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## **Third Prof. N.R. Madhava Menon SAARC**

### **Mooting Competition 2017-18**

#### **INDIA ROUNDS**

**(27<sup>th</sup> - 29<sup>th</sup> October 2017)**

# **MOOT PROPOSITION**



This moot proposition has been authored by Mr. Ravi Prakash, Advocate, Supreme Court of India and settled by Mr. R. Venkataramani, Senior Advocate, Supreme Court of India for the INDIA Round of 3<sup>rd</sup> Prof. N. R. Madhava Menon SAARC Mooting Competition, 2017-18. This moot proposition has been formulated solely for the purpose of this competition furthering the academic exercise.

## MOOT PROBLEM

### Part – I

- [1.] The Constitution of Eden - formerly a 'British Colony' became independent in the year 1947. The dreams and aspiration of independent Eden are aptly captured in its basic governing document - which the leaders of independent Eden formulated and adopted by the constituent assembly - the 'Constitution of Eden'. It establishes Eden as a 'Union of States' of which 'Federalism' is one of the basic feature. The Constitution of Eden is considered and described as one of the most progressive Constitutions based on the principles of 'liberal democratic' governance. It guarantees several fundamental rights, broadly corresponding to those recognized in International Human Rights instruments. The Constitution further guarantees direct access to its Supreme Court for enforcement of those rights. The Constitutional, legal and policy framework of Republic of Eden are *parimateria* to the Republic of India.
- [2.] With its vast human resource, natural resources, flora and fauna, geographic location, science and technology foundations, pattern of sustainable development – the rise of Eden stood as a predicted major global power on the world map. Its economy has grown significantly and sustains a growth rate of nearly 7.5% per annum.
- [3.] The present government of Eden which came to power in Jan. 2016, aims to take the economic reform to the next level with expedition, vision and determination. It gave the new mantra of 'minimum government with maximum governance' and promised its citizenry a set of new policy measures towards realization of basic social- economic rights. In particular, it affirmed its resolution to work and improve on critical domains of 'Health Care Security measures', 'Education' and 'Employment'.
- [4.] Mrs. 'K' is the chief executive of a voluntary organisation - Social Health Care Group (SHCG) – a registered society engaged in the provision of social

welfare/ healthcare facilities including reproductive assistance to infertile couples/ individuals – who face difficulties in becoming a parent or in conceiving a child.

- [5.] SHCG was one of the nodal agencies in five major states in the Republic of Eden which was partnering with the Government in major health care reforms. The Government of Eden wanted to reach out to its last citizen and cater to the health-care needs with the help of new age information technologies. The SHCG used to receive the government grant as well as funds from international agencies (both public and private) for its pioneering work in the field of Health Care in Eden.
- [6.] Mrs. 'K' is the wife of a sitting member of Parliament i.e. Mr. 'X' – who happens to be also the leader of opposition in the lower house of the Parliament i.e. the House of People of Eden. It is an established constitutional convention in the Republic of Eden that the chairman of the Public Accounts Committee i.e. PAC is the leader of opposition in the House of People. Mr. 'X' was a minister in the previous government and was perceived to be of great influence in policy making matters.
- [6.] The Public Accounts Committee (PAC) is a committee of selected members of Parliament, for the auditing of the revenue and the expenditure of Government of Eden. Based on their findings, PACs often make recommendations to government ministries requiring that they change certain policies and procedures to improve their operations. The functions of the Public Accounts Committee (PAC) extend beyond the formality of scrutiny of expenditure to its 'wisdom, faithfulness and economy' in matters involving financial irregularities.

## **Part – II**

- [7.] In the month of February 2016, one of the leading newspapers of Eden highlighted certain financial irregularities committed by voluntary organizations (VOs) / NGOs in India which are receiving grants from various

agencies of the government and other foreign fundings. The absence of proper accounting, fixing accountability for misuse of the funds at the hand of officials / office bearers of these NGOs / VOs was seriously criticized. It also critically examined the nexus between the political patronage of these NGOs/ VOs and the manner in which they receive funds or acts as nodal agencies with the successive change of governments.

