophet has to be applied to solve Nigeria socio-economic problems since the country consists not only of Muslim. The reply to it is that, the country seems to be in search of a viable solution to its problems which posed threats to her since almost fifty-two years of her independence. Over the years, various policies introduced by the Federal, state and local governments in an attempt to address the many problems confronting Nigeria socially, economically and politically of the policies during the Military era led to the establishment of e.g. (DIFRI), Directorate for Food and Rural Infrastructure. (MAMSER,) Mass Agency for Mobilization and Socio- Economic Recovery, Poverty Reduction Programme and Poverty Alleviation Policy to mention but a few. However, these policies have failed to tackle the problems of Nigeria. Therefore Sunnah as a designed path by Allah with instruction from Him to His beloved prophet to teach mankind so that in the society there will be peaceful coexistence. The ignorance of Sunnah of the Prophet in our society hinder our development. Therefore the essence of this paper is to present the beautiful picture of the life of the noble prophet and his practice i.e. his Sunnah for our generation to emulate.

Definition of Sunnah
Sunnah means a praise or path [1]. It is a path worthy of praise to whosoever establish it. The Sunnah of our noble prophet Muhammad (SAW) is an action worthy of praise but not blame. The scholars of Hadith define Sunnah as what emanated from the prophet Muhammad (SAW) pertaining to his sayings, deeds, tacit approval, or the description of his history and activities before or after his messenger ship [2]. The prophet says:

"He who set a good precedent in Islam there is reward for him and for this act of goodness and also for those who acted according to it up to the day of resurrection"

The Usulist (The Scholars of principle of Jurisprudence) define Sunnah, as is has to do with Islamic laws whether such in the Glorious Quran or what has come from the prophet (PBUH). It also includes the intellectual efforts of the companions such as the compilation of the Glorious Qur'an and the act of making people to recite the Qur'an uniformly, as well as the documentation of Hadith [4]. The prophet says:

"Sunnah is (categorized) into two: the obligatory and non-obligatory Sunnah, the obligatory Sunnah is that which its origin is from the Book of Allah the Most High adopting lead one to the straight path while ignoring lead one astray. But the non- obligatory Sunnah is that which its origin is not from the Qur'an the most high adopting it is a blessing and ignoring it is, not a mistake [5]*".*

In view of this Hadith, it is obvious that Prophetic traditions are obligatory, while some are non-obligatory but to emulate Him attract mercy and blessings of Allah which attachment to its practice will be very much essential and beneficial to whoever emulates Him. The prophet Muhammad (PBUH) in his farewell pilgrimage address pointed out the legacy left behind for Muslims in order to be guided and control their social and economic life sphere. He says:

"I left for you two things of which whosoever hold it will not be astray the Book of Allah and my Sunnah [6]*".*

In another Hadith, the prophet (PBUH) described all irreligious act as an act that will be reprobated. He says:

"Whosoever works any work which does not belong to this affair of ours (Islam) will be reprobated [7]*."*

The prophet observed that the act of worship is to love what Allah loves and hate what Allah

The Position of Sunnah in Islam

The Sunnah of the noble prophet occupies a great position in Islam and as such the Glorious Qur'an in many places reiterated the need to uphold with high esteem. The following are some of the verses that emphasized this position: (Quran; 3; 32) [8].

Allah also warned Muslims from going against the commandment of the Prophet (PBUH) which indicate the position of respect given to him by Allah as (Quranl 6: 5 = 7) [9].

Allah commands each and everybody to take whatever prophet gives to them in terms of worship (i.e. Ibadah) or etiquette and moral to control their ways of life for a just and moral society.(Quran; 59; 7) [10].

Another commandment was revealed to indicate that the Sunnah of the prophet came next to Allah's commandments:

All the verses stated the importance which Allah attached to the beloved prophet. Therefore, to emulate him wholeheartedly will surely sanitize and purify out socio-economic vices in Nigeria.

Sunnah as a source of law

The Sunnah of the noble. Prophet is the second source of Islamic law and it comes next to the Qur'an. This means that after the Qur'anic 3:32 [11] injunction, the next important source of Islamic law is Sunnah as stated in the (Qur'an. 3: 32.) (Q, 5; 9) [12].

