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From Editor's Desk

Delhi Law Review Flagship Journal of Faculty of Law, University of Delhi is designed for contribution from academics, policy makers and professionals globally on matters of contemporary legal issues both in public and private law. Team of Editorial Board of this volume with Dean at the helm of affairs are from different legal streams, hence appreciated contributions which were comparative as well as comprehensive in nature. I hope that readers will enjoy not only the Law and Policy but also understand implementation of various legal issues discussed in this volume.

To reach to the standards of the journal was a challenge to all of us which needed some personal efforts in terms of seeking co-operation from contributors both within and outside country as well as the members of the team. I was fortunate to overcome this difficulty due to exceptionally cooperative members of the editorial team and with freehand given by the Dean coupled with the quick response by the contributors of immense repute. Hence this volume 32(2013) of DLR is for your readership and comments.

This volume is significant as it reflects the interest of authors both within and outside India, who have contributed. Further the contributions made are on important contemporary issues like Intellectual Property Laws, International Arbitration, Humanism, Enemies of state, miscarriage of Justice, Reforms in Post. Graduate Legal curriculum, Research methodology in Law Ethical paradigm for regulation of cyber space. Similarly the contributions made by colleagues within the Faculty on Tribunals, Acid attack, MRTP, GI, sustainable development and Right of children of the imprisoned mothers have added to its strength and standard. I thank all the contributors, the Editorial team and Dean Faculty of Law for their co-operation.

All the views expressed are of the authors; however, the editorial team is responsible for editing. In spite of all efforts, readers may have to bear with me for some mistakes left inadvertently. For such problems none else, but I am alone responsible in the capacity of the Editor.

I am sure that all prospective Editors will equally try to improve the Standard, so that the sheen of the DLR is not only maintained but improved.

Professor S.C. Raina

INSIGHTS INTO SELECT ISSUES OF INTELLECTUAL PROPERTY LAW

Professor Ashwani Kr Bansal*

Writing anything in this dynamic world is risky as the same would be called in question by those thinking critically. The diversity of views and conflicting results projected by researches can practically establish anything as an upshot. There is always a scope for improvement in thought as well as the expression. Many may be antagonized with any submission for variety of reasons. The reputation of an author is always at stake. There is recognition in Plato's Seventh Epistle that "no intelligent man will be so bold as to put into language those things which his reason has contemplated... if he should be betrayed into so doing then surely not the Gods but mortals have utterly blasted his wits."

On the other hand, there is increasing acceptance and tolerance in the knowledge sector that nobody may write the last word and if perfection is pursued as test, the writings would become scarce. Knowledge shall flourish only if it is shared.

Sometimes, it is argued that IPRs and copyright restrict the sharing of knowledge, whereas the chief norm of all IPRs and copyright assures that the subject matter would be made public to Government I P office and themes would flourish with many expressions. Competitive works on same theme are encouraged by copyright law and all IP rights must provide a twin environment of monopoly and competition. Contrary to the belief shared by many about Trade Related Intellectual Property Rights (TRIPS) that losses were caused to the developing countries on its advent, it should be increasingly clear that it brought intellectual property rights (IPRs) not only to centre stage, but also within the reach of common man outside the board rooms of large corporations. Another major contribution of WTO and TRIPS is the theoretical equality of each member.

IPRs NOT BASED ON MORALS BUT ECONOMICS

Though, the developing countries could not persuade the developed countries that IPRs are an economic issue and is not a moral one, yet the reassertion of flexibilities at DOHA proved beneficial. Though the concessions claimed in 1970s and 1980s before conclusion of Uruguay round or WTO got delayed by 25 years but most of. Mostly the developing countries took steps and introduced IP legislations.

It is restated that the readjustment of the IP rights among owners, licensees, users by regulating governments[1] is required and is necessarily an economic and/or political process. We are again in a time when a great surge for assertion of public interest is being experienced.[2] At the altar of

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1 Governments are major stake holders. The vested interests of the government or its decision makers are stronger moving forces than the established and proven interests of common population.

2 The Adoption of Invents Act in USA and decisions like *Authors Guild vs Google Books* Southern District of New York (05 Civ. 8136) (DC) on Nov 11, 2013 case display a rethink and are to be welcomed.

disbelief or a revelation, permit me to state that IPRs are all about protecting investment and economic value of human effort in the work produced and the protection to creativity and intellect is a by-product in extending rights to those features which cannot be secured physically and therefore are to be protected by laws and writ of the State.

The IPR laws have nothing to do with morality. It is emphasised that laws are respected more because of ingratiation rather than fear of punishment. All IPRs and Copyright are pure and simple economic matter. This view was shared by all developing countries but was contested by developed countries and they still continue to contest the same. USA did not become member of Berne Convention till 1989 as it did not suit its publishing industry.

The right holders in developed countries advance the moral aspect because it is difficult to enforce the IP rights or copyright once the material has been published and user public has access to the same. The enacted law of a country is accepted as positive morality. But has a violator of copyright done an immoral task is difficult to answer.[3] The right holder is deprived of some economic benefit due to him.

The publishers deprive authors or performers every day in their legitimate due; there is lack of environment or no strict action to protect them. The difficulty of authors is that they per force have to side with publishers, as only the latter has means/power to earn and to pay the former. The work of authors can see the light of the day only through them.

The oft-quoted observation that copyright is based on the principle found in 8th commandment of Bible, 'thou shall not steal', has been superimposed on copyright system in 20th century in a British case, as also in the celebrated book by Copinger on copyright. The copyright has its origin in protecting the investment made by printers after the invention of printing press and publishers. The authors and performers came much later in the scene in the 19th century. Thus, it has always been protection to investment and capital employed in the work and books including the human capital.

Exploiting the virtue, IPRs not for pride: Gains can be made and wealth may be generated by exploiting the IPRs and not by merely possessing the rights. There is no glory in possession of rights without any meaningful exercise of those rights. Glorifying the possession of IP or copyright without exercising the rights is against IP tradition of generating wealth. There is a cost in creation of IP and also obtaining legal recognition for the same, which must be reaped back by exploitation of rights. Similarly, if a patent is not to be exploited then the application money and other effort should not be wasted, rather publish the results and contribute to technological temper.

Domination of IPR literature by rights of owners

Mostly the IPR literature talks about rights of owners, through all conventions as they are more about protecting the investment and ensuring yield on investment. IP literature very bleakly talks

[3] Anyone who violates the legal rights of a right holder commits infringement and is liable to pay damages and in case of a gross breach may have to suffer in a criminal action. If a person wants to opt out of a contract, he has to pay damages for breach of contract, but is it immoral or even illegal , it appears none – but damages are to be paid.

of the rights of public or the facilities for users, consumers. The first objective of IPR policy has to be an interpretation favourable to licensees or users or deprived sections of populations or developing countries by all decision makers or courts. Knowledge of IP laws has been under shrouds; it has to be brought in open and those who talk pragmatic about IP have to be encouraged in policy formulation.

Unless the enforcement and abuse of IP is brought to equal level for understanding, the interests of the rich would always have precedence over the national interest as every professional would desire to work for the rich and mighty. The legal literature has to start describing the rights together with malpractices and explaining duties to users.

Take the Copyright Law for instance, mostly the literature is silent as to the implicit permissions to the buyer of copyrighted products. It is an onerous task to inform the people that a book or CD bought by a person carries with it various economic rights of owner of copyright. The buyer has very limited rights in respect of the book or music CD or film CD or such subject matter stored in a medium.[4] It is a difficult task to expect from the people that the information underlying a book or CD or a sculpture which is available and in their hands, cannot be used by them or that its use is strictly regulated and is in favour of owner. It is in fact a tall order and difficult to achieve. If this message can be disseminated to everyone, then respect for copyright in a work can be built, else it would have to be enforced in those sectors where there is a possibility to earn profits for the creator/ owners subtracting the cost of enforcement. Similarly in trade marks the rights of public are scarce in few provisions like section 30 of Indian TMA.

Knowledge about TRIPS: As against common belief, that TRIPS was not to the advantage of developing countries, it is submitted that it's the most apparent advantage has been that the knowledge of this key instrument of making wealth has been brought into public domain from the close doors of Boards of Companies. The spread of knowledge about IPR acquisition, exploitation, enforcement and curbing its abuse and negotiation strategies has to be the top priority. *It is to be emphasised that the knowledge and implementation of IP strategies contributes more to wealth and availability than creation of IP de novo or making inventions at exorbitant costs.*[5]

I

Insights into copyright

An appreciable norm or contribution of copyright law is not permitting any copyright in ideas. The first expressed writing on an underlying idea on any subject, throws open the idea or theme, for development into a work of expression by many others in their versions without violating the rights in the first expression of the author[6]. Thus, the basic norm of copyright[7] continues that

[4] The matter contained in book, CD etc. is referred to as 'work' in copyright parlance, in which the copyright is enjoyed by its owner.

[5] India boasts of cheap medicines and drugs because of an IP strategy and not inventions. It is not the scientists which provide affordable medicine but by the Indian business and policy makers in relation to IP component of Patent law. It is equally apparent that both the courts and policy makers did not contribute building popular domestic trade marks.

[6] See s 13 and 14 of Copyright Act, 1957. S 13 gives us a list of all subject matter in which copyright subsists. S14 enumerates the rights enshrined in copyright.

there is no copyright in ideas. The sweat of the brow doctrine for vesting of copyright is facing revision in most of the countries, as minimal creativity for vesting of copyright in works is being insisted upon[8]. The shift in law for vesting of copyright is apparent whether, it would do well good or otherwise, can only be determined with the passage of time . The whole copyright law has been put at bay.

Determination of Copyright now with court: Earlier even the trivial expenditure of skill and labour on some existing work led to the vesting of copyright, but now the subsistence of copyright would not be determined till the time a competent court having jurisdiction in the territory would pronounce the minimal creativity and resultant vesting of copyright. Till then subsistence of copyright would remain a matter of opinion of author or publisher. Thus, all the business dealings in subject matter of copyright would flourish on expected outcome of subsistence of copyright

The stray attempts of a few judges to give copyright to ideas by recognising 'concept note' like situations in India seem to be a disappointment, as it may come in conflict with the underlying principle of copyright. The courts have moved in the direction of protecting the expressed idea of a business opportunity of making a cine film or a series of TV episodes[9] and in practical terms overruled the Supreme Court case of *RG Anand v Deluxe Films* AIR 1978 SC 1614 in practice. Thus the copyright law is increasingly becoming indeterminate.

A difficulty is experienced in enforcing the copyright as normally all works are value addition on existing works. The above, the Internet and other technological developments pose a serious challenge to the copyright system as also add to the difficulties, however holding out remunerative litigation opportunities for lawyers

INDUSTRY PRACTICE/ SUPPLEMENT AGREEMENTS OPERATE AS LAW

It is necessary to appreciate that Copyright law in the Act is not a complete code. It only gives minimal rules. Most of the real time issues in copyright are governed by agreements, which operate as supplement to the copyright law. The first major issue is mostly the author –owners and performers both are asked to assign the copyright or performers' rights in favour of publishers or producers. Unless the industry practices are understood or drafting of agreements is intelligent together with negotiating skills, bargaining power and capacity and the environment for enforcement is conducive, the copyright law would contribute little.

Similarly, obtaining a trade mark function from copyright, e.g., seeking to convert copyright in artistic work into a guarantee for selling cosmetics, soaps or FMCG goods and using artistic copyright as a right to restrict competition in goods is an abuse of copyright. In the developed countries such parochial monopoly in the name of copyright is not permitted. It is suggested that exercise of IPRs has to be allowed; only if the rightholder is willing to suffer competition. Even if IPR exists, the exercise of IPR could happen with riders. It needs to be declared as a part of the national IPR policy.

7 The judicial discourse has not been changed. The difficulty shall be experienced in interpreting rights in s 14(a) (iii) and (iv).

8 See cases of *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* [18 USPQ 2d 1275], *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 and *EBC vs D B Modak* 2007 (13) SCR 182.

9 *Urmi Juvekar Chiang v. Global Broadcast News Limited & Anr* 2008 (36) PTC 377 (Bom).

SOUND RECORDINGS AND CINEMATOGRAPH FILMS – DERIVATIVE WORKS

World over Sound recordings and Cinematograph films are considered industrial products liable to competition principles. Necessarily, they need not be given same treatment as is given to basic literary, musical, artistic or dramatic works. Reducing competition in industrial production of sound recordings in the name of underlying primary subject matter of copyright would operate as a threat to the respectability attached to copyright. The job of copyright is economic returns to the author-owner but not the monopoly returns.

Condition of 50000 copies: The underlying work of sound recordings, till 2012, was subject matter of Open General License for making sound recordings by another on payment of a fixed royalty to the copyright holder, if the subject matter had already been incorporated into a sound recording and two years exclusive business had already been enjoyed by the producer of the sound recording. The 2012 amendment added a new section 31C, which restricts the right of competitors to undertake manufacturer of competitive sound recordings in the liberal fashion.

The amendment has enhanced the rights of producers of earlier sound recordings by giving them five years monopoly as against the two years thus reducing competition. The owner of copyright of underlying work which is likely to be owner of sound recording[10] is entitled to receive royalty for a minimum of 50,000 cover versions. Thus the 2012 amendment has accommodated the lobby of sound recordings. [11] This number may be reduced by the Copyright Board, in respect of works in a particular language or dialect having regard to the potential circulation of such works. This appears a defeatist measure and an unjust arm twisting of competitors.[12] The royalty for 50000 units may far exceed the original value of underlying copyrighted subject matter which is to be used in the sound recording.

If possibility of making lawful version records would decrease, production of spurious sound recordings would flourish. Thus section 14(a)(iv) has to be seen as subject to the provisions of s 31C which may have to be looked up to.[13] When a sound recording from one manufacturer or a brand is available, the copyright holder in underlying work has a free hand to give voluntary permissions if not already bound by agreement with first producer of sound recording.

The producers of sound recordings in India have been granted the copyright in India of 60 years. The rest of world gives them a limited right of 25 years under Rome Convention.

AUTHORS/PERFORMERS AND THE CINEMA INDUSTRY

The unequal status and dismal bargaining power of authors and performers *vis a vis* publishers

10 Per industrial practice the ownership of underlying work is mostly with copyright owner of sound recordings.

11 Section 52(1) (j) which allowed repeated making of sound recordings using the same literary, musical or dramatic work at fixed rate of royalty after two years of first sound recording has been omitted. Of course previously such competitors producers were under declaring the number of sound recordings and abusing liberal rules and required strict careful handling

12 Arm twisting of competition by a legal provision enacted by Parliament is preposterous. It shows the mechanical attitude of the drafting committee or a complete sell out to the lobbies of Music Industry.

13 The monopoly period and the initial investment in favour of first producer of sound recording could be moderate. The lobbyists of whittling down of section 52(1) (j) and stricter regulation of re-mixes were earlier guilty of fleecing the population by exorbitant prices. Invocation of s 52(1) (j) brought the prices of sound recordings down by almost 75 % or to 1/4th of the then price.

ostensibly forces authors and performers to sign on the dotted line. Consistent efforts on the part of authors/ performers especially the lyricist of underlying literary and musical work in a cinematograph film has led to passing of 2012 amendment also referred as Bollywood amendment. It has delivered improvement in the position of authors of literary and musical works incorporated in cine films.

The new proviso added to section 17 under the 2012 amendment now clearly specifies that the ownership of the rights in the underlying musical and literary work incorporated in a cinematograph film continue to vest with the authors of such works and not the producers of the cinematograph films irrespective that literary or musical work was produced by lyricists and music writers or composers when commissioned by producer whether under contract of service or for services.[14]

Further, the imbalance between authors and producers is also rectified by adding three new provisions in section 18 that have reasserted the right to royalty of authors. The first proviso that has been added serves as a safeguard with regard to technology.[15] The second proviso strengthens the right of royalty of an author, by denying him as well the right to waive or assign his right to receive royalties with respect to its literary or musical work incorporated in a cinematograph film or sound recording not forming a part of a cinematograph film.[16]

It is to be noted that such a restriction upon the author does not apply in the case of copyright itself, but is only with respect to waiver of the right to receive royalty. This has been done keeping in mind the unequal bargaining power of authors. Apart from this, a safeguard with regard to technology has also been provided for under the same section through.

The 2012 Amendment restricts the applicability of assignment only to those media or modes which were in view at the time of agreement and accordingly the content on media which did not exist or were not in commercial use at the time of assignment cannot be said to have been assigned. Thus, it seeks to protect authors and composers from being made to absolutely and unconditionally part with their copyright, which would disentitle them to the benefits that may arise from technological advancements in the future.

It is submitted that 2012 copyright amendment does not display a direction for the management of economy. At times it has a tilt towards owners and industry; at other times authors of subject matter incorporated in film industry are given better rights but similarly placed in other industries have not been rewarded.

14 By virtue of the second proviso to section 17 added by the Amendment of 2012. The Supreme Court in 1977 interpreted Proviso (b) and (c) of section 17 in the *Indian Performing Rights Society v. Eastern India Motion Pictures Association* AIR 1977 SC 1443, that these clauses shift the default ownership of copyright from the author under a contract of service to the producer applies to cinematograph films as well as the works created for incorporation in cinema film, led to the vesting of copyright in the underlying literary/musical/dramatic artistic work also in the producer.

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II

IP LAWS NOT CONCERNED WITH EXPORTS: TRUE FOR COPYRIGHT

All IP laws world over including India, *only regulate or restrict imports and not exports. Exports of IP incorporated products have never been addressed in IP laws*. Copyright law of no country mingles in export of copyright content and the same is dealt with in the country of import. In the same vein Copyright Act, 1957 of India does not have any provision dealing with export of any product incorporating copyright content. The export of any 'copyright content product' cannot be infringement of copyright, if the work is legally available in country of export. Such exports do not tinker with any of the rights granted in s 14 or 51 of the Act. Exports from India of copyrighted products introduced legally are perfectly legal.[17]

The next issue which I forthwith discuss is that, the Courts in India have on certain occasion's interpreted IPR legislation, a bit in favour of foreign parties. One such instance[18] is interpretation of the 'right to issue copies' in section 14(a) (ii) to the benefit of the foreign publishers in an effort to curb exports of Low Priced editions (LPEs) whether it can be used to authorise the segmentation of copyright markets. Whether a stipulation by a publisher on p 2 of the book can operate equal to legal provision or whether a few cases decided by High Court of Delhi have exceeded in protection to multinational publishers. Applicability of International exhaustion in India was not in issue as that would be relevant only in case of imports and this case had to be judged as per the infringement norms in the country of import.[19]

LOW PRICED EDITIONS (LPES) FOR MARKETS - NOT CHARITY - BUT SHREWD BUSINESS DECISION

The copyright is extended to all works including foreign works together with recognition to the right of public to have access to all copyrighted material at affordable price. It is not to cater to the profits of multinational publishing house or copyright owners.[20] Sometimes the authorities, judges and scholars in law education wrongly believe that LPEs are a great charity. The production of LPEs is a perfect profitable business decision with differential pricing. Right holders and publishers do not want to lose customers in low parity value countries[21]. As already stated, if

17 There can be different copyright owners or rightholders for different countries. The exports from a country would work as import in a country X, and such imports may impinge the copyright of an owner or licensee for such country X. The exports of Low Priced Editions (LPEs) produced for market of India from India, may be and can constitute infringement of copyright in the country of import X, if imported into that territory X without the consent of rightholder for the country X. Moreover, in case the country X follows international exhaustion, then if the initial product (book) is produced and issued under the *authority of the rights owner for any territory whatsoever*, then it will not constitute infringement of copyright even in such country X (of import).

18 The other major instance is the development by Indian courts of principle of transborder reputation to favour foreign trade marks in an institutionalized manner and issuing injunctions against domestically registered trade marks to facilitate FTMs. See chapter 23, *Law of Trade Marks in India*, p 695-715, Thomson Reuter, 2014.

19 India is a country of national exhaustion in copyright for now and foreseeable future. Indian attempt to introduce exhaustion by amending section 2(m) of Copyright Act failed in May 2012, when in last minute the proposed proviso was dropped by the Government.

20 They are copyright owners by assignment, as the original author is mostly coerced to sign on the dotted line to assign copyright, if he desires any publicity to his work, knowledge or existence. Alternate support to authors is completely lacking in India. Present author has not studied the plight of authors in the rest of world.

21 Such a system is successfully in operation world over in relation to patented drugs and medicines with similar hick ups.

such editions are not introduced, the resultant higher price and/or non-availability of books are grounds for compulsory license, thus the introduction of LPE is a legal necessity and still gives profits[22]. These LPEs are normally introduced three years behind full priced editions after fully working out the economy of publication. Many a time remainder[23] books are converted to LPEs and such a sale is able to give the publishers much more value for remainder books than they may earn on them in home countries.

It is common knowledge that publishers of costly books[24] divide the markets (segmentation) by timing of supplies and differential pricing.[25] Sometimes the quality control of books/goods depends on the purchasing power of the prospective buyers. They produce low priced editions (LPE) separately for various combinations of many territories/countries. *The business model of LPEs is useful to publishers as a profit head and necessary to keep the Competent Authority (Copyright Board in India) for compulsory licenses for costly and non-available books off the hook, while ensuring sales.*

Many a time the trade channels or third party bulk buyers in violation of the conditions put up by publishers divert such books to the countries where same book is tagged at higher price. This may be done by chain sellers or third party bulk buyers without any privy of contract with the publisher or distributors.

Often, economic versions (LPEs) of high priced books are exported to the disliking of the publisher to non-designated area are to be stopped at Customs in the country of import. Such bulk buying re-sellers may even advertise on the Internet. The publishers/distributors hate the movement of such LPE books back home or to high price areas which is in conflict with their marketing strategy. Publishers take all measures to minimize this movement of books, *even though IPR laws do not back any such price or profit maximization strategy, by segmentation of markets*. This branch of law is normally addressed by exhaustion or parallel imports principle.

Misapplication of IP laws on exports

Laws and Courts of Country of export have never had anything to do with exports of IPR subject matter. Once the copies have been issued and/or sold in India, further sale of such books cannot be restricted nor their movement and resale can be controlled by publisher/distributor, and thus there was no occasion for court to intervene.

In *John Wiley case infra* the Delhi High Court protected a US copyright owner by prohibiting an Indian party exporter from despatching LPE books for import into USA artificially extending the scope of section 14 of Indian CRA and calling such export as infringement of copyright in India. The Delhi High Court pronounced the import into USA of a validly issued LPE book by

22 Strategy is similar to fashion industry in which prices are fixed quite high for initial market.

23 Refer to unsold books saved with publisher for which it gave print order as expected sales or other strategy of publisher, sometimes a remainder book may be sold at 15% of print price of book.

24 Also applicable to patents in drugs, medicines and other goods and trade marks.

25 Even the syllabi of universities in courses are made dependent on the timing of availability of books determined by MNCs. Even the course packs strategy of universities is under attack from MNC publishers by filing high profile cases against legally permitted photostating.

publisher having designated it for supply in 8 countries including India an infringement in India, at the stage of export from India.[26] a copyright. The Delhi High Court worked as *forum convenience*, and facilitated the plaintiff to enforce the judgement on the defendant in India and deter others in India. It prohibited from exporting LPE books, and thus the Court took upon itself the work of US Courts and Customs, who were the competent authorities to look at imports without the authorization of right holder for the territory of USA. By doing as it did, the High Court did not only go beyond the statutory law but also transcended every principle of IP law.

The Delhi High Court delivered two judgments with *John Wiley & Inc as plaintiffs*[27] on 17th and 20 May 2010 on the important aspect of 'right to issue copies' forming part of bundle of rights in copyright. In both the cases the court was approached by owners of copyright to uphold their right to control the movement/export of the copyright goods (books) as per their stipulation on 2nd page (copyright page) of the book. This stipulation was not by agreement between seller and buyer. In both the cases genuine third party buyers, on principal to principal basis, not having any business connection with copyright owners or their licensees LPE publishers, were offering books for sale on web sites for international customers. The plaintiffs claimed that the books were produced only for the territory of South Asia or Indian sub-continent (listed 8 countries) and issued for these territories[28] and therefore could not be taken outside the stipulated area; plaintiff asserted taking books out of this territory is infringement.

The books were validly produced and issued by the licensees of copyright owner and sold in India. The books were bought in India and then were sought to be resold by the buyer ignoring the stipulations of publishers on p2 of the book. Two honourable judges of Delhi High Court in the two cases obliged and issued injunctions in relation to exports of books accepting it as *infringement of copyright. The Court on its own without any enabling provision stated the plaintiffs could validly engage in market segmentation*. They artificially *declared the ignoring of conditions of sale as inserted on p2 of books on buyers equal to infringement of copyright under section 14 read with section 51 in India, without determining that whether such conditions are binding?*

The High Court did not refer to authoritative book of Copinger or the express wordings of the copyright statute. Copinger (XVth edn 2005) in unequivocal terms in para 7.80 states that in exact 'similar situation of export from UK, the UK courts would have nothing to do with it and it would be a matter to be dealt with by the authorities and the law of country of import'. The law also clearly states that the copyright owner cannot control the movement of literary, dramatic and musical work, not being a computer programme, once it is in circulation.

The law as understood for long in India was sought to be changed by Delhi High Court without any change in the domestic law or international treaties. The High Court unintentionally has catered to the greed of the complainant, but the author apprehends that armed with such a

26 Such a verdict has to be looked as stealing an entrepreneurial opportunity from Indians.

27 Discussion on cases of *John Wiley & Inc v Prabhat Chander Kumar Jain* 2010(44)PTC 675 (Del)., *John Wiley & Sons Inc & Ors v. International Book Store* 2010(43) PTC 486 (Del), will follow.

28 Would it mean that despatch of the book from another country out of 8 permitted countries would also violate s 14 of Indian Copyright Act and would constitute infringement in those countries? The book would enjoy copyright in those countries as imported book under corresponding copyright law of those countries.

decision the MNC plaintiff would influence the judicial pronouncements in many other developing countries. The national IP Policy must endeavour to persuade judges to follow an interpretation *pro bono publico India.*

Controlling movement of IP goods is abuse (copyright)

Assertion of an IPR for imposing any collateral conditions in relation to trade in IP goods or their movement which is not sanctified by law is an abuse of IPR. The purpose of IPR laws or copyright law is to protect the content from unauthorised use and not to control the movement of copyrighted goods mostly undertaken to maximise profits. Anyone who seeks to control the production for overpricing IPR products or uses other restrictive methods is guilty of abuse of IPRs and must not be helped by Courts. Arm-twisting on the strength of an IPR is necessarily an abuse and market segmentation is an illustration of the same behaviour. The Delhi High Court accepted and permitted market segmentation without any legal basis in copyright Act, 1957 and became party to sanctifying profit maximization on the pretext of presence of s 14 (a)(ii).[29]

Conversion of IP owner's desire into IP Obligation/Norm: It is a basic norm of IPRs that as soon as IPR product is sold in the market, the IPR component of the product is exhausted and any further control over its use or movement by the IP owner is unwarranted. The relationship between such IPR owner and buyer has two aspects— one, IPR obligations and second, the obligations arising from stipulations in contract of sale. There is a continuous effort on the part of IP owners to convert the contractual obligations imposed by them on buyers as IPRs, while selling IPR goods (books in this case). ***They also make efforts that their profit maximization strategies are not dubbed as anti-competitive or restrictive or hit by unjust enrichment.*** Similarly when an infringement action is brought, the dominant purpose of which is to maximize profits and not control the IPR violation, such proceedings are themselves an abuse of the process of court.[30] Admittedly, in export of LPE books to non-desired areas there is no violation of copyright content in the book, which is the sole purpose of copyright law. Using Copyright law for an ulterior purpose other than the purpose of its enactment is abuse of copyright law.

The Author submits to Judiciary that stopping the offer of sale on Internet by a third party buyer/ re-seller of LPE books into the territories not liked or authorised by publisher on p2, which in reckoning of publisher were meant for specific market of India (south Asia), is not and cannot be governed by Indian Copyright Act as it contains no provision to control exports. Section 14 (a)(ii) is a provision ushered in UK and India both completely for a different object whereby the permission of copyright owner became necessary for issue of each copy in addition to initial publication of copyright content. Under the present laws it is the job of Customs or Border authorities or Courts of the country of import, both under Berne Convention or WTO-TRIPS.

[29] Section 14(a)(ii) admittedly was enacted completely with different purpose. An interpretation was being impressed that initial publication of the work was with permission of owner and further copies did not require permission of the owner. The amendment was made to insist that production of every copy must have permission of owner of copyright.

[30] See such a remark in India by Justice Sanjay Kishan Kaul in *Hawkins Cookers Ltd* v *Murugan Enterprises* 2008 (36) PTC 290 (Del) para 51.

By the decision in *John Wiley* the Delhi High Court is harming the interest of worldwide users of copyrighted materials. It is harming the interest of weaker users abroad where the same publisher is charging a price which the buyer of such LPE from India cannot afford. The ruling of Delhi High Court declaring exports as copyright infringement would hold good for India, even if importing countries apply international exhaustion and welcome LPE books. ***Thus Delhi High Court would be seen as supporting profit maximizing strategies of multinational publishers by artificially permitting market segmentation and imposing ban on exports of validly issued IPR goods without any legal backup.*** Indian courts respected as they are in developing economies; however this would cause a permanent harm to access of knowledge.

III

Debate on compulsory licensing vis-à-vis public interest: TRIPS to move forward for determining production centres for inventions

When the competent authority, as appointed by a national patent law, authorises the exploitation of patented invention without authorisation of the patentee, the authorisation is referred to as a Compulsory License. Compulsory license is issued in recognition of protection of larger public interest. Under a compulsory license, an individual or company uses another's patent and pays the rights holder a set fee for the license. The expression 'other use without authorization of the right holder' is new nomenclature for 'compulsory license' and is conferred by competent authority.[31] More recently an area of fierce debate has been that of drugs for treating serious diseases such as malaria, HIV and AIDS. Such drugs are widely available in the western world and can help to manage the epidemic of these diseases in developing countries. Such drugs are found too expensive for developing countries when supplied by patentees.

The objective of this part of paper is to project a suggestion that "supply by exports as recognised by TRIPS to be equivalent to local working" needs to be reworked further to achieve an equitable distribution of production facilities utilizing the technology disclosure in patent specifications. How to introduce price competitiveness in the patent products and how to ensure a lower price in low per capita countries has to be factored in. The production centres for supplying the countries must be spread in continents or close to consumption centres.

The Paris Convention, 1883 provides that each contracting State may take legislative measures for the grant of compulsory licenses. The concept of compulsory license was prevalent under Paris Convention and continues in TRIPS. Compulsory licensing by member states is allowed by TRIPS in an effort to strike a balance between public and private interests.

[31] The phrase appears in the title of Article 31 (not quoted) but does not specifically list the reasons that might be cited to issue a compulsory license.

DOHA ON COMPULSORY LICENSING

The Doha Declaration on TRIPS and Public Health postulates that member countries are free to determine the grounds for granting compulsory licenses. Nevertheless, TRIPS Agreement does prescribe a number of conditions which ought to have been fulfilled before issuing compulsory licences.[32] Article 31.f. of TRIPS requires that compulsory licenses be used 'predominantly' for local markets. This requirement complicates the ability of member countries to import medicine or drugs which are produced under CL in another country. Thus, countries lacking indigenous pharmaceutical manufacturing capacities may not effectively access medicines in compliance with TRIPS Article 31.[33]

The patentee has to be paid adequate remuneration for CL taking into account the economic value of the authorization, but "adequate remuneration" or "economic value" are not defined. Compulsory licensing does not result in exclusivity to licensees; the patent owner continues to have right to produce. The TRIPS waives the requirement of prior negotiation in emergency cases or when the subject matter of the patent is required for public non-commercial use, in other words government use.

COMPULSORY LICENSES UNDER DIFFERENT JURISDICTIONS THE WORLD OVER

Specific situations in which compulsory licenses may be issued are set out in the legislation of each country and vary from country to country. Some examples of situations in which a compulsory license may be granted include lack of working over an extended period in the territory, inventions funded by the government, failure or inability of a patentee to meet a demand for a patented product and where the refusal to grant a license leads to the inability to exploit an important technological advance, or to exploit a further patent. Compulsory licenses have been issued by several countries for a number of different pharmaceutical products. Compulsory licensing has been resorted to by developing as well as developed countries of the world.[34]

Thailand issued compulsory licences on three patented drugs in 2007 and despite the criticism had announced compulsory licences on three more drugs in 2008. In **Brazil** compulsory licences have been championed on the basis of public interest. The Brazilian

[32] Art. 31, TRIPs Agreement, 1994.

[33] The Amendment to the Scope of Article 31(f) of TRIPs in the Doha Declaration was made to allow countries unable to manufacture pharmaceuticals to obtain cheaper versions elsewhere if necessary. The requirement of domestic production in TRIPS Article 31(f) has been waived on the following conditions:
- The importing country must make an application to the WTO.
- The compulsory license granted in the exporting country shall also be notified to the WTO and be limited to the amount necessary to meet the needs of the importing country.
- Products shall furthermore be distinguishable through specific labelling and marking and information must be published on the internet.

[34] For instance, Brazil has issued compulsory license for the drug Efavirenz; Canada for Oseltamivir; Italy for Imipenem/cilastatine, Sumatripan succinate; Israel for Hepatitis B vaccine; Ghana for Generic HIV and AIDS medicines; Cameroon for Lamivudine, Nevirapine; Mozambique and Zambia for Lamivudine, Stavudine, Nevirapine; Indonesia for Lamivudine, Nevirapine; Malaysia for Didlanosine, Zidovudine; Thailand for Lopinavir/Ritonavir, Clopidrogel, Erlotinib, Letrozole, Docetaxel and Ecuador for Lopinavir/Ritonavir. During the anthrax crisis and the bird-flu endemic, there was demand even in the USA for compulsory licences to be issued as the medicines in both cases were patented and the emergent situation required immediate production of life saving drugs.

government successfully used CL argument to negotiate price reductions with anti-retroviral manufacturers. Earlier, Roche accepted a price reduction of 40% for *nelfinavir* and in 2005 a price reduction was negotiated with Abbott for the combination *lopinavir and ritonavir*.[35] When the patentee, Merck & Co, refused to reduce the price of HIV antiretroviral efavirenz, Brazil issued a compulsory licence.

COMPULSORY LICENSING IN INDIA

The Indian Patent Act contains very broad compulsory licensing provisions. The two provisions that allow for compulsory licenses are sections 84 and 92.

Circumstances under which Compulsory License could be Granted: Under Patent Act, 1970 section 84 (not quoted), a compulsory license can only be granted on the lapse of three years after the issuance of a patent, if one of the following conditions is met:

1. The reasonable requirements of the public with respect to the patented invention have not been satisfied; or
2. The patented invention is not available to the public at a reasonable price; or
3. The patented invention is not worked in India.

Under section 92 (not quoted), a compulsory license could be granted in India in case of:
1. A national emergency (including a public health crisis);
2. Extreme urgency; or
3. In the event of public non-commercial use.

The Indian Act lists circumstances in which the "reasonable requirements of the public" will be considered as not met. These circumstances are:

- When, by reason of the refusal of the patentee to grant a licence on reasonable terms the trade or industry in India is prejudiced; or the demand for the patented article has not been met to an adequate extent or on reasonable terms; or a market for export of the patented article manufactured in India is not being supplied or developed; or the establishment of commercial activities in India is prejudiced.
- When, by reason of conditions imposed by the patentee upon the grant of licenses or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment of any trade or industry, is prejudiced.
- When the patentee imposes a condition upon the grant of licenses under the patent to provide exclusive grant back, prevention to challenge to the validity of patent or coercive package licensing.
- When the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable.

[35] Darren Smyth, "Compulsory licences: necessity or threat?" *Chemistry World* (May 2013).

- When the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by the patentee or persons claiming under him; or persons directly or indirectly purchasing from him; or other persons against whom the patentee is not taking or has not taken proceedings for infringement.

A compulsory license could be granted if the patented invention is not worked in India. An invention is considered to be "commercially worked" in India if the patented invention is: (a) manufactured in India; (b) imported into India[36]; (c) licensed and forms a part of a product that is sold in India; or (d) commercialized in India in any other manner.

The government can notify a patent for issuance of compulsory license under section 92 if any of the conditions —national emergency, cases of extreme urgency, or in case of public non-commercial use are met:. Under section 92 the government can also ask generic makers to manufacture patented drugs in emergency situations.

Upholding public interest

The issuance of the compulsory license in India has come under criticism from the pharmaceutical industry having headquarters in developed countries. The governments espouse their interests on the ground that CL would be a disincentive to innovate. It would dissuade potential investors from participating in the business of pharmaceutical innovation which as it is inherently risky.

The developed countries where most of the pharmaceutical industry is based, view it as an affront to their guaranteed rights; while the developing countries consider it their responsibility to provide life-saving drugs at affordable price to the poor people. It is debate between strict competition law arguments and liberal human rights approach.

Misplaced projection of essentials of patent

Increasingly, the IP literature mentions that disclosure of invention is the essential bargain as symbol of the patent system. The new justification is being publicised[37] from the time of Uruguay round in 1991 and earlier. If one scrutinizes the Patent system in 19th century it was a time limited monopoly right as reward for disclosing the invention in first country, but patent was granted by later countries to encourage local production using local labour and raw materials. The benefits of local production to a country whether by the patentee or a licensee outweigh the supply of the patented item through exports. The developing countries were coerced to accept TRIPS 1994 wherein supply by exports was recognised equal to commercial working. Arguing from patentee side, can a compulsory licence be issued only because a patentee does not manufacture in a particular jurisdiction, but supplies at a reasonable price? In the present TRIPS provisions it can be safely said that a CL cannot be

[36] This condition was made efdfective in 1995 ignoring the vehement opposition by all developing countries. Author desires TRIPS to move forward and introduce production facilities for patents on the basis of geographical spread..

[37] The spread of literature is under control of MNCs and a misplaced bargain has been successfully campaigned so as to continue with supply by exports as equal to local working of the patent.

issued in such a circumstance. This needs to change in favour of an international agreement as to establishment of production facilities by the patentees.

Governmental intervention before CL as sufficient safeguard for patentee

No competitor would ask for a CL unless his venture can be run profitably and no Governmen would interfere unnecessarily against the patentee interest. Otherwise, as soon as poor or non-availability and high prices of patented product were apparent, the TRIPS and domestic laws both could authorize everyone to produce the patented invention subject to payment of a designated royalty[38]. It is submitted that the requirement of governmental intervention before the grant of CL has to be treated as sufficient safeguard for patentee. A transparent explanation of the circumstances motivating public interest is essential.

The concept of public interest has always been controversial to ascertain and define. The number of compulsory licences issued throughout the world warrants that they are being issued only in exceptional cases.[39] The owners of patents have sufficient clout and strategies to contain the issuance of CLs. The debate on permissible 'exceptional cases and to what extent the issue of CLs should be made flexible' continues. Public interest is a very flexible instrument in the hands of the executive and judicial authorities, and should be utilized effectively.

The government clearance to a compulsory license appears an answer to the desire of government that production under that patent should take place in the country. Looking at the criticality of an invention the governments may legitimately take a view in relation to select inventions. Once the production is situate within the country, whether in the hands of a patentee or a voluntary or compulsory licensee, the government can control prices by various measures including doctrinaire price controls. Moreover, training of personnel in the field of technology is permanently beneficial.

Equitably distributed production centres for patent exploitation desirable

It appears time is ripe for revising the concept that favours "supplying from anywhere as equal to local working" which was accepted at the instance of the developed countries which are homes for MNCs and against the interest of developing countries. The TRIPS may not be revised *status quo ante* and local production may not be insisted upon. For every patented invention having large international supplies, the patentee should be required to establish *production facilities or centres distributing them equitably.* Production

[38] TRIPS insistence on governmental intervention before compulsory licensing grant allegedly breeds corruption. It is suggested, if two conditions enabling consideration for compulsory license are fulfilled, the person interested in getting a compulsory license should be permitted to undertake production of invention either at pre-determined royalties or the same may be fixed by a specially empowered Authority/Commission in this regard. The whole matter of royalty payment may be deferred to post production and royalties for utilizing invention can be paid for production ex post facto.

[39] After 20 years of WTO-TRIPS the time is ripe to achieve goals in New International Economic Order (NIEO 1973), Uruguay 1989, and Doha Declarations. The revision of TRIPS in the sphere of patents, to demand withdrawal of 'supplying the market from abroad' as equal to 'local working' of invention should be insisted which was done while adopting TRIPS in 1994. Such a demand projection takes 20 years to fructify for which Asian and African countries would have to be taken along.

Centres for patented inventions could also be considered on the basis of population of the countries and/or projected consumption of invention.'

The creation of production facilities for working of invention should not be on the free will of patentee but the patentee should follow set standards in TRIPS which should answer the aspirations of countries belonging to geographical regions or by equitably distributing production among developed and/or developing countries or near consumption centres. The countries which are supplied by exports must be given zero or negligible foreign exchange outgo guarantee. They may be supplied from production centres within or close to their countries discounting for benefits derived from local production[40].

The above suggestion would realize that at least some production facilities under patents may be allocated to each country market which may project a likelihood of support from smaller countries to the above proposal. If such a suggestion is carried, it will ensure local production in at least in some non-developed countries, ensuring returns to inventors and would also facilitate equitable distribution of other benefits arising out of production of invention, by way of use of local resources and employment to locals where such production centres are established.

I conclude by making an appeal to the legislatures, policy makers in the Government and Judiciary to apply these principles in order to defend and/or pursue the public interest, or interest of users. The Indian judiciary has not so far endeavoured to handle the cases at hand in a manner that would sufficiently capacitate the IP laws to work for the benefit of users or licensees, which it could, by interpreting the same in a propitious manner.

[40] Utilization of local raw materials and employment generation are major benefits for insisting local production.

ENEMIES OF THE STATE AND MISCARRIAGES OF JUSTICE

Carole McCartney[*] and Clive Walker[*]

EXECUTIONS IN ERROR?

The assuredness of the conviction of terrorist offenders has reached new heights of controversy during the past couple of years in India. First, the Indian Supreme Court has confirmed the constitutionality and application of the death penalty in *Mohammed Ajmal Mohammed Amir Kasab v State of India*.[1] The appellant, the survivor of the terrorist band which carried out the Mumbai attacks in 2008, was held personally responsible for seven deaths in total (out of 166 persons killed in the attacks). He was convicted, *inter alia*, on the charge of waging war against the Government of India and was awarded the death sentence under section 121 of the Penal Code (and has since been executed). His plaint against the death penalty was based on several grounds, the strongest being the emotional fact he was barely 21 years old at the time of the commission of the offences.However, despite his age, the Supreme Court denied that he was 'a mere tool in the hands of the Lashkar-e-Toiba'.[2] Based on the precedents of *Bachan Singh v. State of Punjab*[3] and *Machhi Singh v. State of Punjab*,[4] the death penalty was held to be constitutional in the 'rarest of rare cases', and this case fitted full square into that depiction:[5]

> 'In short, this is a case of terrorist attack from across the border. It has a magnitude of unprecedented enormity on all scales. The conspiracy behind the attack was as deep and large as it was vicious. The preparation and training for the execution was as thorough as the execution was ruthless. In terms of loss of life and property, and more importantly in its traumatizing effect, this case stands alone, or it is at least the very rarest of rare to come before this Court since the birth of the Republic. Therefore, it should also attract the rarest of rare punishment.'

While the floodgates have not opened to capital punishment following this decision, it may not represent the 'one in a million' case envisaged by the Supreme Court.[6]Thus, within one year, another terrorist outrage produced another confirmed sentence of death for a terrorist in *Yakub Abdul RazakMemon v The State of Maharashtra*.[7] The case concerned multiple bombings in Bombay, which had inflicted 257 deaths in 1993 in retaliation for the demolition of the Babri Masjid at Ayodhya in 1992. The Supreme Court upheld the death sentence of Yakub Abdul RazakMemon as the 'driving spirit' behind these crimes of

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1 Supreme Court of India, 29 August 2012.
2 *Ibid.*, para 563.
3 (1980) 2 SCC 684.
4 (1983) 3 SCC 470 para 32.See also *Maru Ram* v *Union of India* (1981) 1 SCC 107; *Machhi Singh* v *State of Punjab* (1983) 3 SCC 470.
5 Supreme Court of India, 29 August 2012, para. 581.
6 *Ibid.*, para. 585.
7 Supreme Court of India, 21 March 2013.

the 'utmost gravity',[8] though it commuted the death sentence of 10 others as mere 'arrows' in the manipulative hands of others.[9]

A third confirmation of hanging occurred in *Devender Pal Singh Bhullar v State of N.C.T. of Delhi*,[10]where a petition for judicial review of the refusal by the President of India to exercise his powers of mercy under Articles 72 and 161 of the Constitution was rejected. The appellant was convicted of involvement in a car bomb which exploded outside the offices of the Indian Youth Congress in New Delhi in 1993 and killed nine persons, an attack linked to unrest in the Punjab. Though the conviction continues to be highly contested because of the absence of corroborative evidence beyond confessions (which are said to have been coerced), the Supreme Court revealed where its sympathies rested in no uncertain terms:[11]

> 'The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights.'

The gravity of these incidents, especially for the many victims and their relatives, cannot be underestimated. However, the United Kingdom has also experienced grave attacks by terrorists over the past four decades. Overall, 3,636 terrorism-related deaths occurred in Northern Ireland between 1969 and 1999,[12] with a further 121 deaths from Irish terrorism in Great Britain during the same period.[13]The advent of Al-Qaida inspired violence has also harmed United Kingdom citizens and residentsmore than those in most other European countries with 67 deaths in the 9/11 attacks in New York and 52 deaths caused by four suicide bombers in the London transport system on 7 July 2005.[14] Nearly a decade on from those attacks, the domestic mobilisation against terrorism continues unabated, with estimates

[8] *Ibid.*, paras.499, 506.
[9] *Ibid.*, para. 500.
[10] Supreme Court of India, 12 April 2013.
[11] *Ibid.*, para.40 *per* Singhvi, J.
[12] See D., McKittrick, S., Kelters, B., Feeney and C., Thornton, *Lost Lives* (Edinburgh: Mainstream, 1999).
[13] Home Office and Northern Ireland Office, *Legislation against Terrorism* (London: Cm. 4178, 1998), para. 2.2.
[14] See Home Office, *Report of the Official Account of the Bombings in London on the 7th July 2005* (2005-06 HC 1087). The most deadly attacks in Europe were the Atocha bombings in Madrid on 11 March 2004 (191 deaths).

that the threat level from Irish terrorism currently remains 'severe' in Northern Ireland and 'substantial' in the case of international terrorism,[15] though EUROPOL has recorded a decrease in both terrorist incidents and arrests in the European Union between 2007 and 2011.[16] Such reminders of threat provide some justification for continuing counter-terrorism initiatives and inflated expenditure.[17]In addition, there has been a wide of array of legal changes, akin to legislation such as India's Unlawful Activities (Prevention) Act 1967 (as amended in 2004 and 2008),as mainly set out in the United Kingdom's Terrorism Act 2000, Anti-Terrorism Crime and Security Act 2001, Terrorism Act 2006, Counter-Terrorism Act 2008, Terrorist Asset-Freezing etc. Act 2010, and the the Terrorism Prevention and Investigation Measures Act 2011.[18] However, one of the deadliest ideologically motivated incident of recent times was that committed by Anders Breivik (causing 77 deaths in linked attacks in 2011 around Oslo, Norway); he was a 'lone wolf' who was determined not to be a member of a terrorist organisation and so was not readily counteracted by the policing or legislative superstructures which have built up over the years.[19]

Returning to the issue of the death penalty in terrorism cases, the United Kingdom has also garnered much domestic experience on that subject.[20] Perhaps the most notorious incident during the past century was the execution by firing squad of 14 leaders of the 'Easter Rising' in Dublin, Ireland, in 1916.[21] Yet, it is notable that while the enthusiasm for prosecution of terrorists has tended to increase in recent years (in preference to administrative or military disposals),[22] the application of capital punishment to these most heinous offenders who are found guilty has decreased. This diminished enthusiasm is in part explained by political calculations – that executions generate sympathy for terrorists and their causes, as was illustrated by the 1916 executions and the last terrorist hanging in the United Kingdom which was of Tom Williams in Crumlin Road Gaol, Belfast in 1942.[23] For this reason amongst others, the death penalty was abolished in Great Britain by the Murder (Abolition of Death Penalty) Act 1965 and for Northern Ireland by the Northern Ireland (Emergency Provisions) Act 1973. However, a further reason for continuing to abjure the death penalty in terrorism

[15] See https://www.mi5.govuk/home/the-threats/terrorism/threat-levels.html
[16] EUROPOL, *TE-SAT 2012: EU Terrorism Situation and Trend Report* (The Hague, 2012). The majority of terrorist attacks were from nationalist causes and occurred in France (85), Spain (47) and the UK (26).
[17] See Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (London: Cm 7547, 2009) and *Annual Report 2010* (London: Cm 7833, 2010) and *Annual Report 2011* (London: Cm 8123, 2011), *Annual Report 2012* (London: Cm 8583, 2013).
[18] See Walker, C., *Terrorism and the Law* (Oxford: Oxford University Press, 2011); Walker, C., and Horne, A., 'The Terrorism Prevention and Investigation Measures Act 2011: One Thing But Not Much the Other?' [2012] *Criminal Law Review* 421.
[19] See *Report from the 22 July Commission* (Oslo: Government of Norway, 2012). See further EU Counter-Terrorism Coordinator, *Preventing Lone Wolf Terrorism* (Brussels: 2012); Barnes, B., 'Confronting the one-man wolf pack' (2012) 42 *Boston University Law Review* 1613.
[20] This discussion excludes those executed for opposition to British imperialism abroad, including in India.
[21] See Royal Commission on the Rebellion in Ireland, *Report* (London: Cd 8279, 1916); Townshend, C., *Easter 1916: The Irish Rebellion* (London: Penguin, 2006).
[22] See C., Walker "Terrorism Prosecution in the United Kingdom: Lessons in the Manipulation of Criminalization and Due Process" in F., Ni Aolain and O., Gross *Guantánamo and Beyond* (Cambridge: Cambridge University Press, 2013).
[23] See G., Hogan and C., Walker *Political Violence and the Law in Ireland 154* (Manchester: Manchester University Press, 1989).

cases is the sorrowful experience of wrongful convictions in some of the gravest terrorism cases. It is with this focus that this paper seeks to examine the connections between 'the enemies of the state', especially terrorists, and miscarriages of justice. Therein lies a salutary lesson for governments, legislatures and courts wishing to apply the death penalty. The potential for, and actual experience of, miscarriages of justice in this type of case has certainly stiffened resistance to any reintroduction of the death penalty in the United Kingdom no matter how great the outrage and demand for revenge.

With the agenda of exploring miscarriages of justice primarily in terrorism cases, this paper will next consider the meanings of 'miscarriages of justice' and 'terrorism' and plot the prevalence of miscarriages arising from terrorism prosecutions. It will next seek to determine the reasons for that prevalence. Finally, consideration will be given to the mechanisms which might be adopted to avert, or at least to reduce, the chances of miscarriages of justice.

'MISCARRIAGES OF JUSTICE', 'TERRORISM', AND THE PREVALENCE OF 'TERRORIST' MISCARRIAGES OF JUSTICE

It is entirely conceivable that the remainder of this paper and beyond could be consumed by attempts to define both 'miscarriages of justice' and 'terrorism'. These are important tasks but are not to be the main attention of this paper. So, no more than an explanation, rather than a justification, will be offered here.

As for the definition of 'terrorism', one author has warned: 'Above the gates of hell is the warning that all that enter should abandon hope. Less dire but to the same effect is the warning given to those who try to define terrorism.'[24] Another author has compared the task to the search for the Holy Grail.[25] Nevertheless, wide currency is given to the following 'academic consensus' formula proffered by Schmid and Jongman:[26] 'Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets.' Three common denominators might be distilled from this excerpt, relating to purpose, target, and method. Consistent with these key concepts, though in some respects more broad-ranging in detail, is the legal definition contained in section 1 of the United Kingdom's Terrorism Act 2000:

> '(1) In this Act 'terrorism' means the use or threat of action where
>
> (a) the action falls within subsection (2),
> (b) the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and
> (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
>
> (2) Action falls within this subsection if it
>
> (d) involves serious violence against a person,
> (e) involves serious damage to property,
> (f) endangers a person's life, other than that of the person committing the action,
> (g) creates a serious risk to the health or safety of the public or a section of the public, or
> (h) is designed seriously to interfere with or seriously to disrupt an electronic system.'

This definition can henceforth serve as an indication of what is being treated as 'terrorism' for the purposes of this paper, so only three further comments are required. One is that it is essentially a positivist definition which takes no account of potential political or humanitarian justifications for political violence.[27] This criticism of indiscriminate labelling could be used with justification against the EUROPL TE-SAT report cited earlier.[28] The second point is that in this respect and others it bears many similarities to the definition in section 15 of the Unlawful Activities (Prevention) Act 1967 (as amended in 2004 and 2008) in India. The third point is that the cases before the Indian Supreme Court which were discussed at the outset of this paper would readily fall within the definition.

As for the term, 'miscarriage of justice',[29] a 'miscarriage' means literally a failure to reach an intended destination or goal. A miscarriage of justice is therefore a failure to attain the desired end-result of 'justice'. Justice is about distributions - according persons their fair shares and treatment. The primacy of individual autonomy and rights is central to the 'due process model' of criminal justice, which recognises that the possibility of human fallibility and error can yield grave injustice, as when the system convicts the innocent or convicts without respecting procedural rights. Thus a possible definition of 'miscarriage' is that it occurswhenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of: first, deficient processes; second, the laws which are applied to them; third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers; or sixth, by State law itself.