[8.] In view of the nature and spread of misuse and analyzing their impact on bonafide reach of welfare programmes, Public Interest Petition was filed by a well known organisation called “People’s Cause” in the Supreme Court of Eden with regard to the substantial funding to voluntary organization/Non-Governmental organization – which sought to have a uniform system of accounting and accountability (whether receiving grants from the Govt. or not) so as to usher in transparency and good governance. The Hon’ble Supreme Court of Eden passed an order in this petition on 10.04.2016 as under: -

“\*\*\* there can be no doubt about the fact, that the amount disbursed by the Govt. Agencies and other similar nodal agencies, is public money. The same must be accounted for. It seems from the counter- affidavits and affidavits of various stakeholders including the Government that the only action taken for non-submission of balance- sheet/ returns by the VO’s / NGO’s, is that the concerned VO/ NGO is blacklisted. In case of non- compliance, it is essential to initiate civil as well as criminal action, whereby, the concerned public fund is returned to the Government and criminal action is initiated for defalcation/ misappropriation. It is, therefore, essential to direct, that the aforesaid action be taken immediately on the completion of the exercise referred to hereinabove. Ordered accordingly.”

The above order was passed after hearing several interveners and interested parties, including confederation of voluntary organisations of which SHCG is a member.

[9.] That the aforementioned direction of the Hon’ble Supreme Court of Eden received wide publicity by the electronic as well as print media. The new age

of Social Media was also full of the above news highlighting the misuse of public funds by the NGOs/ VOs across various sectors.

### **Part – III**

- [10.] As the issue got highlighted in the media, News Channels as well as Social Media – public disquiet emerged about the role of such Non-Governmental Organisations/ Voluntary Organisations – their funding, absence of an accounting mechanism, norms for fixing accountability for their role in various capacities as agents of socio- economic development in a vast country like Eden. General demand for strict law in respect of voluntary agencies was also widely circulated. The Government of Eden also expressed its inclination towards enactment of such a law and it also issued a tentative list of voluntary organisations liable to be banned or restricted in their activities has also prohibitions on receiving funds from foreign resources.
- [11.] That the political nexus of Mrs. ‘K’ along with the financing of and role of SHCG also got highlighted including the extra-ordinary, exorbitant pay/ salary of Mrs. ‘K’ and her travel expenses (including the family vacations) and also of her kin working in SHCG flouting all norms and ethical principles.
- [12.] In the backdrop of the aforementioned direction of the Supreme Court, a Sub-Committee under the PAC committee was appointed to look into the irregularities surrounding the funding and finance given by Eden Government and other State Governments to certain NGOs including the ‘SHCG’. The Sub-Committee was headed by one (Dr. A.), a Member of Parliament, who belonged to the ruling party. One of the references to the sub-committee was concerning the desirability of discontinuing work through such organisations and the need for strengthening Governments institutions.
- [13.] Amidst, all these media glare and highlights and in the backdrop of above factual situation – Mrs. ‘K’ was invited by the Sub- Committee to depose before it in July 2016.

[13A.] The sub-committee decided to follow the procedure provided for under the Commissions of Enquiry Act, 2013 viz. public participation and principles of natural justice.

[14.] Thus she was not under any obligation to attend, nor the Sub-Committee had compelled her to do so in any manner. Mrs. 'K' decided to attend and appear before the Sub-Committee, presumably in part, because she felt that her refusal would not play well with the public, media and her relationship with the 'Leader of Opposition' in the House of People who was also touted as the 'Next Generation Leader'.