Prophet Mohammad (PBUH) in his farewell pilgrimage address pointed out to the generality of the Ummah the legacy left behind for the Muslims to guide them to the favour of Allah. He says:

"I left for you two things of which whosoever hold it will not lust, the Book of Allah and my Sunnah [13]*".*

i) It completes the teachings of the Qur'an

The Sunnah of our noble prophet Mohammad (PBUH) further explains the verses of the Glorious Qur'an in many ways. Prayer, Zakat, Hajj and fasting of the month of Ramadan are injunctions ordained by Allah (SWT) in the Qur'an Allah says:

"And those who believe in the unseen, establish prayer, and spend out of what we have provided for-them" [14],

In another verse of the same surah; Allah commands:

"And establish prayer, and give zakat, and bow with those who bow in worship and obedience [15]*"*

Allah gives His directive in another verse of the same surah to establish prayer: He says:

"And speak good (words) to people and establish prayer and give Zakat" [16]. In the above Qur'anic quotation, Allah does not mention the number of times to establish the prayer either daily weekly monthly or even yearly and He does not mention the number of Raka'at consist in each prayer. The Sunnah of the prophet demonstrated the full detail of the mode of prayer, the number of times to pray in a day, the mode of their observations what, what vitiate the prayer and, the establishment of the college of Ba'di and Qabl to correct mistakes de in the prayer. Prophet says: *"Observe prayer as you have seen me observing it"* [17].

ii) Sunnah as best interpreter of the Qur'an

The most authoritative source of the interpretation of the Quran is the Sunnah of our noble t (PBUH). The Glorious Qur'an says:

"(We sent them) with clear proofs and written ordinances. And we revealed to you the message (i.e. the Quran 'an) that you may make clear to the People what was sent down to them and that they might give thought" [18].

Although, the Qur'an was revealed in Arabic language, the language of Arabs, one may therefore dwell that the need for any interpretation as the literal meaning of the verses is well known to the Arabs is no more necessary. The above statement could not be said to be true as the intended meaning of the Qur'an cannot be known except through an explanation from the prophet who received it from Allah. To this effect Allah (SWT) assured the prophet (PBUH) that he would teach him the real interpretation of the Qur'an [21]. This is contained in the verse which says:

"Then upon us is its clarification to you [19]*"*

It therefore follows that the explanation of the prophet (PBUH) regarding the Quran, the true intended meaning of Allah who teaches the prophet reflects. For example Allah says:

"It has been made permissible for you the night preceding fasting to go to your wife's (for sexual relation). They are clothing for you and you are clothing for them. Allah knows that you used to deceive yourself so lie accepted your repentance and forgive you. So now have relations with them and seek that which Allah has decreed for you (i.e. offering). And eat and drink, until the white thread of down becomes distinct to you from the black thread (of might) (i.e. sunset), and do not have relation with them as long as you are staying for worship in the Mosque. These are the limit (set by) Allah so do not approach" [20].

This verse explained the series of endurance which Muslims have exhibited in the early age of Islam. It stated that Muslims were not permitted to have sexual intercourse with their wives during the night of Ramadan. Ibn Kathir stated that Muslims could only have sexual intercourse with their wives only between Maghrib prayer and Isha'I and anything after even if they slept off during the time for breaking fasting, they are to continue with fasting till the following day. This is the mode of fasting during the early ages of Islam. Later, this burden was removed and permission was granted them to have sexual intercourse with their wives throughout the night of Ramadan. The Quran says the wives of Muslims are their night garment and vice versa.

The Burden of drinking and eating during the night of Ramadan was also removed by Allah when he metaphorically stated that Muslims should eat and drink until white thread is distinguished from black once. When this verse was revealed, Ibn Hazim took both black and white threads to explain the interpretation of the above verse but all in vein. The following day, he went to the prophet to report his experience to him. The prophet (PBUH) replied that Allah means the

lightening of the day and the darkness of the dawn [21]. By so doing it further shows the importance and more recognition of Sunnah.

As of Source of History

The Glorious Qur'an has narrated various stories such as the history of the people of Kahf, the story of Ad and Thamud, the history of battle of Badr, Uhud, etc but the prophet gave explicit explanation of these stories to enable Muslims learn lessons from them. The Qur'an stated that all Allah's signs shown to the people is manifest and sufficient source of history. Allah says:

"We will show them our signs in the universe and in their own selves, until it becomes manifest to them that this (the Qur'an) is the truth, is it not sufficient in regard to your Lord that He is a witness over all things [22]"

It is absolutely believed by every mankind and particularly Muslims that Allah is the sole creator of creatures and the Qur'an. It is His revealed words to the prophet, therefore the capacity to witness incidences and happenings belong to him. Widened the scope of the Qur'anic injunctions on Zakah al-Fitri, explanation of not marrying two sisters together, eating of meat. which Allah's name is not mentioned when slaughter and also a source of details about Qur'anic injunction and gives physical demonstration regarding the injunction of the Qur'an on prayer, Zakah, fasting and Hajj. Likewise the capacity to widen the explanation of the injunction of the Glorious Qur'an belong to the prophet Muhammad (PBUH) as the capacity to narrate the story of the happenings to whom He wishes belongs to Him.