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[24] D, Tucker, *Skirmishes at the Edge of Empire 51* (Westport: Praeger, 1997).
[25] G, Levitt, "Is "terrorism" worth defining?" 13 *Ohio Northern University Law Review* 97 at 97 (1986).
[26] A Schmid and Jongman, A, *Political Terrorism* (North-Holland, Amsterdam, 1987) p 28. See further Schmid, A, "Terrorism on tria : terrorism—the definitional problem" 36 *Case Western Reserve Journal of International Law* 375 (2004) and 'Frameworks for conceptualising terrorism' 16 *Terrorism & Political Violence* 197 (2004).
[27] For further discussion, see C., Walker *Terrorism and the Law* (Oxford: Oxford University Press, 2011) chap 1.
[28] Y., Macciano 'TESAT report shows decrease in terrorist activity in 2011 but national police forces see a continuing threat' 22(2/3) *Statewatch Journal* 10 (2012) .
[29] See further C., Walker 'Miscarriages of justice in principle and practice' in C.P. Walker and K., Starmer (ed.), *Miscarriages of Justice* (London: Blackstone Press, 1999).

Within this wide ambit, the abuse of state powers and the contravention of the rights of suspects in cases of political violenceprovide the focus here, and it is being contended that miscarriage of justice in this context is most starkly demonstrated by greater chance than normal of the wrongful conviction of the innocent. However, the term 'innocent' is not one easily translated into legal terminology.[30]So, while there remains debate over taxonomy, we prefer the term 'miscarriage of justice' to refer to those unjustly convicted rather than seeking to assert some kind of factual or absolute 'innocence', a status, which is not officially bestowed by any court of appeal, even if it is knowable:

> 'This court is not concerned with the guilt or innocence of the appellants; but only with the safety of their convictions… ...the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials.'[31]

Of course, a miscarriage of justice can arise not only in the wrongful determination of guilt or innocence but also through the imposition by the state of an unwarranted penalty, and most appeals in the United Kingdom are about sentence rather than conviction.[32] It is hard to imagine a more unwarranted penalty than the imposition of the death penalty for a crime from which the person is ultimately exonerated. The fact that criminal justice penalties are state-sanctioned and thereby reflect on the legitimacy of the state often gives rise to a weighting to favour of high burdens and standards of proof on the shoulders of the prosecution, procedural guarantees for the accused, and even a tendency towards mercy in proportion to the severity of the potential outcomes of the criminal justice processes. In this way, 'One universal point of agreement must surely be that, "at least in theory… the pursuit of the ultimate social goals of criminal justice must be qualified by the goal of avoiding miscarriages of justice".'[33] To put it more starkly, 'It is better that ten guilty persons escape than that one innocent suffer.'[34]

Practice in terrorism prosecutions in the United Kingdom during the past few decades has fallen well short of these expressed ideals. Evidence of shortcomings can be readily located in notorious terrorism prosecutions brought against Irish suspects of bombings in England on behalf of the irish Republican Army, which constitute a substantial catalogue of contemporary miscarriages of justice. Indeed, the majority of applications to the Criminal Cases Review Commission ('CCRC' - described later)from Northern Ireland relate to terrorist convictions.[35]They reveal a variety of errors going beyond mistake or incompetence and venturing intogross and malicious abuses. The cases dealt with to date by the CCRC

30 Compare M., Naughton, "Redefining Miscarriages Of Justice" 45 *British Journal of Criminology* 165 (2005); H S., Quirk. 'Identifying miscarriages of justice: why innocence in the UK is not the answer' 70 *Modern Law Review* 759 (2007); Roberts, S., and Weathered, L. 'Assisting the factually innocent'29 *Oxford Journal of Legal Studies* 43(2009).

31 *R* v *Hickey* (Court of Appeal, unreported 30 July 1997) per Roch LJ.

32 See Ministry of Justice, *Judicial and Court Statistics 2011* (London: 2012) p.60: A total of 7,475 applications for leave to appeal were received in 2011. Of these, 1,535 were against conviction in the Crown Court and 5,623 against the sentence imposed.

33 A. Sanders and R., Young, *Criminal Justice 9* (London:2nd ed, Butterworths, 2000).

34 Blackstone 1765-9 Vol.iv p.27.

35 L. Elks, *Righting Miscarriages of Justice?* (London: JUSTICE, 2008) chap 13.

have 'shone some newlight on the very stringent methods employed in Northern Ireland in dealing with suspect sectarian or paramilitary offences during the Emergency'.[36]Repeated cases arise from the adopted patterns of the handing enemies of the state, and the impacts of substantial curtailments of protections for suspects, such as longer detention by the police, more 'robust' questioning techniques, more limited access to lawyers, and a readier willingness to resort to rough and ready forensic techniques. These patterns of loosening the ties that bind a civilised society are closely replicated in counter-terrorism laws in India.[37]

Amongst the examples of notorious miscarriages of justice in terrorism cases is the *Guildford 4,*four terror suspects who were convicted in 1975 of pub bombings in Guildford and Woolwich on behalf of the Irish Republican Armywhich killed seven people.[38]In the words of the trial judge, Lord Donaldson, Master of the Rolls: 'Had capital punishment been in force, you would have been executed.'[39]Over the subsequent years of their imprisonment, new evidence was amassed which convinced the Home Secretary to conduct further inquiries and subsequently refer the case back to the Court of Appeal. When it was discovered that Surrey Police detectives working during the investigation had fabricated statements and suppressed evidence, the convictions werequashed in 1989. This result immediately prompted reconsideration of the *Maguire 7* case,[40]as suspicion had only fallen upon the Maguire household as being involved in the bombings when Gerard Conlon (one of the *Guildford 4*) made statements to the police implicating his relative who was accused in the *Maguire* case. Convictions of the Maguire family were based upon forensic tests purporting to show traces of nitroglycerine on household items. On appeal in 1990,[41]the Court considered the possibility that third parties may have left the traces via innocent contamination and so grudgingly overturned the convictions (the non-disclosure of evidence was also a material irregularity). The resultant May Inquiry's *Interim* and *Second Reports* cast doubt on whether the forensic tests used could actually detect the substances claimed, and at any rate, would not be able to provide proof of suspects knowingly handling explosives.[42]

36 *Ibid.*,p.288.

37 The degrees of similarity between different counter-terrorism regimes are considered by Roach, K., *The 9/11 Effect* (Cambridge:Cambridge University Press, 2012).

38 See: *R.* v *Hill and Others The Times* 23 October (1975) p.1, *The Times* 28 February (1977) p.2, *The Times* 20 October (1989). See Hill, P. and Burnett, R., *Stolen Years* (London: Doubleday, 1990); Conlon, G., *Proved Innocent* (London: Hamish Hamilton, 1990); Bennett, R., *Double Jeopardy* (London: Penguin,1993). Three police officers were acquitted of conspiracy to pervert the course of justice: *R.* v *Bow Street Stipendiary Magistrate ex p. D.P.P.* (1992, D.C.); *R.* v *Attwell, Donaldson and Style* (1993) *The Times* 20 May p.1.

39 House of Commons Debates vol.158 col. 283 19 October 1989, Merlyn Rees.

40 *R* v *Maguire The Times* 5 March (1976) p.1, *The Times* 28 June (1977); [1992] 2 All E.R. 433. See; A., Maguire, *Miscarriage of Justice: An Irish Family's Story of Wrongful Conviction as IRA Terrorists* (Boulder: Roberts Rinehart, 1994).

41 [1992] 2 All E.R. 433.One defendant, Guiseppe Conlon, had died in prison in 1980. Four police officers were prosecuted but acquitted for malpractices: *R* v *Bow Street Stipendiary Magistrate ex p. D.P.P.* (1992, D.C.).

42 Sir John May, *Report of the Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974. Interim Report*(1989-90 H.C. 556), *Second Report* (1992-93 H.C. 296), *Final Report* (1993-94 H.C. 449). This argument was expressly rejected by the Court of Appeal: *loc. cit.* at p.444, which judgment the *Second Report* in turn criticises: *loc. cit.* paras.1.6-8, 3.16.

In the following year, 1991, the infamous *Birmingham 6* case was considered on appeal.[43] The six Irishmen had been convicted along of the bombing of two Birmingham pubs in 1974, the most deadly I.R.A. attack on the British mainland. The prosecution case rested upon confessions, forensic tests similar to those used in the *Guildford 4* and *Maguire 7* cases, and highly circumstantial evidence purporting to demonstrate that the six were Republicans and that their movements were suspect. After a refusal of leave to appeal in 1976, there was a further failed appeal in 1988 before the Court was finally persuaded by further revelations concerning the police fabrication of statements (especially of McIlkenny) and new uncertainties about the quality of the forensic tests.

The continued failure of Home Secretaries to use their powers to refer cases such as these back to the appeal courts, coupled with frustrations with the dismissive handling of those which were referred by Court of Appeal, led to the establishment of aRoyal Commission on Criminal Justice.[44] The Commission, reporting in 1993, called for the establishment of a new independent body to investigate miscarriages of justice removing the 'political embarrassment'of a referral by the Home Secretary and replacing the politically tainted and under-resourced process of petitioning the Home Office. This reform, implemented by Part II of the Criminal Appeal Act 1995, created the Criminal Cases Review Commission ('CCRC').

When the CCRC began work on 1 April 1997, 279 cases were transferred to it from the Home Office and 12 from the Northern Ireland Office. In the latter caseload, the majority of files related to terrorism convictions.[45] Those cases reflected the 'very stringent methods employed by Northern Ireland in dealing with suspected sectarian and paramilitary offences during the Emergency'.[46]Such methods were found to include interrogating suspects for up to five days, sometimes for more than 12 hours a day, most often without legal representation for the first 48 hours.[47] This applied to suspects regardless of age or vulnerability.[48] Such methods resulted in confessions, many of which proved to be false but were nevertheless treated as crucial evidence sufficient for conviction:[49]

43 *R.* v *Hill and Others The Times* 16 August (1975) p.1, *The Times* 31 March (1976) p.9; *McIlkenny and Others* v *Chief Constable, West Midlands* [1980] 2 All E.R. 227; *Hunter and Others* v *Chief Constable, West Midlands* [1981] 3 W.L.R. 906; *R.* v *Callaghan and Others* [1988] 1 W.L.R. 1, *The Times* 29 January (1988) p.5, (1988) *The Times* 22 March (1988) p.1; *R* v *Callaghan and Others* (1988) 88 Cr. App. R. 40, *The Times* 1 April (1991); *R.* v *McIlkenny and Others* [1992] 2 All E.R. 417. Commentaries include: Gibson, B., *The Birmingham Bombs* (Chichester: Rose, 1976); C., Mullin, *Error of Judgment* (Dublin: 3rd ed., Poolbeg, 1990); Blom-Cooper, Sir L., *The Birmingham Six and other Cases* (London: Duckworth, 1997). The prosecutions of three of the detectives involved in the case was abandoned: *R. v Read, Morris and Woodwiss* (1993) *The Times* 8 October pp.1, 3, J. Rozenberg, *The Search for Justice 314* (London: Hodder & Stoughton, 1994).

44 The Commission was established in 1991 and reported in 1993 (London: Cm.2263).

45 L. Elks, *Righting Miscarriages of Justice? 288* (London: JUSTICE, 2008).

46 *Ibid.*, p.288.

47 See: *R* v *Gorman* (NICA, 29 October 1999); *R* v *Magee* [2001] NI 17, [2007] NICA 34; *R* v *Green* [2002] NICA 14; *Re Boyle* [2004] NIQB 63, [2008] NICA 35; *R* v *Hindes and Hanna* [2005] NICA 36; *R* v *McCartney & Anor.* [2007] NICA 10; *R v McMenamin* [2007] NICA 22; *R v Morrison* [2009] NICA 1; *R* v *Walsh* [2010] NICA 7. For convictions upheld after referral, see *R* v *Latimer* [2004] NICA 3; *Re McCrory* [2007] NIQB 93.

48 See *R v Adams (Robert)* [2006] NICA 6 who was 16 at the time of arrest; *R* v *Mulholland* [2006] NICA 32 who was 16 years at time of arrest and *R* v *Hindes&Anor.* [2005] NICA 36 where the suspects were under 15 and 16 at the time of their arrest.

49 L. Elks, *Righting Miscarriages of Justice? 301* (London: JUSTICE, 2008).

'Consideration of the Commission's Northern Ireland cases must raise the question whether they represent the tip of an iceberg of wrongful convictions secured on the basis of coerced and unreliable confession evidence…police neglected to observe elementary and obvious standards of fairness in questioning…and the legal rightsavailable…werewholly ineffective … The legal framework for the interrogationof suspects established by the Emergency justice to individual suspects could be lost to sight.'

The importance of this review work, as well as the pervasive potential for miscarriages of justice in terrorism can be illustrated by the final person to be sentenced to death in the United Kingdom, namely, William Holden. Holden had been convicted of the murder in Belfast in 1972 of a soldier on 19 September 1973 (just before the statutory abolition of capital punishment). He was sentenced to death, but the sentence was subsequently commuted to life imprisonment. Following a review and reference back to the courts by the CCRC, the Northern Ireland Court of Appeal in *R v Holden*quashed his conviction.[50]It was sustained that there had been a breach of regulations by the soldiers who had arrested him in that he was held far longer than permissible in military custody before being handed over to the police for interrogation. This created a potential inference of wrongdoing, though his allegations of ill-treatment were not as such sustained.Nevertheless, in light of the material now disclosed the Court considered that there was a real possibility that the admissions would not have been admitted in evidence and that if they had been admitted they may not have been considered reliable by the jury.

Cases such as these from Northern Ireland have dampened any inclination to bring back the death penalty in terrorism cases, though it continues to be raised from time to time.[51]The potency of its deterrent effect must surely be in doubt in the case of terrorists, who already risk death or contemplate suicide. In addition, the threat of death may reduce public cooperation with the police and the willingness of juries to convict,[52] especially in the light of miscarriages of justice in Irish terrorist trials. In any event, the United Kingdom government has now ratified the 6th and 13th Protocols to the European Convention on Human Rights,[53] which largely forbids the use of capital punishment.

Internationally, the pattern of miscarriages of justice in cases involving offenders who are depicted as 'enemies of the states' has been replicated and has produced similarly notorious miscarriages of justice. In the US, one suchcontroversy concerns thetwo Italians, Nicola Sacco and Bartolomeo Vanzetti.[54] Following a failed armed robbery of a shoe factory

50 [2012] NICA 26.

51 See C.P., Walker, *The Prevention of Terrorism in British Law* (Manchester: 2nd ed., Manchester University Press, 1992) pp.305-306.

52 See J.H.J., Edwards, "Capital punishment in Northern Ireland" *Criminal Law Review* 750 [1956].

53 See Human Rights Act 1998, Sched 1; Crime and Disorder Act 1998 s 36; Human Rights Act 1998 (Amendment) Order 2004 (S.I. 2004/1574).

54 See H.B. Ehrmann, *The Case That Will Not Die: Commonwealth* vs. *Sacco and Vanzetti* (Boston: Little, Brown and Company, 1969); P. Avrich, *Sacco and Vanzetti: The Anarchist Background* (Princeton: Princeton University Press, 1991); M. Temkin, *The Sacco-Vanzetti Affair: America on Trial* (New Haven: Yale University Press, 2009).

in April 1920 which resulted in two murders, Sacco and Vanzetti were arrested and later charged, in spite of strong alibis (and later, confessions from other known criminals). Their trial took place at a time of intense political repression – the 'Red Scare' - in the United Statesfollowing World War I, and the two had been previously pinpointed as militants who took part in anarchist actions including strikes and the spreading of anti-war propaganda. Police questioning of the pair had focussed on this political activity rather than the robbery, with them lying in response. Their lies about their radical leanings were then used against them at a highly charged political trial, marred by perjury and illegality on the part of the police, prosecution, and federal authorities. They were sentenced to deathin 1921 and executed in 1927.

Australia's first domestic terrorist attack of the contemporary era, the Sydney Hilton Bombing of February 1978, led to similar controversy and conspiracy theories. A bomb in a rubbish bin outside the hotel detonated and killed three people, while numerous politicians and government officials were at the hotel to attend the first Commonwealth Heads of Government Regional Meeting. Members of the 'neo-humanist' group,AnandaMarga, were named as suspects in the coronial inquest held four years after the bombing. Tim Anderson,Ross Dunn and Paul Alister, weresubsequently convicted of conspiring to murder of the Sydney leader of the National Front. Charges relating to the Hilton bombing against Dunn and Alister were dropped, and Anderson was acquitted at trial. Numerous incidences of breaches of due process have been noted during the investigations, inquest and trials. A judicial inquiry into their convictions for the conspiracy to murder conviction led to their pardon and release in 1985.[55] However, Tim Anderson was re-tried for the Hilton bombing and convicted, winning an appeal in 1991, based on the unreliability of the Crown's principal witness.[56]No-one has ever been successfully prosecuted for the terrorist attack, which prompted greater powers for the Australia Security Services (Australian Security Intelligence Organisation - ASIO) and the formation of a Federal police force for the nation under the Australian Federal Police Act 1979 (Cth).[57]

Reasons for the over-representation of terrorism cases in miscarriages of justice

There are various reasons why, despite any difficulties, prosecution remains an attractive option for governments to pursue against their enemies, including terrorists. At the outset, it should be recognised that this attitude is not universal, and a dissenting note was sounded loudly by US President George W Bush, who announced a 'war on terror' and asserted a state of exceptionalism whereby 'it is not enough to serve our enemies with legal papers'.[58] Many countries followed suit, participating in military action in Afghanistan and Iraq and constructing extraordinary legislative counter-terrorism codes. Yet, with the

[55] Justice James Wood, *Report of the Inquiry held under s. 475 of the Crimes Act 1900 into the convictions of Timothy Edward Anderson, Paul Shawn Alister and Ross Anthony Dunn on 1/8/79* (Sydney: New South Wales Government, 1985)

[56] *R* v *Anderson* (1991) 53 A Crim R 421.

[57] P. Wilson, "When justice fails: a preliminary examination of serious criminal cases in Australia" 24 *Australian Journal of Social Issues* 3 (1989).

[58] George W Bush, State of the Union Address (Washington DC: 20 January 2004) <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120–7.html>

passage of time, the US has become an outlier in its exaltation of executive action. Elsewhere, prosecution has staged a comeback in counter-terrorism, though whether this revival has incurred some costs must also be considered, given the common perception that national security and due process do not mix.[59]For its part, the current stance of the United Kingdom government is that 'prosecution is – first, second and third – the government's preferred approach when dealing with suspected terrorists'.[60]

Two principal factors impel this trend towards criminal justice prosecution. One is the desire for legitimacy and the symbolic assertion of 'normal' constitutional values. Criminal prosecution might affirm individual autonomy through the requirement of *mens rea*, whereas collective risk to public or state security predominates in executive measures. The individuation of crime might thus be esteemed as an affirmation of the values of human autonomy and equality.[61]

A second factor which has favoured criminal justice prosecution is the emergence of home-grown 'neighbour terrorism'.[62] A reversion to criminal prosecution ensues since states are less willing to depart from international standards when dealing with citizens as compared to the treatment of aliens.[63]

Having selected criminal prosecution, a number of appropriate roles can be served by the criminal law in regard to counter-terrorism as compared to other potentially coercive exercises of state power, such as executive (Ministerial) measures or military solutions such as detentions or drone attacks. There may be six identified adaptations of criminal law to counter-terrorism,[64] but each can conduce to miscarriages of justice in ways which add to the inevitable problems affecting political cases, such as high public emotion, the demand for quick and decisive state responses, and bias against those who have attacked the very personnel now tasked with deciding their fate.In this way, governments have been able, with full public support, to introduce repressive and exclusionary measures, including by way of new criminal laws.[65] Terrorism presents liberal democracies with an almost irresistible temptation to temper traditional constitutional values for the sake of countering the threat deemed posed.[66]

[59] See M.L. Volcansek, and J.F. Stack Jr, *Courts and Terrorism 8* (Cambridge: Cambridge University Press, 2011).

[60] Hansard (HC) vol472 col561 (21 February 2008), Tony McNulty.

[61] M.A., See Drumbi, "The expressive value of prosecuting and punishing terrorists" 75 *George Washington Law Review* 1165 at p.1170 (2007); Roach, K., 'The criminal law and terrorism' in Ramraj, V.V., Hor, M., and K. Roach, *Global Anti-terrorism Law and Policy* 137 (Cambridge: Cambridge University Press, 2005).

[62] Walker, C., "Know Thine Enemy as Thyself: Discerning Friend from Foe UnderAnti-terrorism Laws" 32 *Melbourne Law Review* 275 (2008).

[63] See D., Cole, *Enemy Aliens* (New York: New Press, 2003). US citizens could not be held as enemy combatants: *Hamdi* v *Rumsfeld* (2004) 542 US 507.

[64] See further C. Walker, 'The Impact of Contemporary Security Agendas against Terrorism on the Substantive Criminal Law' in Masferrer, A. (ed.), *Post 9/11 and the State of Permanent Legal Emergency* (Dordrecht: Springer, 2012).

[65] See G. Mythen and Walklate, S. "Criminology and Terrorism: Which Thesis? The Risk Society or Governmentality?" 46 *British Journal of Criminology* 379 (2006); Hudson, B. "Justice in a Time of Terror" 49 *British Journal of Criminology* 702 (2009).

[66] M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* 112-145 (Edinburgh: Edinburgh University Press, 2004).

First, and most evident in recent years, criminal law can allow for prescient intervention before a terrorist crime is completed. This impact can be achieved by 'precursor crimes' - the criminalisation of acts in preparation of terrorism. The prime contemporary examples in United Kingdom law are sections 57 and 58 of the Terrorism Act 2000.[67] Section 57 criminalises the possession of materials relevant to terrorism, and section 58 deals with the possession of information relevant to terrorism. Next, by section 5(1) of the Terrorism Act 2006, an offence arises if, with the intention of (a) committing acts of terrorism; or (b) assisting another to commit such acts, a person engages in any conduct in preparation for giving effect to that intention. The scope of the preparatory acts is deliberately broad. In this way, these offences extend the reach of the criminal law to a point where, often based on equivocal evidence, the prospect of harm is uncertain and where the only immorality has been the imagining of wickedness rather than its materialised infliction rather than the traditional predicate of criminal law which is proof of immediate or inflicted harm. Yet, the more remote is the harm, the less certain it is that harm will actually occur or has actually been committed. It is simplistic to say that preparatory acts, such as the collection of information useful to terrorism, are not worthy of moral criticism or legal reaction.[68] But treading beyond the realm of clear attempts of clear criminal offences inevitably increases the possibilities of miscarriages of justice unless care is taken.

Second, there can be net-widening through the criminal law, so that peripheral suspects can be neutralised. Aside from net-widening through the use of the term 'terrorism', as defined by section 1 of the Terrorism Act 2000, it is common to find net-widening through the extension of offences aimed at enemies of the state to their activities on foreign soil. This effect is achieved in relation to a range terrorist-related offences by the Terrorism Act 2000, section 59, and the Terrorism Act 2006, section 17, so that extra-jurisdictional acts can be criminalised in the case of enemies of the state. However, the possibility of miscarriages of justice is again evident. Domestic criminal process must now rely on the gathering of evidence from other jurisdictions in situations which may be ripe for political manipulation as to whether cooperation will or will not be forthcoming.

Third, criminal law can reduce obstructive 'technicalities'. First, it is hoped to favour prosecution by reducing obstacles which safeguard the defendant and thereby apparently fail to reduce the risk of non-conviction. Second, an inherent problem with criminal proof arises from the disclosure of secret sources, techniques and data which can be damaging to state interests. A major aspect of this technique has been played out around the use of reverse burdens in special precursor criminal offences. The problem is relevant to membership offences and to the offences of possession contrary to sections 57 and 58 of the Terrorism Act 2000. Once again the danger of miscarriages arise through the over-extension of the burdens on the defendant, a trend which was curtailed, but not wholly averted, by a series of court judgments in 2008 and 2009.[69]

[67] C. Walker, *Terrorism and the Law* (Oxford: Oxford University Press, 2011) chap.5.

[68] Compare Tadros, V., 'Justice and terrorism' 10 *New Criminal Law Review* 658 at p.675 (2007); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the General Assembly (A/61/267, 2006) para.11.

[69] C. Walker, *Terrorism and the Law* (Oxford: Oxford University Press, 2011) chap.5.

Fourth, the criminal law can be used to mobilise the population against terrorism – to force them to assist in counter-terrorism work. If, as Bobbitt argues, market-state terrorism takes as its principal target the citizens of its enemy,[70] then it makes sense to mobilise that citizenry to defend themselves. Thus, the market-state might demand of individuals, 'Whose side are you on?', in line with the warning to all nations of President Bush that, 'Either you are with us, or you are with the terrorists.'[71] Rather than leaving individuals to a Manichean debate, the law imposes a duty to help themselves and thereby the state. The consequent dangers of this criminal law extension include, first, the creation of social tensions, especially if one takes due cognisance of the fact that the threat of *jihadi* terrorism has shifted from the exceptional alien to one's common 'neighbour'. There is, second, a direct threat to the individual human right of informational privacy. The third problem relates to the speculative basis for intervention, so the dangers are heightened of knowing or unwitting false accusations resulting in miscarriages of justice. Notwithstanding these dangers, novel duties backed by the criminal law have been imposed in the United Kingdom.[72] The most common context is financial reporting measures which are demanded by international bodies such as the Financial Action Task Force under its Special Recommendations on Terrorist Financing.[73] Also relevant is the special offence under section 38B of the Terrorism Act 2000, which is committed if a person, without reasonable excuse, fails to disclose relevant information about terrorism even if committed by close relatives.[74]

Fifth, the criminal law can serve a denunciatory function. The traditional specialist mechanism by which a state can most vehemently denounce its political opponents is by way of offences against the state, such as treason, sedition or waging war against the state. These offences have not been popular because of their many complexities.[75] In addition, the tactic may be self-defeating[76] since offences against the state would emphasise the political nature of the terrorism and therefore claims to legitimacy of the attacks. Denunciation of the espousal of viewpoints hostile to the state has been tackled in a more direct and low key way through the criminal law by the passage of terrorism advocacy offences, in pursuance of Article 5 of the Council of Europe Convention on the Prevention of Terrorism of 2005[77] and United Nations Security Council Resolution 1624 of 14 September 2005. The United Kingdom response is contained in the Terrorism Act 2006, section 1(1), which relates to the publication of statements that are 'likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism'. The breadth of the offence again creates the possibility of miscarriages of justice which might

[70] *Terror and Consent* (London: Allen Lane, 2008) p.147.

[71] http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

[72] See C. Walker, *Terrorism and the Law* (Oxford: Oxford University Press, 2011) chaps.3, 9.

[73] http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html.

[74] See C. Walker, "Conscripting the public in terrorism policing: towards safer communities or a police state?" *Criminal Law Review* 441 [2010].

[75] See G.S. McBain, "Abolishing the crimes of treason" 81 *Australian Law Journal* 94 (2007).

[76] See: Fabian Society, *Tract No. 416, Emergency Powers: A Fresh Start* 19 (London: 1972).

[77] CETS No 196. See further Committee of Experts on Terrorism, 'Apologie du Terrorisme' and 'Incitement to Terrorism' (CODEXTER, Strasbourg, 2004); Joint Committee on Human Rights, The Council of Europe Convention on the Prevention of Terrorism (2006-07 HL 26/HC 247).

be inflicted on those who have asserted their rights to free speech in opposition to state policy, whereby espousal of a political cause such as independence for a territory can be readily associated by the state with an outlaw group, thereby making it an outlaw viewpoint.

Sixth, the criminal law can bolster symbolic solidarity with the state's own citizens and with the international community. The requirement to support other states is expressed forcefully by the seminal UN Security Council Resolution 1373 of 28 September 2001.[78]Other Security Council resolutions which demand action by way of criminal law against terrorism include resolutions 1456 of 20 January 2003, 1566 of 8 October 2004, and 1624 of 14 September 2005.[79] The extent of the expression of solidarity may be evidenced by the volume of legislative activity against terrorism in almost every country, as monitored by the UN Counter-Terrorism Committee. Many of these laws are also 'symbolic' in the sense that they have never or rarely been invoked. The dangers of miscarriages of justice can arise here through the untamed international meanings of 'terrorism', a term which is sounded as a demand for legislative action but is recognised as a potential means of repression against political opponents. These dangers were recognised (though not effectively countered) by the international community when it endorsedUN Security Council resolution 1456 of 20 January 2003, which demanded 'accordance with international law, in particular international human rights, refugee, and humanitarian law', followed by the more ambitious United Nations Global Counter-Terrorism Strategy.[80] More tangible restraint was provided in 2005, when the Commission on Human Rights, in resolution 2005/80, decided to appoint a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[81]

The priority for criminal prosecution impelled by these six adaptations, especially in the context of a 'militant democracy' which seeks to use laws aggressively against terrorism,[82] comes at a price which can be paid through miscarriages of justice. The demand for public proof beyond doubt in a climate of precautionary and secretive risk management required by high levels of security has fostered a slide towards lower standards of due process. Thus, states have made adaptations to their criminal justice processes and criminal offences which sometimes struggle to produce positive counter-terrorism outcomes while still affirming the primacy of prosecution, due process, open justice, and respect for human rights standards even in a crisis. The tensions have certainly showed in Northern Ireland, where it became necessary to abolish trial by jury in terrorism cases after 1972.[83] Equally, changes are afoot in civil proceedings under the Justice and Security Bill 2012-13 in order

[78] See P.C. Szasz, "The Security Council starts legislating" 96 *American Journal of International Law* 901 (2002); E. Rosand, "Security Council Resolution 1373, The Counter Terrorism Committee and the fight against terrorism" 97 *American Journal of International Law* 333 (2003).

[79] See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, First Report to the Human Rights Commission, Promotion and Protection of Human Rights (E/CN.4/2006/98,2005).

[80] UN General Assembly resolution 60/288 of 8 September 2006.

[81] See http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx.

[82] See K., Loewenstein, "Militant Democracy and Fundamental Rights" (Pt I) 31 *American Political Science Review* 417 (1937), Sajo, A. (ed), *Militant Democracy* (Utrecht: Eleven International Publishing, 2004); M Thiel, (ed.), *The 'Militant Democracy' Principle in Modern Democracies* (Aldershot: Ashgate, 2009).

[83] See C. Walker, *Terrorism and the Law* (Oxford: Oxford University Press, 2011) chap 11.

to convenesecretive 'Closed Material Procedures'when national security issues are being considered.[84]At the same time, it must be admitted that neither international nor national law rules out elasticity between the 'normal' and the 'special' in criminal justice, and what is 'normal' has always varied in domestic legal systems too, though subject nowadays to the parameters of human rights. As a result, the vital questions regarding the criminalisation of terrorism are not so much about 'exceptionalism' or specialism. Rather, the legal system always assess whether the adopted format addresses the problem of terrorism effectively and, second, whether it does so in a way that affirms its own legitimacy, including the delivery of high standards of justice for those involved in court.

In summary, the tendencies to over-react, over-reach and over-convict abound in prosecutions of the enemies of the state. Official reaction to terrorism often involves a conscious departure from the normal due process ideology of the criminal justice system and a tendency towards the holding of grand 'State trials'.[85] Hence, Lord Denning's comment in response to the *Guildford 4* case was that even if the wrong people were convicted, 'the whole community would be satisfied'.[86]Some evidence of the struggle which can take place (not always resulting in miscarriages of justice) may be evidenced by the statistics provided by the EUROPOL TE-SAT report for 2011 which reveal that 42% of the 235 terrorist trials in Spain (the highest number of terrorist trials in an EU member state, almost all relating to Basque separatist terrorism) resulted in acquittals. The acquittal rate across all the 12 European Union states in which terrorism-related trials took place was 31%, a far higher acquittal rate than in normal criminal trials.[87]

Preventing miscarriages of justice against enemies of the state

The remedies against the generation of miscarriages of justice, especially in the context of state trials, must be manifold and relentless. Thus, one cannot pick a handful of recommendations or expect even a comprehensive set of recommendations to serve as the final word. Such has been the experience in the United Kingdom, where the dozens of recommendations of the Royal Commission on Criminal Justice[88] in 1993 must be viewed in the light of the dozens of recommendations of the earlier Royal Commission on Criminal Procedure's *Report: The investigation and prosecution of criminal offences in England and Wales: the law and procedure*,[89] which had itself been triggered by a serious miscarriage of justice in the (non-terrorist) case of *Confait*[90]and had produced extensive legislative responses. Subject to that overall observation, it may be suggested that there are

[84] Justice and Security Bill 2012–13 HL (No27). See also, Ministry of Justice, *Government Response to the Public Consultation on Justice and Security* (Cm 8364, 2012); Joint Committee on Human Rights, *The Justice and Security Green Paper* (2010–12 HL 286 / HC 1777) and Government Reply (Cm. 8365, 2012).

[85] See JI Ross, *The Dynamics of Political Crime* (Thousand Oaks:Sage, 2003).

[86] *The Times* 17 August (1990) p.14.

[87] The UK had 12 terrorism trials, with 4 resulting in acquittals, though the Crown Prosecution Service maintains a high rate over a longer period. See Home Office, Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches: Great Britain 2010/11 (London: HOSB 15/11, 2011).

[88] (London: Cm.2263).

[89] (London: Cmnd. 8092-I and II, 1981)

[90] See: (1975) 62 Cr. App. R. 53; *Report of an Inquiry by the Hon. Sir Henry Fisher* (1977-78 H.C. 90).

two fundamental considerations which will aid most legal systems to guard against miscarriages of justice: observance of fundamental human rights even in times of crisis; and explicit mechanisms which can provide for expert, non-political review in cases of alleged miscarriages of justice.

As for the observance of fundamental human rights,especially in times of crisis, the standards are readily available in international laws such as the International Covenant on Civil and Political Rights (ICCPR). Article 14 sets the most pertinent standards, basically requiring 'a fair and public hearing by a competent, independent and impartial tribunal established by law'. It is up to the courts to act as prime guardians against the infliction of miscarriages of justice on individuals[91] and of abusive processes within their own institution. Their task is not to assert the 'bogey of human rights', as in the dismissive words of the Supreme Court in *Devender Pal Singh Bhullar v State of N.C.T. of Delhi*,[92] but to maintain the integrity of the legal and constitutional systems. The jurisprudence of the European Court very clearly establishes that the overall fairness of a criminal trial should not be compromised, even in cases of terrorism, by pre-trial[93] or trial[94] accommodations, bearing in mind also that 'the court is not a laboratory in which technicians generate truth in a test tube. It is the arena in which the power of the State and the rights and liberties of the individual defendant are in opposition. The contest could barely be seen as an equal one'.[95] However, the re-interpretation of due process rights is acceptable if reasonably directed by national authorities towards clear and proper public objective and if representing no greater qualification than the situation calls for.[96] Those states which cannot observe these standards, and especially those which resort 'in time of public emergency which threatens the life of the nation' under article 4 to measures derogating from their obligations, should probably seek alternatives to the solution of criminal trial for their enemies, though should imperatively recognise the need for a return to normal standards of justice.

Given the inevitability of miscarriages of justice being perpetrated against the enemies of the state, the second suggested pre-requisite is an effective post-conviction review. Here, consideration can be given to the Criminal Cases Review Commission ('CCRC') which, as described earlier, was set up in 1995 as a response to the crisis created by miscarriages of justice in the Irish terrorism cases.[97] The CCRC receives its cases by

[91] See Roach, K., and Trotter, G., "Miscarriages of justice in the war against terrorism" 109 *Penn State Law Review* 967 (2005); Zedner, L., "Securing Liberty in the Face of Terror" 32 *Journal of Law & Society* 507 at p.524 (2005).

[92] Supreme Court of India, 12 April 2013, para.40.

[93] See *(John) Murray* v *United Kingdom*, App no18731/91, Reports 1996-I; *Averill* v *United Kingdom*.App no 36408/97, 2000-VI; *Magee* v *United Kingdom*, App no 28135/95, 2000-VI; .

[94] See *Denmark, Norway, Sweden and the Netherlands v Greece* (1969) 12 YBEC 186; *Incal* v. *Turkey*, App no 22678/93, 1998-IV; *Öcalan* v. *Turkey*, App no46221/99, 2005-VI; *Martin* v. *United Kingdom*, App no 40426/98, 24 October 2006; *Ergin* v. *Turkey (No6)*, App no 47533/99, 2006-VI.

[95] Hall, A. 'It Couldn't Happen Today?', in McConville, M. & L. Bridges., *Criminal Justice in Crisis* 314 (Aldershot: Edward Elgar, 1994).

[96] *Brown* v. *Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, at p.115 (per Lord Bingham).

[97] See James, A., Taylor, N., and Walker, C., "The Criminal Cases Review Commission: Economy, Effectiveness and Justice" *Criminal Law Review* 140 [2000]; Nobles, R.,and Schiff, D., "The Criminal Cases Review Commission: Reporting Success" 64 *Modern Law Review* 280 (2001); C. Walker, and C. McCartney, 'Criminal Justice and Miscarriages of Justice in England and Wales' in R.C. Huff, and M. Killias, (eds.), *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008).

simple application, and it has a modest set of staff and resources to investigate further a selection of the most troubling cases. It cannot determine the outcome of the cases that it investigates, but it can refer a case back to the Court of Appeal.In order to refer a case back to the Appeal Courts, the CCRC must consider under section 13(1), that there is 'a real possibility that the conviction... would not be upheld were a reference to be made...'. This 'real possibility' can be realised through, 'an argument, or evidence, not raised in the proceedings...'. Since the Commission's inception, it has been beset by problems of funding, delays, and backlogs. Nevertheless, by 31 December 2012, the Commission had received 15,710 applications, of which 14,770 have been completed. Of these applications, 512 referrals have been made to the Court of Appeal, of which 466 have been heard, resulting in 328 quashed convictions or sentence variations.

Despite criticism that it is insufficiently bold in its relations with the Court of Appeal,[98] the CCRC is an important and innovative reform and is widely accepted, in theory and in practice, to be a great improvement in terms of independence, resources, expertise, and performance on the predecessor C3 Department of the Home Office and the equivalent unit in the Northern Ireland Office. However, increasing criticisms are levelled at the decision-making processes, the resources, and ultimately their remit. Investigations into cases are largely carried out by Case Review Managers, with the assistance of police, using powers to obtain documents from any public body (though regrettably, not private bodies). A wider performance defect of the CCRC is that it has concentrated too much on individual cases and has failed to undertake a broader analysis and audit of systemic failures and necessary reforms. This aspect of inquiry would be 'value-added' work that the CCRC is well placed to carry out or facilitate, but which is currently neglected.[99]

Concluding Comments

An inescapable conclusion based on the evidence from not just the United Kingdom, but also internationally, is that when faced with terrorist or 'extremist' enemies of the state, far too often the criminal justice system delivers an attenuated version of justice. The ultimate result is the creation of a divide between the law and an ethical criminal process, a situation bemoaned by commentators two decades previously, when the 'crisis' over multiple terrorism-related miscarriages of justice was at its height:[100]

> 'While the law has been universally acknowledged as the only suitable supreme arbitrator between different social interests, it has consistently failed to achieve minimal standards of justice in its operation…it stumbles from one Commission and set of proposals to the next, in a condition of permanent crisis, partly, at least, because it seems to have lost any acceptable ethical basis for its workings. Our thesis is that modernity led to a radical separation between law and ethics, legality and morality.'

[98] See especially M. Naughton, (ed.), *The Criminal Cases Review Commission: Hope for the Innocent?* (London: Palgrave MacMillan, 2010).

[99] L. Elks, *Righting Miscarriages of Justice?* 348 (London: JUSTICE, 2008).

[100] Douzinas, C. &C.Warrington., "The Faces of Justice: A Jurisprudence of alterity" 3 *Social and Legal Studies* 405 at p.406(1994).

The political and policy focus of many states in recent years has been on the ability of their criminal justice systems to reduce crime and, above all,to counter 'threats' to their security. However, these aims have often been at the cost of process values and the ultimate quality of justice. The emphasis on tangible 'outcomes'(arrests and convictions) has been to the detriment of principle:[101]

> 'The priority afforded to instrumental goals in Britain over recent years has been consolidated to a very remarkable degree by the tendency to approach problems of criminal justice without reference to a principled basis.'

Whilst rules may not be universally good, nor universally applied; it is the honest pursuit of a fair process that affords the criminal process legitimacy:[102]

> 'We have seen that people drawn into the criminal process do not have the right to the most accurate possible procedures for testing the charges against them. But they do have two other genuine rights: the right to procedures that put a proper valuation on moral harm in the calculations that fix the risk of injustice that they will run, and the related and practically more important right to equal treatment with respect to that valuation.'

This paper expresses the hope that values of due process will be cherished above all, alongside some recognition of system fallibility and the need for systemic review when dealing with the enemies of the state. After all, 'The kind of criminal process we have depends importantly on certain value choices that are reflected, explicitly or implicitly, in its habitual functioning.'[103] In that light, and returning to the recent judicial developments before the Indian Supreme Court, as set out at the start of this paper, it is advisable to take heed of the view of Lord Justice Rose in *R v Mattan*,[104] which was the first case ever to reach the Court of Appeal on referral from the CCRC. Mahmood Hussein Mattan was a Somali former merchant seaman who was wrongfully convicted of the murder of a woman in 1952 and then hanged. On quashing his conviction in 1998, the judge commentated that'capital punishment was not perhaps a prudent culmination for a criminal justice system which is human and therefore fallible'.

[101] Rutherford, A., *Criminal Justice Choices* 14 (London: IPPR, 2001)

[102] Dworkin, R., "Principle, Policy and Procedure", in C.Tapper (ed), *Crime. Proof and Punishment: Essays in Memory of Sir Rupert Cross* 214. (London: Butterworths, 1981). See further Huq, A.Z., Tyler, T.R. andSchulhofer, S.J., "Why does the public cooperate with law enforcement? The influence of the purposes and targets of policing" 17 *Psychology, Public Policy and Law* 419 (2011).

[103] H.L. Packer, *The Limits of the Criminal Sanction* 152-153 (Stanford: Stanford University Press, 1969). See also Damaska, M.J., *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986)

[104] (1998) *The Times* 5 March.

IMPLEMENTING IDEALS OF HUMANISM : AN ODYSSEY IN TO HISTORY OF HUMAN RIGHTS

D.P. Verma*

1. Introduction

Having emerged after the World War II, the concept of human rights is of recent origin. Even though the term "human rights" has not been defined in any declaration or convention, it is considered as such rights "which are inherent in our nature and without which we cannot live as human being." However, it is not denied that its recognition as natural rights is as old as the ancient doctrine was founded on natural law. Human rights and fundamental freedom are essential for full development of our human personality, our talents, our intelligence and our consciousness and to satisfy our spiritual and other needs. They are based on the increasing demand for a life in which the inherent dignity and worth of each human beings will receive respect and protection.[1]The idea of human rights requires a concept as to what rights one possesses as a human being. The expression is not used in the sense that those who possess human rights are human, hut in the sense that in order to have human rights they need only be human. These rights are universal m morel and important, and may also be called as "rights" in some moral order or perhaps under some natural law. Human rights are those minimal rights which every individual must have against the state or public authority by virtue of his being a member of the human family irrespective of other consideration.[2] Human rights are such claims of the individuals for those condition, which are necessary for the full realization of the inherent characteristics that have been betowed by nature upon them as human being. These are inalienable rights because they are human beings and these rights are essential to ensure their dignity as human being irrespective of one's race, religion, nationality, language, sex or any other factor. It is important to understand that all such claims cannot, however, be considered human rights. Only those entitlement which are essential for the development of human personality and recognized as such by the society, constitute rights.[33] In a continuing effort to realize the ideals of humanism , the idea of human rights in sought to be operationalized by ensuring the rule of law, political participation, equality and justice. The system of human rights is founded on the recognition of inherent dignity and worth of every human being. From this flows the respect we all owe to the dignity and worth of everyone else. It also entails a willingness to participate in the solution of common problem, to contribute to the establishment and the maintenance of the rule of law, and to share in the efforts to advance equality and justice.[4]

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[1] Oscar Schechter, "Human Dignity As A Normative Concept" *77 American Journal of International La 848-854,* at 851 (1983).

[2] Jeroma J. Shestack, "The Jurisprudence of Human Rights" 69-113 at 7 4 in : Theodor Meron (ed.) *Human Rights in international law : Legal and Policy Issues.* (Oxford : Clarendon Press, 1985).

[3] K.P. Saxena, Human Rights Today : A Historical Perspective (Institution of World Congress Human Rights, 1995) at 4 IWOCHR Occassional paper No. 1.

[4] AsbjornEide, "Histor of Human Rights : Summary of Lectures", 47-73, at 47 in : International Institute of Human Rights, *Received des course : Texteset Sommares.* (Strasbourg 1996) 27 eme Session d' enseignement.

A Common understanding of history is an important aspect of any discussion which may explain conceptually the idea of human rights. This does not necessarily means a historical research on human rights. One maybe confronted with a paradox as to whether it refers to the history of idea of human rights or it deals with concrete aspects of human rights and their abuses. Further, considering multiple layers of history as a part of its grand narratives also does not mean providing any coherent details of their various meanings. The basic issue about the idea and concept of human rights in to be clarified from a historical perspective. Though history of human rights points to historical research on human rights, but recently it has covered the entire humanity in an equitable manner. However, it is at the same time extremely difficult to find research focused particularly to the study of a specific right in a historical context.[5] Hence, there is a need to examine historical perspective in order to capture the trend and development of the structure and process of human rights. Three dimensions of its historical process deserve particular reference.

First, stages in the *Conceptualization and operationalization of human rights* found in their idealization, positivization and realization. Idealization refers to the development of ideas on natural law, natural rights and rights of man along with human freedom and good governance, as articulated by thinkers, philosophers and publicity, which influenced the thoughts of people since the ancient age to modern time. Similarly, positiviztion means transformation of ideas from soft law to hard law, to normative standards, from morality to law and also development of this idea from international law to domestic law. On the other hand, realization is the other part of the process of conceptualization and operationalization of human rights, when its is concerned with the evolution and creation of conditions are important for implementation of normative standards into actual practice by means of wide range of measures by the states.

Second, the *broadening of the content of human rights,* which had started with an initial concern with personal integrity, due process of law and fair trial, freedom of expression and religion and protection of property. Later, it moved towards recognizing wide ranging rights to association, assembly and political rights. Subsequently the contents of human rights widened to include economic, social and cultural rights particularly after the World War I, and the development of third generation of human rights giving dimension to the debate on individual versus collective rights.

Third, the *geographical expansion of the concern for human rights* leading to universalization of human rights. Having emerged in the triangle of Britain, the United States and France in the 17th and 18th centuries, it became a subject of international concern through the charter of the United Nation after he World War II and finally universally recognized by the Universal Declaration of Human Rights in 1948 and the World Conference on Human Rights held at Vienna in 1993.[6]

[5] A. De Beats, "History of Human Rights", 7012-7018 at7012 in : Neil J. Smelser and Paul B. Bates (ed.), *International Encyclopedia of the Social and Behavioural Science.* Vol. 10. (Amsterdam/ Paris/ New York/ Oxford/ Shannon /Singapore/Tokyo : Elsevier, 2001).

[6] Eide, *Supra Note* 4, at 48-49.

2. Conceptualization and Operationalization of Human Right

(A) Idealization of Human Rights

The process of conceptualization at the philosophical level started with the idea of natural law that had taken place in Athens during the time of Plats and Aristotle. There was perhaps at the time of considerable intellectual interaction between many of the societies bordering the eastern end of the Mediterranean, including North Africa, Arab World, the Indian sub-continent and possibly further afield.[7]

The concept of natural law has underpinnings in Sophocles and Aristotle, but it was articulated by the stories of the Hellenistic period. They had believed that natural law embodied those elementary principles of justice, which were "right reason," i.e. accordance with nature, unalterable and eternal.[8] Thus the Greek Stories conceived of an egalitarian law of nature in conformity with the right reason, or *Logos,* which they claimed to be inherent in the human mind. According to Sophocles, when Antigone was rebuked by crcon for having buried her brother despite her having been forbidden to do so, Antigone had replied that she had acted in accordance with the unwritten and unchanging laws of heaven.[9] Proposition about natural law were not based on general experience nor deduced from observable facts, rather they were considered as entailed by the intrinsic nature of man and that reason was the essential property of man. The standard of natural law was determined by reason because men had reason. Thus the seeds of the idea of human rights can be found in the concept of natural law developed in the ancient Greek society from the Nicomechean Ethics of Aristotle.[10]

The Greek philosophers has developed the essential features of natural law. According to Socrates, man possessed "insight", which revealed to him the distinction between good and bad things and thus he was aware of the absolute and eternal moral rules. The human insight was the basis to judge just and unjust law, and the identify "*isonomia*"[11] and "*isotonic*".[12] The stories philosophy, which had emerged a few generations after Aristotle, was most significant in the history of the development of natural law characterized by affinity between regularity of nature and general regularity.

Influenced by the Greek Stories, the Roman lawyers emphasized upon the basic equality of men found in their common possession of reason. The Justinian Institutes shows the impact of natural law, where justice was defined as the "constant perpetual desire to giving to

[7] *Id.*, at 51.

[8] Shestack, *Supra Note* 2 at 77-78.

[9] Imre Szabo, "Historical Foundation of Human Rights and Subsequent Development", 11-40 at 11 in : Karel Vasak (ed.) *The International Dimension of Human Rights.* Volume 1 (Paris : UNESCO 1982) Revised and edited for the English edition by Philip Alston.

[10] Robert C. Solomon and Mark C .Murphy, *What is Justice ?Classic and Cotemporary Readings.* Second Edition. (New York/Oxford : Oxford University Press 2000).

[11] Equality before law.

[12] Equal respect for law.

every human being what [was] due to him." A categorical distinction was made between *Jus Civile*(Roman national law) and *Jus Gentium*(law common to all nations), while *Jus Natural* (natural law) was considered as established by nature.[13] In this connection, it is important to note that Cicero, the great Roman thinker, had views very similar to Plato and Aristotle. The task of justice, according to him, was to discover the nature of things in a given situation and not based on the revelation by insights. Emphasizing that human being was the only creature in the world of nature possessing the capability of logical thinking and reasoning, Cicero stressed upon the oneness of human kind. He considered that the foundation of law was natural inclination to love fellow being. Natural law, he observed, was one immutable and eternal law applicable to all human beings at all times, because the entire universe was one commonwealth of which both God and men were members and that there was law valid for them. The other Roman Jurist, Ulpian found in justice the idea of taking care and not to cause harm or one's neighbours. This is similar to the principle of just law giving every person to which he was entitled.[14]

This heritage of Greek and Roman thought could not continue after the onslaught by German invaders which brought the collapse of the Roman empire. Early medieval era is Europe was not conducive to further development of this time of reasoning and it was taken over mysticism and theology. However, Saint Thomas Aquinas of this period, believed under the influence of Aristotle, that natural law was derived from reason. Considering that natural law was higher to positive law and that it should therefore be obeyed by all, he was of the view that any order, which contravened natural law, should not be allowed to continue in the society.[15]

The heritage of Athens and Alexandria was taken over by the Islamic philosophers during the 10th and the 11th centuries. Of particular importance were the thinkers like Al-Farabi, Avicenna and Averroes. Al-Farabi, a great philosophical authority after Aristotle, interpreted the ideas of Plato and Aristotle and carried the tradition of the Hellenistic masters of Athenian and Alexandrian philosophical schools. The other scholar, who was inspired by and further developed the thoughts of Plato and Aristotle, was Avicenna. He is said to have penetrated Islamic theology and mysticism, giving it universality and theoretical depth. Averroes was the other Islamic philosophers in Europe. He was judge by profession with expertise on Islamic law. His chief concern was the relation between the law of divinity and human reason. He was of the view that philosophers were authorized by the law of divinity to analyze and interpret according to scientific method, and that the theologians has no authority to intervene in the this activity or to judge its conclusions. Averroes had thus opened the road in philosophy to realism, and his contributions turned out to be significant for subsequent

[13] P.S. Jaswal, *Human Right and the Law 5* (New Delhi : APH Publishing Corporation, 1996); V.T. Thamilnaran, *Human Rights in Third World Perspective* 28-29. (New Delhi : APH Publishing Corpotation, 1992) at 28-29.

[14] Charles Howard Mcilwain, *The Growth of Political Thought in the West* 125-126. (New York : Macmillan Company 1963).

[15] Tony Burns, "Aquinas's Tow Doctrine of Natural Law" *48 Political Studies 929-246*, at 930-931 (2000).

[16] Eide, *Supra Note* 4, at 51-52.

intellectual development. It was unfortunate that the period of philosophy based on reason was subdued by theological mysticism in Islam at later stage.[16]

When the Renaissance and Reformation during the 16th century brought about the existence of several competing Christian churches, Catholics and Protestants, religious difference degenerated into fratricidal struggle both sides adamant to destroy the other by claiming that they possessed the absolute truth. In the light of this background the concern with natural rights started in Europe. The concept of natural right, derived from the philosophy of natural law, assumed another dimension of social contract from the 17th century onwards. When the social contract thinkers talked of the natural rights of human beings enjoyed in the state of nature, they seemed to be asserting that in any society men must be able to think and express their thoughts freely and to like their lives without arbitrary intervention with their persons. They should be treated equal as far as possible. And that the application of these rights to the particular condition of a society should be based on their free consent. Thus the social contractarianstrued to express what they considered to be the fundamental conditions of human social life and government.[17]

Hugo Grotius in Holland provided the necessary impetus to the movement of natural rights, when the propounded his thesis in 1650 that when the fundamental and basic rights of people were being persistent by trampled by the sovereign of a state, such an arbitrary ruler had no right to remain in power under the law of nation. Under that circumstances, an interference by other nations in the cases of gross violation of the law of nature and the law of nation can be justified. Hugo Grotius had immediate impact, because the traditional law had not allowed interference in relationship between another and its own subjects, which was its domestic affairs.[18]

Thomas Hobbes, a great British philosophers, distinguished between natural law and natural right. While he observed in *Leviathen*that *lexnaturalis*was a precept found out by reason, "by which a man in forbidden to do that, which he destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved ",[19] he also defined it in *De Cike*as "the dictate of right reason, conversant about those things which are neither to be done or omitted for the constant preservation of life and members, as us in us lies."[20] We are obliged by this law to avoid any thing incompatible with the preservation of our lives. This obligation is grounded in self-interest.[21] He gave close attention to natural law the state of nature, from which he deduced the non-political condition of man. He had a very pessimistic view about the behaviour of human being in that natural condition, where me had "...solitary, poor, nasty, brutish, and short" life.