[15.] At the sub-Committee proceedings, as per the version of Mrs. 'K', she was subjected to unfair treatment: members of the committee asked her searching questions about her salary arrangements, the mode of receipt of foreign funds, appointment of employees and staffs, use and disbursement of funds and role of her husband in connection with funding despite not having been given advance notice on the nature of enquiry; it was suggested to her by various members of the committee that she was 'Grossly overpaid', that she ran the SHCG 'like a personal fiefdom' and she had done more damage than good to the 'health sector' and to the needy sections of the community.

[16.] Aggrieved and affected by the approach of members of Sub-Committee, she wrote a letter dated 01.08.2016 to the Speaker of the House of People seeking a declaration from her office that the functioning of Sub-Committee is contrary to law and tainted by bias as well, and also sought an order removing from the records of the Sub-Committee, all references to her entered in violation of principles of fairness set out in the Commissions of Enquiry Act, 2013.

#### **Part – IV**

[17.] In the beginning of year 2015, leading drugs manufacturing companies which sought to provide vaccine/ drug to cure infertility among women had approached 'SHCG' to collaborate with them in carrying out the much needed

experimentation of a vaccine/drug that will reverse all current medical procedures relating to infertility. The then Government of Eden had in principle permitted two drugs manufacturers who have patents for the wonder drugs in distinct forms, to carry out experimentations subject to supervision by the Eden Council of Medical Research. It also cleared the association of voluntary organisations with the drugs manufacturers. The drugs manufacturing companies approached the SHCG headed by Mrs. 'K' and got administered the drugs on female(s) ranging from the age of '15 to 32'. This involvement of SHCG with the experimentation process was not publically known.

- [18.] As the trial/ experimentation of new drug/ vaccine was sponsored through the NGO 'SHCG' any claims for any wrongs or injuries and for the compensation in cases of any mishap (including death) was to be routed through the NGO 'SHCG'. However, there does not exist any evidence to suggest that the 'females' to whom the experimental drug/ vaccine was administered were coerced in any manner or undue influence was exerted on them to describe the case akin to 'human guinea pig' on any socio-economic account. This is further reinforced by the fact that the female(s) whom drug/ vaccine was administered were from mix- economic / income level (including BPL, middle income). It remains another fact that most of these females were literate.
- [19.] If successful, the cure of infertility by way of proposed drug/ vaccine among female would be path-breaking and obviously a threat to the other existing industry involved in the current Assisted Reproductive Technology (ART) including surrogacy, IVF etc. The Corporates who were pioneers of existing ART Technology (i.e. surrogacy, IVF etc.) had began to lobby aggressively against this burning issue of 'Drug Trial' on women with respect to 'cure of infertility'. Comparisons were drawn and the debate entered on reckless governmental clearance to unchartered areas of experimentation.
- [20.] However as the experimentation process became operative the role of 'SHCG' came to be known. While it was suggested that there was no coercion of any sort in the enlisting of females, issues of serious adverse effects began to be

communicated and even representations were made to the Government of Eden by some of the participants in the trial.

- [21.] With the involvement of 'SHCG' in the clinical drug trial on the females, the issue further got more attention due to Mrs. 'K' and the pending sub-committee proceedings under the PAC which was looking into the irregularities surrounding the funding and finance given to the 'SHCG'. In the wake of the above, the terms of enquiry (ToE) of the Sub- Committee was enlarged as it appeared from the name itself i.e. Sub- Committee on 'Clinical trial related issue vis-a-vis voluntary organisations – particularly 'SHCG' involvement and funding'.
- [22.] Mrs. 'K' was at receiving end not only because of embezzlement / mis-management of the funding to her NGO i.e. 'SHCG' but also for the obvious reason as the SHCG became the sole sponsoring agency for this 'Drug Trial'. It was obvious that SHCG was not scientifically or technically qualified, nor its staff drawn from scientific experience. It was also found that the two Drugs companies had not looked for any other technically and scientifically well equipped organisations who may be better fitted to the task. She was aggrieved because of pre-mature mud-slinging by the media and she threatened to sue for damaging her reputation which is integral to Right to Life as read under Article 21 of the Constitution of Eden.
- [23.] All this happened prior to Dec. 2015 and following the General Elections in the country, the 'Eden Heritage Party' came to power and formed the federal government. It promised to deal with corruption in public life with strong hands.