Moral Bankruptcy in the Nigerian Society

A Muslim should try to comprehend that, his neighbour has some rights over him whether they are both from the same religion or not. Likewise, each and every individual should be conscious of his behaviors and his duty to perform towards his neighbour either from the same tribe or re1igion, this would make them to establish good atmosphere and strengthen trust between themselves. The bankruptcies in the two spheres of lives are social and economic are as follow:

i) Social Life Sphere

It is quite unfortunate that vices that did not happen in the early period of the independence have taken over the country. A Perpetrators very good example to mention but few is child abuse. This crime use different mode of operations e.g child trafficking, rape, child neglect etc. Some Nigerians children were trafficked to Europe, Middle East and other countries to engage in hard labour, domestic servitude and sexual exploitation. Girls and women were trafficked for prostitution to Italy, France, Spain, Netherlands, Cote De Voire and Benin Republic.

Children were trafficking for voluntary domestic and agricultural labour from Nigeria to other countries. Nigeria is one of the leading countries for child trafficking.

This ugly act came into existence in the early period of 1980s and gradually developed to an alarming rate. In 1999, about twelve (12) young Nigerian girls were deported from Italy for engaging in sexual commercialization i.e. prostitution. In the year 2000, another ninety two (92) Nigerian girls were also deported from Germany, American and Canada for engaging in the act. Some of these girls were below the age of twenty used for either house-keeping, or hard labour in factories with little salary. On raping, report shows that more than 13,000 women were raped within 1999-2006 and another report confirmed that 2000 girls were raped in Nigeria in 2007 [24]. The rate of child abuse in Nigeria is alarming and needs to be urgently arrested.

ii) Examination Malpractice

Another social life sphere which require urgent solution is examination malpractice. It can be defined as an act of dishonest or indiscipline of a candidate or candidates, or any other person to contravene the existing rules and regulations of examination body in order to enjoy an undue advantage over others. This has been recurring event in the history of Educational sector in Nigeria.

In the year 2000, for example the then JAMB Registrar Professor Bello Salim.

Affirmed that Nine thousand eight hundred and nine (9809) candidates caught for examination malpractices. In 2005, one 'of the National Dailies reported that there was leakages of WAEC questions. The news added that the something happen in other Examination bodies like: NABTEB, NTI, JAMB and NECO, The principals and proprietors of Schools do connive with security agents and invigilators to enable their candidate engage in examination malpractices. This ugly scenario needs to be quickly arrested.

iii) Another Social Vice is Drug Abuse/Addiction

This could be defined as taking of drugs for a reason other than medical treatment. This is another dangerous habit which destroyed 'life style of our youth today in this country. Drug abuse is also common to some of our politician, artisan, and many of our force men. Nigerians generally cultivated the' habit of self-medication which also amounts to drug abuse.

In Nigeria today, drugs hawkers have taken over the streets selling drugs without measurement and prescription. Drug abuse definitely have negative effect either in social or particularly in academic life of people in the globe generally and Nigeria in particular.

Economic Sphere

Economically, Nigeria is among the top corrupt nation of the world. For example, some individual firms or corporate organizations in an attempt to evade tax payment collided with government officials who helped them to adulterate audit reports [29]. Many custom officers in Nigeria ignore their oath of allegiance to be faithful to the country. They collided with some bad citizens to have custom duties waived for them. The most unfortunate aspect of it is the smuggling in and out of the country, some goods or drugs that are harmful to human health are being allowed to smuggle in, for exchange of money, whereas the Government is paying them their emoluments monthly. All these acts including human and currency trafficking across the Nigeria borders were in most cases carried out with the knowledge of some of unpatriotic custom officers [30].

Some civil servants also contributed to the economics mess of the nation through the collection of *bribes*, *embezzlement of public funds*, *mismanagement* of public properties and other form of corruptions. Another fraudulent acts, carried

out in the Nigeria society includes the various forms of banks fraud, which some fraudulent citizens have gone to the extent of taking signatures of some people in order to enjoy some financial advantages while many accounts have been rendered empty through the fraudulent activities of some Nigerians [31].