[17] Margaret Macdonald, "Natural Rights," 21-40 at 21 in : Jeremy Waldron (ed.), *Theories of Rights*. (New York: Oxford University Press 1989)

[18] Hugo Grotius, *De Jure Belli Ac PacisLibriTres;* Volume Two. Book I. (New York/London : Oceana Publication Inc/Wildy& Sons Ltd. 1964), at 160. Edited by James Brown Scott under the series of the Classics of International law and translated in English by Francis W. Kelsey.

[19] Thomas Hobbes, " War, Peace and Sovereignty," 50-57 at 52 in : MichealLessnoff , (ed.) Social Contract Theory (Oxford : Basic Blackwell 1990).

[20] *Vicento Medina, Social Contract Theory: Political Obligation and Anarchy* 12 (Maryland: Rawman and Little Field Publisher Inc., 1990.

[21] Hobbes, *Supra Note* 19, at 56.

Sincenatural equality and liberty in that state of nature had made life so intolerably in secured, that there was a need to abandon law of nature. Men in the state of nature, according to Hobbes, were under constant threat of war, where every man was against every man. Establishment of a civil society with an unchangeable sovereign was the need of the time to create a stable or tolerable social structure. For Hobbes, there was no question of a people first constituting itself, then contracting with its ruler, and thus imposing limits on his power.[22]

The natural right to self- preservation was realized as a subject of chief concern; and therefore men entered into a social contract with each other because their reason prevailed upon them that they could best ensure their self-preservation by surrendering all power to a sovereign is the only means to enforce social contract and make it binding.[23] Hence all the powers of sovereign had to be combined in one institution to hold absolute power. This was the only guarantee by which human beings would be protected from each other. No person was obliged to act in accordance with natural law if he thought that it was harmful to his own security. A solution was found in the possibility of promise among individuals that the command of a sovereign would be respected.[24] The goal is to ensure protection against one another. Turning to their arms and expecting from the sovereign to police their surroundings and defend them against aggressors will be all they require of a political state.[25] Hobbes view of assertion of natural right is inherent in his argument for political obligation. According to him, it is the surrender of natural rights that results into political obligation. It is a matter of self-interest and practical efficacy rather that moral compulsion. Hobbes made a decisive break by deducing natural right to self-preservation from the old natural law tradition.[26]

The breakthrough in human rights thinking came with John Locke, Who emphasized that human beings were equal by nature and therefore nothing can compel anyone under the authority of anybody else except through his consent. He departed from the Hobbessian permission by considering that human beings in the state of nature had been free and equal, most of them observing natural law. Thus rights to life, liberty and property were protected. Natural law required them to keep their promises and also to secure welfare of others. In his theory of social contract, men have agreed unanimously to come together as a community, so that they can uphold each other's rights.[27] Natural rights, in Locke, are presented as effective rights, which others have a natural obligation to respect. These rights are more

[22] C.B. Machpherson (ed.), *Thomas Hobbes Leviathan* 186 (Middlesex/Baltimore/Victoria: Penguine Books. 1968).

[23] A.B. Waller (ed.) *Thomas Hobbes Leviathan or the Matter, Form of a Commonwealth Ecclesiastical and Civil*. 87. (Cambridge/London : Cambridge University Press 1904), at 87; D.T.C Charmichael, "The Rights of Nature in Leviathan", *18 Canadian Journal of Philosophy 257-270*, at 263-268 (1988).

[24] Eide, *Supra Note* 4, at 55.

[25] Christopher W. Morris, " AHobbessian Welfare State" 2 *Dialogue* 653-673, at 656 (1988).

[26] C.B. Macpherson , "Natural Rights in Hobbes and Locke", 1-15, at 2-5 in : D.D. Raphael (ed.), *Political Theory and the Rights of Man* (London : Macmillan & Co. Ltd., 1967).

[27] Eide, *Supra Note* 4, at 55.

meaningful and specific. He used natural rights to establish a case for limited government, and to set up a right to revolution.[28]

The first natural rights is the rights to preserve one's life, and hence to the means of subsistence derived from the strong desire everyone has "of preserving his life and being". That is the foundation of a right to the creatures. The second natural right is the right to freedom from the arbitrary will of others. It is a right not to be interfered with. From this follows the right to execute the law of nature, which includes two distinctrights :*One,* punishing the crime for restraint; and the *other,* of taking reparation. The third natural right is the right to property, which excludes others from if, to use, enjoy, consume or exchange it. The right to property, according to Locke, is a right prior to civil society and government, and not dependent on the consent of others to it. Men have desire not only to preserve their lives, and not only to maintain comfortable living, her also to accumulate property beyond the amount required for such living.[29] Locke was very preoccupied with the protection of property, which he believed as the main reason of entering into a social contract. The task of human legislation was to provide necessary precision to enforceability of natural rights which had not existed in the unorganized of nature.

What characterizes human nature in Locke's political philosophy is that the notion of social contract involves two acts of consent :*One,* the unanimous consent to abandon the state of nature and to establish a political society: and *two,* consent of people, within political society, to decide their own representatives. This concept derives its moral force from the fact that each person has an equal right to freedom. which means that no one by nature is under subordination of anyone else. Since everyone has equal rights to freedom, it is conceivable that people could voluntarily consented to by governed by the will of a single person or assembly of persons, provided their natural rights were not violated. According to Locke, even though political society was created by a social contract, no such agreement exists between the people and the government. The ultimate sovereignty resides with the people, and whenever the government betrays their trust, people have the natural rights to revolution.[30]

Jean Jacques Rousseau was another major philosopher of the social contract tradition. the opening sentence in his main work *Due Contract Social,* the opening sentence has become famous : "Man was born free, but every where he is in chains." His argument was that men need not be in chains. If state could be based on a genuine social contract, entered into by persons, who gave up their complete freedom which they enjoyed in sate of nature, they would receive in exchange a better kind of freedom, namely true republican liberty. This liberty would be sustained by obedience to law which was adopted by the people themselves.[31]

[28] Peter Laslett (ed.), *John Locke's Two Treatises of Government.* 270-271 Students (Cambridge/New York/ New Rochelle / Melbourne/Sydney : Cambridge University Press, 1988).

[30] Medina, *Supra Note* 20, at 40-41.

[31] Eide, *Supra Note* 4, at 57.

According to Rousseau, the concept of state of nature was hypothetical construction of mind and not a historical fact. The hypothesis was to present a theory of human civilization starting from its genesis to the highly complex nature of society. For that purpose, he used the concept to explicate the origin of political inequalities and logically divided the state of nature in three stages : *first,* the pure state of nature, pre-social or primitive, without any form of social intercourse; *second* , a quasi-social state, here different forms of social relations gradually evolved into family and trible relations; and *third,* a highly developed social state, having division of labour and significant inequalities ultimately leading to serious threat to social harmony. He further stated that by entering in the civil society. "individuals lost their personal freedom and mutual independence... Social individuals were now faced with the inescapable dilemma....[They] were inescapably condemned to depend on others. Consequently, people in entering civil society exchange personal freedom for social bondage.[32]

He also used the concept of social contract as a political and moral device to transform the unjust status quo of actual political life into a just political order. He tried to reconcile the claims of justice with the claims of liberty and the claims of self-interest with the claims right to form a political union in which laws enacted by all of its members would protect the interest of each without transgressing the interest of others. It was possible through education and legal constraint to encourage the individuals of the community to desire or will only that which was compatible with the general will of the community. According to him, liberty was the ability to act on the basis of self-prescribed rules that respect the rights of others. The self-prescribed rules of and individuals in a community must not conflict with the self-prescribed rules of others in this community. This will is simply and extension of individuals wills as they aspire to generality or the common good.[33] This applies in particular, his notion of the "general will", to which everybody must submit as a consequence of having entered into a social contract.

Rousseau's social contract was aimed to guarantee both the enjoyment of civil and political freedom and the right to private property. It guaranteed the right to have an equal voice in the making of laws and hence the right to vote. Thus, the right to political freedom was derived from the natural right to liberty. He presented two aspects of freedom : positive and negative. While the negative freedom consisted in being independent of the will of others, the positive freedom in acting according to self-prescribed rules. These two aspects of freedom were necessary but not sufficient to exercise one's right to political liberty within. The body politic. Two further conditions must be met if an individual was to be politically free. One of the condition is the equal treatment before the law, while the other condition is equal voice in the making of the laws. People were politically free only if they could govern themselves. According to him, sovereignty was inalienable and it remained forever with the people.[34]

[32] *Jean-Jacques Rousseau's The Social Contract and Discourses* 166-67. Revised Edition. (London/ Melbourne : B.M. Dent and Sons Ltd.1983). Translated in English by G.D.H. Cole; Medina, *Supra Note* 20, at 49.
[33] *Id.*, at 120-121.
[34] *Id.*, at 182-183

The political philosophy of Thomas Paine was also concerned with natural rights. According to him, man did not enter into a society to become worse than he was before by surrendering his natural rights but only to have them better secured. His natural right was the foundation of all his civil rights. Paine observed that the best political society is that in which the civil government in felt least. The government is required only to protect life and property and has no place in the creative activity of its citizens. From this it follows that man's natural rights, changed into civil rights by the acceptance of government, are sacred and could not be violated. But despite his strong defence of the rights of man, Paine strucked a new note in English individualism, for he was "at once the champion of *Laissex faire...* "[35] However, the conceptualization of human rights moved from natural rights to rights of man.

(B) POSITIVIZATION OF HUMAN RIGHTS

The conceptualization of human rights from the Greeko Roman days to the period of Renaissance and reformation in Europe reveals the history and development of human rights in which several centuries had passed. The idealization of the concept took its own shape in its journey from natural law to natural rights paving the way for its positivization in different parts of the world. A story of its positivization begins with the British Magna Carta in 1216, as a turning point in the history of human rights and fundamental freedoms.

(i) BRITISH MAGNA CARTA

During the Norman Conquest in 1066 A.D. and 1200 A.D., the growing power of the British monarch was restrained by feudal lord on the one hand and customary traditions under which certain rights and duties were available to both the emperor and the barons and both of them were under obligation to respect them. However king John (1199-1216) was not satisfied with those powers and claimed more right by breaking the agreement with the feudal lords. This led to revolt of the barons against the empire and king John was compelled on 13 June 1215 to yield to the demands of the barons. The Magna Carta, containing these demands, was adopted and marked and important landmark in the British history as the first step towards positivization along the constitutional path. Though it was initially made to prevent the emperor from breaching the feudal agreement, its provisions were applicable to protect the feudal, ecclesiastical and municipal right and privileges of the feudal or land lords.[36]

Despite the fact that the contents of the Magna Carta were not meant to apply to the common mass of the people, its provisions at subsequent stage proved to be a very important for the human rights of common man in England. The Magna Carta promised that justice shall not be refused or delayed. No person shall be imprisoned or exited nor shall his freedom be destroyed except by the lawful judgment of his peers or in accordance with the law of the land. A confiscation of land or rent for any debt was prohibited so long the debtor

[35] Thomas Paine, *The Right of Man* 41 and 44 (New York/London : EP Dulton and Company Inc/T.M. Dent & Sons Ltd ., 1951), A.J. Ayer, *Thomas Paine* 121 and 132 (London : Martin Secker & Warburg Ltd.,1988).
[36] G.M.D Hawat (ed.), *Dictionary of World History.* 926 (London : Thomas Nelson & Sons Ltd., 1973) William D. Halsey (ed.), *Collier's Encyclopedia withBibliography and Index.* 1990 Volume 9, New York/ London : Macmillan Educational Corporation & P.F. Collier, Inc.,1977).

had the capacity for repayment of the debt. No person was to be forced to make bridge at riverbanks, unless he was legally required to do so.[37] Thus, several provisions of the British Magna Carta in the form of a written document started the beginning of a new era from soft law to hard law in the field of human rights. "The importance of the [Magna Carta] did not lie in what forms its main value for the constitutional theorists of today. To the barons of Runnymede its merit was that it was something definite and utilitarian - a legal document with specific remedies for current evils. To English lawyers and historians of a later age it became something intangible and ideal, a symbol for the essential principles of the English Constitution, a palladium of English liberties."[38]

The next articulation of hard law on natural rights was made in the ensuing years was also made in public declarations and other legal instruments expressing commitments to a new public order. This had included the English Bill of Rights in 1688. the American Declaration of Independence in 1776, the French Declaration on the Rights and the Citizen in 1789, and the United States Bill of Rights in 1791. It was the era of the century of foundations during 1688 to 1791.[39] The natural rights theory passed into the sphere of practical realism when the sovereign had to acknowledge that there were certain rights of the individual that cannot be violated even by a sovereign in whom all power were legally vested. The later development led to enactment of the Petition of Rights as a statute by the British Parliament in 1628 and it become a part of the positive law of that country.

The making of the Petition of Rights, 1628 begins with the story of King Charles I who had broken up the parliament and had ruled England on his own. However, the parliament member, Sir Edward Coke had to take initiative to prepare a draft of the Petition of Rights. The emperor was reminded that the British Magna Carta was not respected by the sovereign for 400 years. It was clearly stated that the Magna Carta had given right to the people, and not to the king. Sir Coke's petition made clear that the sovereign was not above the law, and that the Englishmen were denied the right to trial by jury, protection from unjust punishment or excessive fines, protection from unjust seizure of property or imprisonment and the due process of law. King Charles I had to sign the Petition of Rights on 7 June 168. The Petition of Rights sought recognition of four principles : (a) no taxation without the consent of Parliament; (b) no imprisonment without cause; (c) no quartering of soldiers or subjects; and (d) no martial law in peacetime.[40] It is seen as "one of England's most famous constitutional" instrument, but its principles were completely ignored thereafter.

During the period of Henry VIII and Elizabeth I, aristocratic powers were curtailed. The led to the resentment of the commercial class which expressed that they no longer wanted

[37] *Message of Freedom from Magna Carta to the Lahore Pledge*. (Bombay/ Calcutta/ New Delhi/ Madras/ Lucknow/ New York : Asia Publishing House, 1963), at I and XI. General Education Reading Material Service No. 20 of Aligarh Muslim University.

[38] William Sharp Mckeshrie , *Magan Carta : A Commentary on the Great Charter of King John, with the Historical Introduction (Second Edition Revised and in Part Re-written,* (Glasgow : James Maclehose& Sons 1914).

[39] Eide, *Supra Note* 4, at 54.

[40] Retrieved from *www.britanmic.com/E B checked/topic/454047/Petition-0f-Right.*

to accept the absolute power of the king. This tension was further manifested in half-a-century political struggle of violent nature and finally the achievement of the Glorious Revolution in 1688 and adoption of the English Bill of Rights in 1689. The English Bill was an outcome of that revolution, and this great charter of liberty and freedom established the principle of constitutionally limited government.[41] It further consolidated the important rights and liberties of the people by recognizing the right to trial by jury. It was prescribed that law of excessive fines should be imposed. Infliction of Cruel and unusual punishment was also prohibited. The Bill provided the foundation on which the government rested after the Glorious Revolution. It did not introduce any new principle but explicitly declared the existing law. It made the sovereign conditional on the will of Parliament and provided a freedom from arbitrary government of which the Englishmen became proud in that century. It was considered as the basic instrument of the British Constitution.[42]

The political theory of John Locke not only affected England but also penetrated into the North American Colonies and passed through Thomas Jefferson into the American Declaration of Independence in 1776. The American Colonies were going towards confrontation with the British monarchy and a decision was taken in 1776 to break with England. The American Declaration of Independence, drafted by Thomas Jefferson accepted Locke's idea that "all men are created equal and they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness — that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — that whenever any Form of Government becomes destructive of these ends, it is the Rights of People to alter or to abolish it, and to institute new Government, laying its foundation on munch principles and organizing its powers in suit form, as to them shall seem most likely to effect their safety and Happiness."[43] Thus, the idea about liberty and equality was put in the classic phraseology in the Declaration of Independence.[44] The Declaration is the best known and perhaps the noblest of American state documents. It set representational government as a *since qua non* of national purpose, and the political self-government assured by the Declaration of Independence became enforceable through the Fifteenth Amendment to the U.S. Constitution.[45] In France, the movement in favour of the abolition of the monarchy was gaining ground. The interplay between philosophers, social movement and politicians was based on common aspiration from notions of natural rights and the necessity of government by consent. The French

[41] Eide, *Supra Note* 4, at 56.

[42] Retrieved from *www.britanmic.com/E B checked/topic/503538/Bill-0f-Right.*

[43] Eide, *Supra Note* 4, at 56-57, George B. de Huszar and Henry W. Little field (ed.) *Basic American Documents.* 41-44 (New Jersey : Littlefield , Adams & Co. 1956) ; Ralph Barton Perry, "The Declaration of Independence",
1-8 in ; Earl Latham (ed.), *The Declaration of Independence and the Constitution (*Revised Edition, Boston : D.C. Health & Company, 1956)

[44] *Carl J. Friedrich and Robert G. McCloskey, From the Declaration of Independence to the Constitution : The Roots of American Constitutionism.*3-8 (NewYork: The Liberal Arts Press 1854). *The American Heritage Series Number Six.*

[45] Alexander Tsesis, " Self-Government and The Declaration of Independence" *97 Cornell lawReview 693-751, at 710* (2012).

declaration of the Rights of Man and of the Citizens, drafted by Marquis de Lafayette, was inspired by the work of Jean-Jacques Rousseau and by the American experience derived from Locke as thinking. The Declaration was adopted on 27 August 1789,[46] and it made liberty, property and security as the cardinal rights of inalienable nature. The Declaration which had asserted that "Men were born and remain free and equal in respect of rights," recognized the following rights of men and citizens : (1) no person may be deprived of the sacred and inviolable right to property unless it was required for legally established public necessity, and upon condition of a just and previous indemnity; (2) free communication of ideas and opinions was one of the most important rights of man ; (3) citizens had the right to ascertain the need of public taxation, to supervise its use, and to determine its assessment, payment and duration; (4) the enjoyment of the right to liberty had for its limits only those that assured other members of society the enjoyment of that right and limits determined only be law; (5) every man was presumed innocent until declared guilty, and in case of arrest being indispensable, all necessary severity for securing the person of accused must be severely repressed by law; (6) no one might be punished except by virtue of a law establishment and promulgated prior to the offence and legally applied; (7) whatever was not forbidden by law may not be prevented and no one may be constrained to do so what was not prescribed; (8) no man might be accused, arrested or detained except in the eases of detained by law, and according to forms prescribed thereby; and (9) all citizens, being equal before law, were equally admissible to all public offices, positions, and employments according to their capacity, and without distinction than that of virtues and talents.[47]

The French Declaration of the Rights of Man and of Citizens distinguished between right of man as natural and inalienable, and rights of citizens as rights guaranteed by positive law. The distinction was based on the idea that man appeared as a being who was imagined to exist outside the society and was assumed to exist prior to society; while citizen, on the other hand, denoted the one who was the subject of the state authority. For the same reason, it was considered that human rights had existed before the state, and the rights of the citizen were subordinate to dependent upon them.[48] The Declaration did not find stable place in the French constitutional system for nearly 150 years. It was inserted as a preamble to the French Constitution in 1791, but that constitution disappeared with the new constitution in 1792, and the French Declaration could not find express place in French Constitutional law until the new constitution was adopted in 1946.[49] However, it cannot be denied that "it is under the influence of document that the conception of the public rights of the individual had developed in the positive law of the states of the European continent "as" the most precious gift that France has given to mankind."[50]

[46] Eide, *Supra Note* 4, at 59.

[47] Edward Lawson (ed.), *Encyclopedia of Human Rights;* 529-530 Second Edition, Washington, D.C. : Taylor & Francis, 1996); S.N. Eisenstaedt (ed.), *Political Sociology :* A Reader, 341-342 (NewYork/London : Basic Books Inc.1971).

[48] Szabo, *Supra Note* 9, at 43.

[49] Eide, *Supra Note* 4, at 59.

[50] George Jellinek, *The Declaration of the Rights of Man and of Citizens : A Contribution to Modern Constitutional History* 2 (New York : Henry Holt & Co., 1901). Authorized translation from the German by Max Farrand.

The United States adopted the Bill of Rights in 1791. Its Art. I, Contained the classical human rights : freedom of speech and the press, freedom of religion, freedom of assembly and the right to petition the government for redressal of grievances. Art II and III dealt with the right of the people to keep arms and the quartering of soldier in private homes. Art IV to VIII were related with the right to privacy, freedom from arrest, procedural protection in criminal trial and prohibition on taking private property for public use without just compensation. Several of these rights were already in the English Bill of Rights, but the American Bill went further.[51] The United States Bill of Right set forth that the liberties of people will be protected by barring government from acting in a particular area or from acting except under certain prescribed procedure to safeguard the right of *habeas corpus*, to forbid *export* facto laws, to guarantee trial by jury, to define treason and to limit the way it can be tried and punished. Thus, "the provisions of the Bill of Rights that safeguard fair legal procedures came about largely to protect the week and the oppressed from punishment by the strong and the powerful who wanted to stifle the voices of discontent raised in protest against oppression and injustice in public affairs.[52]

The Bill of Rights was added to the U.S. Constitution as its first ten amendments on 15 December 1791, after the French had incorporated the Declaration of Rights into their constitution.[53]

Thus, within three western countries - Bhutan, France and the United States - the germs were laid for positivization of human rights, "in the sense of its introduction into positive law, be it at the constitutional level or in ordinary statutory law. Inspiration had also been given to other countries to embark the on the same road."[54] Some basic principles of constitutionalism were accepted by those countries which consolidated some kind of democratic rules. There was basic agreement about a division of power between the legislative, the executive and the judiciary, more or less along the lines proposed by Montesquieu, and some basic guarantees for individual freedom, such as the principle of non-retroactivity in criminal matters, freedom from torture, protection of property and freedom of speech. The positivization of human rights led to the next step towards implementation and respect is practice of the normative standards. This included the establishment and proper functioning of courts, law enforcement agencies, welfare institutions

[51] Michaedl J. Locey and KncedHaakonssen (ed.), *A Culture of Rights : The Bill of Rights in Philosophy, Politics in* Law 1791-1991. 451-460 (Cambridge/New York/Port Chester/ Melbourne/ Sydney : Woodrow Wilson International Centre for Scholars/ Cambridge University Press, 1991); Bernard Schwartz, The American Heritage of the *Law in America.* 368-369 (New York : American Heritage Publishing Co. Inc. 1974); Alfred H. Kelly, Winfred A. Margison and Herman Belz, *The American Constitution : Its Origin and Development* 758-760 (Sixth Edition, New Delhi, Tata McGraw-Hill Publishing Co. Ltd., 1986); Tohn Mabry Mathews, *The American Constitutional System.* Second Edition. 498-499 (New York/London : McGraw-Hill Book Co. Inc., 1940).

[52] Hugo L. Black, "The Bill of Rights and the Federal Government", 41-63, at 41-42 and 62 in : Edmond Cahn (ed.), *The Great Rights.* (New York/London : Macmillan/Company/Collier-Macmillan Ltd., 1964).

[53] JaeckKurczewoki and Barry Sullivan, "The Bill of Rights and the Emerging Democracies" *65 Law and Contemporary Problems 251-294, at 252,* (2002).

[54] Eide, *Supra note* 4, at 60.

and others. But its also required acceptance among the public about the knowledge of their own rights and respect for the rights of the other members of society.

(ii) Widening the Content of Human Rights

The process of widening the content of human rights passed from the classical freedom of the 18h Century to the recognition of the economic, social and cultural rights of the 20th century. This process had also to encounter hard-won political rights to the 19th century. The period of classical freedom had a concern with personal integrity, due process of law and fair trial,and freedom of religion, expression and information. It had also included freedom from arbitrary arrest and execution, freedom from torture and freedom from slavery and sewitude. During the 19th Century, major struggle, however, took place to win over the right to association, assembly and political rights and this struggle continued in some countries in the 20th Century.

The process of broadening the content of human rights-further gave explicit support and wider acceptance to economic, social and cultural rights, which had begun at the end of the 19th Century, making a headway after the World War I.

Widening of the content of human rights during the 18th to 20 century was not an essay process, as it had to encounter a number of obstacles. The obstacles can be identified as political development resulting into severe set-back to human right, traditionalism and positivism as challenges to natural law, freedom-autonomy and freedom-participation debate, challenges of extreme nationalism, communism and colonialism.

(iii) Political Struggle

The *first* political development, in which human right suffered during this period, started in England which had to face extreme misery because of the policies related to industrial development severe poverty for large part of the population was caused by the formative stage of the industrial involution and land closure acts. The Great Famine in Ireland in 1846 was the other worst disaster, when one million people died and others in equal number had to leave their country. The Famine was the result of the failure of potato crop for several years where most of the land under the ownership of rich and absentee landowners. The consequences of the disaster could not be avoided in absence of adequate socio-economic policy at that time. It has been observed that "[h]ad economic and social right then formed the part of public conscience and government policy, most of ... death and deprivation could have been avoided" and human right would not have suffered.[55]

The *second* political development had taken place in the United States, when slavery was outlawed by the Thirteenth Amendment to the US Constitution in 1865 after the American Civil War. Despite the proclamation in the American Declaration of Independence that "all men were created equal", the wide-spread slavery continued to exist in the society and a Negro was not entitled to right as a U.S. Citizen. Negroes were considered as property because they were slaves and white man was guaranteed property right under the Fifth

[55] *Ibid.*

Amendment. Even any legislation or the Congress was unable to deprive a citizen of his property without due process of law, and thus human right could not be realized. But these factors led to revulsion against slavery in the form of the Civil War, and the Fourteenth Amendment in 1868 finally included the provision that "All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its Jurisdiction the equal protection of the laws."[56]

The *third* political development was turbulent in France. Napoleon had exploited patriotism of was of expansion in such a manner that traditional feudal political system in other parts of Europe were seriously challenged. But the defeat of Napoleon led to repeated upheavals in 1830, 1848 and in 1870-1871. Though the rule of law was gradually established, but a fully consolidated human right regime could not be possible until the new constitution was adopted in 1946.

The *fourth* political development took place in Czarist Russia when a revolt was severely repressed in 1905. However, it was taken over by the Bolshevik revolution, which brought a totalitarian regime in the Union of Soviet Socialist Republic, where several human rights, recognized in the natural right traditions, were severely restricted.[57] The situation continued until President Gorbachev introduced *Glasnost* and *Perestroika* and the Soviet Union disintegrated in 1991.

(iv) Intellectual Critique of Natural Rights

The theory of social contract and equality of men met with strong challenges from the idea of traditionalism and positivism. In England, this criticism against human right came from Edmund Burke, who had reacted to the notion of "the rights of man" and popular sovereignty, by arguing that democracy will be endangered if the unrestrained and unguided mass will be allowed to rule the society by sheer numbers only. It would cause thoughtless destruction. In contrast to it, the English constitution had the virtues of continuity. Thus the principle of equality as fundamental natural right was challenged in the intellectual discourse. Further analytical positivism in the 19th century, developed by Jeremy Bentham and John Austin, blurred the doctrine of natural right by elaborating a theory of law that it was a command of the sovereign accompanied by sanction. The analytical school of jurisprudence thus gave a death blow to natural law and rights.[58]

(v) Struggle of Freedom-Participation

The natural theory discourse had strengthened the cause of freedom by way of individual autonomy. It had proved beneficial for those who were rich and powerful in economic

[56] *Id.*, at 60-61.

[57] David Lane, *State and Politics in the USSR.* 289-290 (Oxford : Basil Blackwell Publishers Ltd., 1985).

[58] W. Friedmann, *Legal Theory* 314 (Fifth Edition, First Indian Reprint, Delhi : Universal Law Publishing Co. Pvt. Ltd., 1999); Julius Stone, *Legal System and Lawyer's Reasoning's 65, 80 and 86* (Stanford : stanford University Press 1964).

system. Though freedom-autonomy was also available to others who were dependent on their own labour, but it did not help them much in finding jobs. They thought of freedom by way of political participation and trade union activities and claimed extension of the right to franchise, right to be elected and to hold public office. This idea was further inspired by the French revolution, that population must participate in the political process so that inequalities of the old system should be removed. However it was resisted by the advocates of natural rights, who did not like the right to political participation for all. The first half of the 19th century proved to be turbulent throughout Europe as demands for political participation had gained momentum. it was only towards the end of the 19th century and the beginning of the 20th century that freedom-participation was extended to all adult males and even to women subsequently. [59]

(vi) Other Challenges to Human Rights

The widening of the content from freedom-autonomy to freedom-participation gave impetus to liberalism and social democracy. These two major human right-oriented political movements were challenged by aggressive forces of extreme nationalism and communism. The manifestation of extreme nationalism, inspired by the ideas of Fichte, Schelling and Hegel, contributed to the outbreak of the World War I, The condition further deteriorated in the early 1930s because of internal unrest caused by great economic depression remitting into the great problems of inflation and unemployment.[60] Extreme nationalism was practiced by Mussolini in Italy, by Adolf Hitler in Germany and under the Franco regime in Spain.[61] On the other hand, highly centralized communism, with title concern for human right dominated several countries in Europe, with the exception of Belgium, France, the Netherlands and the Nordic countries. Further, Communism was the major challenge to human rights in the 20th century. Under the colonial domination, most of the countries in the African and Asian Continents, even introduction of human right system was not allowed. However, the new nationalist movement in the form of was of national liberation used the human right language for national independence.[62] Despite the fact that individuals were not considered as subject of international law prior to the World War I, an international organization in the name of the League of Nations took several endeavors for the promotion of human rights. The initiatives ofthe great significance were taken to protect human rights of the minorities, refugees and the labour rights.[63] The *first* initiative was made for special arrangement of monitoring system for minorities treaties for those states of the Central and

[59] Manfred Nowak, "Civil and Political Rights", 69-108, at 69-98 in : Janusz Symonides (ed.), *Human Rights : Concept and Standards.* (Jaipur/New Delhi :Rawat Publications, 2002).

[60] F.D. Watters, *A History of the League of Nations.* 427-428 (London/New York/Toronto : Oxford University Press 1969).

[61] Elton Atwater, Kent Forster and Jan S. Prybyla, *World Tensions*: Conflict and Accommodation. 114-125 (New York: Meredith Publishing Co. 1967).

[62] John R. Thomas, "Wars of National Liberation : Internal and External Factors," 14-29, at 14-15 in : Andrew Gyorgy, Hubert S. Gibbs and Robert S. Jordon (ed.), *Problems in International Relations.*Third Edition (New Jersey : Prentice-Hall Inc., 1970).

[63] D.P. Verma, "International Bill of Rights : A Perspective on Progressive Development of Human Rights of Mankind" *7 Universitas 1-29, at 6* (2012-13).

Eastern Europe which were compelled to change their borders as a result of the World War I.[64] The second initiative is found in the international machinery for the protection of refugees fleeing from the Soviet Union as result of the Bolshevik Revolution. Substantial achievements were made for the protection and material assistance in the cased of refugees underthe leadership of FridtjobNansen.[65]The establishment of the International Labour Organization was the *third* initiative. A system was developed to monitor the implementation of standards for the protection of labour right and to create equal conditions of competition in the industrialized states.[66]

(vii) Recognition of Second Generation Human Rights

The economic, social and cultural rights, which are recognized as the second generation of human right, had gained strength from competing sources such as the injunctions reflected in different religious traditions to care for those who were not able to look after themselves and were in need of care and assistance. All the major religious manifested deep concern for the poor and the oppressed. Other sources included the philosophical thought of Thomas Paine, Karl Marx and John Rawls. Further, the International Labour Organization, which was established by the treaty of Versailles in 1919 to abolish the injustice, hardship and privation suffered by workers and to guarantee them a fair and human condition. During the inter-war period, international minimum standards were adopted and those standards were related to economic and social rights. These included conventions on freedom of association, right to organize trade unions, forced labour, minimum working ages, hours of work, weekly rest, protection in the event of sickness, accident, and invalidity, old-age insurance and freedom from discrimination in employment. Another factor was the Great Economic Depression of 1929-1931 which emphasized upon the need for social protection of those who were unemployed. However, it cannot be ruled out that the recognition of economic and social rights was also conceived "as the response of western countries to the ideologies of Bolshevism and Socialism arising out of the Russian Revolution."[67] The economic, social and cultural rights occupied an increasingly important place in the legal systems and political aspirations of different countries. In the beginning of the 20th century, a number of states placed greater emphasis on economic and social rights.[68] Since the

[64] Hurst Hannun, "The Rights of Persons Belonging to Minorities" 277-300, at 280-281 in Symonides *Supra note 60;* J.N. Saxena, "International Protection of Minorities and Individual Human Rights" *24 Indian Journal of International Law* 38-55 , at 41-44 (1984).

[65] Peter macalister-Smith and GudmundurAlfredsson. *AtleGrahl-madsen's The Land Beyond : Collected Essays on Refugee Law and Policy.* 126-137 (The Hague/Boston/London : MartinusNijhoff, 2001).

[66] Christine Kaufmann, *Globalization and Labour Rights : The Conflict Between Core Labour Rights and International Economics Law.* 47 (Portland : Hard Publishing, 2007).

[67] P. Alston," Implementation and Guarantees of Social Rights - International Cooperation", 169-188, at 172 in : *Recueil des Cours, Supra note* 4; AsbjornEide, "Economic and Social Rights", 109-174, at 116 in : Symonides, *Supra note* 60.

[68] For example, these right have been incorporated in the constitution of Mexico (1971), The Russian Soviet Socialist Fedrated Republic (1918), the Weimer Constitution of Germany (1919), Spain (1931), The U.S.S.R (1937) and Ireland (1937).

World War II, the constitutional recognition of both the civil and political right as well as the second generation of human right have become a wide practice.[69] Some countries find it necessary to establish priorities in the realization of economic, social and cultural rights. However, even a high level of economic development and elaborate legal system are not adequate safe-guard of human rights, which requires a just socio-economic structure.[70] A number of the second generation of human rights has been shown to be enforceable in the context of domestic law provided their component parts are formulated in a sufficiently precise and detailed manner.

(viii) Emergence of Third Generation Human Rights

Human rights has always had a close link with man's civilization wherever that concept has flourished, and even today their existence is symbolic of the standard of civilization attained. Human rights date back to the very beginning of civilization and were enshrined in the great religion of the world.[71] The Indian thought of "*AyamNijahParovettiGarhnalaghuchetsam/ UdarcharitamTuVasudhaivaKutembakam"* as appeared in *Panchatantra* meant that "narrow minded persons think in terms of mine and that of the others, but all beings on the earth, appear to the broad minded persons, as belonging to one family."[72] It appears very close and identical to the foundation of third generation of human rights. It taught the idea of the kinship of the entire world meaning thereby that all human beings were all kith and kins of one family. It was the three basis of encouraging the unity and brotherhood among nations with an emphasis on the welfare of the human kind.

The third generation of human rights is a new concept in international law of human rights. Its realization presupposes a common and solidarity efforts by all the members of the world community. It tends to synthesize new human aspirations and attempts to define desirable of the process ofthe widening of the content of human rights.[73] The subjective, objective and implementational features of third generation of human right present basic difficulties of qualifying strictly under the traditional concept of human right. The solidarity right has been supported by the developing countries which attempt to find new possibilities for realization of their vital aspirations.[74]The individuals, the local and regional collectivities and the international human society are the subjects of the rights of solidarity. Being a multilevel concept in a response to the rights of synthesis, its implementation will depend on diversified subjective formula.[75] All these rights are in the interest of the international

[69] The constitution of India, and the Constitution of the People's Republic of China and that of Sri Lanka.

[70] Vladimir Kartashkin, "Economic, Social and Cultural Rights" 111-133, at 113-114 in KarelVasak (ed.), *The International Dimensions of Human Rights* Vol. I, Connecticut/Westport/ Paris : Greenwood Press, 1982).

[71] Nagendra Singh, *Enforcement of Human Rights in Peace and War and Future of Humanity.* 1 (Culcutta/New Delhi : Eastern Law Book House, 1986).

[72] Vishnu Sharma, *Panchatantra :Aparikshit Karak.* 736 (Varanasi :Krishnadas Academy 1993), Verse 38. Translated in Hindi by Sudhak Malviya.

[73] V.T. Thamilmaran, *Human Rights in Third World Perspective.* 128-129 (New Delhi : Har-Anand Publication, 1992).

[74] KrzystofDrzewieki, "The Right of Solidarity : The Third Revolution of Human Rights" *53 Nordisk Tiddskrift for International Ref.26-46, at 41* (1984).

[75] Jerome J. Shestack, "The Jurisprudence of Human Rights" 69-105, at 99-100 in : Theodor Meron (ed.), *Human Rights in International Law : Legal and Policy Issues.* (Oxford : Clarendon Press, 1984)

community. The concept has gained momentum and has legitimate universal application for human kind. The solidarity rights tend to ensure the protection of human values of global character, which are not comprised either by the first generation of human rights (civil and political rights) or the second generation rights (economic, social and cultural rights). The scope and substance of third generation of human rights has such capacity to provide transformation of the international society that it is considered as a revolutionary step. It is complementary to the existing content of human rights. As the first and second generation of human rights had to pass through vast attempts to establish them and to ensure their meaningful realization, same historical process is expected from the third generation of human rights.

3. Universalization of Human Rights

The universalization of human rights is the third dimension of historical process of the development of human rights. This process led to the geographical expansion of the concept. Earlier the concept of natural rights was confined only to the geographical territory of Britain, France and the United States. Moving beyond those boundaries of a few nation states, it become a universal concern only of the World War II through the United Nation Charter. However, the universalization of human rights was not an easy process, rather it had to filter though a number of difficulties and the phase of internationalization of human right.

The recognition of human rights as a concern of inter-governmental relation could not be possible till the World War II, so long individuals was not considered a primary subject of international law. Since the treaty of Westphalia is 1648, only states were the subject of traditional in international law and individual had merely the status of an object of international law.[76] Nevertheless, the League of Nation took significant initiatives during the period of traditional international law in protecting the rights of minorities, refugees and the workers. The inadequacies of traditional international law in protecting individuals from the atrocities of its own government as well the incidents of barbarous acts of crimes against humanity, genocide in the gas chambers, horrors and shock of concentration camp and the use of atomic weapon on Nagashaki and Hiroshima led the international community to develop principle and procedures for protecting the rights of individuals as matter of inter-government concern. It was realized that the effective protection of human right was essential for the

[76] Malcolm N. Shaw, *International Law.* 257-258. Sixth Edition, New Delhi.: Cambridge University Press 2008; Gerhard Von Glaha, *Law Among Nations ; An Introduction to Public International Law.* 5 (New York/London : Macmillan Co./Collier-Macmillan Ltd. 1965); Sir Humphrey Waldock (ed.) *J. L. Brierly's The Law of Nations : An Introductions to the Law of nations.* 41-45 (Oxford : Clarendon Press, 1963); Philip C. jessup, *A Modern law of Nations : An Introduction.* 15-18 (New York : Macmillan Company, 1958); Marck S. Korowicz, "The Problem of International Personality of Individuals" *50 American Journal of International Law* 533-562, at 533-551; (1956) H Lauterpacht, "The Subjects of the Law of nations" *64 Law Quarterly Review 97-119,* at 97-103, (1948) George Manner, "The Object Theory of the Individual in International Law" *46 American Journal of International Law 428-449;* (1952) Clyde Eagliton, "The Individual and International Law" *Proceedings of American Society of International Law 22-26;* (1946) Frederich S. Dunn, " The International Rights of Individuals" *Proceedings of American Society of International law 14-18* (1941).

maintenance of international peace and security. A need was felt to establish an internation order with the idea of internationalization of human rights. With the adoption of the Unite Nation Charter, the international community made a fundamental break with tradition international law by recognizing individual as subject of modern international law. The concep of human right finding a place in a international instrument after the World War II was a unprecedented move it was a complete innovation in international law.[77]

In the words of the US President Truman, the UN Charter "is dedicated to the achievemen and observance of human rights and fundamental freedom".[78] It is also evident from th second preambuler paragraph of the Charter that the United Nation was created, ".... t reaffirm faith in human rights and fundamental freedom, in the worth of human dignity, an also in the equal rights of men and women". A reaffirmation is the starting point of th United Nation Charter to move beyond the territorial limit its realization to a few countrie to the broader plane of international concern at the global level. Art.1 (3) of the Charte provides one of the purpose of the United Nation that international cooperation will b sought in promotion and respect for human rights and fundamental freedoms. Thu international cooperation, not being confined only to a few countries is to be used fo finding solution to common problem and of achieving maximum support from the membe states.[79] Further, it is also a matter of international concern, which finds manifestation inArt.56 of the Charter that all the UN member states have to cooperate by their separate and joint obligations for promotion and respect for human rights. Thus the members state have pledged to undertake separate individual action at the national level and also th action jointly with other states at the regional or international level ultimately serving the cause of the internationalization of human rights.

The UN Charter had not spell out as to what these human rights were. Having given the mandate the Un Commission on Human Rights started its work in 1947 and the draft prepared by it was finally adopted as the Universal Declaration of Human Rights by the UN General Assembly in 1948. The use of the word "Universal" in this instrument of human right was an evidence to the fact the international community had moved from the stage of internationalization to the process of universalization.The Declaration noted in its preamble that it is the common standard of achievement for all people and all nations, to the end that every individual and every organ of the society, keeping the Universal Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedom and by progressive measures, national and international, to secure the universal and effective recognition and observance, both among the people of member states themselves and among the people of territories under their jurisdiction. Having

[77] Verma, *Supra note* 64, at 6-7.

[78] A.H. Robertson and J.G. Merrills, *Human Rights in the World : An introduction to the Study of the International Protection of Human Righs.* 26-27 Fourth Edition, First Indian Reprint, Delhi : Universal law Publishing Co. Pvt. Ltd., 2005.

[79] Leland M. Goodrich, Edvard Hambro and Ann Patricia Simons, *Charter of the United Nations : Commentary and Documents.* 21 Third and Revised Edition, New York/London : Columbia University Press, 1969; S.L. Bhalla, *Human Rights ; An Institutional Frame Work for Implemantation.* 6-7 (Delhi :Docto Shelf 1991).

formulated a normative structure of declaratory human rights, the process of the universalization of human rights, that had started with the universal Declaration of Human Rights in 1948, got a final seal of approval in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 that "*All human rights are universal,* indivisible and interrelated. *The international community must treat human rights globally* in a fair and equal manner, on the same fooling, and with the same emphasis.[80](Emphasis added). The commitment to universal human rights was expressed by 180 governments in that World Conference.

Conclusion

An odyssey into the history of human rights gives strength to the justification of moral force of human rights and to understand the structure of human thought in a manner which reveals the implication of understanding about rights in a particular way. It is not a mere history of milestones and contribution to the historical process rather to "clarify the essence of the platform on human rights as its has evolved over time and direction in which it is evolving" in implementation of the ideals of humanism. The history of human rights with historical movements and antecedents of philosophical thought extract multi-dimensional and multi directional development of human rights at horizontal and vertical levels, which gave rise to consolidation of hard law and protection of the rights of man and of groups.

Human rights law has dynamic and continuing process. If its evolution is traced back to the idealization of conceptual and philosophical norms in the thoughts of great thinkers and publicists, the process of development and adjustment of human rights law has also reflected charging social relations and political realism. Horizontal broadening of its catalogues through the historical process has proved that new human rights need acceptability and recognition in the society, while vertical development has linked conceptualization of human rights norms through its idealization and positivization to their enforcement and monitoring. The society cannot ignore new challenges to which human right law has to respond, but it cannot be ruled out at the same time that further consolidation of human rights standard must be given precedence before concentrating upon the effective realization of existing rights. The struggle for human rights is a continuing effort to realize the ideals of humanism to be operationalized by ensuring to everyone the rule of law, political participation, equality and justice. The history of human rights gives meaning to the proposition that the historical process has witnessed multi dimensional development of human rights from its conceptualization, broadening of its contents to its geographical expansion resulting into humanization of international law[81] and universalization of human rights.

[80] *United Nations Action in the Field of Human Rights.* 385, para.5 (New York/Geneva : United Nations 1994).

[81] Thomas Buergenthal, "International Human Rights in An Historical Perspective", 3-30, at 24 in : Symonides, *Supra Note* 60.

RESERVATIONS: A JOURNEY FROM BALAJI TO UP POWER CORPORATION

Prof. Iqbal Ali Khan*

INTRODUCTION

History is the witness that in every country there exist a community which has been downtrodden, marginalized and poor for long. They have been tortured for ages. So the main concern of any political society should be to eradicate the evil of inequality from which some sections suffer. This inequality is to be understood as a historical continuum of an erstwhile ethos of a society. It might have created a social inequality or economic inequality or both and consequently causing political inequality too in the world of realpolitik. Hence constitutional guarantees to social and economic equality along with political equality have become the raison d'etre of the very system of government. This has been duly acknowledged in the Indian Constitution as special provisions. Ambedkar himself argued in the Constituent Assembly that these special provisions should not be allowed to 'eat up' the general provisions of equality of opportunity for all individuals alike. These special provisions continue to be in force, and it cannot be argued that, because they take collective identities into account and perhaps even strengthen them, they are by definition hostile to the spirit of equality.[1]

This article has been divided into four parts. Part-I deals with the concept of reservation and Part-II deals with history, Part-III deals with various commissions report, and Part-IV deals with the judicial decisions.

CONCEPT OF RESERVATION

The concept underlying the cases relating to reservation can be easily understood if one can discern the conflicting facets of the concept of equality. Whenever the legality and legitimacy of reservation are discussed the concept of equality enshrined in Article 14 of the Indian Constitution becomes the core theme. The policy of reservation is based on the argument that it would be injustice to treat socially and economically backward people at par with the 'upper classes'. The very concept of equality needs to be examined for in Politics as well as in Law. The concept has a Western import and obviously the semantic content that West attributes to it may be alien to the Asian mind.

Reservation policy has its avowed objective the amelioration of BCs who were victims of the prevalent caste system, a feature unique to the Indian social milieu. Therefore, a composite definition of this policy has not been provided.

It is generally understood that the issue of discrimination generally, involve three aspects *positive discrimination, reverse discrimination and compensatory discrimination.*

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1 Beteille Andre, Society and Politics in India 230 (1991).

Positive discrimination involves providing special treatment to those who are susceptible to exploitation. Reverse discrimination is a sort of vindictive measure, which in other words means discrimination against those who had discriminated a particular class for centuries. Compensatory discrimination involved adoption of measures to safeguard the interest of historically disadvantaged section of people.[2]

Equality has its ramifications reflected mainly as natural equality, social equality, political equality, economic equality, legal equality, and ultimately international equality. The list is not exhaustive; yet it is interesting to note that in the social life of humans, a member of the society always faces problems connected with one kind of equality or other. This multi-dimensional aspect of equality generates complex issues. Parliamentary democracies, which demand support of the majority in the legislature for the political executive, makes the problems all the more complicated.[3] Yet within a political society based on a legal framework of constitutionalism these problems should be solved in amicable atmosphere observing the legal principles laid down in the basic law of the land.

F.A. Hayek, another renowned thinker says, that it is just not true that all men are born equal. We may continue to use this hallowed phrase to express the ideal that legally and morally all men ought to be treated alike. But if we want to understand what this ideal of equality can or should mean, the first requirement is that we free ourselves from the belief in factual equality.[4]

He opines that there is a conflict between the concept of equality and the reality of inequality. At the same time he believes that 'equality before law', which is a prerequisite of a free society, would automatically entail equality in material welfare.

Equality becomes an essential ingredient for a better life and better life for their members is the aim of all political societies. A deeper analysis would bring forth the truth that the positive aspect of equality is achieved only when there is "an appropriate opportunity for each; what is to be equalized is not the opportunity to enter a profession or to be successful in business but the opportunity to lead a good life, or to fulfill one's personality."[5] Therefore the sense of justice demands that when the policy of reservation is formulated and executed it must have the nexus with the objectives sought, namely 'to lead a good life' and 'develop one's personality'. Whether this ultimate goal is achieved by the political system, is a pertinent question to be asked both by the decision makers and by the justice deliverers.

Modem democracy postulates 'equality' as the cardinal principle of governance, because of the very fact that democracy presupposes the participation of citizens in the decision making process, and the very decisions the citizens are making or authorize others to make on their behalf affects their future and thereby affects the future of the political society of

2 V. Santosh Kumar, *Social Justice and Politics of Reservation in India: The Post-Mandal Phase* 61-62 (Mittal Publication, New Delhi, 2008).

3 The political parties in their electoral fights encourage socio-economic inequalities and thus cause the inequalities to persist.

4 F.A., Hayek *The Constitution of Liberty* 87 (London, 1960).

5 S. Ben and R.S., Peters *Social Principles and Democratic State* 119 (London, 1975).

which they are members. For the better functioning of democratic system political equality becomes the most indispensable ingredient. All democratic states, therefore, ensure equality of citizens by way of giving each one of them one vote. But this 'equality' is inadequate because of the very fact that other inequalities, especially economic and social inequalities, overwhelm the political equality. Thus 'inequalities' in other spheres of life become significant for this will breed inequities, which will, from within, disrupt the very democratic fabric.

Inequality is inherent in humans. The Marxian philosophy would proclaim that the inequalities were caused by the fact of who owns the means of production. And hence the class difference and consequently class-conflict between the 'haves' and 'have-nots' is inevitable. The panacea for resolving this lies in the establishment of socialism. Thus the socialist's thinkers make the concept of equality an avowed norm for achieving the utopia of class society. Obviously the emphasis of the socialist thinkers is on the economic equality. Criticizing the Marxian approach Bertrand Russell says, "The greatest political evil is not inequality of wealth as the Bolshevik theorists insist, but inequality of power."[6]

A positive egalitarianism, demanding similar treatment of all, irrespective of any difference, would clearly lead to absurdities. To sweep away all distinctions would be to commit injustices as inexcusable as any under attack. Moral progress is made as much by making new and justifiable distinctions as by eliminating established but irrelevant 'inequalities'.[7]

Yet another concept closely connected with equality is 'social justice'. Justice is a word with a host of semantic ramifications. It was the fulcrum around which the dialogue on Plato's Republic revolves. And 'ideal state' became the only answer to realize the ideal of justice. Even today the concept is too elusive to be comprehended and too evasive to be implemented. Yet one can safely proceed on the assumption 'that justice is a positive ethical social value.'[8] Stone has described this ethical value content in the following words: "Men can (and often do) judge things to be just or unjust without formulating any norms attendant on the vague notions which base their judgments; but to explain such judgments, they will always be found to resort to propositions which are tacitly, if not-expressly, normative.'[9] But in realpolitik it has become a slogan to be used and a myth to be perpetuated. Covenants and Constitutions, therefore, invariably incorporate this ideal.

The Preamble of the Indian Constitution too declares Justice, social, political and economic as the noble objective. But unfortunately the Constitutional practice for over half a century presents a sad story of deviation, distortion and disfunction. Equality of treatment is one of the cardinal principles of a democracy. But in a society that has been practicing inequality as a way of life a sudden shift in the power structure that equality would bring about is something intolerable. But social justice demands this power shift.

Secondly in an unequal society, social justice demands unequal to be treated unequally. In other words those who were at the lower rungs of the social ladder must be given the

6 Russell Bertrand, *Roads to Freedom*.111 (London, 1919).
7 Ben S., Peters R.S. 133 op.cit..
8 Julius, Stone, *Human Law and Human Justice* 31 (Bombay, 1965).
9 *Ibid.*

benefits of 'protective discrimination' for the obvious reason that they cannot compete with those who have already been at the upper strata. But here too social tension is created owing to the process of 'power shift' from the classes of citizens who were enjoying it to some other classes who were deprived of it. This again is to be resolved if social justice is to become reality. The period of transformation inevitably brings in points of conflict. And herein comes the Judiciary that tries to restore justice by umpiring. Hence people often approach the Court in the hope of getting justice. There are many laws including directives in the Constitution for ensuring social justice to the people especially to the underprivileged. Yet even today social justice in its philosophic content has come to become distorted at the pragmatic plane. But this is not something confined to Indian condition. As V.R. Krishna Iyer comments:

> *"The Statute book of India contains much legislations designed to lift the Dalits, to abolish their disabilities and to give them special opportunities for advancement in education and in employment. Bonded labour is by law abolished. Untouchability, by Constitution, is forbidden."*

The Civil Rights Act goes a long way to eliminate injustice inflicted on the Dalits. Especially stem punishments are prescribed for commission of offences against Scheduled castes and Tribes, but these magic remedies sleep as paper tigers. The social evils continue. The economic wrongs go on. The law is dead, vis-à-vis these unfortunates. There are plans and sub- plans, schemes and projects worked out by the administration at the Central and State levels. There are special reservations for employment and education and these facilities look like reverse discrimination. But what are the raw realities? Tolstoy's biting words set the tone for a social audit of the performance. The abolition of slavery has gone on for a long time. Rome abolished slavery. America abolished it, and we did, but only the words were abolished, not the thing.[10]

In the Indian political scenario, social justice became an adjunct to the political discourse when Western political philosophies of 'liberalism' and 'socialism' made inroads into the minds of the educated elite. The elite among the depressed and backward classes came to consider 'social justice' an indispensable agenda and as much important as freeing the country from the colonial shackles. This ideal was symbolized, in Ambedkar and his efforts to give social justice its due place in the basic law resulted in the incorporation of provisions for reservation.

The term '*affirmative action*' has been used since the early 60s -when President Kennedy employed it in Executive Order No. 10925 to describe public policies intended "to overcome the present effects of past racial discrimination." Also known as 'preferential treatment' or 'reverse discrimination', affirmative action is based on arrangements, whereby the law sanctions special measures or differences in treatment that, when certain conditions exist, depart from the principle of formal equality. Usually, such special measures aim at protecting,

10 V.R. Krishna Iyer, *Social Justice and Undone Vast* 71 (New Delhi, 1991).

or promoting the welfare of the members of a group previously discriminated against, provided that the group desires such measures.[11]

Historical Development

The Reservation policy in India was introduced during the decades of the British Rule but such a policy was designed more to redress communal inequalities in the representation in public services rather than a social engineering device to redress the rooted socio-economic inequalities of the disadvantaged section of the society because of past societal discrimination.[12] The British India Government has introduced special provisions and concession for the educational advancement of backward classes people, which was later converted into Caste Reservation for Jobs.[13] The entry of a Scheduled Caste into an educational institution in the country was recorded in year 1856.[14] It was in June, 1856 that a Scheduled Caste boy applied for admission into a government school in Dharwal, Bombay Presidency. The incident had created furore in the administration which ultimately attracted the attention of the rulers. The Board of Directors were then forced to formulate on educational policy where it was stated that as long as the schools are maintained by government the classes of its subjects are to be given admission without and distinction of caste, religion and race.