### **Part – V**

- [24.] Following adverse information coming out regarding the clinical trials, Mrs. 'K' was re-invited by the Sub- Committee for further investigation, but this time she declined to testify through a communication dated 01.10.2016 to the

Chairman of Sub- Committee she reminded of her letter dated 01.08.2016 to the Speaker of Lok Sabha and her reasons for not attending such proceedings of the Sub- Committee.

- [25.] The Sub-committee sent a questionnaire to Mrs. 'K' regarding the information that she may be required to supply. The committee also issued a notice to the two drug companies who were conducting the clinical trials. The Committee also received information that clinical trial has led to cases of serious disabilities and possibly cases of death. The information with the committee in the above regard was as yet to be confirmed. The Committee had also asked the Government to enquire into the veracity of the information received by it and to make its report available with the committee.
- [26.] Even though Mrs. 'K' did not attend the proceedings of the committee, representatives of the two drugs companies attended the proceedings of the committee and it said to have supplied confidential information, particularly in regard to be alleged adverse effects of the clinical trial. The Committee thereafter sent yet another notice to Mrs. 'K', giving her an opportunity to deal with the information supplied by the drugs companies. Mrs. 'K' however again declined to appear before the committee, stating that the committee is biased, having regard to its composition and the hostile position taken by the Chairman of the sub-committee. She maintained that only through a due process of law can any matters relating to SHCG can be reached, or dealt with.
- [27.] As the Chairman of Sub-Committee Dr. 'A' through the chairman of PAC submitted the report before the lower House of the People in the Budget Session i.e. February 2017 for its consideration.
- [28.] That during the budget session, the chairman of the PAC did not table the report submitted by the Sub- Committee headed by Dr. 'A'. Consequently, no discussion took place on the report during the Budget Session. Before the start of Monsoon Session of Parliament, called for a Press Conference in which he selectively highlighted the contents of the report, Dr. 'A' alleged the role of individuals and also selectively leaking its findings as well.

- [29.] This Press Conference attracted much public attention in the national as well as international media as it involved human rights issues connected to the working of SHCG and the style of functioning of Mrs. 'K' as well. However, certain pin-pointed questions which were put forward by the media persons during the Press Conference about the role and involvement of Mr. 'X' in the 'Clinical trial related issue vis- a -vis SHCG financing', Dr. 'A' did not answer any such question and asked the media to wait as the Parliament is seized with the matter and is yet to debate on the issue/ report.
- [30.] The advance list of business of House of People listed for discussion on the report titled as 'Clinical trial related issues vis- a- vis SHCG financing'.
- [31.] Meanwhile, before the start of Monsoon Session, the "Peoples Cause" along with leading persons in public life with impeccable integrity filed a Public Interest Litigation (PIL) in the Supreme Court of Eden questioning the inaction of the appropriate authority as regards the role of SHCG as sponsoring agency for the conduct of clinical trials and embarking on such trials without providing for a proper legal framework. The report of the Standing Committee which has now come into public domain was the foundation for the petition. The Petitioners asked for directions to the federal Government as well as State Governments to seriously consider the need for enactment of a legislation pertaining to the issued raised in the report.
- [32.] As the PIL was listed before the Supreme Court for urgent hearing, the Court chose to issue limited notice to the Union of Eden alone on the subject matter of 'human rights violations relating to adverse effects of clinical trial and possible deaths'. It issued limited notice as the Parliament was about to debate/discuss the issues in the forthcoming Monsoon Session and asked that the pleadings be completed expeditiously.
- [33.] On the last date of Monsoon Session of House of People, as fixed and scheduled in the List of Business, the Sub-Committee report was tabled and with the permission of Chair of Speaker of the House, Dr. 'A' as chairman of Sub-Committee started highlighting the salient facts, material evidences and important findings of the Committee (which also had reference to Mr. 'X' and