Corruptions have ruined Nigeria both home and abroad. Even though, not only Muslims are involved in above mentioned offences but what we are saying is that let the Muslims whom I belief to have formed huge number of the working class in Nigeria stop from committing such acts and parhap the rest citizen would be force to stop doing so.

The Effects of Immoral Conduct on Nigeria Citizen and Society

As a result of the various forms of abnormal activities which that have engulfed all sphere of life in the country, the country has turned to the source, transit and destination for exhibiting bankruptcies To this effect, the nation is facing a lot of problems which include the following:

i) Spread of Diseases

Head of National Agency for prohibition and Trafficking in person and other related matter (NAPTIP) Kano State Zone, Ahmed M. Bello has disclosed that over 60% of victims of trafficking repatriated to the country tested are HIV positive. He added that the victims are mainly teenagers who engaged in, commercial prostitution abroad.

ii) Loss of Hope and confidence on the Government

Nigerian have lost hope in their rulers because they are only there to enrich themselves, in addition, the inability of government to maintain security of lives and properties due to the incessant socio-economic crises, the inability of the government to ensure social justice and free and fair election have all resulted into lost of confidence on the Nigeria government [33].

iv) Bad Image

For Nigeria to be ranked among the top corrupted nation in the world, it has injured our image both home and abroad. All the fraudulent acts committed by Nigerian anywhere in the world tarnished our image and integrity before the committee of nation [34].

v) Health Implication

With various forms of sub standards, fake and expired drugs import into the country and with the illegal sexual affairs (i.e. child abuse) made or the state of the health in Nigeria become downtrodden. Transparency international noted that corruption could deprived a nation commendable state of health, because the resources allocated to the sector will not reach the required destination where it is needed [35].

vi) Grooming of dishonest future leaders

Students who have passed the examination through cheating and other forms of corruption, it may be very difficult, if not impossible for such people be a good leader in future. These are the potential future leaders of this country, who raises up and achieves their aims through cheating and fraudulent mean and what do you expect from.

Having discussed the problems facing Nigeria society in socio-economic sphere of life, the next is to check how can the application of Sunnah eradicate and reform these our corrupt ways of live.

Sunnah as a Way out in our Socio-Economic Life Sphere

The problem of child-abuse, exam malpractice, and other forms of corruptions can be effectively eradicated with the aid of Sunnah, All these types of problems were in existence in the pre Islamic society before the arrival of the prophet and were sincerely conquered during the life time of the prophet. Problems associated with sex, evading of tax, breaking of oath of allegiance, smuggling of fake or expired drugs, mismanagement of government properties and other forms of corruptions emulating the style and teaching of the Noble Prophet (SAW) in society.

i) Prophetic tradition on Trust of Allah Entrusted on man

Health and children are among the greatest resources bestowed on man, but unfortunately many people do engage in the practices that endanger their health e.g. drug abuse, prophet Mohammad (PBUH) teaches Muslim various traditions for them to realize and abstained from what can endanger their health. For example prophet says:

"There are two gifts of which many are deprived (namely) good health and leisure [37].

Another tradition stated:

"Ask Allah for forgiveness and health, after certainly of faith, nothing better is given to man than good health [38]."

In recognition of the greatness of this blessing the prophet says:

"The first question that is put to the worshipper on the Day of rising about the pleasure of this world is "Did I not give you, a health body [39]"

The above quoted tradition cautioned mankind from engaging in what could affect their health e.g. drug abuse, drug addiction and consumption of drugs as well as consumption alcoholic drinks etc. which affect the health of the user negatively. If people comply with the instruction of above mentioned tradition,, the issue of spreading of disease will decline in our society because each and every body will opt to protect his health by limiting himself to the lawful foods drinks and abstain from unlawful ones Millions of soldiers have been provided by Allah in the blood of our body to attack any form virus of that could cause disease but the abuse of drug render these soldiers useless and create different kinds of disease in our body.

Children are blessings and trust entrusted on man by Allah as such man shall be questioned about how he take care of them. The following prophetic tradition says:

"Verily each of you is a shepherd and each of you is responsible for his flock So the head who is placed over the people is a shepherd responsible for his/lock a man is placed over the member of his family and he is responsible for his flock; a woman is placed over the family of her husband and his children and she is responsible for them, a servant of a man is placed over the property of his master and he is responsible for it [40]……

Children are special blessings from Allah but if they are not

properly and islamically taking care of and they behave against the will of Allah, the wrath of Allah may be ultimate result.