This policy was further strengthened with the enactment of the Caste Disability Act, 1872.[15] This Act was a severe blow to the social and legal inequalities suffered by weaker sections. The demand for entry into educational institutions and for equality of opportunity was first started in the south. Two southern States including parts of Maharshtra have witnessed movements of the weaker sections for equality due to the pioneering work, done by Brahma Naidu, Narayana Guru, Jyothirao Phule among others under these conditions, the first government circular reserving certain posts in favour of backward caste was made in June 19-21, 1895 by the Mysore Government.[16]

In 1856, the Government of Bombay had to consider the case of a Mahar boy, who was refused admission to the Government School at Dharwar. It was announced in a press note, "Although the Governor-in-Council does not contemplate the introduction of low caste pupils in schools, the expenses of which are shared with Government by local contributors and patrons who object to such a measure, he reserved to himself, the full right of refusing the support of government to any particularly aided school in which the benefits of education are withheld from any class of persons on account of caste or race and further pointed that

11 E, Mata *Group Rights and Discrimination in International Law* 163 (Martinus Nijhoff, Dordrecht, 1991).
12 Parmanand, Singh *Equality, Reservation and Discrimination in India,* 80 (Deep and Deep, New Delhi, 1985).
13 Gopal Singh and Harilal Sharma *Reservation Politics in India, Mandalisation of the society* 14 (Deep & Deep, New Delhi, 1995).
14 K.S., Chelani *"Caste Reservation and equality of opportunities in Education"* 25 *EPN.* (Oct. 2013).
15 *Ibid.*
16 *Karnataka Backward Commission Report.* 100 (Government of Karnataka, 1975)

all schools maintained at the sole cost of government shall be open to all classes of its subjects without distinction".[17]

Political representation as a means to emancipate the backward sections of Indian society from the age old bondage was not given recognition during the nineteenth century. Thus the Government of India Act, 1858 and the Indian Council Acts, 1861 and 1892 did not recognize the special claims of the depressed classes.[18] The dawn of twentieth century also did not herald their recognition as a political entry. In the Government of India Act, 1909 certain privileges were provided to Muslims, but there were no representation for the depressed classes. For the first time the census report of 1910 divided the Hindu into three categories:

(a) Hindus
(b) Animists and Tribals
(c) The depressed classes or untouchables.

As a result the census report of 1910, giving separate importance to untouchables acquired a new political dimension.

On the basis of representations received from the depressed communities, in 1918, the Maharaja of Mysore appointed in the same year the Miller Committee to recommend steps for adequate representation for non-Brahmins in the services of the state.[19] The Government of Mysore, on the basis of the above committee report, extends special benefits to these classes, in education and recruitment in the state services. In Madras Presidency out of every twelve posts five had to go to non-Brahmins two to Brahmins, two to Muslims, two to Anglo-Indians or Indian Christians and one to depressed classes.

The Government of India Act, 1919 recognized for the first time in Indian History the existence of depressed classes and recognized their claim for political representation. The Government of India Act, 1919 provided for communal representations for Muslims, Sikhs, Ango-Indians, Indian Christians, depressed classes. Aborigines etc.[20] Among .the 14 non-official members nominated by the Governor-General to the central Legislative Assembly, one was the representative of the depressed classes. In the Provincial Legislature the depressed classes were represented by four nominations in the Central Provinces, two in Bombay, two in Bihar and one each in Bengal and the United Provinces. In Madras ten members were nominated to represent nine specified depressed classes.[21]

Dr. Ambedkar started for the social emancipation and political mobilization of the people of the oppressed state. He was effective in highlighting the inhuman treatment to which they were subjected by Hindu Philosophy. He divided Hindu civilization into touchable Hindus and untouchable Hindus and pleaded for their representation in the legislative councils on social point of view. His arguments before the Southern-Borough Committee was: A

17 *The Bombay Chronicle*, 31 (March 1924).
18 D.N. Sandandhiv, *Reservation of Social Justice* 24(Current Law, Bombay, 1986).
19 K.S. Padhy and Jayashree Mahapatra, *Reservation Policy in India* 17 (Ashish, New Delhi 1988).
20 Parmanand Singh 82 op.cit.
21 J.R. Kamble, *Rise and Awakening of Depressed Classes in India* 69 (National, New Delhi, 1979).

community may claim representation only on the ground of separate interests which require protection. In India such interest are of three kinds only either they arise out of religious antipathies which are pretty strong in India, or out of the backward state of a community in educational matters, or out of the socio-religions disabilities to which a community may be a subject. Confining ourselves to the Hindu communities there are communities who, besides being very backward, are suffering under a great social tyranny. The untouchable classes must have their own men in the council's hall to fight for the redress of their grievances. The non-Brahmins as a class are subjected to the social and intellectual domination of the Brahmins Priesthood and may, therefore, rightly advocate separate representation.[22]

On the basis of this, he applied two principles such as the standing of a community and principle of minority to determine their quota of representation. The Montague-Chelmsford reforms thus recognizing the differences and divisions within the existing social system preferred nominations for depressed classes to the legislative council.[23]

In 1923, the government issued a resolution that no grants would be paid to any aided educational institution which refused admission to the children of depressed classes. A resolution of the Govt. of Bombay Finance Department, dated 17 September 1923, expressly prohibited recruitment to the lower services from the advanced class of Brahmins and others till a certain proportion of the posts were held by members of the intermediate and Backward Classes. In 1925, a bill was introduced in the Madras legislative council to put under statute the principle of a resolution passed in the previous session of the council throwing open all public roads, streets or path ways giving access to any public office, well, tank or place of public resort, to all classes of people including the depressed.[24]

The grounds on which the reservation of posts were supported, first, that the Brahmins and other castes which had a very strong majority in the personnel of the services, could and did harass the populace simply because they were non-Brahmins. Second, that in the selection for fresh vacancies the dominant castes make it impossible for the non-Brahmins to get the posts.[25]

It was in 1928, that the Government of Bombay setup a Committee under the Chairmanship of O.A.B. Starte to identify Backward classes and recommend special provisions for their advancement. In its report submitted in 1930 this committee classified backward classes into three categories, i.e., "Depressed classes, Aboriginals and Hill Tribes and other Backward Classes".[26]

The constitutional advancement involved the extension of the principle of responsible self-government in the provinces. B.R. Ambedkar submitted a classic memorandum to the Simon Commission for the safeguards and protection of the Scheduled Caste. He did this on behalf of the Bahsikrit Hitkarini Sabha. The memorandum complained that those in

[22] K.S. Padhy and *Mahapatra Jayashree* 18 op. cit.
[23] *Ibid.*
[24] Ghurye, *Caste and Race in India* 292 (Popular Prakashan, Bombay, 1979).
[25] K.S. Padhy and Jayashree Mahapatra 19 op.cit.
[26] Dhananjay Keer, *Dr. Ambedkar: Life and Mission* 115 (Popular, Bombay, 1962).

charge of nation's affairs always forgot the dumb millions and added that under the Act of 1919 grave injustice was done to the depressed classes who constitute one fifth of the population of British India. It demanded 22 out of 140 seats in Bombay legislative council, vehemently opposed the principle of nomination and insisted upon the extension of the principle of election to the depressed classes. It said that they needed political education and ministership which was very important privilege, they must find a place in the cabinet.[27]

The Round Table Conference held in 1930, marked "the beginning of the claims of the untouchables in the arena of the devolution of the political power from the British rulers to the Indian natives."[28] In this conference Ambedkar shifted his position arguing for separate electorates for the depressed classes during a ten-year period, because restricted franchise would weaken the position of the depressed classes politically.

In this Second Round Table Conference in 1931, which was indeed very historic. The congress agreed to participate in the conference and secondly there began a historic and long drawn controversy between Mahatma Gandhi and Dr. B.R. Ambedkar over the position of the depressed classes in India. Mahatma Gandhi wanted to change the society with the willing consent of the orthodox, whereas Ambedkar was not ready for any pretence. He was forthright in first demanding adequate share for the most dehumanized people, the untouchable, followed by fight for the backwards and other weaker sections of society. These priorities included breaking the social bondage of the untouchables from the Brahminical order followed by political independence. Mahatma Gandhi refused to consider both the separate electorates for the depressed classes as well as any form of special representation involving reserved seats. He said in the committee, "I do not mind the untouchables being converted to Islam or Christianity. I should tolerate that, but I cannot possibly tolerate what is in store for Hinduism if there are these two divisions set up in every village. Those who speak of political right of untouchables do not know India and do not know how Indian society is today constructed. Therefore, I want to say with all the emphasis that I cannot command that if I was the only person to resist this thing I will resist it till my life.[29] Thus, Gandhi placed all the blame on the Divide and rule policy of the British Government asserting that the fate of these classes could be bettered by means of drastic legislation.

While Gandhi was not prepared for special safeguards in the nature of either separate electorate or even the reserved seats to the depressed classes, Ambedkar wanted future Constitution to give same means such as equal citizenship, fundamental rights for equality before Law and possession of equal civil rights and abolition of disabilities arising out of untouchability, free enjoyment of equal right, protection against discrimination, special departmental care and also representation of the depressed classes in the cabinet.[30]

[27] Sandanshiv 7 op.cit.
[28] *Ibid.*
[29] K.S. Padhy and Jayashree Mahapatra 19-20 op.cit.
[30] Gwyer and Appadorai, *Speeches and Documents on Indian Constitution.*

After the Third Round Table Conference in 1932, the communal Award was announced under which the Mohammedan, Sikh and depressed classes would elect candidate by voting in separate communal electorates. The most important part of the Award, namely that relating to the depressed classes ran as follow:

"Members of the depressed classes qualified to vote will vote in a general constituency. In view of the fact that for a considerable period these classes would be unlikely, by the means alone to secure adequate representation in the legislatures, a number of special seats will be assigned to them. These seats will be filled by election from special constituencies in which only members of the depressed classes, electorally qualified, will be entitled to vote, any person voting in such a special constituency will, as stated above, be also entitled to vote in a general constituency. It is intended that those constituencies should be formed in selected areas where the depressed classes are most numerous, and that, except in Madras, they should not cover the whole area of the province.[31]

Against this communal Award Mahatma Gandhi undertook, fast unto Death. Ambedkar Compromised for the sake of Gandhiji's life. As a result Poona Pact was born. To act as a compromise between the depressed classes and the Hindu community. It declared that the scheme of reservation of seats for the depressed classes out of general electorates in the provincial as well as in central legislature through election by joint electorates. It also declared about the representation to these classes in public services. The number of seats reserved for the depressed classes was increased to equal their proportion of population, with representatives being chosen in general, from both the community.

The Government of India Act, 1935 took, care of the development arising from Round Table Conference as well as the Poona Pact. The new chapter in our Social and constitutional history said good-bye to Manu and adopted the code of Modern Manu Ambedkar. The excluded got included. The expression Scheduled Caste which was first coined by Simon Commission was introduced in the Government of India Act, 1935. Under it the 'Scheduled Caste' replaced 'depressed classes' and separate list of scheduled Caste were notified for various provinces in 1936.

The First Schedule Part I Section 26 of Government of India Act, 1935 defined that the "Scheduled Castes means such castes, races or tribes or parts of groups within castes, races or tribes being castes, races, tribes, parts or groups which appear to His Majesty-in-Council to correspond to the classes of persons formerly known as the "Depressed class" as His Majesty-in-Council may specify".[32] Under the Government of India Act, 1935 the proportion of seats was as follows: council of state, British India; Total membership-156 and Scheduled Castes-7; Central Assembly: Total membership-250 and Scheduled Castes-19.[33]

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31 K.S. Padhy and Jayashree Mahapatra 20 op.cit.

32 R.G. Mishra and Gurvinder Kaur, *Reservation Policy and Personnel Selection* 19-20 (Uppal, New Delhi, 1990).

33 *Scheduled Castes and Scheduled Tribes Commission Report* 23 (1951).

In 1942 the Government of India decided to fix a certain percentage of Jobs for the depressed classes in order to give them necessary stimulus to equip themselves with better qualification in order to become eligible for post and services.[34] Several steps like age concessions, reduction in examination fees etc. were taken. In 1943, 8.5 percent of job-reservation was provided for the Depressed classed and it was proposed to consider the question of raising this percentage as soon as sufficient number of qualified candidates were found available. However, the percentage of the Scheduled Castes population according to 1931 census was 12.75 percent. This reservation was applicable only in case of recruitment and not in case of promotion. In 1946, however, the percentage of reservation was raised from 8.5 to 12.5 percent corresponding to their population.[35]

The Constituent Assembly had its first and second, meetings on 9th and 13th of December 1946, for making a resolution to provide constitutional reservations.

Dr. Ambedkar expressed the hope that given "time and circumstances, nothing in the world will prevent the country from becoming one."[36]

After setting up of Advisory Committee, in the Constituent Assembly on January 29, 1947, Govind Ballav Pant laid emphasis that "We find that in our country we have to take particular care of the depressed classes, the Scheduled Castes and the backward classes. We must do all that we can do to bring them upto the general level and it is a real necessity as much in our interest as in theirs that the gap should be bridged. The strength of the chain is measured by the weakest link of it and so until every link is fully revitalized, we will not have a healthy body politic."[37]

The Draft Constitution was prepared by the constitutional advisor in October 1947. It prohibited discrimination on the grounds of religion, race, caste or sex and assumed access to shops and places of public resorts and reservation of posts in favor of any class of citizens who, in the opinion of the state, were not adequately represented in the services under the state. The Draft Constitution as settled by the Drafting Committee headed by Ambedkar was submitted to the President of the Constituent Assembly on February 21, 1948. it was suggested that before the words 'Class of citizens' the word 'backward' should be inserted.[38]

On December 30, 1941, however, after taking into consideration the serious implications of reservations of seats for the minorities, at the meeting of Advisory committee, a resolution was moved to abolish reservations of seats to all minorities. It was done with a view to check the growth communalism in the country. However, the Constituent Assembly in its decision taken on May 25, 1949 retained reservation of seat in favour of the Scheduled

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34 *Ibid.*

35 Constituent Assembly Debate, 59 Vol. 1.

36 Constituent Assembly Debate 333 Vol. 1.

37 B. Shiva Rao, *The Framing of India's Constitution 3* (Government of India, Nasik, 1967).

38 Constituent Assembly Debate 330 Vol. III.

39 Constituent Assembly Debate 655 Vol. VII.

Casts and Scheduled Tribes. Jawaharlal Nehru described this crucial decision taken in the Constituent Assembly as a "Historic turn in our destiny."[39]

The importance of this policy K.T. Shah declared in the Constituent Assembly 'This discrimination is in favour of particular classes of our Society, which owing to our unfortunate legacy of the past, suffer from disabilities or handicaps. Those, I think many require special treatment, if they require it, they should be permitted special facilities for sometime so that real equality of citizens be established."[40]

The entry of the Intermediate and backward caste group into politics and the struggle to dominate Congress party or assess a proper share in the structure of the party and the government were further established with achievement of Indian's independence. In this way, the tools of the constitutional provisions regarding protective discrimination in favour of the backward classes goes back to the decade of freedom struggle, where, in fact, the freedom movement itself was strengthened by the "commitment on the part of the national elites to the welfare of the casts and tribes".[41]

The era of emancipation of these depressed castes from the legacy of the past began with the advent of the British rule when major spokesmen like Ambedkar and Mahatma Gandhi took keen interest in their affairs. But the real constitutional provisions on it came since 1950, with special justice as the fundamental constitutional end. The constitution makers were fully aware of this fact and hence resolved, to constitute India into a Sovereign, Socialist Secular,[42] Democratic Republic and inter-alia secure justice, social, economic and political as enshrined in the preamble. The Constitution is an instrument for social, economic and political transformation. It has therefore, provided in Article 37,[43] under Directive Principles that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, economic and political shall inform all the institutions of the nation life. The state shall also strive to minimize the inequalities in economic and ensure to eliminate inequalities in status, facilities and opportunities not only among individuals but also among groups of people residing in areas or engaged in different occasions. It has further been provided in Article 39,[44] that the state shall direct its policy towards securing that citizens men and women equally have the right to an adequate means of livelihood, that the ownership and control of the material resources of the community are so distributed as best to subserve the common goal, and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment etc.

Article 16 alone controls the area of employment, offices and appointment under the state and preferences within this area must be within the scope of Article 16(4). This includes

40 R.K.Hebsur, A Comparative study of four States in a Report submitted to the Backward Classes Commission, 143 Vols. III to VII.
41 The words, "Socialist" and "Secular" were added by the 42nd Amendment Act, 1976.
42 The Constitution of India 14 (Ministry of Law & Justice, New Delhi, 1986)
43 *Id.* 16.
44 *Id.* 18.

judicial offices as well as administrative posts, but not elective offices. Article 16(4) covers not only preferences in initial recruitment into government services but also preferences in promotions within the services.[45]

The legal provisions are embodied in part XVI of the Constitution of India, which is entitled: "Special provisions relating to certain classes."[46] From these provisions it is evident that in 1950 the Constitution makers visualized need to make special provision only for the following classes:

Scheduled Casts and Scheduled Tribes; Anglo- Indian community; and socially and educationally backward classes, for these special categories of persons, the Constitution makers provided for different level and type of concessions. For the Scheduled Casts and Scheduled Tribes, under Article 330 and 332[47] seats in Lok Sabha and Vidhan Sabhas were required to be reserved on the basis of their population. It was envisaged that these reservation of seats would be available for a period of 10 years only. But with subsequent amendments to the Constitution, this period has been extended from time and these provisions are still in forces. For the Anglo-Indian community the facility of reservation of seats in the Lok Sabha was also provided to the extent to two seats by nomination by the President of India, in case he found that this community did not have enough representation. A similar provision was also made for the representation of Anglo-Indians to the Vidhan Sabhas. However, there is no provision in Part XVI for representation of seats in legislature for socially and educationally backward classes.

The special provisions for other Categories' under Part XVI relates to appointment to services and posts in connection with the affairs of the union or of a state for the scheduled Castes and Scheduled Tribes and the Anglo-Indian Communities. For the Anglo-Indian Article 336[48] provides reservation in the railways, custom, postal and telegraph services of the union government on the same basis as they were available to them immediately before August 15, 1947. These reservations, however, were to be reduced every two years by 10% and it was also envisaged that there should be no reservation for them from year 1960 onward.

Article 335[49] of the Constitution of India provides for Scheduled Castes and Scheduled Tribes, that consistent with the maintenance of efficiency of the administration the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in the making of appointment to services and posts in connection with the affairs of the union of the states. There was no cut off period of two years or ten years in the matter of recruitment of Scheduled Castes and Scheduled Tribes to the services and posts in the Constitution.

45 *Ibid.*
46 *Ibid*
47 *Ibid*
48 *Supra* note 32 at 39
49 The Constitution of India 16 (Ministry of Law and Justice, New Delhi, 1986).

After Independence, out of the posts filled directly on an all India basis by open competitive examination, 12½% were reserved for SC. and 5% for ST. These percentages were raised to 15% to SC and 7 ½% ST in 1970 of the post filled on an all India basis other than by open competition, 16 $^{2}/_{3}$% are reserved for SC and 5% for ST (raised to 7 ½% in 1970).

As regards the socially and educationally backward classes, now popularly called "OBCs", the only special provision for them is under Article 340[50] of Part XVI of the Constitution. In consonance with the provision of Directive Principles of State Policy, under Article 340 of the Constitution, provision has been made for the appointment of Commission to investigate the conditions of Backward classes which states that the president may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally Backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the union or any state to remove such difficulties and to improve their condition and as to the grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission. The provision under Article 340 is supplemented by Article 15(4) which state that nothing in this Article (Article 15 relates to prohibition of discrimination on ground of religion, race, caste, sex and place of birth) or Article 29(2) (Article 29 relates to protection and interest of minorities) shall prevent the state from any special provision for the advancement of any socially and educationally Backward classes of citizens or for the SC's and ST's.

In pursuance of the mandate contained in the Preamble, of the Constitution and the Directive Principles of State Policy, the Government of India appointed the First Backward Classes Commission under article 340 on January 29, 1953 under the chairmanship of Kaka Saheb Kelkar. The Commission submitted its report on March 30, 1955. On the basis of criteria evolved by it the Commission listed 2, 399 castes as socially and educationally backward. It recommended various welfare measures for OBC's including reservation in government services and educational institution. *The Central Government did not accept the recommendations of the Commission on the ground that it had not applied any objective test for identifying backward classes.*

When the Central Government changed in 1977, the backward classes problems received the attention of the Janata Party government and the second Backward Classes Commission was appointed in December 1978 under the chairmanship of B.P. Mandal. The Commission presented its report to the President on December 31,1980. The Commission recommended the various welfare measures for the castes listed as socially and educationally backward by it.

Subsequently changes in the Government at the Center and National Front Government came into power at the Centre in December 1989. One of the promises in the manifesto of National Front was the implementation of Mandal Commission Recommendations.[51] Hence

[50] National Front 36 Manifesto, 1989.
[51] Gopal Singh, 23 op cit.

the Government declared its decision on the implementation of some recommendations of Mandal Commission Report regarding reservations in employment on 7th August 1990.

After declaration of the decision of the Government there was a spate of reactions by people representing different walks of life. The decision of the Government to implement some of its recommendations in a participated manner agitated the minds of the Indian public, particularly in the Hindu heartland. There was unprecedented loss of young lives and valuable property, which caused extreme distress, but the Government showed non-paradoxable insensitivity towards the feeling of young people.

However the new Government of Congress (I) at the Centre had given a new twist to whole of the issue by providing ten percent reservation to the poor among forward Castes and also by introducing an economical criteria to the OBC's. This policy of the Government -was stated in the affidavit submitted to the Supreme Court. The Court referred the Case to nine-judge bench and in a majority Judgment the Supreme Court upheld Job reservations for backward Classes in the central Government and declared valid the V.P.Singh Government order on 27 percent job quotas but struck down the economic Criteria inducted by the Narasimha Rao Government.

III Evaluation of Recommendations of various Commissions

Identification of castes/communities as the OBCs and their listing had a long history. After 1806, listings in the colonial period were undertaken on an extensive scale on the basis of administrative reports and assessments. This process gathered momentum through the census from 1891 to 1931. In the post-Independence period, the Kalelkar Commission was first asked to indicate criteria for identification as also to recommend communities to be listed as the OBCs.

The government of India then advised the state governments to prepare their own OBC lists. Various state governments set up Committees/ Commissions to identify the OBCs in their respective states. However, not all the states formulated their OBC lists and despite legitimizing mechanisms of the Committees/ Commissions, the exercise of listing and the extent of reservation for different groups of communities remained a constant juridical issue before the higher judiciary in India. The Government of India then appointed a second Backward Classes Commission (Mandal Commission) for providing identification criteria and names of the communities to be listed as the OBCs. The report submitted in 1980, remained under processing for over a decade until the V.P. Singh Government issued its order of 13 August, 1990, which was challenged before the Supreme Court by Indra Sawhney and others. A nine member Constitutional Bench arbitrated 14 major questions arising there from and gave its historic judgment on 16 November 1992. Among other things, this judgment also directed Constitution of a permanent mechanism for identification of the OBCs at the national level as well as in the State/Union Territories, although it left actual scheduling in the hands of central and state governments. These permanent mechanisms have been active since 1992 and identification of the OBCs has been handled through these routes since then.

The term OBCs did not figure in the Indian Constitution though the debate of the Constituen Assembly had indicated that this was a group which needed special treatment and it was a stratum higher than the Scheduled Caste in social hierarchy. It was also indicated tha these OBCs were to be locally designated meaning that there was realization of difficulties in prescribing universally acceptable tests of backwardness given the diverse local social, economic and cultural conditions in different parts of the country.

Before the Constitution came into operation, several states had not only declared OBC lists and offered several benefits. they had also expanded such lists to include many more communities. The Government of India too was persuaded to extend its scheme of post matric scholarships to the OBCs and while doing so, it compiled its own list.[52]

Different approaches in fixing up the criteria for identification of OBCs by differen Commissions reflect the absence of uniform basis of backwardness. The two Centra Commissions had different outlooks while State Government Commissions had other outlooks having different considerations. Wide differences between these Commissions on various issues, in some cases even irrational, have not only expressed 'absence of uniform policy but also became a source of constant bitterness. Some people though better off enjoy privileges of backwardness in various states and the Central Government services. Others who really deserve privileges, suffer because they belong to castes outside the jurisdictio of backward class. The situation calls for an analysis of different Commissions constitute by various State Governments, including the existing situation and approaches towards th reservation policy for OBCs.

***Kaka Kalelkar Commission (First BCs Commission)*[53]**

The central government appointed the first BCs Commission under the chairmanship o Kaka Kalelkar on 29 January 1953. It submitted its report on 31 March 1955. On the basi of criteria evolved by it, the Commission listed 2339 castes as socially and educationall backward. The Commission made the following recommendations.

1. In all science, engineering, medicine, agriculture, veterinary and other technic institutions, a reservation of 70 per cent of seats should be made for qualifie students of BCs till such time as accommodation is provided for all the student eligible for admission. The remaining 30 per cent and also all seats unavailed of b BCs should go to rest of the students.

2. In making selection to the reserved quota of seats, qualified candidates fro extremely BCs should be taken into consideration first, and in making distributio the principle of favouring the lower of the two claimants among, the candidate from the various communities should be followed.

[52] S.K. Singh and A.K. Singh *OBC Women Status and Educational Empowerment* 80-82 (New Royal Boo Lucknow, 2004).

[53] *Report of Kaka Kalelkar Commission on Backward Classes* (1953).

3. A selection Committee consisting of some of the representative of all communities (not necessarily of the backward alone) should be set up to assist the educational authorities in the selection of deserving candidates.

4. Prestige, power and influence, scales of pay, security of employment and scope to distribute patronage all these have made government service attractive. So long as it continues to be so, claims of OBCs for adequate representation in the service should be recognized by providing reservation of definite quota of vacancies in each class.

5. The interest of the state, the efficiency and the running of the administrative machinery and the increasing role of welfare state which the administrative services have to play in relation to masses of the country-all these demands that reservation should, where education is sufficiently high among the communities, be in proportion to the population of the communities of the OBCs. Taking all these factors into consideration the conclusion reached by a majority of the members of the Commission is that in all government and local body services, the minimum basis of representation of OBCs should be as follows:

   Class 1-25 per cent of vacancies
   Class 11-33 per cent of Vacancies
   Class 111-40 per cent of Vacancies
   Class IV-40 per cent of Vacancies

This percentage would be over and above that which has already been conceded by the government in the case of scheduled castes and scheduled tribes.

6. At the end of ten years, the adequacy of representation of OBCs should be reviewed in the light of the statistics then available as a result of the 1961 or earlier censuses, which may contain all communities listed by the Commission in the OBCs group.

7. For the purpose of distribution of the reserved quota of posts among all the communities comprising the OBCs no hard and fast rule need be followed. The circumstances and the social conditions prevailing in the country necessitate greater consideration for the most backward and unrepresented communities in the group. Some system of rotation worked out in the conditions prevailing in the respective state is called for. Communities should be conveniently grouped according to the degree of advancement in each state and representation in the reserved quota be granted beginning with the most unrepresented groups. This method need not be adhered to for all times. After a period of 15 years the position should be reviewed.

The Central Government refused to accept this report on the ground that no objective criteria were applied in the identification of the BCs. Five out of the 11 members of the Commissions had given notes of dissent. It is also urged at the same time that the best candidates should as a rule, be recruited by means of a competitive examination without any regard to caste consideration. In his forwarding letter, Kaka Kalelkar, the chairman

stoutly opposed caste being made the basis of reservation in public service. He emphatically wrote. "I am definitely against reservation in government services for any community for the simple reason that the services are not meant for the servants but they are meant for the society as a whole. Kaka Kalelkar recognized the central role of public administration in the society and favoured recruitment of only the men available in the land. He ridiculed the practice of reservation by categorically declaring: 'Reservation of posts for certain backward communities would be as strange as reservation of patients for particular doctors. The patients are not meant to supply adequate or proportionate clientele to all the doctors, whatever their qualifications'. He recommended the principle of 'no reservation' but generous preference. His firm view was that backwardness in society could be tackled on a basis other than caste. The Kalelkar Commission has classified .a very large section of the population as backward, and if special assistance had to be given to such large numbers, the government argued, the really needy will be swapped by the multitude. The government preferred economic criterion for the definition of BC.

Mandal Commission (Second BCs Commission)[54]

The Second BCs Commission was appointed under the chairmanship of B.P. Mandal on 1st January 1979. The Commission submitted its report on 31st December 1980. In its findings it found that the SC and ST constituted 22.5% of the population and the OBCs 52%. Thus in accordance with the principles of justice 52% of the posts under central government should be reserved for them. But since the Supreme Court has firmly laid down that reservation should be restricted to 50%, the Commission recommended that total reservations should be 49.5% i.e. 27% for the OBCs and 22.5% for Scheduled castes and Scheduled Tribes. The Commission also recommended that reservations should extend even to the private sector which is aided by the central government.

The V.P. Singh government accepted the recommendations with a minor modification on 7 August 1990 after a span of nearly ten years since the Commission had submitted its report. The government decided that candidates belonging to socially and educationally backward castes recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation of 27 per cent. This was quite contrary to the recommendations of the Commission which stated that it shall be adjusted against the reservation of 27 per cent.

The acceptance of this report led to agitations on a national scale. Unprecedented violence and destruction was a consequence of the governmental decision. V.P. Singh government which was a coalition put even its partners in a fix. Unlike the Kalelkar Commission report which was discussed in the Parliament, the details and procedure adopted by the Mandal Commission were not even discussed in the cabinet.

Mandal Commission has adopted some criteria of education to identify backwardness over and above the caste criterion. It recommended two separate criteria for identifying the backward section of the Hindu community and of other communities where caste system is non-existent. In respect of employees belonging to the Hindu Community, the following criteria were adopted: (i) an employee was deemed to be socially backward if he does not belong to any of the three-twice born Varnas i.e., he is neither a Brahmin or Kshatriya nor a Vaishya and (ii) he was deemed to be educationally backward "if neither his father nor grand Father had studied beyond the primary level" As regards the non-Hindu communities (i) an employee was deemed to be socially backward: if either (i) he is a convert from those Hindu communities, or (ii) in case he is not such a convert, his parental income is below the poverty line, i.e., Rs. 71 per head per month, (iii) he was deemed to be educationally backward "if neither his father nor his grand rather had studied beyond the primary level". Moreover it is stated that the Commission had traveled all over the state, perused the various reservations, schemes prevalent in the state, conducted interactions, with various groups and over and above to all those conducted an extensive socio-educational field survey before arriving at its decisions.

Ranganath Mishra Commission Recommendations[55]

Justice Ranganath Mishra recommend that in the matter criteria for identifying backward classes there should be absolutely no discrimination whatsoever between the majority community and the minorities; and, therefore, the criteria now applied for this purpose to the majority community - whatever that criteria may be - must be unreservedly applied also to all the minorities. As a natural corollary to the aforesaid recommendation he recommend that all those classes, sections and groups among the minorities should be treated as backward whose counterparts in the majority community are regarded as backward under the present scheme of things. To be more specific, he recommended that all those social and vocational groups among the minorities who but for their religious identity would have been covered by the present net of Scheduled Castes should be unquestionably treated as socially backward, irrespective of whether the religion of those other communities recognizes the caste system or not. He also recommended that those groups among the minorities whose counterparts in the majority community are at present covered by the net of Scheduled Tribes should also be included in that net; and also, more specifically, members of the minority communities living in any Tribal Area from pre-independence days should be so included irrespective of their ethnic characteristics.

As the meaning and scope of Article 30 of the Constitution has become quite uncertain, complicated and diluted due to their varied and sometimes conflicting judicial interpretations, he recommended that a comprehensive law should be enacted without delay to detail all aspects of minorities, educational rights under that provision with a view to reinforcing its original dictates in letter and spirit. The statute of the National Minority Educational Institute Commission should be amended to make it wide-based in its composition, powers, functions and responsibilities and to enable it to work as the watchdog for a meticulous enforcement of all aspects of minorities, educational rights under the Constitution. As by the force of judicial decisions the minority intake in minority educational institutions has, in the interest of national integration, been restricted to about 50%, thus virtually earmarking the remaining

[54] *Report of Mandal Commission on Backward Classes* (1980).

[55] *Report of Ranganath Mishra Commission on Minorities* (2005).

50% or so for the majority community he strongly recommend that, by the same analogy and for the same purpose, at least 15% seats in all non-minority educational institutions should be earmarked by law for the minorities as follows:- (a) The break up within the recommended 15% earmarked seats in institutions shall be 10% for the Muslims (commensurate with their 73% share of the former in the total minority population at the national level) and the remaining 5% for the other minorities, (b) Minor adjustments inter se can be made in the 15% earmarked seats. In the case of non-availability of Muslim candidates to fill 10% earmarked seats, the remaining vacancies may be given to the other minorities if their members are available over and above their share of 5%; but in no case shall any seat within the recommended 15% go to the majority community, (c) As is the case with the Scheduled Castes and Scheduled Tribes at present those minority community candidates who can compete with others and secure admission on their own merit shall not be included in these 15% earmarked seats. As regards the backward sections among all the minorities, he recommend that the concessions now available in terms of lower eligibility criteria for admission and lower rate of fee, now available to the Scheduled Castes and Scheduled Tribes should be extended also to such sections among the minorities. In respect of the Muslims who are the largest minority at the national level with a country-wide presence and yet educationally the most backward of the religious communities.

Sachar Committee Report and Recommendations

Notwithstanding the fact that even after many years when Sachar Committee Report was handed over to the Prime Minister and despite the government distributing few thousand scholarships to Muslim students, the government is yet to come out with any concrete proposal for the overall revival of the beleaguered community. The Sachar Committee recommendations were aimed at effecting systemic changes in institutional functioning and improvement in governance, which are essential to enhance the inclusiveness of the marginalized communities. But the poor performance of the Ministry for Minority Affairs is shocking; it has failed to deliver any noteworthy service.

The Central Government and some states have been "implementing the recommendations of the committee" in a piecemeal manner. In fact, every policy measure that can potentially affect Muslims is being attributed to the Sachar Committee, irrespective of whether or not it had a place in the report. Typically, community specific recommendations, which were quite minor in the overall framework of the report, are being focused upon and actually enhanced. As a result, the main recommendations, which were not community specific, are getting sidelined and even being re-cast as Muslim-specific. For example, the Sachar Committee Report had proposed an Equal Opportunity Commission (EOC) on the lines of the UK's Race Relations Act to provide a remedy against discrimination. It was made abundantly clear that the EOC should cover all under-privileged groups that could potentially face discrimination, including Dalit, women, and Other Backward Classes (OBCs). The Group of Ministers (GoM), however, recently decided that the EOC should exist only for minorities, which is being touted as an implementation of the Sachar Committee Report's recommendation. It is another matter that EOC, as currently envisaged as an "advisory"

body, may turn out to be a toothless entity. The UPA has not only picked up recommendations in isolation, but has also highlighted the community-specific programs and its implementation in its election manifesto and other communications. Obviously, the government does not recognize its role in the overall state intervention strategy that the Sachar Committee Report envisages. For example, while promotion of the Urdu language is welcome, the report gives equal importance to the employability of persons who study in schools and colleges. The issue of employability is also critical vis-à-vis any policies with respect to Madarsas, apart from the fact that less than four percent of children in the school-going age group attend them. It would be unfortunate if the perspective on Muslim education gets dominated by Urdu and Madarsas.[56]

Apparently, the mainstreaming measures recommended by the Sachar Committee had much less political utility than promises of community-specific benefits and programs. If one goes by past experience, these large numbers of minority-specific programs that are not only under-funded but largely uncoordinated, are unlikely to have a significant impact on minorities. More importantly, a more progressive policy of mainstreaming efforts that might sharply bring out discrimination and under-development of the minorities gets bypassed. Furthermore, as a negative externality, association of minorities with vote bank politics gets perpetuated. The benefits that can accrue to minorities, if they are able to effectively participate in mainstream programs, are enormous, not only due to the potential reach of these programs, but also due to significantly larger resource outlays.

It is important to recognize that mainstreaming would require a significant change in the nature of politics. Most issues critical for Muslims, such as education, security, political participation, and employment are decided much more by state governments than by the national government. The central government can, at best, "advise" state governments to do certain things (e.g., enhance participation of minorities in Panchayats) or increase the financial outlays of centrally- sponsored schemes, but not much can happen without the support of the state level machinery.[57] Apart from the purposes of better monitoring, detailed information on the socio-religious- economic – caste, religion, income, gender – profile of beneficiaries and regional patterns of service provision needs to be collected and made publicly available. Collection of such information on a regular basis is bound to put some pressure on the implementation agencies to be fairer and thereby reduce discrimination. In order to make it work, collection and reporting of this information by the implementation authority will have to be made mandatory by the government. Modifications will be required in large data collection exercises including those undertaken by the state agencies. Without such a data collection exercise, neither the data bank nor the monitoring authority would serve any meaningful purpose. And the civil society that could play an important watchdog role, given the right to information, would also be ineffective. While these insights help broaden the scope of the gender-injustice debate, several other findings of the Sachar Committee Report can help break myths about Muslims that relate to falling fertility rates

[56] Rakesh Basant, "India in Transition: Perspective of Muslims in India-Sachar Committee Report and its Aftermath" (https://casi.sas.upenn/edu/iit/basant) (2007).

[57] Shiksha Singh, "Reasonable classification under Article 14" (www.legalservicesindia.com).

and the increased use of contraceptives. Unfortunately, while civil society has made little use of this wealth of data, the government has gotten caught in narrow community-specific initiatives. Making the Ministry of Minority Affairs the nodal agency for implementing the Sachar Committee recommendations was a grave error, and has probably gotten in the way of mainstreaming this process. Most of the recommendations of the Sachar Committee favor general programs with better inclusion of all under-privileged groups including Muslims rather than Muslim-specific programs. It is critical that the policy action is not seen only through the "minority lens." The policy-making and implementation task should lie with a general ministry – such as the Ministry of Home or Finance – to obviate this bias. Anything that can be done to enhance the use of the committee's findings in the public discourse would be very useful.

IV Judicial Decisions

One of the important objectives stated in the preamble of the Constitution is '*social justice*'. The court is expected to interpret law in such a way that this avowed objective could be made a reality.

Dr Ambedkar stated that "*the report of the Minorities Committee provided that all minorities should have two benefits or privileges, namely representation in the legislatures and representation in the services.*"[58]

"India's first President Rajendra Prasad assured the Nation that the assembly and the Government's aim was to "*end poverty and squalor to abolish distinction and exploitation and to ensure decent conditions of living*".[59]

Reservation is mainly in the area of admissions in educational institutions, employment in government services and seats in the legislature. Regarding reservation of seats in the legislatures including Union Parliament, there is practically no dispute. Moreover this reservation is only for scheduled castes and scheduled Tribes and originally this reservation were only for 15 years but it has been extended through amendments to the Constitution. Other backward classes (OBC) do not enjoy any reservation of seats in the legislature. But in the sphere of education and government services OBCs do enjoy reservation. In some states like Kerala, OBCs have become a dominant force in the bureaucracy. Thus, the transience of backwardness has given rise to clash of interests both at the political and legal levels.

In this article most of the cases relating to reservation that came before the Supreme Court of India have been discussed and analyzed critically to get a clear picture of the nature of judicial activism vis-à-vis social justice.

58 Articlesonlaw.files.wordpress.com/2010/12/ reservation-in-india.odt.
59 *Ibid.*

In *State of Madras* v. *Champakam Dorairajan*,[60] the court was unwilling to uphold the validity of the Communal Government order of Madras Government, for the impugned order went against the principle of 'equality before law' enshrined in the Constitution.

In *M.R. Balaji and others* v. *State of Mysore*[61] the Court was trying to keep just a balance between the conflicting interests of those who would like to have as much reservation as possible and those who might lose their chance even if they are the deserving ones. The issue in this case was about the admission to the Medical course. "According to the petitioners, but for the reservations made by the impugned order, they were entitled to the admission in the respective colleges for which they had applied." The impugned Order was issued on 31-07-1962 and it reserved seats for candidates belonging to the backward classes whose average students population was the same or just below State average. This 68 percent of seats available for admissions to the Engineering and Medical Colleges and to the other technical institutions were reserved for backward classes, more backward classes, Scheduled Castes and Scheduled Tribes. The classification of the socially backward classes of citizens made by the State, proceeded on the consideration only of their castes without regard to other factors, which were undoubtedly relevant. It was argued that this might lead to a virtual reservation for nearly 90 per cent of the population, which might come under different categories of backwardness. This was being at the expense of those classes of people whose members might perform well but could not get an opportunity.

After analyzing facts and probing the legal nuances, the Court came to the conclusion that caste alone could not be the criterion for backwardness. The Court also observed that reservation should not go beyond 50 per cent. The Court said:

> *"When it is said about an executive action that it is a fraud on the Constitution it does not necessarily mean that the action is actuated by malafides. An executive action which is patently and plainly outside the limits of Constitutional authority conferred on the State in that behalf is struck down as being ultra vires the State's authority. If on the other hand, the executive action does not patently or overtly transgress the authority conferred on it by the Constitution, but the transgression is covert and latent, the said action is struck down as being fraud on the relevant constitutional power... We have already noticed that the impugned order in the present case has categorized the Backward classes on the sole basis of caste which, in our opinion, is not permitted by Article 15 (4) and we have also held that the reservation of 68 per cent made by the impugned order is plainly inconsistent with the concept of special provision authorized by Article 15 (4). Therefore it follows that the impugned order is a fraud on the Constitutional power conferred on the State by Article 15 (4)."*[62]

60 AIR 1951 SC 226.
61 AIR 1963 SC 649.
62 Ibid.

On the whole it is submitted that the apex court succeeded in giving a well-balanced judgment. Caste could not be the sole criterion for identifying social backwardness. But castes, poverty, occupation, place of habitation are some of the relevant factors for determining social backwardness. It is unconstitutional to classify backward classes into backward and the most backward. Above all the court observed that the upper limit for reservation could only be 50per cent. It is open to question whether by fixing the upper limit, Court was not interfering in matters of policy, encroaching thereby the domain of legislature. Moreover fixing a limit on such a question would become inappropriate when the socio-economic changes become more manifestly rapid. The Court changed its observations in accordance with the provisions in the first amendment to the Constitution namely, Article 15(4) is held to valid and not contradictory to Article 15(1).A reasonable extent of discrimination was to be permitted by law. But the honorable Court did not go into the essential social data regarding the proportional strength of the communities in the whole of the population, the educational progress made by each community and the standard of life enjoyed by them. The Court simply went on to pronounce the judgment based on the recent amendment to the Constitution and the philosophy behind the amendment. Perhaps the honorable Court took the stand that was politically correct at that time.

In *T. Devadasan* v. *Union of India,*[63] the Supreme Court by majority (4:1) struck down the carry forward rule. The majority held that Article 14 envis-aged equality among equals and not absolute equality. Article 16(4) provides for reservation for the backward classes who are not adequately represented in the services. But if the reservation was so excessive that it practically denied a reasonable opportuni-ty to members of other communities, the latter have a valid complaint. Relying on *M R Balaji* v. *State of Mysore*,[64] the judgment stated that while reserving seats for backward classes, the government should bear in mind the repercussions from year to year. What precise method should be adopted was a matter for the government to consider. But it must strike a reasonable bal-ance between the claims of the backward classes and claims of other employees.

The court held that Article 16 (4) was a proviso or an excep-tion to Article 16 (1). Therefore, a proviso cannot be interpreted to nullify or destroy the main provision. To hold that unlimited reservation could be made under Clause (4) would in effect efface the guarantee of equality in Clause (1) or at best make it illusory. No provision can be so construed as to destroy another provision in the Act, the majority judgment said. Reservation in excess of 50 percent would be unconstitutional.

However, Justice Subba Rao wrote a dissenting judgment in which he held that Article 16 (4) was independent of Article 16 (1). It grants unlimited power to the government in reservation. The only two conditions are that there must be backward citizens, and they are not adequately represented in the services. Just be-cause too many posts go to reserved candidates is no reason to assail the carry forward rule, unless "unreasonably disproportion-ate" number goes to them.

63 AIR 1964 SC 179
64 AIR 1963 SC 649

It is inevitable that there would be some deterioration in the standard of service, but the provision cannot be held to be bad on that account, the dissenting judge said.

In *R. Chitralekha* v. *State of Mysore,*[65] the Supreme Court dismissed the appeal. The judgment asserted that caste was only a relevant circumstance and it could not be a dominant test in ascertaining the backwardness of a class of citizens. Backwardness could be ascertained without reference to caste. If the government does not take caste into consideration, its order will not be bad in law on that account if other criteria have been taken into account.

Articles 46, 341, 342 and 15 (4) together make special pro-visions for the advancement of backward classes. Article 15 (4) speaks of classes, not castes. If the constitution-makers wanted to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of SC/ST.

In *Abdul Latiff* v. *State of Bihar,*[66] the High Court accepted the petitioner's argument and allowed the writ petition. It ruled that Article 15 (4) was not an independent or substantive enactment but was an exception or qualification of the main guarantee under Article 15 (1). The exception could not destroy the general rule.

The High Court followed Balaji case where the Su-preme Court struck down excessive reservation in favour of SC/ST candidates in technical institutions.

In *Triloki Nath Tiku* v. *State of J & K,*[67] the court noted that the government had not placed on record any order specifying the backward classes or the criteria for backwardness for fixing a proportion between backward classes and others in the matter of promotion. There were no census figures to analyze the social situation of the different communi-ties. The government statement was a bald assertion unsupported by any acceptable data. Therefore, the Supreme Court directed the High Court either directly or through a district court to gather the necessary data to identify the backward classes. The report shall be submitted to the Supreme Court in two months.

The Supreme Court rejected the argument of the government that under Article 16 (4), 'backward classes' are those not adequately represented in public services. If that stand was accepted, however advanced a class may be educationally and socially, if it was not represented adequately in the services, it was a backward class. This theory would exclude the really backward classes from the benefit of reservation. Therefore, the court asserted two condi-tions for valid reservation (1) the class of citizens must be social-ly and educationally backward and (2) it is not adequately repre-sented in the services.

The report was submitted according to the order and the constitution bench considered it. It was found that the scheme of distribution of posts was community wise. It was contrary to Article 16(1) and (2) and not saved by Article 16(4). The promo-tions were held void.

65 1964 SC 1823
66 AIR 1964, Patna 393
67 AIR 1967 SC 1283.

The judgment added: "This will not prevent the state from devising a scheme consistent with the constitutional guarantees for reservation of appointments, posts or promotions in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state.

In *Desu Rayudu* v. *Andhra Pradesh PSC*,[68] the High Court dismissed the petition. The term 'back-ward classes' in Article 16(4) could not be decided exclusively on the basis of caste. The High Court followed the Supreme Court judgment in *GMS Railway vs. Rangachain*[69] and *T. Devadasan vs. Union of India*.[70] Two conditions are necessary to invoke Article 16 (4). Firstly, there must be a backward class of citizens and secondly that class, in the opinion of the state, was not adequately represented in the services of the state. Excessive reservation would also be bad in law, as it would be derogatory to the main clause in Article 16. On the same analogy, under Article 16 (4) caste could be one of the several factors for determining the backwardness, but it could not be the sole or predominant basis. The earlier list was exclu-sively based on caste and hence was bad both under Article 15 (4) and Article 16 (4). The state government was perfectly justified in canceling it.

The court also stated that the Governor could make rules regulating recruitment and conditions of service until the legislature made such provisions. It was also held that under Arti-cles 340, 15 and 16, the President could not issue instructions to states which would have a binding force. The memorandum of the Backward Classes' Commission was not binding on the states. It could not have greater validity than the Supreme Court rulings which had stated that backward class lists based on caste were bad.

In *C.A. Rajendran* v. *Union of India*,[71] the petition was dismissed holding that the government can make reasonable classification of employees for purposes of appointment and promotion. Articles 14, 15 and 16 form part of the same constitutional code of guarantees and supplement each other. Article 16 gives effect to the doctrine of equality. It follows that there can be a reasonable classification of employees for appointment and promotion. The equality of opportunity in Arti-cle 16(1) means equality as between members of the same class of employees, and not equality between members of separate, inde-pendent classes.

It is well-settled that Clause (4) of Article 16 is an exception clause and is not an independent provision and it has to be strictly construed. Article 16 (4) should be interpreted in the context of Article 335. In other words, in making a provision for reservation the government has to consider not only the claims of the mem-bers of the backward classes but also the maintenance of efficien-cy of administration which is a matter of paramount importance.

The court agreed with the government that in class I and II posts a higher degree of efficiency and responsibility was required and therefore reservation was considered harmful to those classes.

68 AIR 1967, A.P. 353.
69 AIR 1962, SC 36
70 AIR 1964 SC 179
71 AIR 1968 SC 507

In *P. Rajendran* v. *State of Madras*,[72] in this case, the list of backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of backward citizens. The state government showed the history of the backward class list starting from 1906. The main test was backwardness of the caste based on occupation. As the members of the whole caste were found to be backward, they were put in the list. The list was occasionally amended and updat-ed. Therefore, it must be accepted that though the list showed certain castes, the members of those castes were really classes of backward citizens.

In *State of A.P.* v. *P. Sugar*,[73] the Supreme Court stressed that Article 15 (1) guaranteed a fundamental right of far-reaching importance. Within certain de-fined limits an exception has been engrafted upon Clause (1), but being an exception, the conditions which justify departure must be strictly shown to exist. A mere assertion by the government that it had acted in good faith in listing the backward classes would not be sufficient under Article 15 (4). When a question arises whether a law which prima facie infringes a guaranteed right is valid, the court must decide it on material placed before it. A mere assertion by the government that the rule was made after full consideration of the relevant evidence and was within the scope of Article 15 (4) would not be sufficient, the judgment said.

The High Court had repeatedly observed that no materials at all were placed before it to enable it decides whether the criteria laid down by the Supreme Court were followed.

In this case, reservation was made in favour of castes, and not classes. Therefore, it infringed Article 15 (1). The criterion for determining backwardness must not be based solely on reli-gion, race, caste, sex or place of birth. The backwardness being social and educational, must be similar to the backwardness from which SC/ST suffer.

In *V.S. Hariharan Pillai* v. *State of Kerala*,[74] the Kerala High Court by majority dismissed the petition, stating that the reservation was within Article 16. The extension of reservation to judicial service with retrospective effect was valid in view of Article 309. It was valid as it was not based exclusively on caste or religion. The members of the castes and sects mentioned in the government rules were backward, socially and educationally. The state government had further applied its mind to the problem and found that those classes were not ade-quately represented in the services. Articles 15 (4) and 16 (4) enabled preferential treatment in favour of 'weaker sections'. Since the Constitution is secular, the classification cannot be made only on the basis of caste or religion. Quoting *R. Chitralekha vs. State of Mysore*,[75] the High Court stressed that only where by and large the entire mem-bers of a community belong to backward class that a classifica-tion could be made by listing them on the basis of caste.

The court also advised the state government to undertake a detailed study of backward classes for a fresh appraisal of the questions involved.

72 AIR 1968 SC 1012
73 AIR 1968, 1379
74 AIR 1968 Kerala 42
75 AIR 1964 SC 1823

In *B. Subhas Chandra Shetty* v. *State of Mysore,*[76] the government had listed certain occupations as contrib-uting to social backwardness: actual cultivator, artisan, petty businessman, inferior service and occupations involving manual labour. The court said that the occupations contemplated by the government order were not casual or temporary occupations, but the habitual occupations of families. Otherwise a person may claim to be treated as backward in one year and forward in anoth-er as it suited to his advantage. Any other interpretation would also result in one member of a family being classed as belonging to the backward class while another not.

Regarding income, the government order treated the family as one unit for purposes of classification. Therefore, what has to be seen is whether a particular family to which the candidate belonged was backward. When the family is considered as a unit for classification, one member cannot be treated different from the other. Moreover, it was not disputed that the annual income of the family exceeded Rs.1,200. Though technically the income of the undivided family was not the income of its individual mem-bers, the social status of a member of a joint Hindu family had relation to the wealth and income of the undivided family.

After retirement, it could not be said that the retired teacher became socially and educationally backward [Article 16(4)], merely because he chose one of the occupations specified in the govern-ment order. It is common knowledge that even after retirement, a school teacher is held in the same esteem in society as before he retired. He could not be regarded as belonging to backward class-es merely because he took to agriculture after retirement. The petition was thus dismissed.

In *Makhan Lal* v. *State of J & K,*[77] the Supreme Court rejected the government's contention and reversed its promotions. The judgment clarified that the ear-lier decision not only struck down scores of promotions, but also laid down clearly that the distribution of appointments, posts and promotions on the basis of communal policy was contrary to the Constitution. The law so declared was binding on the government in all instances, whether the teachers were parties to that case or not. The court quoted instances where Kashmiri Muslims who were juniors were promoted and posted above Kashmiri Pandits in spite of the earlier decision because of the government's policy to avoid the impact of the court ruling. The court also observed that it was abundantly clear that the promotions of those who were not parties in the earlier case were based not merely on the basis of merit but on communal criterion, which had been struck down.