his influence in obtaining finance from Government and international agencies, the influence exerted on Government for clearances of SHCG collaboration in the drug experimentation etc.). The statements made by Dr. 'A' in the course of proceedings were prima facie damaging. There was an uproar and ruckus caused by the members of oppositions in the House. The members seriously question the disclosure of contents of the report by the chairman of the sub-committee even before the report was tabled in the House of People. The members raised the issue of Breach of Privilege of the House. Very curiously, the leader of opposition in Lok Sabha, Mr. 'X' was not present in the House on the last day of Monsoon Session. The Speaker of the House could not continue with the proceedings and was thus forced to adjourn the proceedings of the House *sine die*. Consequently no debate took place either on the report or in respect of the breach of privilege issue.

[34.] That after the end of Monsoon Session, as the members of the House were walking out of the building, several media persons sought a response and put various questions to Dr. 'A'. Those questions were pin-pointed towards the role of Mr. 'X' and Mrs. 'K' to which he affirmed the statements made by him on the floor of the House (but without repeating them).

[35.] That the Parliamentary Sub- Committee Report raised several red-flags with respect to 'concept of consent' as obtained for drug trials for the different category of women and also deprecated the practice/ decision of administering drugs to minor girls (aged between 15 to 18). It also concluded that the proximate cause of adverse effects on the participants in the trial and the alleged deaths of two women, (which was being independently investigated by the concerned agency) who were administered drugs as a process of 'Drug Trial' was the casual and callous approach by the drug manufacturing companies, sponsoring agencies as well as local administration. The report questioned the process of involvement of voluntary agencies without credible scientific and technical expertise, in clinical trials and also the consequences of the lack of relevant legal framework in this regard. Underlying the suggestions was the concern that the federal government should forthwith enact the law not

only regarding the issue of drug trials but also the regulation and monitoring of the working and funding of voluntary agencies.

- [36.] Since no debate took place on the floor of the house, several members of the opposition parties began to issue statements and to write on the report. The question of selective targeting of voluntary agencies was vigorously raised and the federal government was questioned as being involved in Witch hunting. Freedom of Speech and Expression was said to be in peril.

### **Part – VI**

- [37.] Mrs. 'K' preferred a Writ Petition before the Supreme Court of Eden challenging the of Sub-Committee report, seeking a declaration that the report of the Sub-Committee was unlawful and tainted by bias and also sought an order removing from the records of the Sub-Committee all references to her. In addition, she also sought that the report to be quashed on the ground that the said report was prepared under the aegis of Public Accounts Committee – which was headed by her husband. She also made *The Hon'ble Speaker, Lok Sabha* as one of the essential party besides Union of India for her inaction on her representation against the sub-Committee. She claimed that her fundamental right to reputation has been infringed by the proceedings of the sub-committee and that no action can therefore be taken on the basis of the report.

- [38.] Being aggrieved by the conduct of Dr. 'A' outside the house, Mr. 'X' also filed another petition in the Supreme Court for a declaration to quash the report along with activities of Sub- Committee in entirety. He also sought an appropriate relief regarding injury caused to his reputation and the defamatory statements outside the House including the Press Conference organized by Dr. 'A' before the start of monsoon session. Mr. X invoked the provisions of Article 102 of the Constitution of Eden and sought Writ of Mandamus restraining any debate on the report before the House of People takes us the report for consideration.