Custodians of examination's papers are also people entrusted with some responsibilities and they shall stand before Allah to give account of the task given to them, on how do they discharge the duties impose on them. The application of the above tradition if comply with in our society it could give positive change.

The application of the above tradition in our society could assist in bringing positive changes to our life and more especially to the life of those who engaged in the sales of question papers, expired and fake drugs, those who mismanage or embezzled public found as well as those who engaged in breaking of their oath sworn before they were assigned duties and responsibilities. Each and every one of them should remember that they are shepherd given responsibilities and they will be questioned on the Day of Judgment over their flocks, Muslims belief on the Day of Reckoning and perpetrators of evil acts should remember this day.

Cheating of whichever type has been condemned by the prophet (PBUH). In an attempt to phase out this irreligious and unethical conduct from man's life he announced that on the Day of Judgment every traitor would be raised carrying the flag of his betrayal and a caller will carry out in the vast arena of judgment, pointing to him and drawing attention to him. Prophet says:

"Every traitor will have a banner on the Day of Resurrection and it will be said: this is the betrayal of so and so"

Our society would have been a smooth and religious one if people could ignore our difference in terms of race, religion and work towards the same goals and objectives. This will make evil conducts, bankruptcies and all other irreligious activities declines as mentioned in the tradition of prophet below.

"Truthfulness leads to kindness (Birr) and kindness leads to paradise. A man continues to speak the truth until he is recorded in the sight of Allah as a sincere lover of truth (sidiqi) falsehood leads to iniquity and iniquity leads to hell. A man will continues to speak falsehood until he is recorded in the sight of Allah as a liar [42]".

Prophet (PBUH) cautioned Muslims against nudity which is an arrow of raping and weapon of sexual harassment either in public or otherwise. The habit of proper dressing was instructed by the prophet for both male and female of which if it is adopted, our society will be safe from evil f raping, public sexual harassment and spreading of diseases. He described the act of lowering of gaze as an act of sweatiness of the soul for whosoever abide by it and also an act which protects men from unnecessary hungry of sex.

Prophet (SAW) said:

"Sighting is an arrow among the satanic arrow, whosoever abandoned it for the sake of Allah. (Allah) will replace for him with sound faith which its sweetness will be tasted by his soul [43]".

In another tradition the prophet cautions all Muslims to lower their gaze and ignore the practice of looking at the prettiness of a woman which may eventually lead to unnecessary ejaculation.

Prophet says:

"Whosoever among the believers look at the Prettiness of a lady or a woman and (quickly) lower his gaze. Then Allah will establish for him the worship which it's sweetness will be tasted by his soul".

Conclusion

The paper clearly pinpointed out that the socio-economic life sphere in Nigeria are faced with enormous problems which include lack of tolerance and good faith, These problems are the primary cause of cruelty, nepotism, embezzlement and mismanagement of public funds. The teaching of the prophet Muhammad (PBUH) on justice, and good leadership, would assist in reforming and addressing the Nigerian socio-economic problems. This paper mentioned some socio economic problems which purely emanated from our young one, who are potential future leader of this country. All the aforementioned habits must be corrected through proper understanding and emulation of the teaching and practices of the noble Prophet Muhammad (SAW if that is done definitely our society would be free of all source of corruption, and automatically the image of our country will be restored both in and outside the country.

References

1. Mustapha A1-Sibai: Al Sunnah Wamakanatuah Fi Tashri al-Islami, Dar al- Islam 1983, 54.
2. IbidP.55
3. Sunanii Ibn Majah (N.D) Muqaddimah 14, Cairo, Darul Kuttub.
4. Mustapha Al-siba'I op.cit.
5. Ahmad Al-Hashim (N.D): Mukhtar al-Hadith Al-Nabawiyyah, Dar A1-Fikr Baerut 53.
6. Musnadi Ahmad, Beirut, Darul Ilimi 16.
7. Sahih Bukhari, Kitabul Itisani 20 Cairo Mustapha Al-alabi 1976, 69.
8. Quran3:32
9. Qur'an 16:37.
10. Qur'an 59:7.
11. Musnadi Imam Ahmad Op. cit.
12. Quran 5:92.
13. Mustapha al-Sibai Op. cit 55.
14. Quran 2:3.
15. Quran 2:43.
16. Quran2:83.
17. Al-Sibai Op. Cit 53.
18. Quran 16:44.
19. Qur'an 75:19.
20. Qur'an3:187.
21. Imam Abi A1-fadai'I Tafsir Ibn Kathir, Darul Fikri 1999, 405.
22. Qur'an 41:53.
23. Ezzezobov, Ekate, Child Trafficking: A Case of Nigeria in Nigerian Democracy. The Journey so far, Ed. Lateef A A. *et al.* 256.
24. Idiam, Jossy, "Sex Terror" Sunday Sun July 13 2009, 4.
25. Agugbuem E. Co-Examination Malpractices and Cultism in Nigeria Schools: orbit Educational Journal June 1, 52.