In *A. Periakaruppan* v. *State of Tamil Nadu,*[78] the court observed: There is no basis for the contention that the reservation made for backward classes is excessive. The court is not told why it is excessive. Undoubtedly we should not forget that it is against the immediate interest of the nation to exclude qualified and competent students but then the immediate advantages of the nation have to be harmonized with its long-range interests. It cannot be

[76] AIR 1969 Maysore 48
[77] AIR 1971 SC 2206
[78] AIR 1971 SC 2303

denied that unaided, many sections of the people in this country cannot compete with advanced sections of the nation. Advantages secured due to historic reasons should not be considered as fundamental rights. Nation's interest will be best served—taking a long-range view—if the backward classes are helped to march forward and take their place in tune with the advanced sections of the people.

The judgment then analyzed the earlier Supreme Court rul-ings on caste and class. It concluded the discussion on 'backward classes' thus: All the same the government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an ap-proach would defeat the very purpose of reservation because once a class reaches a stage of progress ("take-off stage") then compe-tition is necessary for their future progress. The government should always keep under review the question of reservation and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest. The fact that the backward classes candidates have secured 50 percent of the general pool seats does show that the time has come for a de novo comprehensive examination of the question. It must be remembered that the government's decision in this regard is open to judicial review.

In *State of Punjab* v. *Hira Lal,*[79] the Supreme Court struck down the High Court ruling and upheld the reservation. The Supreme Court observed that the High Court was swayed by the hypothetical cases under which reservation could lead to various anomalies such as the SC mem-ber leaping over several seniors. A head assistant could thus end up as deputy secretary. But the High Court had not shown that such possibilities were imminent or even likely.

The equality guaranteed in public employment under Article 16(1) is subject to several exceptions. Article 16(4) authorized the state to provide for reservation in promotion also. The extent of reservation to be made is primarily a matter for the state to de-cide. But its decision is subject to review. The reservation must be only to give adequate representation to the SC/ST/backward classes in the services. The exception provided in Article 16(4) should not make the rule in Article 16(1) meaningless. The mere fact that the reservation made may give extensive benefits to some persons does not by itself make reservation bad. "The length of the leap to be provided depends upon the gap to be covered."

It is an inevitable consequence of any reservation of posts that junior officers are allowed to take a march over their seniors. This is bound to displease the seniors. Some of them also may get frustrated. But the Constitution-makers have given the protection to the backward classes in the interests of society, the judgment stressed.

In *State of A.P.* v. *U.S.VS. Balaram,*[80] the Supreme Court held that the High Court view in this matter was wrong. It stated that factually the classes enumerated as backward classes were really socially and educationally back-ward on the application of the principles

[79] AIR 1971 SC 1777.
[80] AIR 1972 SC 1375.

laid down by the apex court in *M R Balaji* v. *State of Mysore*,[81] *R. Chitralekha vs. State of Mysore*,[82] and *State of A.P. vs. P. Sagar*[83]. The social and educational backwardness need not be exactly similar in all aspects to that of SC/ST. If an entire caste was found to be socially and educationally backward, their inclu-sion in the list of backward classes by their caste name was not violative of Article 15(4). A caste was also a class of citizens and a caste as such may be socially and educationally backward. If a caste was found to be so, reservation for such group was valid notwithstanding the fact that a few individuals in that group may fee above the general average.

The Supreme Court rejected the criticism that the commis-sion had used its personal knowledge for characterizing a particu-lar group as backward. If the personal impressions gathered by the members of the commission had also been utilized to add to its data, it could not be said that its report was vitiated by that factor.

In *Janki Prasad* v. *State of J & K*,[84] the Supreme Court set aside the selections made by the promotions committee. It pointed out various defects in the rules and stated that until they were cured they would not be given effect to. The court said: "It is unfortunate that this controversy is going on from 1965. The net result has been to deprive schools of their headmasters. There can be no doubt that considerable dam-age must have been done to overall discipline in schools."

The court observed that it could not be a coincidence that the same number of Muslims and Hindus could have been selected. Such a selection could not be called a selection at all.

According to the ruling, the expression "backward classes of citizens" in Article 16(4) means the same thing as "any socially and educationally backward class of citizens" in Article 15(4). It is not merely educational backwardness or social backwardness which makes a class backward. The class must be both 'educationally' and 'socially' backward. Poverty is not the only test.

Though the two words are cumulatively used, one may find that if a class is educationally advanced, it is generally also so-cially advanced because of the reformative effect of education on that class. The words 'advanced' and 'backward' are only relative terms.

In identifying backward classes, one has to guard oneself against including sections which are socially and educationally advanced because the whole object of reservation would otherwise be frustrated. It must also be remembered that in appointments and promotions to responsible public offices, greater circumspec-tion would be required because efficiency and public interest must always remain paramount.

In *A.R. Choudhary* v. *Union of India*,[85] the petition was dismissed, following the rulings

[81] AIR 1963 SC 649
[82] AIR 1964 SC 1823
[83] AIR 1968, 1379
[84] AIR 1972 SC 1840
[85] AIR, 1974 SC 532

in *M.R. Balaji* v. *State of Mysore*[86] and *T. Devadasan* v. *Union of India*.[87] The court held that reserva-tion for a backward community should not be so excessive as to create a monopoly or unduly disturb the legitimate claims of other communities. Following the above two judgments, the govern-ment had modified the 'carry forward' rule to fall within the Supreme Court rulings. The Railway Board prepared a model roster on that basis. It was further clarified that "if there be only one post to be filled, selection should invariably be held for two posts i.e. one actual and the other to cover unforeseen circum-stances." In this case, a SC teacher was promoted in the carry forward quota, which was challenged. The Supreme Court dis-missed the challenge, ruling that reservation could be carried for-ward to the next year and it would be available then even if there was only a single vacancy.

In *G.K. Gupta* v. *Union of India*,[88] the High Court dismissed the petition and held that reser-vation for SC/ST was within the scope of Article 15 of the Con-stitution. It said that the allegations in the petition were vague. It was not stated who were the SC/ST candidates who were selected though they had not secured the qualifying marks. Nor was there any assertion as to the qualifying marks. The allegation that those who got only 10 percent marks were admitted was vague. The petitioner made two further arguments. Firstly, that the reserva-tion was not protected by Article 15 and secondly, admission could be controlled only by an ordinance framed under Section 28 of the Institutes of Technology Act and not by any executive direction issued by the government. Answering the second point, the High Court said, that no ordinance had been framed, nor was there any administrative or executive order. Therefore, there was no violation of the Act.

Regarding Article 15, the court stated that the reservation was saved by clause (4) of Article 15. Clause (4) makes the equality provision of Article 15(1) inapplicable if the state makes special provision for the advancement of socially and educational-ly backward classes of citizens or members of SC/ST. The gov-ernment by making special provision for admission of SC/ST to technical institutions must be held to have done so for securing their advancement. Such a step would not be hit by Article 15(1) or Article 29(2) but would be within the scope of Article 15(4). The purpose of reservation in this case is to make seats available to SC/ST as they cannot be available to them without reservation. Once reservation has been made, the method of filling up of re-served seats may be different from the one adopted for filling up unreserved seats. The qualifying marks for this class may also be different or there may be no qualifying marks at all, the High Court ruled.

The court rejected the argument that the quality of engineers would be affected by the low qualifying marks for SC/ST. It said that the concession was granted only at the stage of admission. No concession is being granted in passing the final examination. Unless they qualify themselves through the education given to them at the institute they would not pass and the country would not get engineers who are not fully qualified.

[86] AIR 1963 SC 649
[87] AIR 1964 SC 179
[88] AIR 1974 All 288

In *State of U.P.* v. *Pradip Tandon,*[89] the court held that reservation for candidates from rural areas was unconstitutional but reservation for those from hill and Uttrakhand regions was valid. The hill and Uttarkhand areas in the state are instances of socially and educationally backward classes of citizens. Backwardness is judged by economic criteria like population, standard of living and fixed property. From an economic viewpoint the classes of citizens are backward when they do not make effective use of resources. When large areas of land maintain sparse, disorderly and illiterate population whose property is negligible, the element of social backwardness is ob-served, the judgment explained.

When effective territorial specialization is not possible in the absence of means of communication and technical processes as in the hill and Uttrakhand areas, the people are socially back-ward classes of citizens. Neglected opportunities and people in remote places raise walls of social backwardness.

Educational backwardness is ascertained with reference to these factors. The hill and Uttrakhand areas are inaccessible. There is lack of educational institutions. People in these areas illustrate the educationally backward classes because lack of educational facilities keeps them stagnant.

On the other hand, reservation for rural areas cannot be sustained on the ground that those areas represent backward classes. In UP, 80 percent of populations in rural areas are not a homoge-neous class. Poverty in the rural areas cannot be the basis of classification to support reservation for rural areas. Poverty is found in all parts of India.

Moreover, reservation on the bass of place of birth is violative of Article 15 of the Constitution. Incident of birth in rural areas cannot be the basis of reservation. The burden of proof is on the government to establish that the reservation is for back-ward classes. It has established that in the case of hill and Uttrakhand areas, but not in the case of rural areas.

In *State of Kerala* v. *N.M. Thomas,*[90] the Supreme Court upheld the validity of the rule and set aside the High Court judgment. It stated that equality of opportu-nity should not be confused with absolute equality. Article 16(1) does not bar reasonable rules for selection to any employment. Promotion to a selection post is also included in the matters relat-ing to employment. Article 16(4) provides for reservation for ap-pointments and selection posts. In doing so the state has to take into consideration the claims of backward classes consistently with the maintenance of the efficiency of administration.

The classification of SC/ST employees separately for allow-ing them an extended period of two years for passing the special tests for promotion is just and reasonable. Such special treatment was an integral feature of the service conditions in Kerala and its predecessor states. Rule 13AA only made it statutory. The rule was also in tune with Article 335 dealing with the claims of SC/ ST in appointment in services. Promotion to upper division clerks was governed by seniority rules. The temporary relaxation given to SC/ST was warranted due to their inadequate representation in the services and their overall backwardness.

[89] AIR 1975 SC 563
[90] AIR 1976 SC 490

A rule in favour of an unrepresented backward community specifying the basic needs of efficiency of administration would not violate Articles 14, 16(1) and 16 (2). The rule in the present case did not impair the test of efficiency in administration as SC/ ST members had to acquire the qualification of passing the test. The only relaxation was in giving them two years more time to do so.

In *K.S. Jayasree* v. *State of Kerala,*[91] the Supreme Court dismissed the petition, accepting the government's arguments and relying on its earlier judgment in *R. Chitralekha vs. State of Mysore*, AIR 1964 SC 1823. It also referred to the report of a Backward Classes' Commission which had stated that the rich segment of the backward communities was not suffering discrimination, though they have not acquired a high level of education.

In ascertaining social backwardness, caste cannot be the sole test. Backwardness could be the result of poverty. Therefore, both caste and poverty should be considered, not just one of them.

Moreover, determination of backwardness is not a simple thing. This is the function of the state. The court's jurisdiction is only to decide whether the tests applied are valid. In this case, the commission had determined the class which deserved special pro-tection on the basis of the principles laid down earlier by the Supreme Court. Therefore, the petition was dismissed.

In *Nishi Maghu* v. *State of J & K,* [92] the Supreme Court held that this classification was vague and therefore invalid. The nine selections were thus struck down. However, the challenge to reservation of seats for candidates from bad pockets and areas adjoining the actual line of control was held valid as the residents of those areas were indisputably back-ward.

The court rejected the challenge to reservation for 'social castes.' Such castes were listed in a schedule. They were identi-fied by a committee as backward. The basis of identification was their occupation. Therefore, the list was valid. There was objec-tion to a Christian candidate's selection, as Christians did not belong to any of the castes listed. But the court stated that as the category was based not on caste, but on occupation, the objection could not be sustained.

In *Chotey Lal Pandey* v. *State of U.P.,*[93] the backward classes list was held to be unsustainable and reservation on the basis of that was struck down. The 1945 list was presumably prepared on the basis that those castes were at that point of time educationally backward, though the tests applied have not been disclosed. The phenomenal progress made after independence in the fields of irrigation, mechanization of agriculture, community development and the like has led to the Green Revolution transforming the face of the countryside. There-fore, many old social handicaps have disappeared. Moreover, successive general elections based on adult suffrage at all levels have led to shifts in centres of influence

[91] AIR 1976 SC 2381
[92] AIR 1980 SC 1975
[93] AIR 1979 All. 135

and prestige in society. Therefore, to proceed on the basis of the 1945 list "would fly in the face of the repeated exhortations of the Supreme Court to constantly review the provision of different classes in the context of backwardness and cannot to allow reservation of seats on the basis of backwardness to become a vested interest *A. Periakakaruppan* vs. *State of Tamil Nadu,*[94] the High Court emphasized. The government was directed not to make reservation of posts for backward classes based on the prescribed list.

In *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India,*[95] the Supreme Court dismissed the challenge in a unani-mous but three separate judgments of the division bench. The main judgment of Justice Krishna Iyer stated the state may clas-sify, based upon substantial criteria, groups of classes. This process did not necessarily violate Articles 14-16 of the Consti-tution. Since there is a great dividing line between SC/ST and the rest of the community the fundamental right of equality of oppor-tunity has to be read as justifying the categorization of SC/ST separately for the purpose of 'adequate representation' in the servic-es. The classification is just and reasonable and valid under Arti-cles 16(4) and 46.

However, reservation should not be applied with overkill. Obsession with backwardness and politicking with castes may in appropriate cases, demand judicial examination.

Reservation for SC/ST in matters of promotion has already been upheld in (1962) 2 SCR 586. The other provisions in the railway circulars were also upheld in the present judgment.

Further, the judgment underlined that constitutional ques-tions must be answered in the social milieu which gives it living meaning.

In Bihar State Harijan Kalyan Parishad v. *Union of India,*[96] the Supreme Court reversed the High Court ruling and allowed the appeal. It stated that the two letters were contrary to the presidential directive. The directive assumed that reservation did apply in the selection, but prescribed a separate procedure for that. The Steel Ministry has done a "volte face", which was sur-prising, the judgment said. It was asked to give effect to the interpretation given by the court.

In *K.C. Vasantha Kumar* v. *State of Karnataka,*[97] since there is no ruling as such, the following are some views expressed by the individual judges, These can be used to buttress one's arguments.

Reservation must continue as at present (1985), without the means test, for at least 15 years. The test of economic backward-ness ought to be made applicable even after 2000 AD. Reserva-tion policy must be periodically reviewed (Chandrachud).

The time has come to review the criterion for identifying the backward classes ignoring the caste label. The only criterion should be economic backwardness. Benefits of reservation

[94] AIR 1971 SC 2303
[95] AIR 1981 SC 298
[96] AIR 1985 SC 983
[97] AIR 1985 SC 1495

have so far been snatched by the creamy layer of the backward castes. This must be avoided at all costs (D.A. Desai).

There is neither statistical basis nor expert evidence to sup-port the assumption that efficiency will necessarily be impaired if reservation exceeds 50 per cent, if reservation is carried forward, or if it is extended to promotion posts ... Class poverty, not individual poverty, is the primary test. Other tests are the stan-dard of living, the place in the hierarchy, the habits and customs etc. (Chinnappa Reddy).

Economic backwardness is the test to determine backward-ness. Caste should be used only for identification ... Since the problem of reservation cannot be resolved through litigation the Central Government should consider setting up of a permanent national commission for backward classes (A.P. Sen).

It is now necessary to re-determine the question of back-wardness of the various castes, tribes and communities in the light of the latest figures and to refix the extent of reservation for backward classes... There are in all castes and communities poor people who deserve to be given liberal grants of scholarships and other educational facilities to attain a high degree of proficiency (E.S. Venkataramiah).

In *Gundla V.S. Rao* v. *Dist. Collector, Khammam,*[98] the High Court ruled that the petitioner belonged to Goud community in respect of Agency tracts and was entitled to a certificate showing his community as ST. The court went into several orders passed over the years and interpreted them to arrive at this conclusion. The discussion is particular to those orders and regions of the state and not of general interest, and hence omitted here.

In *Bharat Sevashram Sangh* v. *State of Gujarat,*[99] the Supreme Court dismissed all the arguments against the law, including the point relating to SC/ST. The court pointed out that a large number of teachers whose salaries are met by the grants given by the state under the grants-in-aid code are em-ployed by their managements. The State should, therefore, have a voice in the method of recruitment. The state should also make provision for reservation of certain percentage of seats for SC/ST under Article 16(4) of the Constitution. The insistence on having teachers belonging to SC/ST is also in public interest. Children should be brought up in an atmosphere where there is an opportu-nity to mix freely with students and teachers belonging to tradi-tionally disfavoured communities also. The opportunity to show reverence to teachers belonging to SC/ST will in the long run enable the child brought up in that atmosphere to shed the feeling of superiority over SC/ST. Section 34 serves this laudable objec-tive. Even the teachers belonging to SC/ST must possess the requisite qualifications for the posts. Therefore, there was no ille-gality, the court ruled.

In *Comptroller & Auditor General* v. *ML. Mehrotra,*[100] the Supreme Court overruled this view and held that the circular was valid and binding. It said that the High Court was

[98] AIR 1985 A.P. 15
[99] AIR 1987 SC 494
[100] AIR 1991 SC 2288

not right in stating that there could not be an administrative order directing reservation. The rules did not provide for reservation. But the government could direct reservation by executive orders. Administrative orders cannot be issued in contravention of the statutory rules but it can be issued to supplement the statutory rules. (See also *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India*, AIR 1981 SC 298).

The High Court had also faulted the circular as it was not issued by the President after consultation with the Comptroller. The Supreme Court stated that the circular was not issued by the President, but by the Comptroller. There was, however, proper consultation between the government and the Comptroller for is-suing the circular. The fault pointed out by the High Court was only in the form, and not with regard to substance. The circular ought to have been issued in the name of the President. But since the government had approved the circular, and since it was in accordance with the declared policy of reservation, the Comptrol-ler cannot be restrained from enforcing-it.

In *AP State SC Welfare Association* v. *Director of Engineering, Indian Airlines,* [101] the High Court dismissed the petition, after dealing with the two main issues. The first was whether there was any fixed quota of 25 per cent in this matter. A reading of the presidential directive showed that there was no such definite quota. It only recommended that adequate margin should be provided to as many SC/ST candidates as were sponsored by the ministries and that it would be useful to earmark 25 per cent of the seats to SC/ST wherever possible. The court also noted the airlines statement that an SC candidate had indeed been selected on merit.

The second issue was whether the merit of SC/ST should be assessed inter se or in relation to the general candidates. If selec-tion was made on inter se merit, efficiency would have to be compromised. The lives and safety of hundreds of passengers would depend upon the expertise and efficiency of such personnel. "The question in all such matters is not whether a particular person belongs to a particular caste or not but that the best avail-able persons irrespective of their caste or any other consideration should be put in charge of such operations which are of a highly sophisticated nature," the judgment underlined. It was held that since there was no rule of relaxation in the qualifications required, no one could claim selection on the basis of reservation. It was more so as there was no positive reservation. The court cannot substitute its opinion in place of expert guidelines of the ministry.

Since the question of efficiency crops up frequently in the debate about recruitment of SC/ ST, it would be useful to examine certain passages from Supreme Court judgments on this subject. In *Ashok Kumar Gupta* v. *State of UP*[102] this question was-raised by engineers who lost promotions be-cause of caste reservation. The judgment ridiculed the argument of efficiency in the following terms:

"Efficiency in service attracts the well-known hyperbole that insanity cannot be cured until married and marriage cannot be celebrated till sanity is cured. Unless one is given opportunity

[101]. AIR 1991 A.P. 88
[102] 1997(3) SCALE 289

and facility by promotion to hold an office or a post with respon-sibilities, there would be no opportunity to prove efficiency in the performance or discharge of the duties. Without efficiency one cannot be promoted. How to synthesize both and give effect to the constitutional animation to effectuate the principle of adequacy of representation in all posts or classes of posts in all cadres, service or grade is the nagging question."

Discussing the question of "efficiency in administration", the Supreme Court in *DTC* v. *DTC Mazdoor Congress*[103], "if a superior officer develops liking towards a sycophant, though corrupt, he would tolerate him and find him to be efficient and pay encomiums; and corruption in such cases stand no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing to be "not upto the mark', "wanting public relations'. etc. At times they may be termed to be "security risks' (to their activities). Thus they spoil the career of the honest, sincere and devoted officers. Instances either way are galore in this regard."

In *K C Vasantha Kumar* v. *State of Karnataka*,[104] the Supreme Court said: "We do not mean to say that efficiency is to be altogether discounted. All that we meant to say is that it cannot be permitted to be used as a camouflage to let the upper classes take advantage of the backward classes in its name and to monopolize the services, particularly the higher posts and the professional institutions. We are afraid we have to rid our minds of many cobwebs before we arrive at the core of the prob-lem."

In *Sida Nitin Kumar* v. *Gujarat University,* the High Court allowed their petition and asked the uni-versity to consider them for both categories. The decision of the university denying the petitioner's claim to the seats in the com-mon merit list was held to be illegal and void.

The court said that while the posts were reserved for the backward classes, they could not be asked to occupy only the reserved seats/posts. They would be and should be free to occupy any seat or post including unreserved posts. But while claiming unreserved posts, they should prove their merit like any other citizen who was not entitled to reservation. To deny them the right to occupy any seat other than the seat reserved would amount to denying them the right to equality under Article 14 of the Consti-tution.

Moreover, such a course would result in compartmentalization of society, the judgment stressed. The Constitution aims at cohesion of society and not at disintegration of society into castes and communities.

Therefore, no provision of law or scheme of reservation or special provisions conferring benefits on members belonging to the weaker sections can be interpreted so as to lead to disintegra-tion of society.

[103] 1991 Supp 1 SCC 600
[104] 1985 (Supp) SCC 714

The policy and procedure adopted by the university ask a candidate to waive his fundamental right of being treated equally and claim seat from unreserved pool of seats on his own merits. In turn, the university relieves itself of its obligation to enforce the fundamental rights of the citizens. The "pernicious" result flowed from the ''generous steps" of granting choice at the stage of filling in the form and again at the stage of interview. He is in fact asked to waive his fundamental right of equality. To claim the benefits of reservation or special provision, he is not required to waive his fundamental right or his right cannot in any way be truncated.

Moreover, a student belonging to backward classes would be tempted to opt for reserved seats only, since he would not know what would be in store for him if he waited till his turn reached in the common list. Thus a meritorious student, even though he may be one of the first ten topping the merit list, would be tempted to secure a reserved seat. He would thus deny seat to another candidate belonging to the reserved category, defeating the very pur-pose of reservation.

In *Indira Sawhney* v. *Union of India,*[105] forty-three years after the founding of the Indian republic, the Supreme Court was asked to settle the law on reservation for backward classes. The occasion arose when the short-lived V.P. Singh government at the Centre decided to implement the Mandal commission report. It was followed by riots in most parts of northern India.

Though the Constitution guarantees equality of opportunity in matters of public employment, it also provides for reservation of posts in favour of any backward classes. A commission, called the Kaka Kalelkar Commission, was set up in 1953 to study the conditions of the socially and educationally backward classes. Its report did not find favour with the then government and it was not discussed in Parliament. The second commission (called the Mandal Commission) was set up in 1979. The report was submitted in 1980. However, no action was taken by the governments at the Centre till 1991 when V.P. Singh decided to implement the recommendations of the aforesaid commission. It was seen as a political ploy to defeat his opponents in Parliament. There were howls of protests from the upper castes, and many youths in the northern cities immolated themselves against the government decision. Southern states, where reservation was a fact of life even before the Constitution, re-mained comparatively calm. Ultimately the issue was taken to the Supreme Court through nearly four score petitions. They were decided by a nine-judge bench. The majority view was delivered by Justice Jeevan Reddy. Only a very brief summary is given here.

The claim of Other Backward Classes and Other Weaker Sections must be considered consistently with maintenance of ef-ficiency in administration. Complex social, constitutional and legal questions upon which there has been sharp difference of opinion in society could more satisfactorily be settled by political processes. The issues have been relegated to the judiciary-which showed both the disinclina-tion of the executive to grapple with these sensitive issues as also the confidence reposed in judiciary. Provisions for reservation in

[105] *AIR 1993 SC 477*

favour of backward classes need not be made necessarily by Parliament or legislature. They can also be made by the executive wing of the Union or the state.

When reservation is made by an executive order, it becomes ef-fective and enforceable the moment it is made. Enactment into law or incorporation into the rules is not necessary to make it enforceable.

For assuring equality of opportunity, it may well be neces-sary in certain situations to treat unequally situated persons un-equally. Article 16(1) permits such reasonable classification to promote equality. Article 16(1) and 16(4) should be read harmo-niously. The second provision is not an exception to the first.

Under Article 16(4), not only reservation, but also all sup-plemental and ancillary provisions including exemptions, conces-sions and relaxations are permitted. Reservation under Article 16(4) is not exhaustive. Reser-vation can be made under Article 16(1) also in exceptional cir-cumstances.

The phrase 'Backward Class' in-Article 16(4) is not anti-thetical to 'caste', and caste can be taken as a backward class of community. In identifying backward classes, caste can be a con-sideration. Test to identify backward classes need not be uniform.

In identifying backward classes, the theory of 'lingering ef-fects' of past discrimination is not relevant as discrimination is still prevalent in the country. Identification of only those who suffer from lingering effects of the past would not be proper.

Article 16(4) contemplates social backwardness, and not so-cial and educational backwardness.

While reserving posts, the creamy layer must be excluded to make the class a truly 'backward' class. The government was asked to specify the basis of exclusion whether based on income, land holding or other criteria.

Neither the Constitution nor the law prescribes the procedure of identification- of backward classes. The court cannot lay down the method either. It must be left to the authority appointed to identify them.

The satisfaction of the state as to the inadequacy of repre-sentation of backward classes in services is open to judicial scru-tiny.

Economic criterion alone cannot be the criterion for identify-ing backward classes. It may be only one, in addition to social backwardness and occupation-cum-income.

Further classification of backward classes into backward and more backward is not permissible.

Reservation for services under Article 16(4) should not ex-ceed 50 per cent. The rule can be relaxed only in extraordinary situations.

A SC member getting selected in open competition on the basis of merit should not be counted against the reserved quota.

Article 16(4) does not contemplate reservation in promotion as well. It is true that the expression 'appointment' takes in appointment by direct recruitment, by promotion and by transfer. But the question of promotion should be answered by a combined reading of Article 16(4) and Article 335. Reservation theoretically means impairment of efficiency. There can be no justification to multiply 'the risk' by holding that reservation can be made in promotions also. Otherwise it would affect the rule of equality.

Reservation for backward classes is not against merit. Effi-ciency, competence and merit are not synonymous concepts.

Reservation must be consistent with requirements of effi-ciency of administration. There should be minimum marks for SC/ST candidate also. Reservation for backward-classes cannot be made in posts where merit alone counts, as in defence services, technical posts, airline pilots or super-specialties in medicine, en-gineering etc.

Ordinarily, there should be no judicial review of reservation for backward classes. It is a matter of policy of the government. The court would normally extend due deference to the discretion and judgment of the executive.

The court directed constitution of a permanent body to iden-tify and deal with complaints of inclusion and non-inclusion of backward classes.

The Mandal Commission report was not invalid because it was based on 1931 Census. Nor would its implementation result in discontent and demoralization. It would not curtail the concept of equality.

Reservation for backward classes should be estimated with reference to representation in different grades and categories.

The States found the implementation of the Mandal judgment difficult for political reasons. Identifying the 'creamy layer' and excluding them from the benefits of reservation would alien-ate the vote banks. The case of the Kerala government was typi-cal. It passed the Backward Classes (Reservation of Appoint-ments or Posts in Services) Act in 1995 declaring that there was no 'creamy layer' in the State. This was done retrospectively. In *Indira Sawhney* v. *Union of India*,[106] the Su-preme Court struck down the relevant provisions of the Kerala Act, on a writ petition moved by the Nair Service Society. The court said the law violated Articles 14 and 16 of the Constitution. Quoting the *Akhil Bharatiya Soshit Karamchari Sangh* v. *Union of India,* [107] judgment, the judgment said: "... to politicize Article 16(4) for com-munal support and party ends is to subvert the solemn undertak-ing of Article 16(1)."

[106] AIR 2000 SC 498
[107] AIR 1981 SC 298

In *Malkhan Singh* v. *Union of India,*[108] the Supreme Court agreed with the petitioner but by the time the judgment was delivered, he had superannuated. The court examined the provisions of the brochure on reservation for SC/ST issued by the government, especially Chapters 8 and 11. Referring to exchange of reservation between SC/ST. Para 11.2 says: "While vacancies reserved for SC and ST may continue to be treated as reserved for the respective community only, ST candidates may also be considered for appointment against a va-cancy reserved for SC candidates and vice versa where such vacancy could not be filled by SC or St candidate even in the third year to which reservation is carried forward." This was the case of the petitioner. This view was reaffirmed by the Supreme Court in *K N Sreenivasan vs. Flag Officer.*[109]

In *Sate of Bihar* v. *Bal Mukund Sah,*[110] the majority stated that the Act covered not only ordi-nary services, but also the judicial service. Section 4 would di-rectly conflict with the constitutional provisions if it is applied to judicial service. But it would operate validly in the rest of the public service. The court read down the controversial section so as to exclude the judicial service from reservation. The judgment said that reservation in judicial service can be made only after consultation with the High Court. The independence of the judicia-ry also mandated it. The constitutional limitation of "efficiency in administration" in Article 335 should also be taken into account, the judgment pointed out.

In *K. Ameer Khan* v. *A. Gangadharan,* [111] the Supreme Court, passed orders to correct the imbalances in the recruitment of SC/ST candidates to the post of assistant controllers in Southern Railway through departmental competitive examination. The railway did not reserve the requisite number of posts for SC/ST candidates. Out of 7 posts, at least 2 posts should have been reserved for them, which was available against 30 per cent quota. Therefore, the Administrative Tribunal gave certain directions to offset the imbalances caused by the wrong application of the instructions issued by the Railway Board. The Supreme Court upheld these tribunals order. It further stated that those who had been working in the post quite some time after promotion need not be disturbed. The board was asked to enlarge the panel to accommodate two more SC/ST candidates in the next recruitment to balance equity.

In *Komirisetty Rama Rao* v. *Collector,*[112] a former sarpanch of a village challenged the collector's decision to reserve a village as scheduled caste constituency for purpose of panchayat elections. According to him, there were only 94 scheduled caste voters in that particular village, whereas the neighbouring village had 325 such voters. He showed the voters list to show the composition of different villages and to prove that the collector's decision was arbitrary and illegal. The Andhra Pradesh High Court pointed out that under Article 243-0 of the Constitution, dealing with panchayats, the validity of any law relating to

[108] AIR 1997 SC 465
[109] (1996) 7 SCC73
[110] AIR 2000 SC 1296
[111] 2001 (5) Scale 477
[112] AIR, 2001 A.P. 420

delimitation of constituencies or allotment of seats to such constituencies shall not be questioned in any court. Therefore the scope of judicial review is very limited. The narrow ground is when delimitation was done without inviting objections and hearing them. The court said that there was force in the submissions made by the petitioner that the SC population in the hamlets was not considered and the concerned panchayat and the persons interested were not heard by the Collector. The High Court discussed case law under Articles 243-D, 243-0 and 243-K and stated that having regard to these provisions, the complaint should be considered by the state election commission. Under Article 243-K, the superintendence, direction and conduct of panchayat elections is vested in the state election commission. The High Court allowed the petitioner to move the state body with his representation.

In *All India SC & ST Employees Association* v. *A Arthur Jeen,*[113] the Supreme Court dismissed the appeal against the order of the Madras High Court affirming the selection process and reservation made in employment of Khalasis by the Railway Board. After analyzing the complicated facts in the case, the Supreme Court stated that no fault could be found with the direction of the High Court to issue appointments only to available vacancies on merit out of the candidates included in the panel of selected candidates following rules of reservation and to reserving 3 per cent seats to physically handicapped. It further emphasized that merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the state is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution bench of the Supreme Court in *Shankatsan Dash vs. Union of India.*[114]

In *Balagopalan* v. *Kerala PSC,*[115] the Kerala High Court, asked the petitioner to prove that he belonged to a "non-creamy layer" community to claim reservation in state government jobs. He applied for a post mentioning his caste as Hindu Gurukkal (OBC). The Public Service Commission asked him to produce the community certificate. In the certificates he had produced, it was stated that he belonged to Hindu Yogi Community which is OBC and not in the creamy layer category. The commission, however, classified him as a member of the forward community and not one from the non-creamy layer category. He argued that Gurukkal and Yogi Communities were the same. The High Court stated that there was no evidence to accept the argument. Therefore, it allowed the petitioner to prove his contention before the commission within a month. If he cannot prove it, the commission can reject his claim.

In *Unni Krishnan, J.P. & Ors.* v. *State of Andhra Pradesh & Ors,*[116] the court held that right to establish educational institutions can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). This was overruled in *T.M.A. Pai*

[113] JT 2001 (5) SC 42
[114] (1991) (3) SCC 47
[115] AIR 2002, Kerala
[116] (1993) (1) SCC 645

Foundation vs. State of Karnataka,[117] and P.A. Inamdar *vs. State of Maharashtra,*[118] Supreme Court ruled that reservations cannot be enforced on Private Unaided educational institutions.

In *I.R. Coelho (Dead) by LRS.* v. *State of T.N.*[119], the Ninth Schedule law has already been upheld by the court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24 April 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder. Action taken and the transactions finalized as a result of the impugned Acts shall not be open to challenge.

In *Ashok Thakur* v. *Union of India and others*[120] hailed as Mandal II, the Supreme Court's constitution bench has cleared the way for social justice in higher education. In four separate judgments running to 369 pages, five judges of the Supreme Court have attempted to answer about 25 questions on India's pursuit of affirmative action in higher educational institutions. The Bench was disposing of certain public interest petitions challenging the constitutionality of 93rd Constitution Amendment Act, enacted in 2005 inserting Article 15(5) of the Constitution. The petitioners also challenged the validity of Central Educational Institutions (Reservation in Admission) Act, 2006, which provides reservation in admission to certain Central Government run educational institution for students belonging to SC, ST and other OBC categories. Hearing the arguments from both the sides the Court pronounced this monumental judgment on 10th April, 2008 which provides that-

The 93rd Constitutional Amendment Act, inserting Article 15(5), does not violate the basic structure of the Constitution so far as it relates to aided educational institutions. As far as private unaided educational institutions are concerned, four out of five judges have left the question open in the absence of challenge by such institutions, while *Dalveer Bhandari J.* has held that it violates the basic structure.

- The Central Educational Institution (Reservation in Admission) Act, 2006, is constitutionally valid subject to the exclusion of creamy layer.
- The quantum of 27% reservation for OBC's is not illegal.
- The 2006 Act is not illegal merely because a time limit is not prescribed for reservation.
- There should be a review of the lists of socially and educationally backward classes every five years.

Thus in the aforesaid judgment, the Supreme Court rightly excluded creamy layer from the list of other backward classes. It also vehemently negated the policy of reservation regarding

[117] (2002) 8 SCC 481
[118] 2005 AIR(SC) 3226
[119] 2007 (2) SCC 1 : 2007 AIR(SC) 861
[120] (2008) 6 SCC 1.

promotions. The intention of the Parliament was clear that they wanted to include creamy layer for the purpose of reservation. The term 'creamy layer' in simple words means the elite from the lowest caste. Popular perception is that this term was first coined in *Indira Sawhney vs. Union of India*.

Contrary to popular belief, the said term was first coined by Justice Krishna Iyer, in *State of Kerala vs. N.M. Thomas*, wherein he observed that *'benefits of the reservation shall be snatched away by the top* ***creamy layer*** *of the backward class, thus leaving the weakest among the weak and leaving the fortunate layers to consume the whole cake'*. This term was cited again by Justice Krishna Iyer in *Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India* and by Justice Chinnapa Reddy in *K.C. Vasanth Kumar vs. State of Karnataka* raising similar concerns. The roots of this concept can however be traced back to the case of *K.S. Jayashree* v. *State of Kerela* wherein the people belonging to backward class, but whose family income exceeds Rs.10000, were denied the benefit of reservation.

However, in *Indira Sawhney* v. *Union of India* the Supreme Court dealt with "creamy layer" at length. That case dealt with reservation of backward classes in case of public employment. Justice Jeevan Reddy stated that 'creamy layer' can be, and must be excluded from the purview of reservation. He emphasized that upon a member of a backward class, reaching an advanced social level or status, would no longer belong to the backward class and would have to be weeded out. After excluding the creamy layer alone, would the class be a compact class and such exclusion would benefit the truly backward. The Supreme Court had observed that *'the backward class under Art. 16(4) mean the class which has no element of creamy layer in it. It is mandatory under Art. 16(4) that the state must identify the creamy layer in a backward class and thereafter excluding the creamy layer extend the benefit of reservation to the 'class' which remains after such exclusion.'*[121]

In *Ashok Kumar Thakur* v. *State of Bihar*, unreasonable conditions were prescribed to identify the creamy layer. Unlike in *Indira Sawhney* case wherein it was stated that children of any IAS or IPS officer would be denied the benefit of reservation, in *Ashok Kumar Thakur* v. *State of Bihar* an additional condition was laid down that the IAS or IPS officer should also be earning a minimum salary of Rs. 10000 per month, which condition was quashed as discriminatory. In *Indira Sawhney* v. *Union of India (II)*, also known as the Kerala creamy layer case, the Kerela Legislature passed an Act declaring that there would be no creamy layer in the State of Kerela. The Supreme Court in this case further explained the rationale underlying the rule of exclusion of creamy layer. As the creamy layer is not entitled to the benefits of reservation, non-exclusion thereof would be discriminatory and violative of Articles 14 and 16. Thus the Act was declared unconstitutional.

The above cases were with respect to the exclusion of creamy layer from reservation in public employment. The issue of exclusion of creamy layer from reservation in educational

[121] Indialawjournal.com/volume3/issue…/article_by_rusminsunny.ht.. (2007).

institutions was dealt with in *Ashok Kumar Thakur* v. *Union of India*. The main contention raised by counsels appearing for the Respondents regarding inclusion of creamy layer for the purposes of reservation centered on the idea that the objective of reservation under Article 15 and Article 16 is different. The contention was that reservation under Article 15 is not a poverty alleviation programme nor is it a programme to eradicate unemployment and nor is it a programme to educate all the backward classes. It is to bring about equality among different castes. Therefore it was contended that if the lower castes are deprived of the facilities and opportunities in the name of the creamy layer, then it will be counter productive and would frustrate the very object of reservation, namely to achieve equality in status, facilities and opportunities.

Chief Justice K.G. Balakrishnan, addressing the aforesaid contention said that the people belonging to the backward caste, but being economically advanced do not require the protection of reservation. He stated that the creamy layer principle is introduced merely to exclude a section of a particular caste on the ground that they are economically advanced and educationally forward and unless they are excluded, there cannot be proper identification of backward class. If creamy layer is not excluded, then that would mean that identification of OBCs would be solely on basis of caste and thus violative of Article 15(1) and 16(1). Moreover reservation of OBCs under Article 15 is designed to provide opportunities in education thereby raising educational, social and economic levels of those who are lagging behind.

By excluding those who have already attained economic well being or educational advancement, the special benefits provided under these clauses cannot be further extended to them and if done so, it would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination. Thus, if the creamy layer is not excluded, the identification of OBC will not be complete such non-exclusion of 'creamy layer' may not be in accordance with Article 15(1) of the Constitution. The word 'social' under Article 15(4) and 15(5) is much wider and also includes 'economically. Former Prime Minister of India, Shri. Jawaharlal Nehru said that 'economic' was included in the 'social' portion of 'social and educationally backward'. Only 'social and educationally backward' was added under Article 15 so as to maintain symmetry with Article 340 also. Had it not been for a desire to achieve symmetry in drafting, 'economically' would have been included. Had this been done, the creamy layer would have been excluded *ab initio*. Thus the objective of the founding fathers is very clear that they intended to exclude creamy layer from the benefits of reservation.

The persons included in the creamy layer are already advanced and can be compared to the so called forward section of the society. They can be treated as equals with the forward section of the society. Thus the contention that exclusion of creamy layer would not bring about equality as those people would remain backward, is not well founded. Instead inclusion of creamy layer would mean unequal persons being treated as equal thus being violative of Article 14, 15 and 16. Another important issue with regard to the creamy layer controversy is whether the restrictions imposed on the creamy layer would apply in case of Schedule Caste and Schedule Tribes also. The Supreme Court held that 'creamy layer' is a parameter

to identify backward class. Therefore this principle cannot apply to SCs and STs as they are separate classes by themselves.

I most respectfully differ from the said view of the Hon'ble Court. The Court seems to have assumed that there is no creamy layer from amongst the persons belonging to SCs and STs. The whole purpose of reservation is to see to it that backward classes advance forward. For over 60 years, reservations have been given to SCs and STs and it would be expected that certain sections of SCs and STs would have advanced or will advance forward (socially and economically). The same logic and the same rationale as it applies to OBCs, should also apply to SCs and STs with respect to exclusion of creamy layer. It was observed in *M. Nagraj* v. *Union of India*, that creamy layer from SCs and STs also needs to be excluded. The Supreme Court seems to have overlooked the said observation.

In *Ashok Kumar Thakur* v. *Union of India*, Justice Balakrishnan, CJ, did not lay down any new principle for determination of backward classes, but followed the principle as was laid down in earlier judgments. The question dealt was whether the list formulated by the National Commission for the Backward Classes and the State Commission of Backward Classes has considered all relevant factors and criteria apart from caste for determination of backwardness.

Various commissions had held public hearings at various places for determination of backward classes. National Commission held 236 public hearing before it finalized the list. National Commission recommended 297 requests for inclusion and at the same time rejected 288 requests for the inclusion in the final list. The Commission had taken into consideration detailed data with regard to social, educational and economic criteria. It had also looked into whether there had been any improvement or deterioration in the condition of the caste or community (mentioned in the final list) during the past 20 years. Thus Justice Balakrishnan, in his judgment held that identification of OBC's was not done solely based on caste. Other Parameters were followed in identifying the backward class. Thus Act 5 of 2007 is not invalid for such purpose. Justice Dalweer Bhandari, in his dissenting opinion raised various important points. He stated that the ultimate goal of the Constitution is to have a casteless society and determining backwardness on the basis of caste would instead give a fresh lease of life to caste system in India. He propounded that economy should be the sole criteria for determining backwardness and that any proposed affirmative action must be time bound.

I most respectfully differ from the opinion of Hon'ble Justice Dalveer Bhandari. We agree with the majority opinion of Justice KG Balakrishnan that caste ought to be considered as a major criterion for determination of backwardness. Caste system has been prevalent in India since time immemorial. Every individual belongs to some caste or the other. The backwardness of people in India can be traced to the caste they belonged to. Every caste is associated with a particular occupation. That relation could not be severed. An example cited was in the case by learned Counsel Ravivarma Kumar, appearing for the Union of India, that throughout the country in 6.5 lakh villages, it is the barber communities and the

barber communities alone, which carry on the traditional occupation of hair cuttings and no other community has taken up the said occupation. Though it may be said that people have deviated from that occupation and became doctors, engineers, lawyers, etc, but these people form a very small number. This caste-occupation nexus exists till date in India. Thus the whole caste on the basis of the occupation they follow could be called backward. [122]

Thus caste as a criterion cannot totally be ignored. So far as people belonging to these castes, but economically and educationally well off, are concerned, they would fall within the creamy layer and would thus be denied the benefit of reservation. Thus no person would be wrongfully granted the benefits of reservation. As far as the goal of forming a casteless society is concerned, it is not reasonable to expect to achieve such goal in the immediate future. Till such time, affirmative action needs to be adopted for the advancement of castes which are backward. When it is felt that these castes have become sufficiently advanced, then caste as a criteria for backwardness can be disposed off. However, we concur with Justice Bhandari on the view that time limit needs to be propounded for caste-based reservation.

In *Indian Medical Association* v. *Union of India*,[123] the Supreme Court held that a private, non-minority higher educational institution that admits students only on the basis of their scores in an entrance test is in violation of Article 15(2).

In *Suraj Bhan Meena* v. *State of Rajasthan*,[124] court held that, in view of *M. Nagraj & Ors* v. *Union of India and Ors*,[125] if the state wants to frame rules with regard to reservation in promotions and consequential seniority it has to satisfy itself with quantifiable data that is there is backwardness, inadequacy of representation in public employment and overall administrative inefficiency and unless such an exercise was undertaken by the state government the rules in promotions and consequential seniority cannot be introduced.

Reservation in promotion is dependent on the inadequacy of representation of members of SC, ST and backward classes and subject to the condition of ascertaining whether such reservation was at all required. As no exercise was undertaken to acquire quantifiable data regarding in adequacy of representation. The Rajasthan High Court rightly quashed the notifications providing for consequential seniority and promotion to the members of SC and ST communities and the same does not call for any interference. *S. Balakrishnan* v. *S. Chandrasekar*,[126] and *the Government of Tamil Nadu* v. *Registration Department SC/ ST*,[127] the Madras High Court has held that reservation in promotion is available only to SC and ST and not to backward class (OBC) and most backward class (MBC) *Sudam Shankar Baviskar* v. *Edu. Off. (Sec), Z.P. Jalgaon*,[128] The court held that consequential seniority is not available to VJNT.

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[122] *Ibid.*
[123] AIR 2011 SC 2365
[124] (2011) 1 SCC 4667
[125] AIR 2007 SC 71
[126] (28/2/2005)
[127] (9/12/2005)
[128] 2007 (2) MhLJ 802

In *UP Power corporation Ltd.* v. *Rajesh Kumar*,[129] the Supreme Court held that Arts. 16(4-A) & (4-B) and Arts. 16(4) & (1), 335, 14, 141 and 309 - Reservation in promotion with consequential seniority for SCs/STs - Valid manner in which may be provided - Law providing for (i.e. R. 8-A of 1991 *Rules*) are invalid on account of: (a) non-compliance with mandatory requirements laid down in M. Nagaraj,[130] and (b) non-consideration of parameters of Art. 335 - State Government of U.P. by R. 8-A of 1991 Rules providing for consequential seniority in promotions to STs/SCs by virtue of rule of reservation/roster - For introduction of said Rule, State Government neither identifying nor collecting any quantifiable data showing backwardness of the class, inadequacy of its representation in public employment nor taking into consideration issues relating to efficiency of administration; all mandatory preconditions laid down in M. Nagaraj case- Government only relied on fact that: (a) M. Nagaraj case had upheld validity of Arts. 16(4-A) and (4-B) to make law thereunder r/w Art. 309, and (b) that S. 3(7) of 1994 Act provided that reservation in promotions by virtue of any government orders (which reservation was in force as on date of commencement of 1994 Act) would continue to be applicable till such government orders were modified or revoked - R. 8-A of 1991 Rules and S. 3(7) of 1994 Act, held, are invalid - Arts. 16(4), (4-A) and (4-B) are enabling provisions and State can make reservation laws thereunder only on basis of a clear and certain factual basis or foundation - Concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured - How best the conflicting claims of reserved and unreserved category can be resolved without compromising efficiency of administration, depends on facts and data - Such conflicting interests must be balanced and harmonized because they are restatements of principles of equality under Art. 14- Government can only provide reservation after being satisfied about said facts and data - Therefore, final judgment of Division Bench of Allahabad High Court at Allahabad, set aside and judgment of Division Bench of Allahabad High Court, Lucknow Bench affirmed on this issue - However, any promotion that was given based on dictum of *Indira Sawhney* and without aid or assistance of said S. 3(7) and R. 8-A to remain undisturbed.

On the basis of aforesaid decision the following principles can be carved out:

i) Vesting of the power by an enabling provision may be constitutionally valid and yet 'exercise of power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14.

[129] AIR, 2012 SC, 2728
[130] (2006) 8 SCC 212

iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling-limit of 50% is not violated. Further roster has to be post-specific and not vacancy based.

v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4A). Therefore, Clause (4A) will be governed by the two compelling reasons – "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

vi) If the ceiling-limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.

vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

viii) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of

representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.[131]

Conclusion

Reservation has done a wonderful job in uplifting the weaker sections of the society. It has also served the cause of social justice. One can see the people of SC/ST and backward classes in every office. These people have to much extent, come into mainstream of the society. Much have been done for their benefit and much have to be done. In this regard it is earnestly submitted that the time has come to implement the principle of creamy layer to all including SCs & STs. This submission is based on the fact that the person who falls within the category of 'creamy layer' has the capability in imparting education for their children in the best available institutions. It is the motive of justice is that this principle applies in cases of backward and most backward classes but not in SCs and STs. The ethos and spirit of the Constitution framers underlying behind the enactment of Article 15 & 16 would be achieved in earnest if the people falling in creamy lawyers belonging to SCs & STs come forward and give up the benefit of this provision to their unprivileged brothers.

It is also submitted that the benefit of the policy of reservation is visible in every sphere of life so our Parliament and legislatures should take a daring step for reducing the percentage of reservation (may it be one percent). This will not only enhance the notion of efficiency and administration in state machinery but also boost the morale of general class.

The whole philosophy of equality revolves around the premise that equality should be among equals and unequal being treated unequally. Legislation must be enacted for the unequal's treating them as a separate class. This is the rationale of the entire reservation policy.

[131] AIR, 2012 SC, 2728

THE SIGNIFICANCE OF RESEARCH METHODOLOGY IN HUMAN RIGHTS: A BIRD'S EYE VIEW*

DR T.S.N.Sastry**

Introduction

Human rights compare to yester years are more complex in the contemporary era. From their evolutionary phase as claim rights, they underwent phenomenonal change in their growth, outlook, thinking process, significance, applicative percepts, norms, forms and procedures in the modern epoch. Accordingly, any study or research in human rights needs to be examined from different dimensions. Firstly, the theoretical foundations of Human Rights in their development need to examine legal and non-legal perspectives. Secondly, the legal base, evolution of it from municipal to international, and vice-versa needs a detailed examination. Thirdly, the generational impact and development of various rights requires an examination in the context of the fourth phase of economic oriented era of globalization. Fourthly, the role and perspective of the international organisations and their contribution in the promotion and advancement of rights and their propagation through education necessarily play a lead role in their augmentation, requires in-depth study. Sixthly, the functioning of various international and national institutional mechanism, methods and percepts for which, they are created need a critical analysis. Seventhly, the role of social actors and advocacy groups, researchers and scholars requires an extensive deliberative research. Seventhly, to help students and researchers what methods need to employ, expose, examine and analyse violations of human rights and their consequences in their promotion and dissemination. Eighthly, what would be impact of science, technology and other disciplines in the law making process of human rights? Ninthly, the role of international and national judicial organs and their jurisprudential vistas in the promotion and remedial mechanism provide for the arrest of violations, calls for investigation. Tenthly, what are ethical and moral implications of human rights research and advocacy? Finally, it requires comprehensive examination through employing various methods that require motivating students, researchers to rise above disciplinary and professional divides and explore new techniques to strengthen their research design and implementation.

The proliferation led to the systematic evolution and development of legal standards, protective mechanism to address stupendous changes in the relations amongst comity of nations, scientific and technological temperaments, the process of change in gloablisation, and other economic, social, cultural aspects. However, one thing remains common and permanent in the saga of theirs is persistent and continuous violations. The challenges posed to them in evaluation to ancient periods magnify from day to day, due to the perceptional transform of ethical, moral, social, behavioural outlook of individuals, in their approach and

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practice mostly rely on the realisation of their rights, than to discharging the duties casted on them. To encounter the violations, and to address increasingly mature regime of specific rights characterized to suit specific needs of every society due to the proliferation of indivisible, interrelated nature of international law of human rights, it has developed an array of systematic legal standards, supervisory mechanism at the international and national levels[1].

The extraordinary growth needs a systematic study from every angle to understand the acrobatic dimensions of human rights, and its educative impulse to erect an ethical world to enjoy the fruits in an equitable distribute approach, to augment the basic tenets of equality before law, life and liberty without any discriminatory practices. To address the gamut of international law of human rights, and its adaption to diverse subjects, situations and issues to deduce the positive and negative impact on its actors, a number of research methods and tools have had been developed in the contemporary era. The subjective and objective factors of development of these techniques is to motivate the researchers and students to undertake in depth studies to address the causative factors for their hindrance on the growth and promotion of international law of human rights and its educational objectives.

The paper examines to focus on some of the important significant factors of techniques of research to measure and understand the dimensions of human rights with reference to Meaning and conceptual perspectives of research Methods, Implications of Methodological perspectives, the necessity of snap shot issues, Significance of Ethical and Moral percepts, Significance of Survey, Statistical and case study methods, and the various tools and methodological percepts to carry research through the above methods in Human rights to measure the results and their implications.

Meaning and conceptual perspectives of Research and Research Methods

Research can be defined in simple terms as any systematic study to inquire any aspect with an in-depth investigation to gain new knowledge. It further denotes to answer a question or to find out a solution to a problem with new techniques or procedures to be adopted with original thinking process. Further it seeks to find explanation to unexplained concepts, to clarify the doubtful facts and to correct the misconceived facts. In the words of Karlinger, research is a "systematic, controlled and critical investigation of hypothetical proposition about the presumed relation among natural phenomena."[2]

This means a researcher need to adopt a good hypothesis to guide the researcher in a good perspective without looming large on various aspects or to fall in dark. However, since research fundamentally guides one to proceed in a systematic fashion to acquire new knowledge and to find out solutions in a fruit-full manner, it can also be preceded without hypothesis. In fact in areas like human rights which, is highly interdisciplinary in nature many a times it may not be possible to fix a hypothesis with a single agenda. In issues relating to socio, economic and cultural perspectives, the researcher may examine the

1 *Ilias Bantekas And Lutz Oette, International Human Rights: Law and Practice*, 8-30 (Cambridge,2013).
2 *Karlinger Fred. W, Foundations of Behavioral Research*, 11 (N.V. Holt , Rinchart and Winston, 1975)

issue under study from different dimensions by drawing a set of specific objectives of the study. In such a case, since the aim and objective of research is a careful study of a subject, especially in order to discover new facts or information about it[3], the issue of hypothesis is not a necessary ingredient to proceed further and may lead to find out a hypothesis.[4]

Research Methods

The present century has opened up with a number of challenges to be addressed basing on the economic, social, cultural, political and legal perspectives. To address the various issues that are plaguing the comity of nations to evolve long lasting solutions, a number of tools are required to investigate each issue to temper with scientific solutions that need to have a legal basis.