- [39.] Meanwhile the Government of Eden issued a statement that in view of the substantial nature of issues raised it is desirous of legislating on some of the issues and had solicited the views of the Law Reforms Commission. In terms of a recent protocol issued by the Government, reports of the Law Reforms Commission have to be tabled in the House along with an action taken report within three months of the submission of the report. The government is said to have referred to certain contents of the report of the sub-committee while forwarding the request to the Law Reforms Commission.
- [40.] That the petition preferred by Mrs. 'K' and Mr. 'X' were listed for the first time before the Supreme Court of Eden on 06.09.2017. When the matter was heard, the petitioners in the writ petition titled 'Peoples Cause and Others' intervened in the matter and sought that notices be issued in their petition to all the concerned drugs manufacturing companies and private parties including SHCG and Mrs. 'K'. Consequently, the Supreme Court of Eden issued notice to all the parties and directed completion of pleading within 4 weeks and posted all the petitions for consolidated hearing on 10.10.2017.
- [41.] The respective governmental authorities filed their respective affidavits about the safety measures being undertaken with regard to the consent, method / procedure of clinical trial on human being and preventive steps taken to avoid hazards to human health. The Union of Eden as well as Government agencies maintained that the Sub- committee report has a solemn sanctity in parliamentary democracy and there are no limitations or restrictions in regard to their disclosure. They maintained that the issue of the report being subjected to Judicial Scrutiny prior to being debated in parliament is an open question, even though Article 102 leans in favour of prohibition of any discussions pertaining to the report prior to parliamentary debate. Whereas the Drug Manufacturing Companies contest the report submitted by the Parliamentary Standing Committee on the issue and submits that any such reliance on the sub-committee report (i.e. a Parliamentary Standing Committee report) is likely to disturb the delicate constitutional balance if the contours of 'rights' are to be adjudicated on the basis of sub- committee report which is impermissible.

[42.] The following provisions of the Constitution of Eden, the Federal Penal Code, and Tort Claims Act, 2016, are likely to be invoked in the above proceedings:-

**I: Constitution of Eden:**

**Article 21.H**

- (a) That every citizen of Eden is guaranteed access to health care as may be provided by law.
- (b) The State shall by its own efforts, or through any form of citizen endeavours or through any partnership, ensure that all aspects of health care are provided for and health care will be a concurrent obligation of the federal and state governments.
- (c) That companies, corporations, or partnerships engaged in making of medicines, drugs or any related health care devices, and instruments shall act in the promotion of healthcare and not in pursuit of capitalizing on them.

**Article 21.D**

The State or its institutions shall not act in any manner in the discharge of its functions as may lead to infringement of any fundamental rights particularly the right to liberty.

**Article 32.C**

- (1) .....
- (2) .....
- (3) No claim involving monetary reliefs or remedies shall be entertained by the Supreme Court and such reliefs can be sought only in civil courts constituted in this regard by law.

**Article 102**

- (i) No report of any committee or commission set up by the Federal Government or the House of People required to be laid before the House, shall be debated, discussed or called into question in any court for any purpose whatsoever.

- (ii) The Primary authority to deal with such reports vest with the House of People and no judicial review of such reports can be exercised prior to determination of outcomes and measures by the House of People (Thus sub-clause was inserted into the Constitution just prior to the Constitution of the sub-Committee in question).

**Section 299A, Federal Penal Code; Corruption in Public Office**

Persons holding Public Offices including members of all legislative bodies, if found guilty of abuse of their office in any manner, for doing favour to any party whatsoever in matters relating to grant of licenses, permissions, contracts or lease of resources and properties vested with the government, shall be punished for imprisonment for a period of 6 years and shall also be disqualified from contesting any elections or holding any public office.

[43.] The Petitions have been slated for hearing by a constitution bench of the Supreme Court. In terms of Article 136 of the Constitution, only substantial questions involving the interpretation of the provisions of the Constitution will be dealt by a Constitution Bench. The Court has directed all the parties to frame such substantial questions for its considerations including preliminary issues relating to jurisdiction.

[44.] Considering the substantial questions of law relating to the interpretation of the Constitution involved, the three petitions have been referred to the Constitution Bench, which is scheduled for hearing on 28<sup>th</sup> - 29<sup>th</sup> October 2017.

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