26. Anti-Corruption Handbook by Fix Nigeria Initiative, MC. Print System, Abuja. 7.
27. The Macmillan Family Encyclopedia, Arete Publishing Company Princeton New Jerson, 6:272-281.
28. Isah Madawaki Aisha, Drug Abuse/Addiction in the Society. The Role of Counselling Psychologist Sokoto Educational Review, 9(I):124-125.
29. Anti-Corruption Handbook Op. Cit 17.
30. Mohammad, Usman Jirn Oh, Some Impediment to Good Governance and Public Administration in Nigeria: A-Quran lea-way A Paper Presented at the National Conference of Teachers of Arabic & Islamic Studies, Kebbi 2007, 4.
31. Anti-Corruption Handbook, Op. Cit. 20.
32. Ibid.
33. Mohammed Op. Cit. 20.
34. Anti-Corruption handbook Op. Cit. 5.
35. ICPC Monitor, 2008. 1(4):47.
36. Anti-Corruption Handbook Op. Cit 17.
37. Adam U. Faruk Medicine in the Qur'an and Sunnahn Islamic Medical Association of Nigeria (UDUTH).
38. Sunani Daud (N.D) Babul Adab H. 101 Cairo, Darul llimi.
39. Ibid 27.
40. Fatihul Ban Shrh Sahih Bukhari Vol. 5 and 11 Babul'itiq 227 Beirut, Darul Kuttub al ilmieah
41. Sahih Muslim, Kitab Imarat H. 139, Beirut Darul Fikri.
42. Sahih Bukhari Kitabul Adab H. 69 Cairo Darn! Kuttub.
43. Ibid 19.
44. Musnad Imam Abmad Beirut, darulilmi, 5:264.

International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawresearchjournal.com
Volume 2; Issue 2; March 2016; Page No. 40-42

A brief jurisprudential analysis of "Brown v. Entertainment Merchants Association" and its proximity with China's real name network system

[1] Muhammad Ali, [2] Liu Yideng

[1] The first author is currently a currently a Master's student at School of Law of Central South University, Changsha, Hunan, China.

[2] Professor at School of Law of Central South University, Changsha, Hunan, China.

Abstract
Brown v. Entertainment Merchants Association (2011) is a landmark case in the US constitutional law history. It has redefined the basic human right of freedom of speech. Although the decision is a recent one but it is a depiction of jurisprudential development. It has strong linkage with China's proposition of Real Name Network System.

Keywords: Brown v. Entertainment Merchants Association, natural law, positive law, pragmatism, Real Name Network System

Introduction

In 2011, US Supreme Court struck down a 2005 California law. In 2005, California banned the sale of certain video games to the children without parental supervision [2, 33]. The main reason was that the games were containing violent and inappropriate material. It is an undeniable fact that video games do contain violent content. The games like, Resident Evil, Taken Series, Mortal Kombat, Call of Duty and many others, have killings, use of weapons, and showing of blood and rage. The Californian law aimed at safeguarding the minor from this and shifting the liability to parents.

US Supreme Court declared the law null and void on the basis of restriction on freedom of speech. The Supreme Court had declared that video games are protected under the right of free speech [1]. The views of judges were different, although linked with each other but with different explanations and interpretations. They thoroughly compared video games with other media and more they emphasized on proper regulations and social education on broader level than micro level restrictions.

The above mentioned case is interesting in a way that it involves many theories of jurisprudence. Some of these theories were applied completely when deciding this case and some were thoroughly negated, but there are gray areas that involve many aspects of jurisprudence and a mixture, rather an amalgamation of theories is there to open new horizons in the field of jurisprudence to look at and think for.

It is quite obvious that US Supreme Court has totally negated the "Positive Theory of Law" that laws coming from sovereign must be and shall always be followed or more specifically, positive law may be characterized as "law actually and specifically enacted or adopted by proper authority for the government of an organized jural society" [2].