In comparison with sciences, in social sciences, and especially, law being a normative science, each issue needs a systematic and through investigation from different angles. In a subject like human rights, which has an over bearing of every field of study in it, it needs every issue a proper examination by adopting various research methods, patterns depending on the type of issue under consideration for investigation.

Before employing the methodological aspects to examine the problems and percepts of human rights, the main tool that is required to have a research design. Prior to framing a research design, in social sciences a researcher needs to have two fundamental tools that is descriptive and explanatory types to investigate the problem.

Descriptive Method of Research

Descriptive and explanatory research mainly leads a researcher to collect data by probing through what and why issues. This could be considered as the base for developing a research design. It will in turn lead to examine and deals with the type of research questions, data analysis that need to be applied to the problem under investigation. Descriptive method is concerned with 'what is 'might be applied to questions to investigate.[5] This method is mostly employed with respect to state sponsored research with respective to a number of issues by employing a number of indicators. The intention of this research is to produce a statistical data. In issues of human rights to give, an indication to state or international organisations to find out the type of schemes and methods require to adopt and to access the impact of the schemes that are introduced by it. The data needs to be collected either singly or in various combinations based on the type of research issues are at hand.

Explanatory Method of Research

Explanatory research deals with 'why' type questions and goes beyond description and tries the reason for the phenomenon that the descriptive study already provided. In this,

3 Oxford Learner's Dictionary , on line edition available at http://www.oxfordlearnersdictionaries.com/definition/english/research_1 (Last updated14.5.2014)
4 *Reena Gautam, Sources of Research In Indian Classical Music*, 3 (Kanishka Publishers, New Delhi, 2002)
5 What is descriptive research, http://learngen.org/~aust/EdTecheBooks/AECT_HANDBOOK96/41/41-01.html, (last updated, January 1 2013)

one may employ causal questions for probing the issue and then proceed to expand the area with number of players. In issues of human rights, it can be started probing into a single issue, which may be expanded to study to the same issue with reference to different contexts and countries. For example, issues like exploitation of disable and vulnerable and causes for their vulnerability in different contexts and other number of aspects may be examined through explanatory method.

Both the methods lead to answer the theoretical percepts,[6] which are highly intricate and significant in the context of social sciences in general, and human rights in particular. The observational aspects by employing descriptive and explanatory methods would lead to inductive and deductive reasoning to arrive at a set of propositions based on the theoretical percepts. In a way, it would help to find out the authenticity of the theoretical base of a number of issues of human rights since many of them evolve out of an account of economic, socio, cultural and legal process.

Significance of Research Design

Research design means the integration of various issues to study in a coherent and logical fashion there by one could examine the issue under study effectively with the help of analysis of data already collected by employing various methodologies. A research design helps to address the proper concerns of research and guides a researcher to fill if any inadequacies found while, procuring further data. In view of a number of designs[7] are available to examine the research data, especially in human rights research, choosing a design is the most important aspect since each issue and problem are complex and intricate in nature. For an easy and quick understanding of a design, the significance and their applicability in a specific context, the paper subtly, examines few of them.

1. *Action Research Design*

An action-based research mostly helps in community-based research activities. It focuses on pragmatic and solution driven research than to adopt simple theoretical perspectives. All serious studies have a direct and obvious relevance to practice. This methodology is commonly employed in community-based research to examine the policy perspectives, benefits derived and to suggest the necessary implementation mechanism to redress the grievances. It also helps to suggest to access the national and international

[6] Theory means, *A set of interrelated constructs (concepts), definitions, and propositions that present a systematic view of phenomena by specifying relations among variables, with the purpose of explaining and predicting phenomena.* (Kerlinger F.N. and Lee H.B., Foundations of Behavioural Research, *15 (2000),; for a clear description theory and theory building* see Jason A. Colquitt and cindy P. *Zapata-Phelan, Trends in Theory Building and Theory testing : A Five Decade Study of the Academy of Management Journal,* 50, American MJ., 1281-1303 (2007)

[7] For a detailed study and methods and designs see www. ibguides.usc.edu/content.php?pid=83009&sid=818072 and the literature cited there in (last updated 15.2.2014). also see, Ooona A.Hathaway, *Do Human rights Treaties makes a different.?* 111 Yale L J, 1935-2042 (2002) where the author discussed some of the models that need to be applied in the context of binding nature and application of human rights treaties.

policy framework on major issues such as Environment, Right to Development, and to address the various issues of group rights.

2. *Case Study Design*

Case study design is normally applied in two ways in legal research. One is to understand the perspectives oriented in a practical problem. This will help to understand and examine an issue in particular context and facilitate to analyse with the theoretical parameters. Another one is to examine the cases decided by courts, and to examine them in the social context with an analysis of practical and theoretical purposes of the value of judgment and its impact on the enjoyment of a number of human rights. A number of cases decided by various courts, especially, the Supreme Court of India expanding the provisions of the constitution through Public Interest Litigation are highly helpful to study by employing this method. It further helps to study, how and in what perspective individuals can demand the state for the implementation the non-justiciable rights or Economic, Social and Cultural rights through the prism of Fundamental rights or Civil and Political rights, when the directives are neglected and which have a substantive bearing on the enjoyment of the first generational rights.

3. *Causal Design*

This type of research in human rights will help to understand the impact of a specific change on the existing social conditions, norms and the futuristic assumptions that one can lead to study a number of aspects in a causal fashion by interaction with various individuals on various aspects of human rights, or with a particular group of people whose rights are at peril. This type of research will help the researcher to understand at what point of time, the other methods can be initiated either individually, or collectively as a mixture to broaden the research to study whether claims mechanism need to be included for the various violations of the rights, if so, what type of mechanism need to be employed to address or to suggest the redress mechanism to the victims of rights.[8] This type of observational skills led a number of people to evolve the Social Action Litigation in India which could provide a number of durable solutions to a number of rights of various sections of people to augment their rights as guaranteed by the constitution in its true spirit.

4. *Cohort Design*

This is normally a design employed in medical sciences. However, human rights being an applied social science, this type of design help to study the behaviour and attitude of particular populations and the way they exercise the rights and inherent difficulties that they face in a new or particular locality. This method is mostly useful to study the problems and perspectives of Migrant and causal labour, refugees and internally displaced persons etc.

[8] For a discussion on Claim research, David J. Harding and Kristin S. Seefeldtee, "Mixed Methods and Causal Analysis" in *Stephen .L., and Morgan (eds), Handbook for Causal Analysis of Social Research* 91-113(Springer, New York, 2013)

5. ***Cross Sectional Design***

Cross section studies provide a snapshot outcome and basing on the studies of a researcher to draw inferences from the existing difference between people, subjects and the various measures that have been taken in the enjoyment of human rights. In this survey method is mostly employed to collect data[9].

6. ***Descriptive Design***

Descriptive research is employed to obtain information about the current status of the phenomena and to describe what exists with respect to variables or different conditions in a situation. As discussed above, basing on the variables adopted by a researcher, the problems will be addressed with a set of questions to investigate further what type of methods and mechanism need to be employed to undertake further research.

7. ***Experimental Design***

Experimental research is employed in limited time span to understand the issue under study with a particular perspective to collect the evidentiary value of the issue. Before proceeding further, the researcher need to develop a blue print with a set of aims and objectives or a hypothesis to reach the conclusion about the independent or group issues of the conceptual perspective of human rights of the particular group, or independent issues which have relevance to the study with the help of corroborative substances such as policy framework, statutory framework, judicial decisions etc. Before undertaking an experimental research to verify the result oriented framework, it is always advisable to undertake a pilot study which may help in the longer run to experiment with a single larger group or different groups.

8. ***Exploratory Design***

This is conducted in an area where there is no much research is undertaken. The main objective of the research is to gain to obtain the insights and familiarity for later investigation and to encourage further research. If a researcher would like bring a new conceptual perspective, basing on the general aspects of human rights, or to articulate a new right basing on the substantive rights which has not been advocated either directly or indirectly in any of the texts and documents adopted either at the international or national level. For example, Right to participate which is an important right constitutes as one of the basic rights of the concept of life and liberty. Though this might not have been advocated in any of the documents, basing on the necessity, the researcher may develop the thesis to address the rights of an individual or a group whose rights might have been effected basing on this concept.

[9] For a discussion on and the conceptual perspective on cross sectional design, Chris Olsen and Diane Marie M. St. George: Cross-Sectional Study Design and Data Analysis, 2004, available at http://www.collegeboard.com/prod_downloads/yes/4297_MODULE_05.pdf , (last updated Dec.12,2013)

9. ***Historical Design***

The purpose of a historical research design is to collect, verify, and synthesize evidence from the past to establish facts that defend or refute your hypothesis. It uses secondary sources and a variety of primary documentary evidence, such as, logs, diaries, official records, reports, archives, and non-textual information [maps, pictures, audio and visual recordings]. The limitation is that the sources must be both authentic and valid.

After adopting the design, one need to undertake the various issues under study mostly by employing the ethical and moral percepts of each problem, since human rights are the synonym in the contemporary era to consider the value based ethical percepts by observing, adopting, restraining and respecting the rights of others. By employing the ethical and moral standards and their measurement through observation, practice, survey or statistical methods through cross-cultural percepts, case studies, one could understand the future regulatory norms to be evolved to make everyone to derive the benefits of human rights the way they are guaranteed. This method and design mostly centres round the duty concept as advocated in the rights paradigm, especially through Article 29 of the Universal Declaration of Human Rights.[10]

Implications of Methodological perspectives and the necessity of snap shot issues

The significance of human rights could be tested only in a practical perspective. Any right or any issue of human rights could be measured only on its implementation, the extent of enjoyment and the benefits derived there from or the negative aspects that hamper could be assessed by employing a number of research methods for investigation of an issue under study. For example to study the implications and significance of Human Rights Education, a researcher need to gauge various methods to resort. In employing a method, a researcher in Human Rights need to have the requisite tools such as information gathering, types of information required for the study, interview, survey, statistical inputs, interview etc.[11] After acquiring all the data one need to select a specific method of study to suit the design that is already planned.

To understand quick results to examine an issue under study, snap shot research is one important tool, which is handy to employ in analyzing issue of human rights. However, one need to be cautious while adopting this pattern. This pattern is of two types with respect to human rights perspective is concerned. One is to study a specific problem in a time frame and analyse the context in which the issue is raised. For example the impact assessment of a judgment of a court or a problem and other aspects that can lead to obtain quick results.

Secondly, snap shot issues in human rights may be studied by observational methods of a photo type study and analyse the issues that need to be mapped basing on the

[10] For a detailed discussion see *OHCHR: Human Rights Indicators A guide to measurement and Implementation*, 2012, especially chapter II

[11] Navaneetham Pillai's *Lecture on Human Rights Investigation and their Methodology* available at www. OHHCR official website.

understanding of the researcher. In this also a researcher need to choose the focus group or focus area of research, which is vital.[12] This methodological perspective could be adopted in most sensible issues of human rights to understand, study the magnitude of the problem. To assess the impact of the the judgment of the Supreme Court of India on various issues such as Section 377, Prostitution, Trafficking, Child abduction, and other vulnerable and disadvantaged sections problems, Environmental concerns of human rights etc., this method is highly useful. It is a handy tool, especially, for media and student researchers to study in depth with respect to a small issue and to understand its significance in the context of study. In litigation and trial monitoring aspects also these method can be employed easily to obtain quick results through observational percepts.

Significance of Survey, Statistical and case study methods

Survey and statistics and case studies are other vital resource for conducting human rights research. Survey is a method of data collection to describe, compare or explain individual or societal knowledge feelings, values, preferences and behaviour. Human Rights being a mixture of number of aspects, it needs to be studied form different dimensions and angles. Hence survey plays an important tool to collect data.

Statistics is the most important tool in human rights research. This will help to test the information in a comparative perspective. It is an extended tool to conduct qualitative research by employing a number of questions like, what, which, how, what parameters, how many samples are needed etc. This will further lead a researcher to find out the multiplicity of problems surrounded in the free enjoyment of rights and would lead to find out solutions for such problem to ensure the enjoyment of such rights without any violation in future.

Case study is another important method for human rights research. In this, the researcher need to focus on a small area and observe the perceptional aspects involved in it. Case study method requires a long term perceptional ideas and to study extensively the problem under study from a number of angles. It requires to analyse the behaviour patterns of people of a particular society or group, obstacles encountered by them in the enjoyment of their guaranteed rights, the various dimensions of socio, economic, political, cultural issues involved in the enjoyment of such rights, the actions and reactions of the people, reverse discriminations, the affirmative action's of the state and society etc.

Methodological Tools

In the methodological tools a researcher generally require information, analysis of the information, applicability and relevance of the data are necessary to carry forward research. The researcher needs to have a thorough understanding of the issue under study. The theoretical base would help the researcher where, how and what type of data is required for the study. This classification would help to analyse the progressive nature of

[12] Kristin Reed and Ausra Padskocimaite: *The Right Tool Kit*, April 2012 p.38 available at http://www.law.berkeley.edu/files/HRC/Publications_The-Right-Toolkit_04-2012.pdf (last updated june 12 2012)

the human rights issues to study. For example, human rights education is not simply meant to study the various documents and literature. It advocates studying a number of issues such as the affected groups, their rights; the legal scenario and other aspects need to be combined to obtain accurate research data to apply to the problem under study[13]. At times, simple issue may bring in a number of complications involved in the area of research. For instance a particular group or community may become vulnerable due to the changes in the legal policy, or other aspects of behavioural and other patterns. In such situations a researcher need to have patience and to investigate all the aspects from every angle and then analyse the reasons which are most suitable in the given case that a particular group became vulnerable and suggest remedies to reverse the situation.

After obtaining the data basing on the theoretical perspectives or literature, one need to give a sharp focus on the skills of interviewing. Interviewing is not an easy task and should not be taken in a simplistic perspective. It needs a comprehensive preparation with a few sample questions, lack of focus on the art of interviews, framing of questions, the adequacy of language, who should be the targeted group, how and when to conduct the interview, the socio, economic, cultural differences, behavioural patterns etc play a vital role in developing the various perceptions of research.

Conclusion

Research in human rights is still in its infancy. The various methodological percepts, theoretical dimensions need to be augmented with practical application at every point of time. In the ultimate analysis human rights in every contextual problem of study need to be interpreted with legal rules and regulations. Accordingly, one needs to undertake mapping exercise as rightly pointed out by UN High Commissioner for Human Rights Navaneetham Pillai. Mapping exercises is a three pronged approach, such as 1) documenting gross human rights violations committed during a particular period, (2) assessing the existing capacities within the national justice system to deal with such human rights violations; and (3) formulating proposals for the creation of appropriate transitional justice mechanisms to address the legacy of these violations in terms of truth, justice, reparation and reform.[14]

This would lead a researcher first to search for the documents. In the contemporary era, due to technological advantage of internet, mammoth data is available for information and search. Various Academic and publishing houses, Universities, Governments, UN and other non-governmental organisations developed a multipronged and multi disciplinary based research information on various facets of human rights and their educative process and procedures. Among the various resources, the electronic resource guide developed by the

[13] For discussion on Methodological Tools Pirko Poutiainen et.al., Methodology and Tools for Human Rights based Assessment and Analysis, 2004,OHCYR and UNDP Project report available at http://www.ichrp.org/files/papers/186/impact_assessment_human_rights_approach_paper.pdf (last updated 20.5.2012)

[14] Navneetham Pillai : *Lecture delivered on Human Rights Investigations and their Methodology*; 24th February 201, available at http://unispal.un.org/UNISPAL.NSF/0/C9222F058467E6F6852576D500574710#sthash.SrD1w2QM.dpuf (last updated January 10 2014.)

American Society of International Law is regarded as one of the exhaustive list of resources on human rights. The advantage in this e-resource guide is various links and their resources are provided in a most easy and convenient fashion.[15]

Whatever may be the type of research or the problem that need to study on human rights, they need a small and humble beginning to develop and address the issues from their closer circle as rightly observed by Mary Robinson, the Chair person[16] of the Universal Declaration of Human Rights that:

> *"..where, after all, do universal human rights begin? In small places, close to home so-close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world ."*

The above statement clearly advocate research in Human Rights and the promotion of Human Rights Education need to augment in every Institution irrespective of their discipline of study. It is the duty of the academic institutions, especially the scholars of law to beat the cudgels of wrong beliefs, and other cultural perceptions to promote human rights for all equally. To this end, it is necessary to focus more on the strategies and tools of research and its methodological percepts in human rights. The research perception if highlighted, nurtured, imparted to students of law in particular and various scholars and every segment of society in general, it becomes easy to prevent the distortions and violations that surround the most famously infamous area i.e., "Human Rights." The above brief discussion is mainly intended to create awareness amongst the various researchers in India to further study to develop research patterns in human rights applicable to both international and national scenarios and especially by legal scholars.

[15] Marci Hoffman: *International Human Rights Law, electronic Resource Guide* http://www.asil.org/sites/default/files/ERG_HUMRTS.pdf (last updated August 28,2013)

[16] Draft of the UDHR Presentation In Your Hands: A guide for Community action for the Tenth Anniversary of the UDHR, UN, March 27, 1958

STRATIFICATION OF MASTERS EDUCATION IN LAW IN INDIA: A DEBATE ON ONE YEAR LL.M. AS AN ALTERNATIVE OR A CASH COW.*

Prof. M.R.K. Prasad

The debate on the purpose of higher education is increasing in the wake of liberalization and globalization particularly, in developing countries like India. The growing concern for overt emphasis on market oriented education which undermines the social value of education, is a challenge which the present educational reforms has to face. Revamping of higher education in law by introducing One Year LL.M. program has generated greater concerns than industry oriented education. This article seeks to look at these concerns, such as the possibility of stratification in legal education and using the One Year LL.M. program as a cash cow by elite and private institutions. This article also focuses on various expectations from higher education by different stake holders and argues that the higher education cannot fulfill its expectations without the contributions from various stake holders.

Traditionally, educational institutions are expected to create and disseminate knowledge. Higher education being described as liberal education is naturally pre-supposes the inculcating of critical thinking and developing advanced ideas and beliefs.[1] However, professional education may have an additional goal of training in professional skills and values. The change of social values particularly due to the emergence of economic liberalization, globalization and market orientation raises the debate of higher education as a public good versus private benefit.[2] Corporatization of higher education further takes this debate to its pinnacle as it advocates that higher education shall prepare its pupil to be industrial oriented and suitable to the modern job market contrary to the conventional academic and scholarly ideas discourse.

Legal education in India is no stranger to this debate. Firstly, the debate is on whether it is a law school or lawyer's school and secondly, whether the law schools need to cater to the needs of the market or the society at large. Efforts to reform legal education dates back to pre-colonial era and has continued in the post-colonial period.[3]One notable omission in these efforts was lack of focus on Masters Program in legal education which is mandatory

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[1] See Roy Y. Chan, '*What is the purpose of Higher Eduction/ comparing Student and Institutional Perspectives on the Goals and Purposes of completing a Bachelor's Degree in the 21st Century*', Paper presented at the Annual Association for the Study of Higher Education Conference, St Louis, Mo, 2013.

[2] For aims, goals and purpose of higher education See: J.H. Newman, *The Idea of a University* (1873); Peter G. Taylor, *Making Sense of Academic Life – Academics, Universities, and Change* (Buckingham: SRHE & Open University Press, 1992); S.V. Barnes, *"England's civic Universities and the triumph of the Oxbridge Idea"*1, *History of Educational Quarterly* 36; P. Ramsden, *Learning to Teach in Higher Education* (London: Routledge,1992); N.J. Entwistle and K.A. Percy, *Critical thinking or conformity? An Investigation into the*

for the teaching faculty in law.

The LL.M. program has failed to receive the attention that is received by the LL.B. program.[4] It is ironical that Masters Program receives such a treatment when the execution of reforms in legal education largely depends on the faculty.

It is not to say that there are no efforts. Several reports do mention the deterioration in standards of teaching.Occasionally, there are references to improving the quality of teaching standards.[5] For example, there is a great deal of discussion on 'non inculcating skills' which finally led to the introduction of four practical papers by Bar Council of India (BCI) in LL.B. curriculum in 1998.However, practically no measures were undertaken by the BCI to equip the faculty in offering these practical papers.

1. Higher Education in Law: Goals, Problems and Perspectives

LL.M. stands for *Legum Magister*, which means Master of Laws.It is a Latin abbreviation.[6]The LL.M. (Master of Laws) is a postgraduate law degree usually obtained by completing two years full-time program in India. LL.M. program in India was designed on the line of other postgraduate programs like M.A., M. Sc, M.B.A and M.Com. Several advantages in obtaining an LL.M. degree are indefinable. One may pursue LL.M. for academic interest in the higher learning, or to acquire knowledge on a special subject, mastering a super-specialized area in law, or to change the career.

V. Wish, identifies seven reasons why students opt for LL.M. in USA [7]

1. To upgrade once C.V. by opting a better Law School
2. To qualify for appearing in USA Bar Exam
3. To develop a specialization
4. To improve English
5. To get a job
6. To get some international experience
7. To learn research and to publish

Though there may be many other benefits to undergo LL.M. program,like some may choose it just as an additional qualification or for promotion.The main purpose one could say is to choose a career in teaching law in Indian context. LL.M. is made mandatory to become a law teacher in India though it may not guarantee the job as time and again several other

Aims and Outcomes of Higher Education, Research into Higher Education (London: SRHE, 1973) and R. Barnett, *The Idea of Higher Education*(Buckingham: Open University Press and SRHE,1990).

[3] *See Law Commission of India 14th Report* 1958; Gajendragadkar. J, *Report of the Committee on the Reorganization of Legal Education in the University of Law, Delhi,* (1964); *Government of India, Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, Report of Expert Committee on Legal Aid : Processual Justice to the People(1973); Report of First Regional Workshop on Legal Education.* (1975); *Government of India, Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, Report on National Juridicare: Equal Justice – Social Justice 1 (1977); Report of the U.G.C. Workshop on Socially Relevant Legal Education.* (1977). UpendraBaxi, 'Towards A Socially Relevant Legal Education ' (University Grants Commission 1979) (reporting on the University Grants Commission Workshop on "Modernization of Legal Education); *Report of Committee for Implementing Legal Aid Schemes* 1981; Report of All India

eligibility criteria have been prescribed by UGC. However, there is a new trend that has developed in India; to get an LL.M. degree from a better institution particularly when LL.B. degree is from a less known institution. Emergence of National Law Schools in India greatly contributed to this development. For better employment prospective students often join LL.M. programs offered by National Law Schools. It is not to say that LL.M. is completely irrelevant to attaining the higher learning of law. Many atime's students do pursue LL.M. when they realize that what they have learnt in LL.B. is not sufficient, as quality of legal education offered by majority of law colleges in India is dismal.

Therefore, an LL.M. program is expected to cater to the above expectations. Converse to the expectations, the mushroom growth of LL.M. programs all over the India resulted in poor standards and in a sense it became continuation of LL.B. Many of these programs started offering the same subjects that are taught in LL.B. program that to without any specialization. Further, the teaching levels both at LL.B. and LL.M. did not differ.

Dung Niuyen writes, "the educations systems that are created in ancient times are not designed for masses, they were in fact, created for the elite and intelligent. They were created for the purpose of enlightenment of mind and creating ideas of wisdom".[8] However, this is no longer the case, not only in India but all over the world. Increase in terms of quantity in educational institutions turned, what started as centers for elite, into centers for masses. Highly subsidized higher education in India which is offered through several State and Central Universities provided access to the populace.[9] A massive expansion of higher education particularly at Master's level brought both, desirable and undesirable changes in the focus of higher learning.

Due to this mass expansion, the intellectual discourse that is centre to the learning in the Master's program gave way to monotones and repetitive topics being taught every year. This trend is evident if one can see how often the core curriculum of an LL.M. program is modified. Further, University Grants Commission which controls the Masters' program in India creates the model curriculum and most of the Universities offering LL.M. program blindly adopt the same thereby killing the innovation and local needs.

These trends of less emphasis on dynamic curriculum and good teachers and more focus on marks and grades and timely graduating with their degree "the romantic notion of learning for the sake of increasing one'sunderstanding is no longer practiced."[10]

Though, there is nothing wrong in offering higher learning to the masses, the methods that are adopted for the same have diluted the very purpose of higher education in India. As a result there are several teaching institutions that have mushroomed and the liberalization

Law Teachers' Conference 1981; Report of the Curriculum Development Committee (1988-90) known as Baxi Committee; Justice Ahmadi, Report on Reforms in Legal Education and Regarding Entry into Legal Profession, 1994;.K. Koul and V.K. Ahuya, Ed.s, Legal Education in Indian 21st Century: Problems and Prospects (1999) report of the proceedings of All India Law Teachers Congress held January 22-25, 1999 at University of Delhi; Report of Curriculum Development Committee 2000; First National Consultation Conference of Heads of Legal Education Institutions held at National Law School of India University, Bangalore on 12.8.2002; Law Commission of India, 184th Report on The Legal Education and

policy that is adopted in education system has further opened the flood gates to private actors in higher education. A new directionin higher learninghas been heralded with the entry of private institutions. The public expenditure on higher education has dwindled and existing public Universitieshave suffered severe financial crunch and new appointments have almost reached to nil.

In addition to all these problems, distance education which was meant for reaching the unreachable, created a new opportunity to amass wealth and contributed to further decline in standards of higher education. LL.M. is no exception to this and many Universities started offering LL.M. by distance education practically without orvery little class room teaching. The mandatory requirement of submission of dissertation at the end of two years became symbolic and travesty in the absence of qualified guides to guide the students in research.

The neglect of LL.M. program resulted in poor teaching standards at the LL.B. programs. Mediocrity in legal education is largely evident and in fact mediocrity became a hall mark. The eligibility criteria adopted by the UGC for teaching faculty made LL.M. program redundant at least for those who opted LL.M., to choose teaching as career. The ability to teach, comprehensive knowledge of the subject, communication skills, research skills and most importantly teaching aptitude and integrity of the prospective teacher had been absolutely ignored by the NET/SET examination which is mandatory for becoming teachers. The new Academic Performance Indicator (API) adopted by UGC had a potential to further deteriorate the teaching standards.

2. One Year Master's Program in Law

In the year 2009, the Ministry of HRD, Government of India constituted a Round-Table on Legal Education. The purpose of such consultation was to advice and make recommendation for transforming the legal education system in India. In one of its meeting, the issue regarding restructuring of the existing LL.M program was raised.[11] In order to attract the brightest graduates in law towards the post graduate program, reducing the current LL.M. program duration from two-years to one year duration was considered.

One of the core objectives of such consideration is to improve the traditional post-graduate study in Law in the University system.[12] The task of restructuring the LL.M. was entrusted to UGC. Accordingly, the UGC constituted an Expert Committee.[13]

Professional Training and Proposal for Amendments to the Advocates Act and the University Grants Commission Act, 2002; and Knowledge Commission, Compilation of /recommendations on Education 2007.

[4] It is not to say that there are no efforts to reform LL.M. For example two notable attempts were made by UGC for revamping the curriculum of LL.M. first one in eighties by Curriculum Development Centre and the second one in 2001 by Curriculum Development Committee.

[5] The Report of the Curriculum Development Centre in Law (volume 1), UGC, 1992, First National Consultation Conference of Heads of Legal Education Institutions held at National Law School of India University, Bangalore on 12.8.2002; 184th Report on The Legal Education and Professional Training and Proposal for Amendments to the Advocates Act and the University Grants Commission Act, 2002; and Knowledge Commission, Compilation of /recommendations on Education 2007.

The Expert Committee submitted its Report in favour of introducing one year LL.M. Program along with Draft "UGC (Introduction of LL.M. I-Year Course) Regulation, 2010". However, at the meeting of Round Table it was suggested that the U.G.C. may expand the existing Expert Committee on restructuring legal education for ensuring wider consultation. As a result, in the month of July 2010, an Expert Committee of 13 members was constituted again under the Chairmanship of Prof. (Dr.) Jose P. Verghese. The Committee after holding five sittings during July 2010 to February 2011 submitted its final Report based on the proposal made by the subcommittee.[14] The Report consists of two parts. The first part covers the requirements of the program arrangement of semesters. The second part consists of titles of the courses to be taught. The main recommendations of the Report are as follows:

The One-year Master's Degree in Law would be based on Academic Creditswith a trimester within 12 month duration. All the requirements specified in this Scheme shall be mandatorily completed during the trimester.Each of the trimesters shall have 12 weeks working duration. After each trimester the University may determine the break of one or more weeks.

It is recommended to have four components such as: (1) Foundation / Compulsory Papers (4 papers of two Credits each); (2) Optional/ Specialization Papers (4 papers of two Credits each); (3) Practical Teaching Exercise (four Credits); (4) Dissertation (four Credits).

It is mandatory for the Institution offering One Year LL.M. program to establish Center of Excellence for Advanced Legal Studies & Research (CEALSR), and shall have at least four qualified Professors/Associate Professors of Law, as regular teaching facultyand its total strength should not be less than 10 in number, and other necessary research personnel, and sufficient non teaching staff, to start the above said Course.

The recommendation also suggests that an application for recognition as a Center of Excellence shall disclose all necessary information and an undertaking to observe the guidelines/norms issued by UGC from time to time.

[6] In Latin, a letter would be repeated to show the plural form when used in abbreviated form. Therefore "LL." is a short form for "laws", as Legum is a plural form of lex. Lex means law and it denotes a general concept of law whereas Legum means "specific laws" See, *What is an LL.M., LL.M. Guide, Master of Laws Programs Worldwide*, available at http://www.llm-guide.com/what-is-an-llm (last visited 02 - 02 – 2014)

[7] *V. Wish, 7 Reasons Why Lawyers Do An LL.M.?*, LL.M. Guide, available at http://www.llm-guide.com/article/ 607/7-reasons-why-lawyers-do-an-llm (last visited 02 - 02 - 2014)

[8] Dung Nguyen, *The True Purpose of College and Higher Education*, available at http://www.deltacollege.edu/org/deltawinds/DWOnline00/thetruepurposeofcollege.html (last visited 12-02 - 2014).

[9] As per UGC there are 659 Universities in India out of which 312 are State Universities, 45 Central Universities, 173 Private Universities and 129 Deemed Universities, available at http://www.ugc.ac.in/oldpdf/allUniversity.pdf(last visited 10 - 04 - 2014).

[10] Dung Nguyen, *supra Note* 8.

[11] 17th November 2009.

[12] *Report of the Committee on Restructuring Legal Education*, 2012

[13] The Committee consists of a Chairman and five other members. Prof. (Dr.) Jose P. Verghese was appointed as a Chairman.

[14] *Supra Note* 12.

The CEALSR is expected to maintain highest standards of academic excellence both in teaching, research and capacity building. Different courses must be designed for this one year program and these coursesshall not be the same as arealready studied at graduate level. It is also suggested that this course being intensive in nature, the graduates of One Year LLM may be exempted from NET Examination for being appointed as a law teacher.The recommendations also allow the students to undertake a semester in another law school in India or abroad under Student Exchange Programs by transfer of credits.

Based on the above recommendations,University Grants Commission permitted the introduction of one year LL.M. programin India from the academic year 2013 – 14.[15] However, it is pertinent to note that there are several changes that were made in the final guidelines issued by UGC (hear in after the Guidelines).

The nomenclature of Center of Excellence for Advanced Legal Studies & Research (CEALSR) is changed to Centre for Post-Graduate Legal Studies (CPGLS). Though the new guidelines issued by UGC state that post-graduate education in law can be introduce only after fulfilling the minimum requirements but it failed to provide any measures to ensure such compliance.

Provisions regarding application for recognition, mechanism for post recognition monitoring of compliance to the guidelines, were conspicuously missing in the UGC guidelines. At several places the Guidelines stress on the quality and standards, but unfortunately, in absence of monitoring mechanism there is no guarantee that the one year program is going to be any different from two year program except reducing the duration of the course.

The original recommendation made it mandatory to disclose the staffing pattern and infrastructural facilities in the application and undertaking to observe the guidelines/norms of UGC. However, the Guidelines are not only silent about it but it mentions that the Centre of Post-Graduate Legal Studies shall disclose similar information only through its prospectus/ website. As a result, the basic idea of improving standards of LL.M. would be defeated particularly when 200 and odd Universities/institutions that are offering LL.M. program in India[16] decide to introduce One Year LL.M.The recommendation that the course should be offered by trimester was also diluted by the Guidelines as it gives a choice to the Colleges to opt either for trimester or semester.

It is not to say that there are no positives in the Guidelines. It has inserted a specially designed curriculum[17] to orient students towards teaching and research, which if offered by the Institutions would have a greater impact on improving the teaching standards in law colleges.

[15] UGC Circular No: D.O.No.5-1/99(CPP-II) dated 18th January 2013

[16] See, http://www.telegraphindia.com/1110616/jsp/nation/story_14120327.jsp (last visited 02 - 02 - 2014)

[17] The guidelines in its Annexure mentioned six specialization in which the sixth one focus on LL.M. (Legal Pedagogy and Research).

3. Stratification of Masters Education in Law

Legal education in India being mass education,[18] poses serious restrictions on quality, depth and its contemporary relevance. On the other hand LL.M. is expected to attract few students and provide deeper insights to the study of law which would be able to address there restrictions. However, it is evident that the existing two year LL.M. has failed to do the same. LL.M two years course is mostly viewed as an extension of LL.B. The idea of planning One-Year LL.M on the lines of Universities in US and UK is to improve the standards of learning and research. However, the rising cost of one year LL.M. seriously dents this idea.

Three factors: raising tuition fee, low teaching standards, and high expectation upon the students with time constraint, undermine the very idea of introducing One Year LL.M. After looking into the fee structures of institutions offering One Year LL.M., one can say that it would have worst possibility of causing stratification of post graduate legal education in India. It has the effect of reserving better/quality education (though I have my own doubts about it and I strongly believe that the number of years would make no improvement in quality) to the rich and urban middle class.

It creates a social stratification among the students of One Year LL.M. and Two Years LL.M. as students of One Year LL.M. are viewed as more sophisticated and better qualified. Sucha view is made possible by the very description of the One Year LL.M. as intensive course and the report says that the One Year LL.M. program was introduced to revamp LL.M.

But in reality it may so happen that the students who can afford high fees will go forOne Year LL.M. program and students who cannot afford, will go for Two Years Program. As a result, the student of two years program who already suffers due to the stratification, is also in a disadvantageous position of studying one year more where as students of one year would be able to get gainful employment a year before.

Further, most of the traditional Universities are not in a position to introduce One Year LL.M. due to several reasons such as establishing a separate centre for LL.M. and number of dedicated faculty to the program. Universities of single faculties such as National Law Schools, other private Universities and deemed Universities are in a position to introduce one year LL.M. as changing the nomenclature to Centre for Post-Graduate Legal Studies is easy and simple compared to the multi-faculty Universities as there is minimal level of scrutiny due to in-house monitoring. This trend is evident through reading of the data that out of 10 institutions that are offering one year LL.M., there is not even a single multi-faculty Universities are offering one year LL.M.yet.[19]

[18] There are about 1,100 law college in India, http://www.barcouncilofindia.org/wp-content/uploads/2010/05/List-of-Law-Colleges-2013-as-on-1st-Jan.-2013.pdf (last visited 02 - 04 - 2014).

[19] The data is based on the information available on internet search for the LL.M One Year Course. There could be a possibility that the information about the institutions which are offering one year program might not have been available on internet.

In almost all the institutions offering LL.M., the fee structure is very high, the lowest being Rs. 45000[20]and the highestRs. 4,00,000/-.[21]Privatization of education is one of the main reasons for escalation of costs in higher education. The requirement under the one year LL.M. guidelines that minimum ten dedicated faculty members of which at least four should be either Professors or Associate professors, requires a lot of financial support. The faculty salary alone would be between 8 to 10 lakhs a month leaving apart the infrastructural and administrative costs. This imposes a huge financial burden on any institution that offers a one year LL.M. course keeping in mind that the cap on admission is 20 students. Further, implementing the workload requirements under UGC regulation would not be possible due to the fact that the number of teaching hours would be much less than the UGC norms.[22]

The high costs of legal education would have an adverse effect and often force students to complete the basic requirements mechanically thereby restricting any effort to gain knowledge for personal enlightenment. The effect of stratification leads to the belief that certain institutions or class of institutions are meant for particular courses where as others would not be in a position to offer such courses.

As the Marxists point out, the economic base determines the shape of the superstructure i.e. society – culture, the State, and education; higher education becomes a certification of class membership.It legitimizes the system of inequality in the educational structure. The Marxist idea of educational institutions trains the rich to take up top jobs while conditioning the poor to accept their lowly status and restricting their chances in taking top jobs in the class structure, stands vindicate.

Institutional differences such as One Year or Two Year LL.M. influence the degree of education that students obtain and perpetuate continual income and social differentials in the education system. Further, grading of institutions tend to concretizinginequality in education structures. Grading tends to separate students by class and limits opportunities for students.[23]

The most significant factor that determines the quality of education is quality of teaching, availability of the qualified teachers and adopting best teaching practices. The teaching method adopted in India particularly in legal education is lecture method. Though of late,

[20] Indian Law Institute, Delhi, available at http://www.ili.ac.in/courses.pdf

[21] Jindal Global Law School, Sonepat, available at http://jgls.edu.in/content/eligibility-and-fees

[22] As per the UGC regulations Professor and Associate Professor are expected to engage in minimum 14 hours of direct teaching and learning process whereas Assistant Professors are expected to engage 16 hours per week. However a relaxation of two hours may be given to Professors who are involved in extension activities and administration. A simple calculation would reveal that 10 dedicated faculty for LL.M.(4 Professors/Associate Professors + 6 Assistant Professors) would require about 152 hours of direct teaching and learning process per week.

[23] Dr. G.B.Reddy describes that introduction of One Year LL.M is with "the sole object of facilitating the entry of Law graduates from National Law Schools, who pursue one-year LL.M from US and UK Universities, into law teaching posts in national Universities". R.Ravikanth Reddy is of the opinion that 'Only the future of National Law Schools has been kept in mind'. See, *Proposed One-Year LLM leaves some teachers fuming*, The Hindu, available at http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/proposed-oneyear-llm-leaves-some-teachers-fuming/article4042293.ece, (last visited 02 - 02 - 2014)

several other methods of teaching have gained momentum in legal education, the use of lecture method is still prevalent. This is a widelyused method,particularly in LL.M.

Revamping of LL.M., needs to address the issues of quality of teaching, methods of teaching and building the capacity of the prospective teachers. These issues in fact should be in forefront, as in India, LL.M. is a basic qualification to choose the career in academics. Unfortunately, no effort was made in this regard. Even the Expert Committee for One Year LL.M. failed to address this problem. However, Prof. Madhava Menon while submitting the guidelines to UGC, introduced a specialization to address these issues under the title 'Legal Pedagogy and Research'. The idea behind creating such a specialization is to build teaching capacity and quality of academicians.

Surely, this is an important step towards improving the quality of teaching, nevertheless, majority of the institutions offering One Year LL.M do not offer this specialization thus making this novel step redundant. Till now only one institution offered this specialization.[24] The reason for such apathy from the majority of the institutions is that students may not opt for such a specialization as it would restrict their career option only to teaching. At the same time what about the students who have opted for other streams as specialization and would later like to opt for academics? They have no exposure to the legal pedagogy. The Indian Law Institute reconciles such a problem by making available two papers on legal pedagogy to all streams of LL.M.

High expectation from the students, with time constraint, results in ignoring the deeper understanding of the subject. Rushing through the course within in one year make the students more concerned about completing the course within time and getting good grades, than real learning. Obtaining the degree on time becomes the primary concern over the central idea of learning by challenging well established thoughts, doctrinesand probing mysterious ideas. In the process, 'learning for the sake of learning" is lost and there is no time for idyllic learning and exploring the possibilities of broadening the perspectives.[25] Few interactions with the faculty offering LL.M. confirm the fear that completing the course in time is more important than the learning. Quality of learning, improving research abilities, and honing the skills become secondary to obtaining the grades. As a result the very idea of starting One Year LL.M program, is lost.

4. One Year LL.M. a Cash Cow

In such a scenario one gets the feeling that one year LL.M. has become Indian 'cash cow program' for many institutions. For example in early 70's to late 90's in USA, LL.M. program was basically aimed to attract foreign students. Very few American students used to opt for LL.M., such as specialization in tax laws. Most of the law schools in USA do not offer any special courses or classes separately to LL.M. students. LL.M. students usually take the same courses of JDs[26]. However, LL.M. students pay the same tuition fee as

[24] Institute of Law,NirmaUniversity, http://www.nirmauni.ac.in/law/admission/LLMAdvertisement2013.pdf

[25] Dung Nguyen, *Supra Note* 8

[26] JD in USA is equivalent to LL.B. in India.

JDs. There are no special efforts from the law schools in LL.M. and even the placements. In spite of this the LLM students in USA consist of about 7 percent of law school enrollments and the total number of LLM degrees has increase to 65 percent in the last decade. As a result critics describe LL.M. program as a "cash cow" and still growing in popularity at law schools in USA.[27]

By looking at the manner in which one year program was introduced and also considering the point that the dilution of standards with no accountability and scrutiny on how this course is being run by the institutions,it would have the effect of turning it in to an Indian Cash Cow Program. For example, the requirement of ten dedicated faculty as already discussed, is not feasible. In the absence of any scrutiny, the institutions tend to use the same faculty of LL.B. thereby enjoying greater financial benefits. Therefore, the institutions may like to introduce the program for monetary gains. This belief would be further strengthened by looking into the treatment given by the elite law schools to their LL.M. programs. It is an open secret that the elite law schools focus on LL.B. program and LL.M. gets a step motherly treatment. Unlike in USA, institutions in India though offer LL.M. as separate course with special class, there are no special efforts from the institutions in strengthening the students.

It is not to say that pursuing an LL.M,both in India and abroad, has no benefits and if so, why is there a growing popularity for obtaining LL.M. nationally and internationally? LL.M abroad may help in international network and gaining admission to the bar in USA.[28] The globalization of legal norms particularly in trade matters requires international perspective and training. An LL.M. from a reputed law school may improve employment opportunities. The advantages may be indefinable as in terms of exposure to other legal systems, different law school environment, challenging traditional and doctrinal limitations, interactions with different students and faculty gives an edge than having mere LL.B degree.

Though these benefits cannot be ignored, reducing the term without improvement has an adverse impact giving an undue advantage to elite and private law schools. Short term also means quick money, no time to reflect what is happening both for the institution and the students. Paying high fee one way guarantees degree. There is no time for improvement, review and rectification.

5. Expectations from Higher Education

Educational institutions particularly at the higher learning bear higher responsibility in designing the courses and curriculums as they impart education to the students who are supposed to play a pivotal role in the socio, economic, political and spiritual development of society. This burden is more due to the fact that being humans we need a greater amount of care and education to become the doable members of the society. Unlike animals,

[27] Bryce Stucki, LLM: *Lawyers Losing Money*, The American Prospect, available at http://prospect.org/article/llm-lawyers-losing-money (last visited 02 - 02 - 2014).

[28] For instance, an LL.M. degree from an ABA-approved law school allows a foreign lawyer to become eligible to apply for admission to the Bar (license to practice) in some US States, such as New York.

humans need years of protection and training to survive in society. As Richard R. Ernst points that several years of education is necessary to make the humans ready for "social integration, for reducing our inborn egoism, and for developing compassion, mutual understanding, and responsibility."[29]

When education determines the fate of human society, what would be its goal? Is it simply providing information and offering knowledge? The ultimate goal of the higher educational institutions is not providing mere information and imparting knowledge but wisdom. Wisdom cannot be achieved simply by generating information and providing opportunities to gain knowledge by reading facts from heaps of documents, textbooks and internet. Education is expected to liberate the minds of its pupil. To liberate the minds it should be "bias-free and limitless openness, combined with critical thinking, and most importantly, combined with wisdom and compassion".[30]

As a result every stake holder of the society has a great expectation from the educational institutions. Profession expects a truly skilled professional with values; industry expects the graduates who are properly trained and prepared to satisfy the demand of industry, and State expects law abiding and productive citizens. Everyone expects better results. However, one needs to understand the expectation of educational institutions from these stake holders and the contribution from these stake holders to the institutions in shaping the students. It is crucial to answer these questions as these expectations pose serious challenges to higher education because each stake holder's expectations are different from others.

Therefore, it would be shortsightedness to believe that the educational institutions are created just for industry and for fulfilling its requirements. It would be foolishness to accept that these corporations could just pick and enjoy the fruits of trained students, and multiply their profit. Similarly the society, the profession could not expect to reap the benefits without contributing to the legal education. Would it be wrong to expect the Industry to share the responsibility and the burden of providing resources to the educational institutions in shaping the students to be market oriented and industrially suitable? Is it not the duty of the State and the profession to step in improving the intellectual and infrastructural requirements of the LL.M. program? Unfortunately the efforts of State in revamping the LL.M. program hasresulted in creating a cash cow to the elite law schools and depriving many deserving students who cannot afford the fee.

An increased cost of education has a direct impact on the path the students choose. It is obvious why most of the LL.M. programs offer only industry oriented subjects, as specialization. It would be unfair to expect that these students would choose their careers as policy makers, teachers, judges or researchers and thereby contribute to the development of the country. As a result both one year and two year LL.M. fall well short of expectations of other stake holders.

[29] Richard R. Ernst, *Heading towards a Better World*, available at http://www.chab.ethz.ch/personen/ emeritus/rernst/publications/Heading_Towards_a_Better_World.pdf last visited (20 - 04 - 2014)

[30] *Ibid*

In conclusion, it is obvious that there is a crisis in higher education in law and that the crisis runs deep. The so called reforms in legal education particularly at LL.M. are superficial and failed to address the problems in a systematic manner. These reforms need to aim at pedagogical training and by garnering institutional support for innovative, practice-oriented teaching approaches. Further, any changes in the higher education in law shall aim at promoting and producing competent and socially sensitive legal professionals. The idea of revamping LL.M. shall not be confined to providing knowledge effectively but should focus on wisdom.

Industry oriented legal education may be necessary for better job opportunities but such an endeavor should not ignore the need for buildinga just society. Therefore, in the name ofmodernizing legal education by revamping LL.M., merely reducing its time duration without making it socially relevant to produce barefoot lawyers, is meaningless.After all making legal education socially relevant is the minimum commitment that we need when we consider the cherished noble ideologies of our Constitution.

Ethical paradigm for regulation of Cyber-Space

Amar Pal Singh*

Introduction

As the ICANN, which performs the functions of top level numbering and name assignments, prepares to relinquish part of its functions to a more internationalized system, the jostling for more space in internet governance has increased at the international level. While countries like Russia, China and Saudi Arabia bat for multi-governmental body under the International Telecommunication Union of United Nations, US insists on multi-stakeholder oversight body. India apparently has been trying to hide its lack of preparedness under the grand-standings like greater say to governments and accountability on the nature of civil society. It is worth noting in this context that while a multi-lateral government takeover is apparently a bogey, the multi-stakeholder concept and the way it works, may end up in serving the needs of powerful corporations with the imprimatur of civil society. In such a scenario securing a healthy democratic space with due respect to the values of freedom of speech, human rights and privacy rights in the internet governance is going to be a major challenge before the new government in New Delhi which swears by the name of e-governance.

May we take note of the fact that irrespective of the approaches of the governments towards internet and e-governance it cannot be forgotten that today IT sector is deeply integrated with the global economy and contributes nearly 8 percent of India's GDP. Besides India is world's third largest group of internet users and therefore India does not have the luxury of quixotic pursuits. Our negotiating positions have got to be firmly rooted in our economic interests and issue based coalitions with a firm belief in securing that democratic space in internet governance. It is in this background that this paper seeks to explore the quality of control mechanism in internet governance, the regulatory pattern that the international community would negotiate and seek to establish with an overall objective of international peace and prosperity. Obviously this cannot be in the form of all or nothing rule systems, the black letter law or the "hard law approach" as an international law practitioner would put it, rather it would require soft law approaches in the form of ethical principles, and mechanism for creation of trust and fiduciary relations slowly maturing into hard law approaches. At the same time mere ethical framework too would not suffice for ensuring a viable and long-term structure of cyber-governance. If history tells us anything, frontiers and public commons do not fare well without government protection. The seemingly limitless space for growth for the nascent internet is likely to face the "Tragedy of Commons". In fact we already face the threat of sex and money having carved deep channels into the Internet environment that will require serious intervention and reclamation efforts on a very wide scale, which only governments are equipped to do.

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The paper has been divided into five parts. Part-I, which seeks to explain the import of "cyber-ethics" is followed by a discussion as to the exact import of hard law vs. soft law approaches in Part-II. Part–III would make an attempt at deciphering the soft law approaches in terms of ethics and trust building and part-IV would take into account the necessity of balancing soft law approaches with hard law approaches so as to avoid the 'tragedy of commons' a la Hardin[1]. Part-V would sum up the paper with concluding remarks and suggestions on the topic.

I Cyber-Ethics

The term "cyber-ethics" refers to a code of safe and responsible behaviour for the Internet community. Practicing good cyber-ethics involves understanding the risks of harmful and illegal behaviour online and learning how to protect ourselves, and other Internet users, from such behaviour. It also involves teaching young people, who may not realize the potential for harm to themselves and others, how to use the Internet safely and responsibly. While it is a matter of great satisfaction that we live in an exciting time in history, where widespread availability of computers and Internet connections provides unprecedented opportunities to communicate and learn, there are some who exploit the power of the Internet for criminal or other nefarious purposes. An internet user is constantly subjected to the fear of a hacker phishing for his bank details, spammer filling up his email in-boxes with unwanted advertisements for everything from sexual aids to Russian wives, and with apocalyptic prophecies of cyber-terrorist attacks that may have substantial real world consequences. Undoubtedly, regulating the internet is a big challenge for the governments all over the world. Free speech content control in cyberspace, intellectual property in cyber-space, safeguarding internet privacy, securing the electronic frontier and allowing the global e-commerce to flourish throughout the world would require fine tuning of not only the existing legal regime but even coming up with imaginative and ultra-modern e-tools to ensure that internet is harnessed for the services of humanity.

II Hard vs. Soft Law Approaches:

Regulation strategies have historically been classified into two viz soft law approaches and hard law approaches, those who think that people will comply with the laws when only confronted with tough sanctions and those who believe that gentle persuasion works in securing compliance with the law. Further, the emphasis of the sanction approach is *post-monitory, i.e.* reacting to violations of the law with penalties once they are committed. On the other hand, the persuasion approach is *premonitory,* and tends to ensure compliance with law before violations occur. The latter approach is typically known as soft law approach. At a time when we are talking of pre-litigation mediation processes, soft law approach is something which also accords with current trends of law. The argument made by those in the soft law camp is that persuasion is cheap, and punishment expensive. Furthermore, the argument is that it is better to spend your money up front to proactively prevent violations, than to invest your energies in violations that have already occurred. The administrative

[1] Hardin argues that the open public spaces shared by the community in general which Hardin calls 'commons' necessarily collapse because of the inherent selfishness of people over shared resources.

justice system, in particular, has come to understand clearly that enforcement and adjudication in hard law paradigm are expensive in terms of time and cost. As a result, a variety of alternative dispute resolution (ADR) models have proliferated that build on the successes of negotiated solutions in labour arbitration. Although ADR is not without its critics, the attempt is made to provide less costly and less confrontational adjudication experiences.

For the purpose of understanding the soft law approaches one can look into some of the defining features of 'soft laws'. First, in a soft law regime the formal, legal regulatory authority of government is not relied on unduly; second, there is voluntary participation in the construction, operation, and continuation in the regime of a particular party; third, there is a strong reliance on consensus-based decision making for action and institutional legitimacy; and, fourth, there is absence of authoritative, material, in terms of sanctions by state.[2]

It is different from hard law approaches, which in its most basic form insists on adherence to the letter of the law, rather than its spirit. Depending upon the complexity of the law, and the adjudicative system, it is possible for individuals and corporate firms to spend time and valuable resources on building a legal defense for a violation, rather than adhering to the spirit of the law itself. As such an individual might be encouraged to develop a rather legalistic defense, when the facts of the case do not appear to support his or her claim. Finally, for the government agency, hard law approaches are costly in terms of legal counsel and administrative support.

Hard law approaches also have particular meaning for the justice administration system as well. First, it refers to the degree of formality in the physical layout and atmosphere of enforcement proceedings, and second, to the way in which tribunals interpret and apply legislation. Under soft law approaches, on the other hand, the current ADR endeavours and institutions like administrative tribunals have been envisaged as providing ready access and natural justice for the workplace parties. Hard law would generally tend towards uniformity of treatment and fixed conditions based on prior knowledge while many current issues in cyber governance would demand significant diversity and constant experimentation and adjustment. Further hard law is very difficult to change and many times actors do not internalise the norms of hard law and therefore to achieve optimal results and to ensure compliance it may be necessary that frequent changes in a typical paradigm of technological over-run are affected with lot of negotiating space for parties in question. Excessive formalism in statutory interpretation tends to work contrary to the spirit of law. Say for example, in cases of unjust dismissals it becomes difficult to proceed without a lawyer and sophisticated legal argument. As a result, easy accessibility, speedy decisions, and low cost adjudication had been increasingly getting jeopardized. Indian system with its experiences in PIL cases has lots of experiences of this sort.

This might look like providing a final foolproof argument for a soft law approach in cyber governance programme. However the soft law approaches are not free from criticism. Justice O.W. Holmes argued that the law is not about 'good men' seeking a guide for

[2] Kirkton and Trebilcock, *Introduction: Hard Choices and Soft law in Sustainable Governance.* (Ashgate, Aldershot, UK, 2004).

action. Rather, for him the law is about 'bad men' who would try to avoid the legal strictures of society, and who need the prospect of punishment as a deterrent for doing so. And therefore Holmes would put it that Law is hard by definition. It must be taken note of, in this context that Holmes' analysis is steeped in Anglo-American jurisprudence that borrows from Austin's positivist notion of law as "commands backed by force." The intention of this author here is not to provide argument for or against soft law vs. hard law approaches, but to explain the standpoint for building an argument for an element of ethics in Cyber-Governance. And therefore in the next section we make an attempt to understand the dynamic of ethics in the governance of cyber space.