The decision is a denial of the view that the sovereign (in this case legislature of California) must be obeyed habitually and laws should be backed by threat of sanctions (in this case punishment or fine). The decision has practically separated the sovereign and will of general public into different categories, and perhaps a clear statement that merely elected by the votes of general public does not allow any legislature to make any laws which is contrary to the will of general public.

On the other hand this decision can be called as a Natural Law influenced decision. The philosophy of natural law says that certain rights and values are inherent by virtue of human nature, and universally cognizable through human nature [4, 5]. The basis of decision is freedom of speech, which is not only a recognized human right in modern days but also a subject of ancient primitive natural law. The major issue is that whether freedom of speech involves creating and selling of violent video games? As far as developing a video game and confining it to oneself or may be to a limited number of audience, then yes it falls under the category of freedom of speech. The complexity arises when it comes to selling it to minors. One can sell anything of his "own" and technically one can buy something which is affordable for him, but selling video games to minors which can cause damage to their mental health is a wise thing to do or not?

The theory of natural law is beautifully applied here and shows a bright side of human rationale and thinking. The decision tells us that video games follow a system of self-rating. It classifies games into different categories and tells us that for which age group they are suitable. This decision hereby is a great expression of advocacy of free human will and not only freedom of speech but also freedom of choice.

It seems a far-fetched idea that there is involvement of pragmatism and capitalism in this decision, but a link can be found. Pragmatism says that everything is valuable according to its practical use and success. Pragmatism rejects the idea that the function of thought is to describe, represent, or mirror reality [2]. So selling and buying video games is useful and practical for the purpose of entertainment and market economy [3, 4, 5,]. Although it is not the basic idea discussed but if to be looked deep and thoroughly then there is a connection. So the practicality of keeping youth busy, providing them entertainment and keeping the market economy going, and adding another source to capital development is definitely

subjected to pragmatism. It is just like function of a thought is to reflect and describe reality.

Social control and deterrence is basically a subject of crime and punishment but it is also applicable on other situations as well. Social control refers to control and make the rating system of games better and educate children to differentiate between good and bad. Deterrence on the other hand requires parental supervision and it is important to consider that deterrence can lead to social deviance and may cause a greater harm to society.

Now there is a question that society should be regulated by norms, laws or social behavior? It is true that social norms most of the time become laws but what if there is a separation between them or a thin line division. Briefly speaking the above mentioned case law is an example of evolution of legal system from positivism to naturalism. The law made by Californian legislature was will of the sovereign and by nullifying it on the basis of restriction over freedom of speech is true and honest application of natural law. The laws should be according to the will of people. The regularization and system of categorization shall also be according to the will of people. It is also a debatable issue that what is the will of general public? It is simple that general public want to have everything free but with certain rules and regulations. Restrictions of irrational nature are against the nature of human beings, like if some parents do not like video games then it means not any kind of video games for kids? As far as concept of freedom of speech is concerned, the concept is variable from time to time and society to society. No doubt the concept and idea is universal but it is very much dependent upon the geo-political dimensions. There is countless number of acts and activities acceptable now a day, were not even allowed in the past. It is easy to say that concept is changing and somewhat progressing with every passing day.

There are many examples. In some societies, pornography is legal and allowed with age restrictions and in some societies without even age restrictions [1]. There are rules and regulations that deal with this phenomenon in accordance with the will of general public and that should be respected. This decision is basically a win of naturalism over positivism and it will encourage the legislatures to make regulations instead of strict restrictions.

One of the examples is ban on eating beef and slaughtering of cows in different states of India [1, 2, 3, 4, 5, 6,]. It is clearly an abomination of people's right to choose food. Restriction like this cannot last long just because it is against the human nature and a violation of human right of free choice (as far as it is not harmful to anyone physically).

This decision has also strengthened the views and basis of pragmatism as far as capital economy is concerned. It is not about morals and morality; it is about rationality and advantages. Anything that brings money in the system and strengthens the economy shall be seen as a positive thing and must be adopted.

These kinds of decisions are very important as far as legal world is concerned. It is not about one country and one legal system. It is about development of a certain phenomenon in whole world. It is not merely a win of naturalism over positivism but it shows growing concern of legal systems about the will of general public over strictness of legislature.

China's Real Name Network System.

A real name system is a system in which a user who wants to register an online account, shall and must use his/her real name instead of a fake online pseudonym, so in case of a law breaking or mostly online fraud the real identity of culprit shall be available.