III Ethics a la Soft Law Approach

Ethics can be explained as a set of rules of behaviour we expect and will accept from one another. As an ideal our ethics allow us to live together, productively and in harmony. Ethics represents the core value system we use for everyday problem solving. They create a framework for determining "right" versus "wrong" Terms like medical ethics, legal ethics and so on indicate something common and that is that a group of like-minded people have decided that there are particular limits within which one's actions may be deemed to be in accord with social/moral conventions. Golden Rule of course lies in what Holy Bible would put it, "Do not do to others what you do not want them to do for you"

Let us take the case of ethical input in the e-business first. For any kind of a business to flourish there is always a need of consumer-seller confidence. This element which is an essential input of ethical behaviour in a marketplace appears to be conspicuous by its absence in e-business. Despite a lot of euphoria about use of internet in business processes and e-shopping it is a fact that only a very small percentage of Internet users shop on-line, and a majority of them express extreme dissatisfaction with e-business. The major concern of such shoppers is about the security and reliability of online shopping. The basic fact is that consumers do not have sufficient trust in e-commerce, corporations and the Internet. Businesses do not trust consumers either. For instance, a senior executive from an e-business admitted that we can deliver goods only when we make sure the payments have been transferred to our account. Unfortunately, this process is not under our control and could last weeks. As a result, e-business's distrust of consumers reinforces the latter's distrust of e-business, because consumers have no good reason to extend trust to an e-business when it insists on delivering goods only after obtaining hard currency. It is not surprising that doubtful of the safety of payment online through credit cards, many online buyers tend to choose slower, inefficient, yet safer methods of remittance. Buyers and sellers perceive the threats to safety not only from third parties, or hackers, but also from the contracting parties. Accordingly, for electronically modulated business to flourish, there must be greater mutual confidence among the buyers and sellers.

For building up consumer and seller confidence, trust is the keyword, which is a very important component of ethically good behaviour in business processes. This element of "Trust", in fact has become an Internet buzzword. Companies such as Microsoft talk about

establishing trust.[3] The Napster-Bertlemsen deal traded on a notion of trust, dealing with the protection of artists and their works so they could trust putting their intellectual property on the market.[4] Management strategists would talk and write about placing trust at the center of a company's Internet strategy so as to encourage repeat business from customers. The focus on trust also drives governmental action. How governments and businesses can devise ways to encourage people to trust e-commerce, thus seems to be at the heart of internet thinking.

The first and purest level of trust, essentially happens in non-economic settings. Ethical behaviour in business processes is a tool for creation of trusted relations which help in shaping up business environment. The heart of ethical knowledge comes from those interactions with other people when we can understand the consequences of our actions and learn that our well-being is tied up with the well-being of others. The places where these interactions occur are known as "mediating institutions," and they are indispensable for the development of moral knowledge and the orientation of ethical business behavior. Such situations are essentially non-economic settings, as in families or religious organizations members find joy in the well-being of others, and if a similar kind of trust can be created in business environment, business relations cannot but flourish. However that is more of a utopia than reality and is a difficult proposition to be created in fact.

Therefore the second level of trust situation is, where reliable relationships can be created. Business literature would mostly refer to this level of trust relations. The idea underlying this trust is that customers, in particular, have reason to rely on the businesses that conduct commerce over the Internet. In this regard, companies that state a privacy policy and abide by it; provide and assure security for credit card transactions; ship reliably and provide a place for customers to call with questions, all lead to customers becoming comfortable with doing business over the Internet. These tactics, which are certainly not exhaustive, build "Real Trust" in the market. Companies that do these things are more likely to attract repeat business from satisfied contractual partners. If they do not, market forces will punish them. This second level of trust depends upon the ability of some parties to hold a company accountable for its promises and practices. The market is, obviously one mechanism for doing so. However the law has always been a second mechanism. Thus, laws regarding warranties, product defects, and even criminal regulations make companies more accountable, and in doing so, provide customers with assurance that they have resources to make the company accountable.

The third level of trust that can be termed as hard trust situations, happen basically in two ways, i.e. either by way of hard law, or technology. Generally legal mechanism ensures that certain borderlines are made and are complied with finally and in case of non-compliance, sanctions would follow. When law either fails to do so or dithers from making such a borderline situation then technology is the answer. Say for instance, the "encryption".

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[3] See Richard Purcell, Chief Privacy Officer: Microsoft's Richard Purcell Spends His Days Wrestling With Some of the Toughest Questions Raised by E-Commerce, Harv. Bus. Rev., Nov.-Dec. 2006, at 20.

[4] See Don Clark, Napster Alliance Boosts Prospects for Encryption, Wall St. J., Nov. 2, 2000, at B1.

Encryption allows parties to a transaction to keep others out of the transaction.[5] Thus, encryption used for privacy keeps personal information away from those transactors that do not want to have it. Encryption used for contractual purposes, such as digital signatures, verifies the identity of business parties. Digital signatures keep out those who want to impersonate a contractual partner. Encryption used for the protection of intellectual property prevents illicit duplication of protected material. This creates confidence amongst business partners that the business is dealing only with intended parties to the transaction. This level of trust is created when a sovereign clearly defines, patrols and enforces borders, or in the absence of sovereign action, when parties define, patrol and enforce borders for themselves.

L.G. Zucker has differentiated among process trust, person-based trust, and institution-based trust.[6] Process trust is tied to a record of past expectations: by seeing a record of success after going through a process, one has confidence that an additional engagement will lead to satisfactory results. Person-based trust is tied to similarities between people; one trusts because one has an expectation that the other party has some degree of affinity or affiliation. Finally, institution-based trust is tied to formal mechanisms such as professionalism and insurance. This kind of affiliation blends process and person trust, because one establishes an affinity with others on the basis of a set of process standards to which members of an organization commit themselves. In all these trust situations, if we revert to what we have noted in the introduction to this article that hard law in all or nothing situations is neither possible nor desirable to be made applicable. The three levels of establishing trust by way of ethical behaviour in business situations is possible only in a gradual way, flexibility and negotiability being the essential qualities of such legal mechanism.

IV Global Commons of Internet : A la 'Tragedy of Commons'

But does that mean that hard law would have no role to play or that the government interventions by way of legal mechanism would never be required ? The answer would be a big no. The global commons of internet, if we call it that way on the pattern of "tragedy of commons" in natural eco-systems, is as vulnerable to tragedy of commons as Hardin's natural eco-systems. However before we move on to Hardin's tragedy of commons, one thing has got to be taken care of. The present author is using the analogy of Hardin's tragedy of commons for a limited purpose only, i.e. for the purpose of making an argument. This does not mean endorsing Hardin's view of tragedy of commons. Let us understand the tragedy of commons first.

The commons were defined as an expanse of land under collective or open use. The commons embody not only the rainforests, rivers and natural resources, but also the indigenous knowledge and practices connected with these commons and the cultural meanings involved. Hardin's article argued that the commons necessarily collapse because of the inherent selfishness of people over shared resources. The example of an open pasture illustrates the thesis: every individual will add extra animals to their herd to maximise their benefits from the common pasture, so the pasture will end up being ruined. Hardin's article,

[5] American Bar Association, Digital Signature Guidelines Tutorial, at http://www.abanet.org/scitech/ec/isc
[6] Institutional Patterns and Organizations: Culture and Environment OUP, London (1988).

which has become the reference point for subsequent discussions on the issue, argues that the commons and its inextricable tragedy have no technical solution, except privatisation or public-based coercion. Hardin first coined the term to describe situations where two conditions are met, first, there exists a "commons," a resource shared among a group of people, and second, there exists individual decision makers, free to dictate their own actions, intending to achieve short term gains from exploiting the resource but do not pay, and are often unaware of, the cost of that exploitation except in the long run. The sum total of all the individuals acting in their self-interest, add up to a total activity with a life of its own. Eventually, the individuals fall, as the economic activity itself collapses due to over-exploitation.

Using the analogy of Hardin's tragedy of commons, one can safely assume that the unlimited use or abuse of the internet space has its perils. History tells us that, frontiers and public commons do not fare well without government protection. The "seemingly limitless horizons" of natural eco-systems and western ranching in the latter half of the nineteenth century collapsed within 100 years and overgrazing, reduced vegetation cover, resulting into drought, and storms took a terrible toll on cattle, ranchers, and the land and now threaten the very existence of humanity a la global warming, climate change and ozone depleted environmental cover. Unfortunately, the ultimate losers in the tumult are the land's native ecosystems. The seemingly limitless space for growth for the nascent internet is likely to face the same fate. In fact we already face the threat of sex and money having carved deep channels into the Internet environment that will require serious intervention and reclamation efforts on a very wide scale.

V Concluding Remarks

It is obvious from the above discussion that for a viable internet governance hard law approaches may not be the only solution. Trust building with an element of morality playing a dominant and leading role might provide a better infrastructure for internet governance. Obviously mere trust building would also not be sufficient, as has been seen above. Hard law approaches shall have to play a supportive and supplementary role in assisting the process of ethics building. While hard law would provide a procedural infrastructure for an institutional basis of trusting behaviours, the soft law approaches in terms of ethics and trust building would provide the sound basis for individuals dealing either with institutions or processes to have confidence that they can rely on either with minimal risk for opportunism. This would encourage individuals and companies to practice basic integrity that deepens into interpersonal and institutional trust. What is required to be noted is that contracting based on hard law approaches cannot govern every aspect of business affairs. Legal rules have got to be somewhat general and broad in view of the myriad variable situations that arise in human affairs.

THE MAURITIAN INTERNATIONAL ARBITRATION ACT 2008: IS IT A PLATFORM FOR INTERNATIONAL COMMERCIAL ARBITRATION? *REFLECTION ON CHALLENGES AND PERSPECTIVES*

Rajendra Parsad*

I. Introduction

According to the Prime Minister of Mauritius, Dr the Hon. NavinchandraRamgoolam[1]:

> "The Government of Mauritius has embarked on an ambitious project to establish Mauritius as an international arbitration centre, the first of its kind in the region. Our aim is to offer a modern and attractive jurisdiction for international arbitration".

Apart from some *éloges* which are reported in Doing Business 2011 Report and which ranks Mauritius 1st in Africa and 20th worldwide and the Economic Freedom Index, which ranks Mauritius 12th and 4th, according to the Africa Competitiveness Report how arbitration grew up is also of concern because with the establishment of and consolidation of the Permanent Court of International Justice in the 1920 the procedure of arbitration through the Permanent Court of Arbitration (PCA) began to decline.

Historically, arbitration began its burgeoning in Europe in the beginning of the twentieth century. A Protocol on Arbitration Clauses was signed in Geneva on the 24th September 1923 followed by a *Convention on the Execution of Foreign Arbitral Awards* which was signed in Geneva on the 26th September 1927. Both protocol and convention were given effect in the United Kingdom by enacting Part I of the *Arbitration (Foreign Awards) Act 1930* which was subsequently re-enacted as Part II of the *Arbitration Act 1950*, and in India which pased the *Arbitration (Protocol and Convention) Act 1937*.

Maybe the *Geneva Protocol Arbitration Clauses 1923* was among the first protocols to recognise the right of parties to agree to arbitration prior to any dispute. Its Article 1 provides that:

> "Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject".

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[1] www.pca-cpa.org

Mauritius has passed the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001* and the *International Arbitration Act 2008 (Act 37)* very recently. An arbitration culture is also developing rapidly in Mauritius but apart from the PCA there are also highly reputed institutions providing for the conduct of arbitration and it is important to mention a few of them here:

- –The American Arbitration Association
- –The Inter-American Commercial Arbitration Committee
- – The International Centre for Settlement of Investment Disputes
- – The International Chamber of Commerce
- – The London court of International Arbitration
- – The Stockholm Chamber of Commerce

Shaw, who is one of the most respected authors on Public International Law, explained clearly the burgeoning of arbitration worldwide such that:

> "The procedure of arbitration grew to some extent out of the processes of diplomatic settlement and represented an advance towards a developed international legal system. In its modern form, it emerged with the *Jay Treaty of 1974* between Britain and America, which provided for the establishment of mixed commissions to solve legal disputes between the parties. The procedure was successfully used in the *Alabama Claims Arbitration of 1872* between the two countries, which resulted in the UK having to pay compensation for the damage caused by a Confederate warship built in the UK. This success stimulated further arbitrations, for example the Behring Sea and *British Guiana* and *Venezuela Boundary 92 BFSP. P.970* arbitrations at the close of the nineteenth century. The *1899 Hague Convention for the Pacific Settlement of Disputed* included a number of provisions on international arbitration, the object of which was deemed to be under Article XV, 'the settlement of differences between States by judges of their own choice and on the basis of respect for law'. International arbitration was held to be the most effective and equitable manner of dispute settlement, where diplomacy had failed. An agreement to arbitrate under Article XVII implied the legal obligation to accept the terms of the award. In addition, a Permanent Court of Arbitration (PCA) was established. It is not really a court since it is not nominated by the contracting States (each one nominating a maximum of four), comprising individuals 'of known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of an arbitrator'".

International commercial arbitration in the settlement of disputes is rather complex in terms of technicality. Therefore, the structure of this article is divided into four major topics which cover arbitration worldwide in a Mauritian perspective. After a general introduction **(-I-)**, the debate begins on the choice for arbitration **(-II-)**, the aim and scope of international commercial arbitration **(-III-)**,the awards **(-IV-)** and the arbitrability and public policy in the

settlement of commercial disputes **(-V-)**. The paper will close with a conclusion **(-VI-)** and a list of relevant materials **(-VII-)** for scholars and researchers who wish to go further in depth in this emerging fieldin Mauritius.

II. A choice for arbitration: 'Does it look Good? Does it Taste Good? Is it Good for You?'

Actually, States now have a choice between the WTO settlement of disputes mechanisms and international commercial arbitration litigants. However why Mauritius makes it so attractive for international arbitration, second why and where is the importance of the PCA in the Mauritian *International Arbitration Act 2008 (Act 37 of 2008),* the major piece of legislation in this emerging field of the law and, finally but not the least, third is there any conflict of law in Mauritius?

Whatsoever, prior to commencement, it is also important to point out that for long there has been judicial suspicion on arbitration! Justice Blackmun of the United States Supreme Court in the famous case of *Mitsubishi Motor Corporation* v. *Solar Chrysler-Plymouth Inc. 473 US 614, 627:*

> "We are all well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative measure of dispute resolution".

Similarly, in the USA the *United States Federal Arbitration Act (9 USC 1)* was passed in order to reverse centuries of judicial hostility to arbitration agreements and to place them on the same footing as other contracts for example. In *Channel Group v. Balfour Beatty Ltd 1993 A.C' 334, 364* Lord Mustill of the House of Lords spoke of the "partnership which exists under English law between the arbitral process and the courts". Jan Paulsson; one of the most respected authors on ADR, has gone further than that.In an article entitled 'Discrimination in Favour of International Arbitration by National Courts. Does it look Good? Does it Taste Good? Is it Good for You?'; wrote that:

> "I rather imagine that the will to favour or to disfavour international arbitration depends on the perceived answer to the third question: is it good for you? At different stages of social and economic development, the answer is likely to evolve. A country which lacks sophisticated negotiators and which has no high-value added export industry, let alone nationals who invest abroad, may view arbitration as very nasty-tasting medicine indeed. In time, and given greater development, such a country may come to see the process in a different light-not something to be feared and resisted, but something to be used and relied upon".

Second, there is nothing more which can be added what two eminent scholars, Redfern and Hunter have written on the PCA, jurisdiction of which has been introduced in the Mauritian *International Arbitration Act 2008 (Act 37 of 2008).* According to the principle of *Kompetenz-Kompetenz*arbitrators have the power to decide upon their own jurisdiction

but in Mauritius and under the IBA 2008 any arbitrator may be challenged and the PCA has power, among others, and not the court to decide on the challenge. The two respected authors wrote that:

> "Arbitration involving either disputes between States or between States and private parties, or disputes in which a State organisation is involved, may be held at the PCA. The parties can choose the procedural rules that will apply, from either the rules of The Hague Convention of 1899 or 1907; the PCA optional Rules or other appropriate rules such as the UNCITRAL Arbitration or Conciliation Rules. The fact that the parties are allowed such a broad choice shows a great deal of modernity and forward-thinking by the PCA. An arbitration held under the auspices of the PCA will take place in the Peace Palace at no charge; for a moderate charge, the PCA can provide rooms for hearings and the services of the International Bureau in other arbitrations. Given the time and expense involved in conducting a major international commercial arbitration, the excellent facilities of the Peace Palace have much to commend themselves to parties. The only requirement for recourse to the PCA is that, except under the optional rules, the State concerned should be, or should become a party to either of the two Hague Conventions. By the end of 1996, more than 80 States had done so."

And according to Shaw:

> "When contracting States wish to go to arbitration, they are entitled to choose the members of the tribunal from the panel. Thus, it is in essence machinery facilitating the establishment of arbitral tribunals. The PCA also consists of an International Bureau, which acts as the registry of the Court and keeps its records, and a Permanent Administrative Council, exercising administrative control over the Bureau. Administrative support was provided in this context by the Bureau in the *Heathrow Airport User Charges arbitration*".

A third question relates to the seat of arbitration? Provided it is an international arbitration, the arbitration shall be, in accordance with section 3(2) of the Mauritian International Arbitration Act 2008, the juridical seat of the arbitration in Mauritius as determined by the arbitration tribunal, and if it is not yet constituted the Supreme Court of Mauritius or the Permanent Court of Arbitration may make a provisional determination of the issue pending the determination thereof by the arbitral tribunal[2].

III International Commercial Arbitration

In most ADR cases the term 'commercial' is often the gist of the agreement and is called for interpretation. The UNCITRAL Model of law on International Commercial Arbitration as adopted by the United National Commission for International Trade Law defines the term 'Commercial' thus:

[2] Section 5 (a) and (b) of the International Arbitration Act 2008 (Act 37 of 2008)

> "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions; any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road."

Prior to commencement on international commercial arbitration it is important at this stage to understand what is meant by international commercial arbitration? It can never be denied that most domestic and international arbitration deals with commercial contracts. Though there is no proper definition on the subject matter, the Apex Court had this to say in the Indian case of *TSM Infrastructure Private Limited v. UE Development India Private Limited 2008 14 SCC 271*:

> "The term 'international commercial arbitration' has a definite connotation. It, *inter alia*, means a body corporate which is incorporated in any country other than India. It was contended that since the central management and control is exercised in any country other than India, and thus, despite the fact that the company is incorporated and registered in India, its central management and control being exercised in Malaysia, it will come within the purview of section 1 (1)(f)(iii) of the Act. Whenever in an interpretation clause, the word 'means' is used the same must be given a restrictive meaning. 'International commercial arbitration' and 'domestic arbitration' connote two different meanings. The Arbitration and Conciliation Act, 1996 excludes domestic arbitration from the purview of international commercial arbitration. The company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although sub-clause (iii) of section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company".

Both Mauritius and India have their legislations on arbitration. What is arbitration? Redfern and Hunter (*supra*) have co-authored a book on the Law and Practice of International Commercial Arbitration. Both authors explained the place of the term 'arbitration' in 'Alternative Dispute Resolution' (or ADR):

> "It might be thought that the term 'Alternative Dispute Resolution' would be used to describe any methods of resolving disputes, other than those adopted by the courts of law as part of the system of justice established and administered by the State. On this view, arbitration would itself be classified as a method of alternative dispute resolution-since it is a very real alternative to the courts of law. However, the term ADR is not always used in this wide (or, it might be said, precise) sense. Accordingly for the purpose of this section, arbitration is not included".

The two authors went on to quote another two respected authors on ADR: Carroll and Dixon, who wrote that:

> "Arbitration presents an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility. However, it is nonetheless fundamentally the same in that role of the arbitrator is judgmental. The function of the judge and the arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved so much as to apportion responsibility for that problem. ADR, like litigation and arbitration, will often involve an independent third party but his function is fundamentally different from that of a judge or arbitrator and is best described as a neutral facilitator. He does not impose a decision on the parties but, on the contrary, his role is to assist the parties to resolve the dispute themselves. He may give opinions on issues in dispute but his primary function is to assist in achieving a negotiated solution"

In India, the Indian legislature, respecting the mandate of the General Assembly, passed the *Arbitration and Conciliation Act, 1996* largely based upon the UNCITRAL Model Law and the *Conciliation Rules*. Similarly, the Mauritian *International Arbitration Act 2008(Act No. 37 of 2008)* is mostly based on the *UNCITRAL Model Law* as amended in 2006[3]. But since local cases are rare and since some sections are analogous it is therefore important to refer to some Indian precedent cases. There is also an abundant literature on arbitration, mediation and conciliation elsewhere but local doctrine on the subject-matter is eventually inexistent. Why arbitration? William W. Park wrote that:

> "Contemplating alternatives to Court Proceedings.Arbitration. To reduce cost and delay of such documentary credit litigation, parties to letters of credit sometimes agree to submit their controversy to arbitration under the rules of an institution that has developed experience in documentary credit disputes. Such institutions include the International Chamber of Commerce (ICC), the London Court of International Arbitration, the American Arbitration Association, and the recently created Institute of International Banking Law and Practice. Special care must be taken in drafting an arbitration clause for a letter of credit, since the dispute may implicate more than two parties. For example, if a controversy involves an applicant or beneficiary as well as the issuing and confirming banks, the arbitration clause should provide for consolidation of all claims before a single arbitral tribunal. Otherwise, a bank may be caught in the middle between inconsistent results of multiple arbitral and/or court decisions".

[3] Appendix Table 1

Where is the legal basis of arbitration in Mauritius? The main source of arbitration is the newly passed legislation, the *International Arbitration Act 2008 (Act 37 of 2008)* or IAA 2008. Actually, the IAA 2008, the *Supreme Court (Mediation) Rules 2010* (GN No. 180 of 2010[4]) coupled with The *Convention on the recognition and Enforcement of Foreign Arbitral Awards Act* 2001 and The *Investment Disputes (Enforcement of Awards of 1969)* form the *ossature*of our domestic law on arbitration, mediation and conciliation. Mr Salim A.H. Moolan wrote:

> "Mauritius is a signatory of the *New York Convention*[5] and of the *Washington Convention*[6]. The legal system of Mauritius being a hybrid one, these two Conventions were transposed into domestic law, the first through Act no. 8 of 2001 (*The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001*) and the second through Act no.12 of 1969 (*The Investment Disputes (Enforcement of Awards of 1969*). The accession of Mauritius to the *New York Convention* was made subject to the reservation of reciprocity, but not that of commerciality".

Very recently in Mauritius, since the case of *Francoeur v. Francoeur*[7], *les travauxpréparatoires* which were long forgotten as an important source of law have gained considerable importance once more as a rule for statutory interpretation for example. Some respected authors like Redfern and Hunter (*supra*) have explained the intention of *travauxpréparatoires* when they wrote that:

> "The *travauxpréparatoires* of the Model Law make it clear that the public policy provision is intended *inter alia* to cover the possibility of setting aside an award if the arbitral tribunal has been corrupted in some way, or if it has been misled by corrupt evidence. This was considered necessary because doubts were raised as to whether the other provisions adequately covered all the circumstances in which awards might be set aside".

Most academics and scholars affirm that arbitration and ADR have a number of advantages over traditional courts but are there any disadvantage? It is time to set up what are the major advantages and disadvantages of arbitration[8], Shaw wrote that:

> "Arbitration is an extremely useful process where some technical expertise is required, or where greater flexibility than is available before the International Court is desired- *Argentina-Chile Case1966, 38 ILR p.10* where the arbitration tribunal consisted of a lawyer and two geographical experts. Speed may also be a relevant consideration. Arbitration may be the appropriate mechanism to utilise as between states and international institutions, since only states may appear before the ICJ in contentious proceedings. The establishment of arbitral tribunals has often been undertaken in order to deal relatively quietly and cheaply with a series of problems with certain categories, for example, the mixed tribunals established after the First World War to settle territorial questions, or the Mexican Claims commissions which handled various claims against Mexico".

[4] Government Gazette of Mauritius, No. 86 of 23 September 2010
[5] Mauritius has signed the Convention on 19 June 1996 and acceded to the Convention on 17 September 1996
[6] Mauritius has signed the Convention on 2 June 1969 and acceded to the Convention on 2 July 1969
[7] Francoeur v. Francoeur 1989 MR 31/SCJ 74
[8] Appendix, Table 2

To what extent do litigants, who very oftenare used to traditional courts, have trust in arbitrators? In 1845 Justice Story of a US court said of arbitrators in the case of *Tobey v. County of Bristol 23 SED CAS 1313, 1320:*

> "They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is such a *rusticumjudicium*. Indeed so far as a system of compulsive arbitrations has been tried in America, the experiment has not, as I understand it, been such as to make any favourable impressions upon the public mind, as to its utility or convenience".

It is time for an international arbitration culture to take its *envol*in Mauritius and the Mauritian legislator may even bring some amendments on interim measures to make the IAA 2008 more attractive and certainly to make arbitration more accessible.

The task to challenge other jurisdictions is therefore not easy as most litigants rely on traditional courts too often and the challenge is great but we must know what is arbitration, "where we are, and we could then better judge what to do and how to do it", Abraham Lincoln said. Whatsoever, an invasion of armies can be resisted, but not an idea whose time has come, Victor Hugo added.

Anyway, do arbitrators like judges? Or do arbitrators like that courts intervene in their private and confidential matters? Redfern explained that:

> "It is undoubtedly too severe in its demarcation of the line between courts and arbitrators in its apparent concept that an international arbitration agreement acts as a warning notice to the courts: 'This is private property- keep out'".

About usages of international trade, which are rare in arbitration cases, one *ICC case No. 5721, Clunet 1990 p.1020* the arbitral tribunal found that:

> "The autonomy of the arbitration clause, widely recognised nowadays, is justification for referring to a non-national rule deducted solely from international trade usages…"

So, domestic law and international cohabit when arbitration and awards are in issue. And to what extent they cohabit has rightly been pointed out by Shaw when he wrote that:

> "Agreements sometimes specify that the decisions should be reached in accordance with 'law and equity' and this means that the general principles of justice common to legal systems should be taken into account as well as the

provisions of international law. Such general principles may also be considered where there are no specific rules governing the situation under discussion- Re Competence of the Conciliation Commission. The rules of procedure of the tribunal are often specified in the compromise and decided by the parties by agreement as the process commences. Hague Convention I of 1899 as revised in 1907 contains agreed procedure principles, which would apply in the absence of express stipulation."

IV The award

Over and above the outcome of the arbitral proceedings, and this is what parties to the dispute are awaiting of, is in the form of an award of the arbitral tribunal made by the arbitrators. In the case of *La Pine Technology Corporation v. Kyocera Corporation* 909 F.Supp. 697, 705 N.D. Cal. 1995 the arbitration was commenced on the basis of the following arbitration clause:

> "The arbitrators shall issue a written award which shall state the basis of the award and include detailed findings of fact and conclusions of law. The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon nay of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous".

So what everybody is expecting from an arbitral tribunal is the award of the arbitrators. And what is an award is still not properly defined. Under the section 2 of the *Employment Relations Act 2008 (Act 32 of 2008)*, a (domestic) award is an award made by the tribunal (Employment Relations Tribunal). Under the *International Arbitration Act 2008 (Act 37 of 2008)* there is no definition under the interpretation section of the same Act. And whether an award is domestic or international not to say foreign award therefore depends from one country to another.

In India, under *the Arbitration Act 1940* (the *Arbitration and Conciliation Second Ordinance 1996* is now replaced by the *Arbitration and Conciliation Act of 1996*) and the *Foreign Awards (Recognition and enforcement) Act 1961* even if an award is rendered in London this award is still a domestic award as much as the entire arbitration proceedings were governed by the *Indian Arbitration Act, 1940*, as it was held in several Indian precedent namely *Oil and Natural Gas Commission* v. *Western Company of North America 1987 SCC 496.*

In *National Themal Power corporation* v. *Singer Company AIR 1993 SC 998* a single judge of the Delhi High Court affirmed that an interim award made in London by an arbitration tribunal constituted under the ICC Rules of Conciliation and Arbitration was not a domestic award but a foreign award but the Indian Supreme Court on appeal took a different approach and confirmed that since a provision in the contract declared that the laws applicable to the

contract would be the laws in force in India, the proper law was the Indian law. The Court observed that:

> "An award is 'foreign' not merely because it is made in the territory of a foreign state, but because it is made in such a territory on an arbitration agreement not governed by the law of India. An award made on an arbitration agreement governed outside India, is attracted by the saving clause in section 9 of the Foreign Awards Act and is, therefore, not treated in India as a foreign award."

The decision of the Indian Supreme Court on appeal is now of authority and was followed in the Delhi High Court in the case of *Gas Authority of India Ltd* v. *SIP CAPAG SA AIR 1994 Delhi 75*. However, in some foreign jurisdiction (like England for example) the proper law of commercial contracts is not chosen by the parties, then it ought to be determined by the conflict of law.

The *English Arbitration Act 1996* provides that if there is no choice or agreement by the parties, the tribunal will apply the law determined by the conflict of law rules which it considers applicable- *Sumitomo Heavy Industries* v. *Oil and National Gas Commission 1994 1 Lloyd's Rep 45 at 57*. Justice Steyn explained in the case of *Smith Ltd* v. *H&S International 1991 2 Lloyd's Rep. 127* at *130* that:

> "What then is the law governing the arbitration? It is, as the present authors trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g filing a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g removing an arbitrator for misconduct)".

Apart from the arbitration agreement, there is also the *compromis* which is applicable both in domestic and in public international law. In our domestic law, the Code de Procédure Civile in its articles 1008- 1010 provides for a *compromis* between parties to a dispute. Article 1008 providesthat:

> *"Le compromise est la convention par laquelle les parties à un litige né soumettent celui-ci à l'arbitrage d'une ou plusieurs personnes".*

The *compromis,* in public international law, is summarised by Shaw who,once more, explained that:

> "Consent to the reference of a dispute to arbitration with regard to matters that have already arisen usually expressed by means of a *compromis*, or special agreement, and the terms in which it is couched are of extreme importance.

This is because the jurisdiction of the tribunal is defined in relation to the provisions of the treaty or *compromis*, whichever happens to be the relevant document in the particular case. However, in general, the tribunal may determine its competence in interpreting the *compromis* and other documents concerned in the case. The law to be applied in arbitration proceedings is international law, but the parties may agree upon certain principles to be taken into account by the tribunal and specify this in the *compromis*. In this case, the tribunal must apply the rules specified. For example, in the *British Guiana and Venezuela Boundary 92 BFSP, p. 970* dispute, it was emphasised that occupation for 50 years should be accepted as constituting a prescriptive title to territory. And in the *Trail Smeltercase 3 RIAA, 1938, p. 1908; 9 ILR, p. 315*, the law to be applied was declared to be US law and practice with regard to such questions as well as international law".

In the USA, the legislator came out with the *US Federal Arbitration Act* and a *Convention on the recognition and enforcement of arbitral awards* was adopted in New York in 1958. In the case of *J.P. Corcoran* v. *Ardra Insurance Co. Ltd, R.A Di Loreto and J.S. Di Loreto*[9] the US Supreme Court took the wording of the arbitration agreement into consideration and went on to say that since the New York Law governed the arbitration agreement and since its provisions were modelled upon the New York Insurance Law, and consequently applied New York law it can be concluded finally that the claim was not arbitrable. Subsequently, UK passed the *Arbitration Act 1975* and India with the *Foreign Awards (Recognition and Enforcement) Act 1961* and the *Arbitration and Conciliation Act 1996*. By inspiring from the UNCITRAL Model Law on *International Commercial Arbitration 1985* therefore most countries have now tailor-made adaptations to resolve commercial disputes and other procedural difficulties. In Africa, the treaty establishing an Organisation for the Harmonization of Business Law in Africa (OHADA) has set up a Joint Court of Justice and Arbitration but had heard not yet heard any case. In addition to the *New York Convention 1958* most conventions were devised by the United Nations in the mid seventies.

V Arbitrability and public policy in the settlement of disputes

In the case of *Scherk v. Alberto Culver* the American Court had this to say on international policy:

> "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved by our courts."

Furthermore, in an arbitration culture domestic or municipal courts and an arbitral tribunal cohabit and some of their powers may also overlap. Authors think aloud to interim measures for example. If there is an arbitration agreement between the parties and a clause which

[9] J.P. Corcoran v. Ardra Insurance Co. Ltd, R.A di loreto and J.S. Di loreto, Yearbook XVI 1991 pp. 663-668, p. 67

stipulates that they shall solve their disputes by arbitrators then they must solve their disputes by an arbitration tribunal to avoid beating the system. Kaplan, a High Court Judge, in one of his articles[10] on arbitration wrote that:

> "It seems clear that the courts recognise that they have a role to play in support of the arbitral process but that their intervention should be very much as a matter of last resort. I think it also clear that most courts would more readily become involved in the arbitral process in a domestic case than in an international one".

In arbitral awards, for example it is common practice that the losing party usually rely on 'public policy' and, thus, ask the court to set aside the award because it is not enforceable in that country as the award is against public policy. In fact, article 1026-9, alinéa 1 of the Code de Commerce et Code de Procédure Civile providesthat:

> "Le Ministère public peut s'opposer à l'exécution de la sentence arbitrale, lorsqu'il estime que cette exécution est de nature à porter atteinte à l'intérêt public.

Cases on arbitrability and public policy are too numerous to confirm same. Whatsoever, judges on appeal are very cautious with 'public policy', also linked with arbitrability (refer to *The Attorney General of New Zealand v. Mobil Oil New Zealand Limited 1989 2 NZLR 649* a case under the New Zealand Commerce Act where Justice Heron ordered a stay of proceedings) when the court is asked to set aside an award on ground of public policy for example and is not is granted. Two important cases have been dealt in this book-*Fertilizer Corporations ofIndia v. IDI Management Inc 517 F. Supp. 948 1981 530 F. Supp. 542 1982 USDC Ohio* and a decision of the English Court of Appeal in the leading case of *DST v. Rakoil and Shell International Petroleum Co.*, 1987 Lloyd's Law Reports Vol. 2, p. 246 to enlighten us on enforcement of a foreign award. In the first case the American court held that:

> "Enforcement of a foreign arbitral award may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice"

And in the second case the English Court of Appeal went on to say that:

> "Considerations of public policy should be approached with extreme caution. It is never argued at all, but when other points fail. It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be

[10] Neil Kaplan: A case by case examination of whether national courts apply different standards when assisting arbitral proceedings and enforcing awards in international cases as contrasting with domestic disputes. Is there a worldwide trend towards supporting an international arbitration culture? In International Dispute Resolution- towards an international arbitration culture, General Editor: Albert Jan van den Berg with the assistance of the Permanent Court of Arbitration, The Hague, p.204, Kluwer Law International.

wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised. Asking myself these questions, I am left in no doubt that the enforcement of the award would not be contrary to public policy".

VI Conclusion

Mauritius would probably become the tiger of the Indian Ocean attracting foreign direct investment(FDI) from China, India, France, South Africa,the United States of America and settle international commercial disputes. It has also great ambitions to settle an Islamic bankinghub in the country promoting and enhancing small and medium enterprises to develop creating job opportunities for young entrepreneurs. In addition to all these opportunities in investments, the Republic of Mauritius is a stepping stone for emerging economies like China and India to reach the African continent, which are deeply involved like many developing and under-developed countries in regional and international trade and finance, coupled with regional economic partnership agreements (COMESA. SADC, IOR), to which Mauritius is proud of and to which it is a full fledged member. It has also signed and ratified a large number of treaties and conventions with a view to promote human rights, labour and education and business and finance. The Indian Ocean Commission (IOC/COI) is also headquartered in Mauritius and a good opportunity is offered here to tie bilateral relations with other islands (Comoros islands, Island of Reunion, Seychelles or Madagascar) with a view to share knowledge and business opportunities.

VII References

Appendix

INTERNATIONAL ARBITRATION ACT 2008 (ACT 37 OF 2008)	UNCITRAL Model Law	INTERNATIONAL ARBITRATION ACT 2008 (ACT 37 OF 2008)	UNCITRAL Model Law
Section 2	Article 2	Section 15	Article 14
Section 2(1(, (3), (4) and (5)	Article 3	Section 16	Article 15
Section 3	Article 1(1) and 1(2)	Section 20	Article 16
Section 3(1)	Article 1(3)	Section 21	Article 17-17G
Section 3(2) and 3(3)	Article 4	Section 22	Article 17 H-17I
Section 3(7)	Article 5	Section 23	Article 17J
Section 3(8)	Article 2A	Section 24	Articles 18,19 and 22
Section 4	Article 7	Section 25	Article 23
Section 5	Article 8	Section 26	Article 24
Section 6	Article 9	Section 27	Article 25
Section 9	Article 21	Section 28	Article 26
Section 10	Article 20	Section 29	Article 27
Section 11	Article 10	Section 32	Article 28
Section 12	Article 11	Section 34	Article 29
Section 13	Article 12	Section 35	Article 30
Section 14	Article 13	Section 36	Article 31
		Section 37	Article 32
		Section 38	Article 33
		Section 39	Article 34
		Section 40	Article 35 and 36
		Section 42	Article 6

(Table 1)

ADVANTAGES	DISADVANTAGES
Parties are free to appoint the arbitrator(s)	The scope and ambit of an arbitration is strictly limited and is not open to criminal proceedings, divorce matters or cases of alimony just to name a few
The parties set the arbitration clause and agree upon procedural rules to be followed during the arbitral tribunal proceedings	Domestic courts and proceedings are often assessed as being slow but all documentary evidence, experts, witnesses make the system more rigid but, may be in return, they are more efficient
Less expensive than a domestic court	It is not always true that the fees for arbitrators are low
Less time consuming than domestic court proceeding	If the arbitrators are challenged and removed the dispute may be settled with a certain quantum of delay
The arbitrator may arrive to a fair and just award which satisfies both parties unless one of the parties to the dispute appeal against the award	Injunctions in domestic courts are always speedy. Injunctions may be granted in arbitration only in special circumstances- anti-suit injunction
The dispute is settled amicably and there is freedom for appeal to domestic court	In case of multiplicity of parties to join in the same dispute, it is relatively more easy to consolidate the parties in traditional courts than in arbitration proceedings
Privacy and confidentiality of documents are protected and may not fall into public domain whereas domestic courts may decide that documents are kept as a matter of public policy or revealed to the public, again as a matter of public policy	The award may be too profitable and beneficial to party to the dispute in an arbitral award but it could be disastrous to the other party in return
The arbitrator is neutral to the dispute and it ensures a fair trial	The arbitral tribunal or the court may refused to set aside an award as objections by one of the parties to the dispute have been made a very late stage

(Table 2)

THE DIABOLICAL CRIME OF ACID ATTACKS: A MEDICO-LEGAL ANALYSIS

Vageshwari Deswal*

INTRODUCTION

"One of the most horrifying forms of gender-based violence, a growing phenomenon in India, is acid attack. Though acid attack is a crime which can be committed against any man or woman, it has a specific gender dimension in India. Most of the reported acid attacks have been committed on women, particularly young women, for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. The acid is used with malicious intent to take revenge, disfigure and harm the person. An acid attack is a terrifying experience. Acid melts human flesh and even bones. It causes excruciating pain and terror. The victims are left mutilated and scarred for the rest of their lives. Some suffer permanent disabilities such as blindness and some victims even die as a result of their injuries."[1]

In India acid attacks on women are a systemic form of gendered sexual violence. Born and brought up in male dominated patriarchal culture, men find it difficult to accept rejection from women and when their advances are spurned they retaliate by throwing acid at the woman. Unlike acid attacks on men, these attacks are used as a weapon to silence and control women by destroying what is constructed as the primary constituent of her identity, i.e., her body[2]. The fact that a woman's identity is reduced to her body which can be possessed or mutilated when denied access is a signifier of the commoditization of a woman's body. Body as a site of violence has long since been recognized[3]. By reducing women's bodies to products, objects or commodities that can be sold, manipulated for profit or used as sites to exert domination, commodification as a process achieves super-exploitation and social degradation of women[4]. "The purpose of throwing acid on the face or head particularly of a girl can be no other than to permanently disfigure her head or face so that she may not be in a position to show her face in the society or if she shows that face in the society she may look ugly. It is a different matter altogether that in the present day by getting plastic surgery done, some of the bad effects of acid or like that are removed but that is a different matter".[5] Apart from the physical and mental damage caused to the victim, it has considerable effect on the parents of the victim and in turn on the society also[6].

In common parlance, the term used to describe the act of acid throwing is 'vitriolage'.

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1 *Mahender* v. *State*, MANU/DE/4161/2013; 2013 XAD (Delhi) 577, para 2.

2 Burnt not defeated: Women fight against acid attacks in Karnataka, A report by CSAAW 2007 at p. 22

3 *Ibid* at p.15

4 *Ibid* at p.34.

5 *Sangeeta Kumari* v. *State Of Jharkhand* and Anr. on 8 July, 2003, Jharkhand High Court 2004 CriLJ 1734

6 *State of Karnataka by Jalahalli Police Station* v. *Joseph Rodrigues S/o V.Z. Rodrigues*, Judgment delivered by Karnataka High Court on 22 August 2006 in Cr.A. 1239/2004 filed by the accused and State appeal-Cr.A 1065/2004.

Concentrated Sulphuric acid is known as oil of vitriol as it has a yellowish oily appearance.[7] Since Sulphuric acid is the most commonly employed acid in acid attacks, hence the name 'vitriolage'. The crime of acid attacks covers cases of attacks by acids, alkalis as well as other corrosive substances too. Both acids as well as alkalis (bases) are highly reactive chemicals, and their strength is measured on the pH scale. Burns resulting there from are known as chemical burns. pH below 7 is considered as acidic, pH at 7 is neutral, and pH above 7 is alkali. Both acids[8] (H2SO4, HCL, HNO3 etc) and alkalis[9] (Lime, ammonia, caustic potash etc) can cause chemical burns, However, alkali burns are more severe than acid burns because they penetrate the tissues more rapidly and more deeply. The severity of burns is directly related to the pH of the acid/alkali used, its concentration, duration of contact, volume and physical form of the agent. In cases where nature of the agent is not known, doctors use litmus paper test to find out the pH in order to determine whether the agent was acid or alkali.

Effects of Acid Burns

Burns is the severest form of injury suffered by human body. Acid burns are rarely accidental and seldom homicidal. Usually the intent behind using acid as a weapon is to destroy looks, disfigure or maim. Acid burn injuries are not hypothermic, but are a consequence of tissue reactions to noxious substances. They usually give a trickle like pattern indicating the area that first came into contact. The worst scalds are found in the area of initial contact and it decreases in intensity as the liquid flows away. The appearance of wounds in acid injuries is indicative of the acid or alkali used in the attack. Sulphuric acid affected areas turn grey or black, nitric acid produces yellow brown discoloration of the skin. Strong alkalis react with skin and tissue lipids to give the wounds a slimy look which is initially grey and later turns brown in appearance.

Acid burns cause multiple cascading effects, some of which are visible and others invisible.

Physical: The immediate effects of contact with acid and other such corrosive substances are "swift and devastating"[10] and ultimately permanent. Once acid burns the skin the effects

7 The term 'Oil of Vitriol' was coined by the 8th-century Alchemist Jabir ibn Hayyan (http://www.alchemylab.com/arcana.htm#Vitriol).

8 Acids are proton donors and so they release hydrogen ions and reduce pH from a neutral 7 down to values as low as zero. Hydrogen ions are reactive and protonate any amine or carboxylic site. This causes a protein structure to collapse. After sometime, hydrogen ions catalyze protein hydrolysis into constituent amino acids. Some acids produce the effect of heat generation and dessication. Some lead to chelating of calcium as well. Hydroflouric acid is somewhat different from other acids in that it produces a liquefaction necrosis.

9 Alkalis are proton acceptors. They strip hydrogen ions from protonated amine groups and carboxylic groups. This causes protein structure to collapse and alkalis catalyze protein hydrolysis. They can also cause tissue destruction. Alkalis typically produce a more severe injury involving denaturing of proteins as well as saponification of fats which does not limit tissue penetration thus leading to liquefaction necrosis. Alkali burns usually result from lime products, plaster and mortar, oven and drain cleaners, dishwasher powders, fertilizers, and sparks from "sparklers."

10 Hooma Shah, "Brutality by Acid: Utilising Bangladesh as a Model to Fight Acid Violence in Pakistan"26 *Wisconsin International Law Journal* 1173 (2008-2009)

cannot be eliminated, erased, reversed or forgotten. It takes only 5 seconds of contact for superficial burns to happen. After that the acid rapidly eats into the skin melting all flesh, muscle and even bones unless it is promptly washed off or medical aid is provided. Lack of awareness regarding administration of first aid to acid victims leads to delay in treatment during which time irreparable damage is caused. Survivors have described their initial reaction to being attacked as though it were water thrown at, or poured on, them; and their subsequent horror at the immense burning heat searing through their body, with the terrifying realization that their skin is dissolving away[11]. Acid affects the skin, eyes, ears, joints and other body areas and acid burns are one of the major causes of systemic inflammatory response syndrome involving most of the organs because of the various inflammatory mediators released. If septicemia occurs in burn patients, it becomes almost impossible to save the patient. The metabolism in burn patients is as high as 150% of normal individuals. Thus their nutritional requirements are tremendously high to maintain the immuno-competence. Also there is tremendous protein loss from the denuded body surface so extra requirement is in addition to the daily requirement.

The long term effect is irreparable physical damage. The skin dissolves as the acid eats into the skin and if the concentration is higher and the acid is not washed off, the acid may go deeper and even melt the bones. The recovery is slow, painful and involves lots of expenditure on treatment and reconstructive surgeries. There is uneven resurgence of skin and lump formation over affected areas and the victims suffer from various disabilities such as lack of vision, hearing, movement of joints etc.

Economic: As a consequence of acute physical disabilities resulting from acid attacks, many survivors are no longer able to perform even simple tasks without assistance and support. Thus they have to face a perpetual struggle to earn their livelihood. People are reluctant to hire them and for those already in services, it becomes increasingly difficult for them to retain their employments. Their financial dependence on family members coupled with expensive treatment adds to their stress.

Psychological: The psychological problems arising out of the shock and syncope resulting from acid attacks are as debilitating as the physical effects of acid burns. Victims are terrorized when they see acid eating away their skin. Despite extensive treatments it is impossible to regain normalcy. Their bodies are scarred and deformed and the infirmities have debilitating effects. They suffer from various disabilities such as lack of vision, hearing, movement of joints etc. The physical appearance is spoilt due to formation of lumps and uneven re-growth of skin over affected areas. For unmarried girls the marriage prospect is finished and every day is a struggle for survival. Public perception and reactions further traumatize the survivors and there is lack of self worth. Of all the causes, disfigurement plays a powerful role in the subsequent psychological and emotional trauma experienced by survivors.[12]

11 Roksana Noor Khurshid, "Acid Attacks On Women in Bangladesh", Proceedings : 1st Annual Symposium : Graduate Research and Scholarly Projects, Wichita State University, pp.121-122

12 On the relationship between physical deformities and psychological traumas, see Ronald P Strauss, "Culture, Rehabilitation, and Facial Birth Defects: International Case Studies" *Cleft Palate Journal* 56-62 (Jan. 1985).

The survivors often suffer from feelings of depression and there is loss of loss of self-esteem. They live under perpetual fear of another attack and this leads to several problems such as insomnia and headaches. Many people develop suicidal tendencies too. There have been cases where acid survivors have filed for mercy killing before the courts. They are scared to testify against offenders for fear of another such attack against them or their other family members.

Social: Acid survivors are scared to face the society because they feel embarrassed by their looks. They cover their faces and other affected body parts for fear or ridicule or repulsive looks from others. People shun them and avoid their company because it evokes strange feelings in them to see such deformed bodies and faces. The other aspect is stigma associated with such offences. People suspect the woman survivor to have done something wrong and the general perception is like 'she asked for it' or 'she deserved it'. People question her behavior, her conduct and aspersions are cast on her character. Thus the victim is looked down upon and placed at par with the accused. Some people also associate their misery with their misdeeds in this or previous lifetimes and consider the victims as unlucky. They are seldom, if ever invited to any functions or social gatherings. The society largely treats the victims as social outcasts due to which they avoid going out. All this eventually turns them into a social recluse.

Classification of Burns

Depending upon thickness of the affected area burns are clinically classified as partial thickness burns or full thickness burns for medico legal purposes. In partial thickness burns there is loss of the outer skin layer i.e. epidermis and part of dermis. Such burns are more painful. In full thickness burns there is loss of whole epidermis and dermis and along with it the nerves causing sensations also get destroyed due to which these burns are painless. First and second degree burns are known as Epidermal burns. These result in formation of blisters and inflammation of the affected part, but on healing scars are not formed. Third or fourth degree burns are dermo-epidermal burns in which there is loss of cuticle and full thickness of skin. On complete healing there are resultant scars. In Deep burns there is charring of external and internal tissues and they are categorized as fifth and sixth degree burns. In these even bones are charred and nerve endings are destroyed. Upon healing such burns result in formation of scars, contractures and deformities[13].

Burn Surface Area Assessment

Total body surface area (TBSA) is an assessment of injury to the skin in burn cases to draw estimates regarding severity of the case. Such assessment is very important for treatment (Fluid resuscitation) and transfer decisions. When calculating burn area, both the size of area covered as well as the intensity (depth) of burns are to be taken into consideration. Erythema should not be included as it may take a few hours to fade, and

13. As described by Dr. Sujata Manohar, Sr. Consultant, Burns and Plastic Surgeries Department at Safdarjung Hospital, New Delhi in an interview conducted by the author as part of her Project on Vitriolage sponsored by National Commission of Women.

result in overestimation of actual injury. During assessment, it is important that all of the burn is exposed and assessed. The environment should be kept warm, and small segments of skin exposed sequentially to reduce heat loss. Pigmented skin can be difficult to assess, and in such cases it may be necessary to remove all the loose epidermal layers to calculate burn size. However, it should be understood that total burned surface area is not the only thing that determines if a burn is critical or not. The usual methods employed in estimating burn areas are the *Wallace rule of nines*[14], *Palmar surface*[15] *and the Lund and Browder chart*[16]

Medical Aid to Acid victims

First aid is the help or assistance administered to a victim first in point of time. Assistance of experts is not always handy yet doctors advise the following simple steps to be taken immediately to reduce the intensity of burns. First is removal of the cause of burns which can be done by copious hydrotherapy i.e. continuous washing of the affected area by clean water to dilute the acid. Dilution of the chemical is of paramount significance. Dipping the affected area in bucket or tub of water is not a good idea as the water would also get contaminated by the washed off the surface and may add to the severity of burns. Removal of clothes or jewellery soaked in the chemical is equally important. Sometimes the chemical has to be brushed off before flushing the affected area e.g. if it is powder like such as lime. In case acid is ingested, the victim should not be made to vomit as gastric emptying is not advised. Dilution with milk or water is contraindicated if any degree of airway compromise is present. After initial hydrotherapy the affected area of the victim should be wrapped loosely in a dry, sterile piece of cloth to protect the wound from any contamination or infection and immediately shifted to the hospital. During transfer safety of the victim is more important than speed and if possible an ambulance with adequate equipment

14. This is a quick way of estimating medium to large burns in adults. By dividing the body into areas of 9%, the "rule of nines" can be used to determine the total percentage of area burned for each major anatomical section of the body.
To account for inequities in shape and size of the victims, burned surface area is calculated as a percentage of total body area. In an adult the configuration is taken as *head and neck* 9%, *front of trunk* 18%, *back of trunk* 18%, *upper limb each* 9%, *lower limb each* 18%, *perineum and external genitalia* 1%. Added together these entire surfaces amount to 100%. Children have relatively disproportionate body part surface areas, thus using 'Rule of Nine' for a child can lead to wrong estimation of the extent of area burnt. In applying the rule of nines, all the areas of the body that are burned deep enough to cause blisters or worse are added. Utility of the rule of nines is that it is intended to quickly determine if victims need to go to a specialty burn center. Once the victim is in a burn center, more advanced techniques are to be used to determine the exact burned surface area.

15. *This method employs usage of human palm to assess the area affected.* The surface area of the victim's palm (including fingers) is roughly 0.8% of total body surface area. Palmar surface area method is used to estimate relatively small burns i.e. less than fifteen percent of total surface area or very large burns i.e. more than eighty five percent burns, when un burnt skin is counted or areas of irregular or non-confluent burns. For medium sized burns, it is inaccurate.

16. This method involves the drawing of a cartoon on a chart, and an associated age specific table is used to calculate the body surface area involved. This chart, if used correctly, is the most accurate method. It compensates for the variation in body shape with age and therefore can give an accurate assessment of burns area in children.

and a qualified doctor should be arranged. In cases of extensive burns the initial treatment has to take care of airway, breathing, circulation and resuscitation with intravenous fluids, hence a fully equipped ambulance in very important.

Duty of Doctor to inform the Police

Acid attacks fall under the category of medico-legal cases where in investigations by the law-enforcing agencies are essential to fix the responsibility regarding the causation of the burns. All burn injuries caused by corrosive chemical substance, injuries caused by friction, lightning, electricity, ultra violet of infra-red light rays, X-rays and corrosive chemical substances are classified as burns for medico-legal purposes[17].

Informing the police is necessary whenever

- The victim asks the doctor to inform the police; or
- After eliciting history and examining the patient, the attending doctor suspects some foul play and feels that some investigation by law enforcement agencies is essential to establish and fix responsibility for the case.

The doctor should intimate the nearest police station of the case without undue delay, preferably in writing and obtain a proper signed acknowledgement. Alternatively, where it is not possible to give written information, the police may also be intimated by telephone. In cases where information is conveyed orally or through telephone then the doctor should diligently ask for the diary number as proof of intimation and properly document the number in the patient's records. In all acid attack cases the doctor should take the consent of the patient for registering the case as an MLC. Consent for such a registration may be refused by the patient and the doctor has no right to force anything on the patient. Where the victim refuses to register an FIR, it is the duty of the doctor to carefully document all the findings and inform the nearest police station regarding the same, giving reasons for his actions. Even where the patient needs to be referred or shifted to another hospital for better treatment, it is the duty of the attending doctor to issue a referral letter stating whether it's a MLC or not. If it does so, then he must register the case as an MLC and make a serially numbered entry in the medico-legal register maintained in the casualty of every hospital for this purpose.