It comes under the vast application and subject of cyber laws or more cyber rules and regulations worldwide. It is just a proposition in China but many social media websites around the world have partially started this kind of verification, for example Facebook is asking for a valid passport identity or driving license etc. for authentication in case there is some kind of suspicion of a fake account or fraud.

In China, right now it is just a proposition but a really progressive thought to control the cyber setup [1]. There is already a new set of rules and regulations in China about true advertising and it is also applicable on internet or web advertising. So bringing in the true identity of every other web client will ultimately cause less spread of false information. This policy is actually a method to save general public from any potential fraud. The decision of US Supreme Court apparently seems in contradiction of to this policy, if we consider having a pseudonym as freedom of speech but in broader sense it is in compliance with this policy. It is not a deterrent method but a smooth way of showing state's concern for general public and saving them from any potential cyber fraud. It can be compared with the system of rating video games. It is going to be the set of rules and regulations that can prevent society from a greater harm.

The decision of US Supreme Court is basically to promote freedom of speech at macro level, freeing it from the boundaries of micro and minor hurdles and obstacles. It is to accept the change in society and actually is the validation of accepting the process of change. It is success of naturalism over positivism. The legislatures should take in consideration the will of public before creating or giving effect to any law. It fairly favors the change in society, and norms and ethics of any society, making it more liberal and accepting rather than being strict and close.

References

1. 564 U.S. 2011, 08-1448.
2. http://mediacoalition.org/brown-v-ema/131 S. Ct. 2011, 2729, aff'g sub nom. Video Software Dealers Ass'n v. Schwarzenegger, 2009; 556(3):950.
3. Brown, governor of California, *et al.* v. entertainment merchants association et al. (certiorari to the united states court of appeals for the ninth circuit Argued. 2010, 2011, 08-1448.
4. Positive law, Black's Law Dictionary (5th ed.), West Publishing Co. 1979.
5. Strauss, Leo. Natural Law. International Encyclopedia of the Social Sciences. Macmillan. 1968.
6. Natural Law. Columbia Electronic Encyclopedia, 6th ed. Columbia University Press. 2007.
7. William James. The Meaning of Truth. Retrieved. 2015, 1909.
8. Zimbalist Sherman, Brown Andrew, Howard J. Stuart. 1988.
9. Comparing Economic Systems: A Political-Economic Approach. Harcourt College Pub. 6-7. ISBN 978-0155124035. Pure capitalism is defined as a system

wherein all of the means of production (physical capital) are privately owned and run by the capitalist class for a profit, while most other people are workers who work for a salary or wage (and who do not own the capital or the product).
10. Rosser, Mariana V, Barkley Jr J. Comparative Economics in a Transforming World Economy. MIT Press. 7. ISBN 978-0262182348. In capitalist economies, land and produced means of production (the capital stock) are owned by private individuals or groups of private individuals organized as firms.
11. Chris Jenks. Core Sociological Dichotomies. Capitalism, as a mode of production, is an economic system of manufacture and exchange which is geared toward the production and sale of commodities within a market for profit, where the manufacture of commodities consists of the use of the formally free labor of workers in exchange for a wage to create commodities in which the manufacturer extracts surplus value from the labor of the workers in terms of the difference between the wages paid to the worker and the value of the commodity produced by him/her to generate that profit." London, England, UK; Thousand Oaks, California, USA; New Delhi, India: Sage. 2003, 383.

Web sites

1. https://en.wikipedia.org/wiki/Pornography_by_region
2. http://scroll.in/article/689155/Ban-on-cow-slaughter-in-24-Indian-states-is-leading-to-dead-humans-on-the-border
3. http://www.outlookindia.com/magazine/story/prime-cuts/292209
4. http://www.thehindu.com/news/national/cattle-slaughter-in-varying-degrees/article6956046.ece
5. http://scroll.in/article/711064/maharashtras-beef-ban-shows-how-politicians-manipulate-hindu-sentiments-around-cow-slaughter
6. http://timesofindia.indiatimes.com/india/Sushil-Modi-vows-cow-slaughter-ban-in-Bihar-Congress-cites-1955-law/articleshow/49235945.cms
7. http://www.hindustantimes.com/india/graphic-mapping-cow-slaughter-in-indian-states/story-k4WOaEl9GCDNjsAjbQFVtO.html
8. http://www.pcworld.com/article/2879912/china-demands-use-of-real-names-in-social-media-accounts.html