A medico legal report is a report given by an expert and is of confidential nature and is not a public document. As such the accused or respondent is not entitled to get a copy of the same during the investigation of the case. In such cases a no objection certificate should be obtained from the police authorities investigating the cases before a copy is supplied. Every hospital should ideally maintain a medico-legal register in its casualty ward and details of all medico-legal cases should be entered in this register in duplicate/ triplicate on the prescribed proforma. Such an entry should contain the details of the time and date of receiving the case, the time and date of examination and the name of the doctor who has examined the case for easy future reference. Doctors should take care to avoid abbreviations

17 Modi s Medical Jurisprudence and Toxicology, 23rd edition at page 641

and over writings as the information recorded here in is very vital to the case. Corrections wherever necessary, should be initialed with date and time. Many times, during court proceedings, defence raised the issue that in the case history sheet drawn by the doctors, the name of the person who had thrown acid on the victim was not recorded. This argument is without substance, because the doctors are normally concerned with the injuries and their treatment and not with the fact as to who had caused the same.[18]

Under medical ethics all cases should be examined after obtaining consent. Consent should be taken before starting the procedure and after clearly explaining the patient or his attendant who may be a friend or relative, what exactly is to be done. If the patient is a minor or less than 18 yrs of age consent of the guardian is necessary for examination of private parts. In case of women, it is preferable that a lady doctor should conduct the medical examination. Wherever this is not possible, a female attendant should be present during the examination.

In cases of severe burns where the chances of survival are slim, the doctors should, inform the police to arrange for a magistrate to record the 'dying declaration'. Doctors are not required to attest the dying declaration or act as a witness in case when police or magistrate records the dying declaration. However in critical cases where there is immediate likelihood of death and it is not possible to contact a magistrate, the doctor should himself record the dying declaration in the presence of another gazetted officer or two responsible persons, either fellow doctors or qualified nursing staff. Statement of the witness shall be recorded, preferably in the vernacular of the patient in which he/ she speaks. In all such cases medical officer should obtain either signatures or thumb impression of the patient. The original dying declaration shall be sent to the SDM concerned in a sealed cover through the Medical Record Department.

In case the patient dies then the Doctor is duty bound to immediately inform the police and send the body to the hospital mortuary for preservation, till the legal formalities are completed and the police releases the body to the lawful heirs. The dead body should never be released to the relatives. It should only be handed over to the police or be sent to the hospital morgue, pending the arrival of the police. In such cases a medico-legal postmortem examination is necessary to ascertain the details of death.

However, the first priority in every case is to save the life of the patient. Thus doctors should first administer necessary medical aid to the patient. All legal formalities are to be suspended till the patient is resuscitated. In the case of *Pt. Parmanand Katara* v. *Union of India & Ors*[19], Justice Ranganath Mishra observed that "Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statute or otherwise which would interfere with the discharge of this obligation cannot be sustained

18 *Sudershan Kumar* v. *State*, ILR 1970 Delhi 504.

19 AIR1989 (SC) 2039

and must, therefore, give way". The court further said that, "Institutes should be asked to provide the immediate medical aid to all the cases irrespective of the fact whether they are medico- legal cases or otherwise. The practice of certain Government institutions to refuse even the primary medical aid to the patient and referring them to other hospitals simply because they are medico-legal cases is not desirable. However, after providing the primary medical aid to the patient, patient can be referred to the hospital if the expertise and facilities required for the treatment are not available in that Institution". There are no provisions in the Indian Penal Code, Criminal Procedure Code, Motor Vehicles Act etc. which prevent Doctors from promptly attending seriously injured persons and accident case before the arrival of Police and their taking into cognizance of such cases, preparation of F.I.R. and other formalities by the Police. There can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or be a criminal liable to punishment under the laws of the society, it is the obligation of those who are in-charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished".[20]

Under Section 39 of the CrPC, there is a duty on every citizen to inform police of any incident affecting human body. Doctors are also required to inform the police in case of any suspicious acid injuries. This is an extension of their duty as a responsible citizen. This process of informing must be started as soon as the patient is stabilized.

The Criminal Laws Amendment Act, 2013 has introduced Section 357C[21] in the CrPC which makes it mandatory for all hospitals public or private, to immediately inform the police of any incident of rape or acid attack, when they receive any victim of these offences for treatment. Thus reporting has been made a legal duty.

Section 357C of the CrPC casts a twofold obligation on the hospital administration to

- provide immediate first-aid and treatment, free of cost to the victim of acid attack; and
- immediately inform the police of such incident

Earlier Section clause (6) of 357A CrPC had provisions where under the State or the District Legal Services Authority could alleviate the suffering of the victims of crimes by ordering immediate first aid facility or medical benefits to be made available to the victim free of cost, subject to the production of a certificate of the police officer-in-charge of the police station or a magistrate of the area concerned certifying such requirement. Now 357C of the CrPC provides for treatment of victims and makes it absolutely mandatory on

20 *Ibid*

21 357C. Treatment of Victims:
All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately provide the first-aid or medical treatment, free of cost to the victims of any offence covered under Section 326A, 376, 376A, 376B, 376C, 376D or Section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident.

the part of all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, to immediately, provide the first-aid or medical treatment, free of cost, to the victims of acid violence.

Non compliance with the provisions of Section 357C CrPC has been made a punishable offence under Section 166B[22] of the IPC. Thus, where a person in charge of a hospital, public or private, whether run by the Central or the State Government, local bodies or any person, contravenes the provisions of Section 357 CrPC i.e. either refuses to administer first aid to victims of acid violence; or charges money for the same; or fails to inform the police regarding such incident, the law provides that such person will be punished with imprisonment for a term up to one year or with fine or with both.

Reconstructive Surgeries of Acid Survivors Exempted from Tax

Treatment of acid attack survivors need multiple and extensive reconstructive surgeries to restore ones' appearance and body functions. All reconstructive surgeries undertaken to restore one's appearance, anatomy or bodily functions affected due to congenital defects, developmental abnormalities, degenerative diseases, injury or trauma would be outside the scope of 'service' for imposition of Service tax on Cosmetic or Plastic Surgery Service under the Finance Act, 2009[23] . Processes undertaken to correct impairment caused by burns, fractures or congenital abnormalities like cleft lip etc. [24] have been made non-taxable. Thus reconstructive surgeries in cases of acid attacks have been purposely kept out of the ambit of taxable services.

Development of Laws against Acid Attacks

Earlier there would be stray incidents of acid attacks and they would be covered under Section 326 of the Indian Penal Code, 1860 as offence of 'voluntarily causing grievous hurt by dangerous means or weapons'. The police too enjoyed a great deal of discretion in imposing charges in the absence of clear cut provisions relating to such attacks. Bribes, preconceived gender notions, bias etc were several factors influencing their discretion in deciding the sections under which the accused was to be charged. Their discretion was heavily loaded with their own notions of morality and character traits of women. They would register cases of acid violence under sections 320, 322 and 325 (voluntarily causing grievous hurt) and 326 (causing grievous hurt by dangerous weapons or means) of the IPC. Under these sections, the accused could be sent to jail for a period of one year to 10 years. If the victim lost her life in the incident or due to it, then the accused was booked under relevant clauses of Sections 299[25] or 300[26] IPC. But all the above mentioned provisions

22 Punishment for non-treatment of victim Section 166B:
Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

23 Service Tax imposed from 01.09.2009 vide Notification No.26/2009-ST dated 19th August, 2009.

24 Available at http://indiabudget.nic.in/ub2009-10/cen/dojstru2.pdf

25 Culpable Homicide

26 Murder

were insufficient to deal with the multidimensional harm caused by this offence. Acid violence leaves indelible scars on not only the body but also the mind and soul of the victim. The existing definition of grievous hurt was found to be lacking in the coverage of the complex and different kinds of injuries resulting from corrosive substances like acid. It also failed to cover cases wherein the victim was forced to drink acid. This definition also did not account for the various social disabilities, stigmas and discriminations faced by acid survivors. Moreover in cases of acid throwing, if the victim managed to escape unhurt, the accused could also not be prosecuted. The punishment prescribed under these sections is the maximum awardable in these cases which leaves a great deal of discretion with the judges to award lesser punishment.

The statistics too, showed an alarming rise in the incidences of acid attacks over the last decade thus prompting the Government to take cognizance of the problem. The state has tried to adopt a two pronged approach by enacting specific provisions criminalizing acid violence and limiting the accessibility to acids by regulation of its sales. At present the law to check Acid Attacks in India is piecemeal and scattered. We have two provisions in the IPC (326A & 326B) declaring acid attacks as a specific crime, one section in CrPC (357A) dealing with compensation, the Supreme Court order on acid attacks in Laxmi v. UOI (Criminal Writ petition 129 of 2006), an Advisory issued by the MOHFW regarding the free treatment of acid attack victims dated 2nd May, 2013 and the Poisons Possessions and Sales Rules, 2013.

Sections 326A[27] and 326B[28] IPC, 1860.

Criminal Laws Amendment Act, 2013 introduced two new sections in the Indian Penal Code, 1860 dealing specifically and exclusively with acid attacks.

27 Voluntarily causing grievous hurt by use of acid etc
Section 326A. Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:
Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:
Provided further that any fine imposed under this section shall be paid to the victim.

28 Voluntarily throwing or attempting to throw acid
326B.Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.
Explanation 1.—For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bo dily injury leading to scars or disfigurement or temporary or permanent disability.
Explanation 2.— For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.

Under Section 326A, an accused can be held guilty if he causes either grievous hurt (as defined under Section 320 IPC) or permanent or partial damage or deformity to, or burn injury or disfigurement or disability to, any part or parts of the body of a person. All kinds of damages to the body, whether permanent or temporary, total or partial, reversible or irreversible have been covered under Section 326A. It also covers injuries that result in some sort of deformity, disfigurement or disability. If a person is maimed owing to such act of the accused, that would also attract punishment under this section. Burns resulting from such act irrespective of their degree would also attract punishment under this provision. Thus ambit of this provision has been expanded by including all sorts of grievous hurt covered under Section 320, as a type of injury qualifying for punishment under this section. The only condition being that the cause of grievous hurt or any of the above injury, disability or disfigurement should be throwing or administering of acid or any other similar corrosive substance; and the act complained of must have been done with either the intent of causing such injury or hurt; or with the knowledge that his act is likely to result in such injury or hurt

The legislators have purposely included both intention as well as knowledge for conviction under Section 326A. Now an accused who throws acid at a person cannot be allowed to argue that he never intended to cause such serious injuries. Inclusion of the term 'Knowledge' paves the way for inclusion of all such cases within the purview of this section as in criminal law, every person is presumed to be aware of the nature and consequences of his actions irrespective of whether he intended to bring about those consequences or not. Thus for conviction under Section 326 the prosecution needs to only prove that act of acid throwing was done by the accused voluntarily and the injury is not an accidental injury such as when he never wanted to splash acid on a human being. This would be no defence that he intended to throw acid on someone else and some other person accidentally got in the way. Punishment in such cases would be irrespective of such considerations.

Punishment for an offence under Section 326A has been prescribed as imprisonment for a minimum term of ten years and maximum life imprisonment and also fine.

The proviso to Section 326A further clarifies that the amount of fine payable under this section shall be paid to the victim and should be sufficient enough to cover the medical expenses of acid victims. In a case[29], a husband who had thrown acid on his wife was ordered to pay a meager amount of Rs 2,000. Medical procedures in acid cases run into several lakhs of rupees and still complete recovery is not possible. Awarding of Rs 2000 in such a scenario would tantamount to a mockery of the criminal justice system.

To attract liability under Section 326B there must be throwing or attempt at throwing or administering acids or other means and such act or attempt should be done with the intent to injure damage, disfigure, disable or maim any person. Thus under Section 326B it is not only the actual act of acid throwing but also attempts at acid throwing or administering which have been made punishable offences. Explanation -1 appended to this section further

29 *Balu* v. *State*, Cri. App. 1078 of 2004 (Mad H.C.)

broaden the ambit of this provision by defining acid in broad terms to cover all substances of acidic or corrosive character or which have a nature to burn. Thus any substance capable causing bodily injury leading to scars or disfigurement or temporary or permanent disability will be included in the term 'acid' for purposes of conviction under this section. Explanation-II clarifies that all kinds of damages permanent or temporary, total or partial, reversible of irreversible, would be covered here in.

Offences covered under both Sections 326A and 326B have been made cognizable and non-bailable.

Right of private defence against acid attack.

Clause Seventhly of Section 100 of the IPC gives a person the right to even cause the death of an aggressor while exercising the right of private defence against an act of throwing or administering acid or attempts to throw or administer acid, where such act or attempt causes the reasonable apprehension that grievous hurt will otherwise be the consequence of such act. This clause was inserted in Section 100 of the IPC vide the Criminal Laws Amendment Act, 2013. This is recognition of the fact that self help is the best help. Since State help is not always readily available, a person threatened by acid may take the law in his own hands and even cause the death of the other person as a protective and preventive measure, where circumstances justify the extreme step.

Acid Violence: Also a type of Domestic Violence

Acid violence by a family member is also covered under Section 3 of the Domestic Violence Act, 2005 which defines domestic violence as any act, omission or commission or conduct that harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. The explanation clause appended to this section further clarifies that for the purposes of this section "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force.

Registration of FIR mandatory in Acid Attack Cases

Under Clause 'c' of Section 166A failure on part of a public servant to record FIR in acid attack cases has been made punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and such public servant shall also be liable to fine. Sub section (1) of section 154 of the Code of Criminal Procedure, has made reporting convenient for women by making it mandatory on part of State to make arrangements for women police officer to record information regarding offences of acid attacks against women, where the informant is herself the victim of such assault or attempted assault.

Regulation of Acid Sales

Earlier we had no law to regulate the sale of acid generally. Due to this acid such as Hydrochloric and Sulphuric acids which are used in households could be easily purchased from street vendors, medical stores and the local market. Acid is also a very inexpensive weapon to procure, as a litre can be obtained for as less as Rs 25 at most locations.[30]

Earlier the sales of acid could be regulated only for industrial purposes in, by the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. Now **Model Rules**[31] have been framed under the **Poisons Act, 1919** to regulate sale of acid and other corrosive substances. The Model Rules include, inter alia, the form of acids (liquids or crystalline and its concentration) that can be stored and sold, issue of licenses, procurement by individuals, educational and research institutions, hospitals, industries, Government Departments and departments of Public Sector Undertakings. According to Section 5 of the Poisons Act, 1919, any substance specified as a poison in a rule made or notification issued under this act shall be deemed to be a poison for the purposes of this Act. The list of poisons[32] supplied in the schedule to the Model Poisons Possession and Sale Rules, 2013 declares certain acids as poisons[33] and their sales and possession have to be regulated in accordance with the Poisons Act, 1919 and the rules[34] made there under.

Compensation to the Victims

Victim compensation scheme under Section **357A** of the **CrPC** casts an obligation on the State Governments in co-ordination with the Central Government, to prepare a scheme for providing funds to the victims or dependants of victims who have suffered loss or injury as a result of crime and require rehabilitation.

Under Section 357B of the CrPC, it has been clarified that whenever the court awards payment of compensation to survivors of acid violence the compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A of the Indian Penal Code.

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30 *"Acid Attack Victims yet to get Assistance", The Hindu* (Karnataka April 27, 2007).

31 The Model Poisons Possession And Sale Rules, 2013

32 "Acetic acid (beyond 25% concentration by weight), Acetic Anhydride, Sulphuric acid (H_2SO_4)(beyond 5% concentration by weight), Hydrochloric acid (HCl) (beyond 5% concentration by weight), Phosphoric acid (H_3PO_4), Hydrofluoric acid (HF), Perchloric acid ($HClO_4$), Formic Acid (beyond 10% concentration by weight), Hydrocyanic acid except substances containing less than 0.1 per cent weight in weight of Hydrocyanic acid., Hydrochloric acid, except substances containing less than 5 per cent weight in weight of Hydrochloric Acid, Nitric acid, except substances containing less than 5 per cent weight in weight of Nitric Acid., Oxalic Acid, Perchloride of mercury (corrosive sublimate), Potassium Hydroxide except substances containing less than 2 per cent weight in weight of Potassium Hydroxide, Sodium Hydroxide except substances containing less than 2 per cent weight in weight of sodium Hydroxide., Hydrogen peroxide (beyond 50% concentration by weight) Formaldehyde (beyond 25% concentration by weight), Phenol (beyond 3% concentration by weight) and Sodium Hypochlorite Solution (beyond 5% concentration by weight)"

33 *Supra* note 24, Rule 3

34 The Model Poisons Possession And Sale Rules, 2013

The compensation package for the acid attack survivor should ideally consist of the entire treatment costs including expenses incurred in reconstructive surgeries, grafts, physiotherapy, hospitalization and medications. Further damages for loss of present and future earnings and earning capacity should be calculated and paid along with compensation for pain, sufferings and even loss of consortium in cases where injury is so severe that that the girls loses all chances of marriage or for married women when it interferes in the normal establishment of conjugal relations between the spouses.

In 2013 budget, the then Government of India had announced *'Nirbhaya Fund'* which is a fund with a corpus of Rs. 10 billion. This fund was named 'Nirbhaya' meaning the fearless as a tribute to the brave heart that fell prey to monsters in the 16th Dec 2012 gruesome rape incident that had shocked the collective conscience of our country. The fund was launched amidst much fanfare with the objective to support initiatives taken by the Government and NGO's regarding ensuring safety of women against crimes against their dignity and safety. The fund is to be used to enhance safety and security of women in both the public as well as the private domain. In November 2013 the Ministry of Urban Development had sent requisitions to all States for proposals to implement new projects to be financed by the Nirbhaya Fund. In February this year, the Government has allocated additional Rs. 1000 crore to this fund. However, what is depressing is that not a single penny has been allocated out of this fund till date as the Government is yet to take decisions on proposed projects where it may be utilized. These funds need to be put to proper use and decisions regarding their allocation should be taken fast.

Testimony of Acid attack survivors

Section 119[35] of the Indian Evidence Act has also been amended and now it has made provisions for witnesses who are unable to speak to give their evidence in any other manner in which it can be made intelligible, as by writing or by signs; but such writing must be written and the signs should be made in open Court. The evidence so given in writing or by signs shall be deemed to be oral evidence. The proviso to Section 119 further provides that, if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement and such statement shall be video graphed.

This provision shall be of immense help to survivors of acid attacks as in most of the cases their face is targeted due to which their lips are burnt completely and their facial muscles are distorted due to which they have great difficulty in opening their mouths or speaking with clarity.

35 119.Witness unable to communicate verbally
A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence:
Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.

Section 54A[36] of the CrPC, makes provision for persons who are suffering from physical disability to identify the person arrested, under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with. The proviso to this section further provides for such identification process to be videographed.

Prophylactic Measures by the Judiciary

In 2006, while delivering judgment in Haseena's case[37], the Karnataka High Court rejected the defence plea that, in absence of medical evidence showing that throwing acid on face and eyes of the injured would have caused the death, proper conviction would be under Section 326 of IPC and not under Section 307 of IPC. The Judges remarked, "The Court cannot shut its eyes to obnoxious growing tendency of young persons like accused resorting to use corrosive substances like acid for throwing on girls, causing not only severe physical damage but also mental trauma to young girls. In most of the cases the victim dies because of severe burns or even septicemia or even if luckily survives, it will only be a grotesque disfigured person, who even if survive lives with mangled flesh, hideous zombie like appearance and often blind if acid is splashed on face and suffer a fate worse than death. As such, in our view the offence should be treated as falling under Section 326 of IPC or under Section 307 of IPC depending upon the intention, knowledge, severity and the extent of damage caused to the victim". It is the nature and gravity of the crime and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in if duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual but also against the society to which the criminal and the victim belong.[38]

Dealing with this cruelest menace, the honourable Supreme Court in a recent case of *Laxmi* v. *Union of India and Others*[39] directed the State governments and the Union territories to make appropriate rules for the sale of acid in states and union territories respectively. In August, 2013 the SC had enhanced compensation payable by the State governments to acid attack victims to a uniform Rs 3 lakh from an earlier limit of Rs 50,000. It also had directed the states to implement stringent norms for retail sale of acid,

36 Section 54A. Identification of person arrested
Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit.
"Provided that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with:
Provided further that if the person identifying the person arrested is mentally or physically disabled, the identification process shall be videographed.

37 *Supra* note 6

38 *Ravji* v. *State of Rajasthan*, (1996) 2 SCC 175

39 2012(9) SCALE 291

treating it as a poison under the Poisons Act, 1919, within a period of three months. Banning the sale of acid to minors the Court said the corrosive substance could be sold to only those who have valid identity cards issued by the government and specifies the purpose for the purchase in writing. It had also asked the Centre and states to make the acid attack offence non-bailable.

The honorable Apex Court also directed the government to take appropriate measures for proper treatment, after care, rehabilitation and payment of compensation to the victims of acid attack. [40] In July 2013, The Supreme Court had laid down a stringent regulatory mechanism for sale of acid to curb acid attacks on women and directed the states to notify within three months a regulatory framework for sale of acid. In Dec, 2013 Supreme Court asked all States to formulate specific guidelines regarding sale of acid and also for payment of compensation and providing free medical treatment for survivors of acid attacks and notify the same before April, 2014. The bench also asked the respective states to ensure that every police station, immediately after registering an FIR about an acid attack should intimate the concerned SDM, who would in turn inquire how the acid was procured by the assailant.

Conclusion

Laws against acid attacks in India are still in the nascent stage. Our immediate neighbor Bangladesh has succeeded in bringing down incidences of acid violence by strict enforcement of its twin legislations[41] relating to control of acid sales and punishing those accused of acid violence with heavy punishments. Social welfare organizations in India too are pressing for a separate legislation to specifically and comprehensively deal with acid attacks. Acid attack is a diabolical crime indicative of sinister motives. It is a pre planned inhuman and barbaric act that deserves nothing but the extreme penalty awardable under law. We need to enact a law that specifically and exclusively deals with acid attacks. Until then we should focus on proper and strict implementation of the existing provisions against acid attacks under various laws. Throwing of acid on helpless victims, mostly women, is on the rise, which is a dastardly and cowardly act and the same is to be controlled with an iron hand. It leaves them disfigured, blind and, sometimes, even dead[42].There is need to impose harsher penalties on the perpetrators, enforce the laws strictly provide adequate compensation for treatment and rehabilitation of acid violence survivors, and ensure regulation of acid sales in the country. Law as a cornerstone of the edifice of "order" should meet the challenges confronting the society.

40 *Ibid*

41 Acid Crime Prevention Act, 2002 and The Acid Crime Control Act, 2002

42 *Nitin Kumar Arora* v. *State (NCT of Delhi)*, Judgment delivered on 30th August 2013 in CRL. A. 788/2011.

LAW CRIES FOR CHANGE: ASSESSMENT MEDICAL TERMINATION OF PREGNANCY ACT, 1971 FOR MENTALLY RETARDED PREGNANT WOMEN

Dr Sunanda Bharti*

Preface

In India, the law of abortion is contained in the Medical termination of Pregnancy Act, 1971 (MTP Act, 1971). Though the popular understanding regarding the statute is that it *permits* abortion, making it legal, the technically proper understanding would be that it declares abortion (the expression used in India is 'medical termination of pregnancy') to be *illegal* as India is a pro-life country. After stating this general rule, it provides for certain exceptions wherein pregnancy can be lawfully terminated. These are very specific circumstances and have remained the same ever since its enactment.[1]

The main aim of this paper is to highlight that the provisions of the MTP Act, 1971 as they stand today, infringe upon the fundamental right guaranteed under Art 21 of the Indian Constitution[2] in so much as they compel a pregnant woman (PW), who is not stable in mind to undergo the physical trauma of delivering and raising a child which could have been avoided.

I Introduction

Medical Termination of Pregnancy Act, 1971

Prior to the Medical Termination of Pregnancy Act, 1971, a pregnancy could not be terminated in India without attracting penal sanctions under the Indian Penal Code, 1860.[3] In 1971, the MTP Act was passed which provided for termination of certain pregnancies by registered medical practitioners (RMP's)[4]. In a way, the MTPA, 1971 diluted the rigours of the prevalent law, though abortion was not provided for in all cases of pregnancy but only in specific cases.

The MTPA, 1971 is a small act consisting of only 8 sections. Under the Act, termination of pregnancy is possible only if:

- the continuance of pregnancy would involve a risk to the life of the PW; or
- the continuance of pregnancy would involve a risk of grave injury to her physical or mental health[5]; or

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1 Dealt with later in the paper.

2 Art 21 of the Indian Constitution guarantees the right to life and personal liberty-a provision which has been creatively read by the apex court umpteen numbers of times.

3 Indian Penal Code 1860, ss 312 and 313 provide punishment for induced abortion.

4 Medical Termination of Pregnancy Act 1971, s 2(d) states that a registered medical practitioner means 'a medical practitioner who possesses any recognised medical qualification as defined in Cl.(h) of Sec. 2 of the Indian Medical Council Act 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

5 Medical Termination of Pregnancy Act 1971, s 3(2)(i).

- if there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.[6]

However such termination is dependent on the gestational age of the foetus. MTP can be performed only where:

- the length of the pregnancy does not exceed twelve weeks; or
- the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks: in this case the opinion of two registered medical practitioners in favour of the termination is essential.[7]

There is another provision under which the pregnancy can be terminated validly irrespective of the length of the pregnancy and without the requirement of two opinions. In this case, the registered medical practitioner should be of the opinion, formed in good faith that the termination of the pregnancy is *immediately* necessary to save the life of the PW.[8] The opinion of the RMP's should be formed in good faith.[9]

In sum and subtance, the provisions of the MTP Act, 1971 make it clear that, termination of pregnancy was envisioned by the Legislature only in certain cases as a circumscribed activity. Despite this, innumerable abortions are carried out every year in India[10] and a substantial number are illegally induced.[11] The figure for reported abortions in India during 2010-11 was around 6, 20,472 whereas the unreported number is estimated at 10 times this figure. The perpetrators escape punishment easily which reflects that the MTPA, 1971 is followed more in breach than observance.

To highlight the issues relevant to the paper, the Medical Termination of Pregnancy Act, 1971 provides for three things:

1. that, India fixes viability of foetus at 20 weeks

6 Medical Termination of Pregnancy Act 1971, s 3(2)(ii).

7 Medical Termination of Pregnancy Act 1971, ss 3(2)(a) and (b).

8 Medical Termination of Pregnancy Act 1971, s 5.

9 Such opinion has to be certified under the MTP Regulations framed under the Act. In the form the reasons for forming the opinion also have to be stated. Further every RMP who terminates any pregnancy is required within three hours from the termination of the pregnancy to certify such termination in the said form where again the reason for terminating the pregnancy has to be specified: See Medical Termination of Pregnancy Regulations 1975, regs 3(1) and 3(2) published in the Gazette of India dated 4.10.75.

10 See Wm Robert Johnston, 'India abortions and live births by state and territory 1971-2011' (Last updated 17 October 2012) <http://www.johnstonsarchive.net/policy/abortion/india/ab-indias.html> accessed 11 March 2013.
Wm Robert Johnston is a PhD in Physics, MS Physics, BA (Astronomy) and a data analyst of sorts. His archive, known as the Johnstons Archive is a valuable and updated source of many important data, including abortion.

11 This is as per the findings of National Abortion Assessment Project, a nationwide study on abortion and abortion services in the public and private sectors in six Indian states. According to the study, most abortions were opted for as a family planning measure. The National Abortion Assessment Project was a multi dimension and multicentric research initiative co-coordinated by CEHAT and Healthwatch. CEHAT (Centre for Enquiry into Health and Allied Themes) is the research centre of Anusandhan Trust involved in research, training, service and advocacy on health and allied themes.

2. that this fixation of viability is totally divorced from any medical proficiency of saving foetuses of that small gestational age.
3. that in India if the pregnancy has crossed the 20 week gestation mark, and there is no emergency but the mental or physical health of the PW is at stake, or there are chances that the child, if born, would suffer from such physical or mental abnormalities to be seriously handicapped, the PW would have to compulsorily carry the pregnancy to term or till the situation turns emergent for the life of the PW.

The author protests that the cap of 20 weeks is a hindrance or a constriction on the liberty of the expectant mother to terminate the pregnancy. In the western world an expectant mother can abort even at 24-28 weeks of gestation but a woman in India is legally prevented to do the same.[12] A PW in India, once she has crossed 20 weeks gestation must compulsorily continue with the pregnancy till delivery, unless some emergency causes threat to her own life.

***Rationale behind 20 weeks*:** The rationale of fixing up-to 20 weeks as the upper limit for legal abortion appears more holistic than logical. Medical technology cannot save a foetus of 20 weeks gestation as of now, but since most of the body parts are almost developed by that age, it is viewed as a sacred life form, worthy of being brought into the world. The MTPA, 1971 is silent of a situation where the mother of post 20 weeks gestation is hale and hearty but the foetus suffers from severe deformities. Similarly the act does not come to the rescue of a foetus who is in the womb of a retard mother who is unable to understand the responsibilities of raising a child.

Mental Retardation of PW and Foetal Rights

The Indian case that best explains the para title is *Suchita Srivastava v Chandigarh Administration*.[13] Here, a Division Bench of the High Court of Punjab and Haryana ruled that it was in the best interests of a mentally retarded woman to undergo an abortion because the said woman had become pregnant as a result of an alleged rape that took place while she was an inmate at a government-run welfare institution located in Chandigarh. The Supreme Court ruled otherwise, holding potential life to be sacrosanct and also hailing the rights of the mentally retarded to reproduction.

The SC in doing so might have gained approbation amongst the conventional human rights activists, it nonetheless fell prey to holistic approaches towards implementing the law rather than being practical.

Moved by the trauma of the victim in certain cases like these, the court overlooks the fact that it is establishing a precedent-one difficult to be adhered to in all similar circumstances. Also, it conveniently overlooks and sadly misses the opportunity to modify the existing laws

12 The Abortion Act, 1967 of the UK on which the Medical Termination of Pregnancy Act, 1971 of India is modelled, in section 1 declares the viability period to be 24 weeks.

13 (2009) CA No 5845 (Punjab and Haryana HC).

like the MTPA, 1971 some clauses of which have been crying for change since times immemorial.[14]

Suchita Srivastava v Chandigarh Administration

There are many aspects all rolled in one in this case:
Mentally retarded female
Orphan
Raped
In a govt. run welfare institution

Facts of the Case: Before we deal with the implications of each, it is important to know the bare facts of the case:

After discovering the pregnancy, the Chandigarh Administration (respondent in this case) approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child. The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an Expert Body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. In its order the High Court framed a comprehensive set of questions that were to be answered by the Expert Body. In such cases, the presumption is that the findings of the Expert Body would be given due weightage in arriving at a decision. However, in its order the High Court directed the termination of the pregnancy in spite of the Expert Body's findings which showed that the victim had expressed her willingness to bear a child.

Supreme Courts' Take: Aggrieved, the appellants moved the Supreme Court since the statutory limit for permitting the termination of a pregnancy, that is, 20 weeks was approaching, a notice was issued to the Chandigarh Administration and both parties were heard. The SC granted a stay on the High Court's orders and ruled against termination of the pregnancy. It based the decision on two factors: one, that it was incorrect on part of the High Court to direct termination of pregnancy without the *consent* of the woman in question.[15]

The second that even if the said woman was assumed to be mentally incapable of making an informed decision, appropriate standards for exercising 'Parens Patriae' jurisdiction was not adopted by the HC. The SC was of the opinion that 'best interests' of the woman could not be achieved by termination of her pregnancy.

[14] As reflected by *Dr Nikhil D Datar v Union of India* SLP (Civ) XXXX 2008 (SC).

[15] Medical Termination of Pregnancy Act 1971, s 3(4) provides that:
(4)(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.
(b) Save as otherwise provided in C1.(a), no pregnancy shall be terminated, except with the consent of the PW.

Since the woman involved, suffered from mild mental retardation[16], she was held capable of forming consent which, per the SC, was not considered by the HC:

> [P]ersons who are in a condition of 'mental retardation' should ordinarily be treated differently from those who are found to be 'mentally ill'. While a guardian can make decisions on behalf a 'mentally ill person'[17], the same cannot be done on behalf of a person who is in a condition of 'mental retardation'. The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act 1971 clearly lays down that obtaining the consent of the PW is indeed an essential condition for proceeding with the termination of a pregnancy. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent[18] is liable to be misused in a society where sex-selective abortion is a pervasive social evil.[19]

In substance, the court gave the following reasons for declaring that the victim was capable of forming consent which was in favour of keeping the pregnancy:

- That the woman, being a case of mild mental retardation was not to be taken as a mentally ill person; hence a guardian could not be allowed to take a decision on her behalf.
- Stretching the argument further, the SC was of the opinion that though the woman did not understand the consequences of her decision, and was incapable of giving an explicit consent, this incapacity could not be read as if she wanted to terminate the pregnancy.
- That the MTP Act, 1971 declares obtaining consent of the PW as essential for proceeding with the termination of a pregnancy and without that consent, pregnancy should not be terminated.
- That to avoid propagation of sex selective abortions, this requirement of consent should not be diluted.

[16] There are varying degrees of mental retardation: borderline, mild, moderate, severe and profound. Persons suffering from severe and profound mental retardation usually require intensive care and supervision. However, there is a medical consensus that persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

[17] Medical Termination of Pregnancy Act 1971, s 3(4)(a).

[18] Contemplated by Medical Termination of Pregnancy Act 1971, s 3(4)(b).

[19] (2009) CA No 5845 (Punjab and Haryana HC) para 15.

Medical Board Succumbs to Moral Difficulties: It is notable that the SC based its decision guided by the findings of a three member medical board that assessed the mental status of the victim and another multi-disciplinary medical board that assessed the victims' capacity to hold the pregnancy through.

It would be pertinent, at this juncture to refer to some of the Expert Body's findings:

- It was found that her mental status affected her ability for independent socio- occupational functioning and self-sustenance and hence she required supervision and assistance.
- As per her mental status, she was found incapable of making the distinction between a child born before or after marriage or outside the wedlock and was unable to understand the social connotations attached thereto.
- Though she knew that she was bearing a child and was keen to have one, she was found unable to appreciate and understand the consequences of her own future and that of the child.
- Her perception about bringing up a child and the role of an ideal mother was grossly limited.

Despite this, the final finding of the Expert Body was in the favour of continuation of pregnancy. It seems that holistic and other pro-life reasons attached with pregnancies weighed heavily in the minds of the experts to hold thus. The same considerations later guided the SC to rule against termination of pregnancy, though it smartly shrouded the bases in legal reasoning. In brief, the Court declared that termination of pregnancy could not be permitted without the consent of the victim[20] and since the victim had expressed her keenness to bear a child, her reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter.

Court Overlooks 'Reasonable Foreseeable Environment: One is compelled to ask if the judges did not fail to appreciate and take into account the PW's actual or reasonable foreseeable environment, as is required by law, into deciding whether the continuance of a pregnancy involved risk of injury to her health. The answer would be a clear affirmative, given her social environment which failed to protect her from assault. It would not be logical and fair to bring another life into the same hostile environment. However, the Expert body and the apex court both fell victim to an age-old, orthodox anti-abortionist stance that compels us to protect potential life at all costs.

As the mother did not fully understand the requirements that go along being one, it was totally unfair to thrust a responsibility on her which eventually she might not be able to fulfil. Moving beyond the mother victim, one should not fail to look into the interests of the foetus that she was carrying and its rights. Would it be fair and reasonable to bring him/her into this hostile world only to realise that his/her mother would be unable to look after him/her?

[20] As per Medical Termination of Pregnancy Act 1971, s 3(4).

Even if special treatment is ultimately provided to the victim, the entire beneficial machinery of the state is put at her disposal, and she is in a position to look after the child, would the SC come to the rescue of all such hapless women who may find themselves in a similar miserable circumstance in future? Is it morally and legally correct to let the mentally retarded PW continue with the pregnancy just because someone else has volunteered to look after the child once born? Does this not mean reducing the PW to that status of a mere foetal container? Such episodes should be dealt with a practical approach rather than a holistic or sympathetic one. Moreover regard should had towards potential life and not only existing life.

Court Ignores Rights of Foetus: Foetal rights were never a favorite of the courts in India and most of the legal fraternity still believes in no independent status to the unborn, maintaining it to be just an extension of the PW. Following this trend, the Supreme Court conveniently ignored as to why should, in such cases, a life be pitted to suffer this harsh world, if an alternative was available?[21] Article 39-F of the Directive Principles of State Policy under the Constitution of India stipulates that '*children should be given facilities to develop in a healthy manner with dignity and freedom and childhood should be protected against moral and material abandonment*'. But, in the absence of any infrastructure to actualise this lofty claim, the provision remains toothless.

It is indeed strange why the legal system of our country chooses to be as insensitive and hapless as to compel the would-be child, who would be guaranteed 'dignified life' but given a life that *spells* moral and material abandonment in reality.

Court Beats the Drum of Protecting State interest in Potential Life over Existing Life: Para 11 of the judgement read as follows:

> ...Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

Agreed that the fundamental right to personal liberty of the mother is not an absolute one and may be taken away according to 'the procedure established by law'. However, after landmark *Maneka Gandhi*[22] judgment, it is well established that the 'procedure' mentioned in Art 21, 'must be 'right and just and fair' and not arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all and the requirement of Art 21 would not be satisfied. The present state of the 'procedure' that compels a mentally retard, orphan woman to compulsorily carry the pregnancy to full term once gestation is beyond 20 weeks is not only illogical, it is oppressive, mentally, physically and financially, for particularly the mother

[21] This can be argued as one of the rights for the unborn.

[22] *Maneka Gandhi v Union of India* AIR 1978 SC 597.

being the primary carer, who would be pitted against the whole world and more so against her own debilitating condition to raise the child, regarding whose delivery she could never form the requisite consent.

There is hence an urgent need to modify the MTP Act, 1971 to dilute the consent clause.

Agreed also, that State has, and rightly so, interest in potential life, but this cannot be allowed to be pursued at the cost of ruining real, existing life (of would-be mother). It would clearly be against the best interests and fundamental rights of the mother. It would also be against the rights of the unborn, who might later blame the state for his sufferings.

Something about Parens Patriae: The second and last reason for ruling in favour of retaining the pregnancy was that appropriate standards for exercising 'Parens Patriae'[23] jurisdiction were not adopted by the HC. The SC held that in the absence of an explicit decision to terminate the pregnancy, it was incorrect on part of the HC to direct otherwise by adopting the doctrine of 'Parens Patriae' and to arrive at the conclusion that the termination of pregnancy would serve the 'best interests' of the victim.

Just because the exercise of Parens Patriae jurisdiction did favour retaining the pregnancy does not indicate that its exercise was improper. The SC was of the opinion that while exercising the Parens Patriae jurisdiction, the HC had wrongly used the 'substituted judgment' criterion and actually took a decision' on behalf' of the victim with regard to termination of pregnancy. This approach of the SC appears to be totally unfair. The author opines that it was absolutely correct on part of the HC to give due weightage to the fact that the victim did not fully appreciate the consequences of retaining the pregnancy or the responsibilities of motherhood. The court relied on some norms of international law, particularly, the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971.[24]

> '7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.'

Since India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) and the contents of the same are binding on our legal system, the personal autonomy

[23] *Parens patriae* is a Latin expression that means 'parent of the nation'. In most legal systems, it refers to the power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. In cetain cases it may also be used by the government to create locus standi to sue on behalf of the subjects.

[24] UNGA Res 2856 (1971) 20 December (XXVI).

of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy as laid down by the MTP Act, 1971 must be respected.

The judgment also observed that '…the victim would need care and assistance, and that would entail some costs. But this could not be grounds for denying the exercise of reproductive rights.'

The author concedes to the truthfulness and desirability of the aforesaid provision but individual rights of the foetus should not be ignored.

In the name of confronting social stereotypes and prejudices that commonly operate to the detriment of mentally retarded persons in India; the court ended up making the would-be life of the child of the victim more miserable. The life of the child born eventually could be expected to be full of hardships. Though the Court directed that the best medical facilities be made available to the victim so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care. How hollow all this is can be gauged from the fact that the woman in question was assaulted in a *government* facility. There is no guarantee of what might happen later. All this could have been avoided had the court given a practical decision.

II Keeping Right of Abortion and Demanding Legal Personality for Unborn, not contradictory

Despite being an avid supporter of foetal rights the author maintains that abortion should be available in proper cases. Similarly, placing of reasonable restrictions on the right of reproduction of the PW, where fulfillment on part of the PW of responsibilities that go along with pregnancy and motherhood itself is doubtful, is not unjustified considering the best interests of prospective life. This is because the idea is not only to derive and extract legal personality for the unborn, so that it can enjoy right to life, but rather the attempt is also to ensure that the new entrant to the world has a *meaningful life* replete with ample resources, nurturing mechanism and support system to grow into a mentally and physically healthy adult. If the unborn is unwanted to the extent that the host PW herself is unwilling (as due to deformities detected in the foetus post 20 weeks) or ***unable*** **(as due to mental retardation in the present case)**, under compelling circumstances, to carry the pregnancy to term, there is no logic in forcing the latter to deliver. The author here is simply suggesting legalising the way via which the PW can bail herself out of the situation. This would not only reduce the instances of illegal and unsafe abortions, but would also go a long way in attaining some meaning for foetal personhood.

Suggestion for Bail out in Difficult Cases: The author suggests that instead of taking viability as a criterion for determining the validity of abortion, health of the mother should be the only parameter. In simple terms, abortion should be allowed or forbidden not on the point of viability but on whether the emotional and mental health of the mother permits it. And this snould be allowed only in certain specific situations. This way the whole perception towards abortion would shift from being holistic to being more practical.

Law Reform required to include Complex Episodes

In 1973, the US Supreme Court gave a landmark decision in *Roe v Wade* [25] by putting the health of the pregnant woman first in priority to everything else. Amongst other things, it ruled that woman's right to abort before viability (24-28 weeks depending on case to case) was almost absolute and a part of her right to privacy/self determination etc. Even after viability, abortion was declared as permissible provided the health of the mother was at stake. This pro-abortionist decision led to changes in the abortion laws of many countries. India was not to remain unaffected-the MTP Act, 1971 reflects that. However, elsewhere also it has been argued[26] that the MTP Act, 1971 requires certain amendments.

It is useful to elaborate that India fixes viability at 20 weeks.[27] Hence, an Indian mother, once she has crossed 20 weeks gestation must compulsorily continue with the pregnancy till delivery, unless some emergency causes threat to her own life. The law is clearly flawed or inadequate to cover especially two types of cases—

1. Disability on part of the PW to properly understand the responsibilities that go with pregnancy and motherhood—as the present case of a PW who is an orphan, a retard and victim of assault (all combined) and the pregnancy is past the 20th week because the guardians of the mother (victim) are late in bringing the matter to light; and
2. Unwillingness on part of the PW to continue with the pregnancy because of defects in the foetus detected post 20 weeks.

Such lacunae have given rise to issues that clearly indicate the need to do away with the limit of viability and decide on issues arising out of pregnancy on sensitivity of case basis. There is also a need to read the requirement of consent with practical objectivity, if the mother suffers from mental retardation.

Focusing attention on just the present case where mother suffers from mental retardation and for a more permanent settlement of issues, it can be argued that the provisions of the MTP Act, 1971 as they stand today, infringe the fundamental right guaranteed under Art 21[28]. They compel the pregnant woman, who is not stable in mind and who has already suffered an assault, to undergo the physical trauma of delivering and raising a child which could have been avoided, considering her social surroundings.[29]

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25 410 US 113 (1973).

26 See, "Health Interests of Foetus and Expectant Mother: Visit Abortion Law and Surrogacy", *Prof Ashwani Bansal and Sunanda Bharti, Journal of Constitutional and Parliamentary Studies* 2009.

27 Author's emphasis: The rationale of fixing upto 20 weeks as the limit appears more holistic than logical. Medical technology cannot save a foetus of 20 weeks gestation as of now, but since most of the body parts are almost developed by that age, it is viewed as a sacred life form, worthy of being brought into the world, no matter what.

28 Art 21 guarantees the right to life and personal liberty-a provision which has been creatively read by the apex court umpteen numbers of times.

29 Here is it pertinent not to forget that she suffered the assault in a government run institution.

Positives of MTPA, 1971

No abortion on demand or request: The MTP Act, 1971 does not confer or recognise any right on any person to perform an abortion or terminate a pregnancy. A PW can get her pregnancy terminated only under the circumstances mentioned in the Act as stated above. Unlike the USA and the UK, even during the first trimester, the woman cannot abort at her will and pleasure; there is no question of 'abortion on demand'.[30]

By refusing to provide abortion on request or demand, the scheme of MTPA, 1971 is to encourage the use of family planning measures to prevent unwanted pregnancies. However, keeping the ground realities in mind[31], it also includes provisions which ensure that safe, affordable, accessible and acceptable abortion services are available to women who need to terminate an unwanted pregnancy in dire circumstances.[32]

Serves as Strict law to prevent female foeticide: The MTPA, 1971 was primarily enacted keeping in mind the health and safety issues of PW. It was believed that providing women with access to legal ways of aborting would reduce reckless and untrained abortions thus, minimising abortion related health hazards and mortality. Though it was initiated as a health concern for women, it revealed itself as a tool to serve the patriarchal interests of the Indian society that has an undying obsession and preference for the male child. It is fact that innumerable abortions happen within the legal limits of the Act or by manipulating/ bypassing it. To top this maladministration of the law, if abortion on demand is made available in India, as a right as in the USA and the UK, it would pave a way towards the damaging trend of forcible but completely legal abortions of female foetuses.

Not a tool for birth control: It has been held by the Madras (now Chennai) High Court that, 'sec.3 of the Act is only an enabling provision to save the RMP's from the purview of the IPC, 1860. Termination of pregnancy under the provision of the Act, is not the rule and it is only an exception'[33] Hirve seconds the same by stating that,

[A]bortion policy in India is consistent with safeguarding reproductive rights as envisaged by International Conference on Population and Development (ICPD) and other international agreements. It does not advocate abortion as a family planning measure.[34]

Administration of law by Doctors, a unique positive point of MTPA, 1971: The Indian MTPA, 1971 does not allow for termination of pregnancy on request or demand. Hence,

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30 See Dr. Mukesh Yadav and Dr. Alok Kumar, 'Medical Termination of Pregnancy (Amendment) Act 2002- An Answer to Mother's Health & 'Female Foeticide'' (2005) 27(1) *Journal of Indian Academy of Forensic Medicine* (2005).

31 Like rape, contraceptive failure, risk to life of PW etc.

32 Though here, some important new realities need to be included for instance, availability of legal abortions for unmarried women. For brevity and to prevent digression, elaboration on the same has been omitted here.

33 *V Krishnan* v. *G Rajanalia Madipu Rajan* (1994-1) 113 Mad LW 89 (DB).

34 See Siddhivinayak Hirve, "Abortion Policy in India: Lacunae and Future Challenges" *10 CEHAT policy review* (May 2004)

and rightly so, it does not provide PW with an absolute 'right' to abortion. Infact it would not be wrong to state that the ultimate responsibility for terminating an unwanted pregnancy rests with the RMP, who is required to opine, in good faith, the need for such a service.

'A major critique of the MTP Act, 1971 is its apparent 'over-medicalisation' and 'physicians only' policy that reflects a strong medical bias and ignore the socio–political aspects of abortion.'[35] Many opine that since under the MTPA, 1971 the essential decision whether abortion should be carried out or not remains with the doctor[36] and not the PW, it results in (or might result in) denial of abortion care to vulnerable women in need. This is because the personal prejudices of RMP's might come into play while making the decision.[37] The fear is not wholly unfounded as the chances of this happening increase manifold in the absence of any guidelines for making relevant decisions.

It is frightening that there is no national consensus on abortion protocols regarding drug dosage and schedules. The current MTPA, 1971 does not offer any technical counsel nor has the government adopted any international technical guidelines. In the absence of any guidelines for 'good clinical practice', the doctors continue to either be arbitrary in deciding whether abortion is advisable or fall prey to equally arbitrary precedents and practices.[38]

Despite the onerous responsibility imposed on medical professionals, since the Act does not provide them with any guidelines the doctors are left with only the PW to assist in the abortion decision. It is suggested that to ensure that the foetal interests do not go unguarded and un-advocated, a fourth neutral party must be introduced into the Act (in addition to 2 doctors and the PW) to advance the foetal interests vis a vis the claims of the PW.

The role of this fourth party would be to ensure that the claim of the foetus to continued life is balanced against the claim of the mother to having her pregnancy terminated.[39]

The author maintains that once this drawback (of absence of guidelines) is overcome, this very point, that is, administration of the law by Doctors is what makes the Act unique. They being the experts on life and health issues, it appears only logical to repose trust in their judgement when it comes to deciding whether abortion is advisable or not. Also, it is the RMP's who can properly ascertain and conclude whether and if the provisions of the Act are being abused as a method of birth control. Such abuse of law creates an impression as if the unborn is an easily discardable property. It strongly goes against attaining personhood for the foetus. However, there are two things that must be guarded against—(1) conscientious decisions laden with overdose of morality on part of the RMP's and (2) random decisions by RMP's, by-passing the guidelines (once they are in place) for abortion.

35 Siddhivinayak Hirve, 'Abortion Policy in India: Lacunae and Future Challenges' (May 2004) Centre for Enquiry into Health and Allied Themes (CEHAT) 9 (policy review). *Ibid.*

36 He has to conclude in good faith, whether such a termination is needed.

37 The general sentiment being in favour of preserving the foetal life.

38 See Siddhivinayak Hirve, 'Abortion Policy in India: Lacunae and Future Challenges' (2004) Centre for Enquiry into Health and Allied Themes (CEHAT) 10. *Supra* note 34

39 Jane ES Fortin, "Legal Protection for the Unborn Child" 51(1) *The Modern Law Review* 54, 74. (1988)

40 See *R* v. *Smith* [1973] 1 WLR 1510.

In the UK, regarding analogous provisions of the Abortion Act, 1961 it has been held by courts that 'only the doctors can decide whether individual circumstances justify a legal abortion. They alone have the 'great social responsibility' for administering the law.'[40]

Reforms Required in MTPA, 1971

Need for Additional grounds for Termination

There is an urgent need to modify the MTPA, 1971 section 3 to include more grounds for abortion. In matters of such reform, India cannot and **should** not imitate any country because the problems of this country are unique and we should have a law that seeks to redress those unique problems. For instance, obsessive preference for the male child, female foeticide, aversion to contraception, no family planning etc are issues that can safely be branded as unique to this part of the world.

Some of the suggestions that have a bearing on the issue at hand are as follows:

A. ***Remove viability as a criterion for deciding possibility of abortion***: The suggestion here is to do away with the fixation of viability-connected-personality altogether and treat the foetus as a legal person from conception itself. Presently the jurisprudence on foetal rights revolves around the point of viability.[41] To elaborate, it is only if it can be established that the foetus was viable that it would get some semblance of personality and it is only upon viability that culpability can fixed on the perpetrator. Hence 'viability' is that stage of gestational development which is central to any crime/tort against the foetus.[42] In other words, the unborn in order to be protected by Criminal or Tort Law must have reached such a stage of development so as to be capable of being 'born alive'.

There should be no fixed upper limit for abortion. The whole concept of viability draws a distorted and fundamentally wrong picture of the State being concerned about the welfare of the foetus as if it was a person.[43] While the truth is that in most of the crimes against the unborn, it does not have a standing as an independent victim. Almost always, it is taken as an adjunct of the PW.

Consequently, it is suggested that the legislative fixed upper time limit of 20 weeks being too inflexible should be replaced by a no-limit-case-sensitive criterion. It is only logical because of the following reasons:

41 Though in India, civil or criminal conviction of the defendant as against a viable foetus is yet to happen in a proper court of law. See *Kanta Mohanlal Kotecha* v. *Branch Manager, United India Insurance Company Limited* 2006 Indlaw SCMAH 5 [Maharashtra Consumer Disputes Redressal Commission] para 12.

42 In other words, viability is that stage of foetal development when the foetus acquires the potential of sustaining itself and having meaningful life independent of the mother. The stage normally occurs anytime between 24 to 28 weeks.

43 The projection of the State is that the foetus cannot be touched for purposes of abortion in the post viable stage as if it was a person; while the truth is that it has been consistently denied personhood. The author maintains that viability is has become a clumsy legislative substitute for imposing a properly thought out upper limit on abortion.

1. it would enable the State to focus on the health of the existing person (that is the PW) completely rather than bogusly adopt the shenanigan of caring for the potential person by declaring that it would be illegal to end that potential life after a certain limit.
2. because an amendment of such nature would automatically accommodate complex issues mentioned above.[44]
3. because the rate of individual foetal growth varies enormously, it is anyways improper and futile to fix any limit; a fixed criterion would be challenged for its appropriateness and would be an issue of continuous contention considering the rapidly advancing medical knowledge.

Presently, the whole matter of viability seems to suggest as if a bargain has been struck between the PW and law that allows the former, to enjoy the right of self determination[45], until viability sets in. If the upper limit of 20 weeks is substituted with a case sensitive criterion, it would not only be in the best interest of the PW (in so much that she would not be compelled to look after a deformed child and also would not be compelled to perform duties of motherhood without understanding them properly), it would also augur well with the foetal right to wholesome life.

There is nothing permanent with practices. So is the case with legal conventions and in the light of new medical developments and demands to treat foetus a person since conception, fixation to viability should be done away with.

Focus should remain with the mother.

In an attempt to appease the moralists, the MTPA, 1971 while declaring the upper limit for viability, attempts to couch the true effect by maintaining that beyond viability, since the foetus is capable of living independently, abortion is impermissible. This creates an illusion of foetal personality. It enables the State to project as if it cares for the unborn and is concerned about its protection while in reality it is just a crude display of false respect for 'potential life'.[46] There should be no mark to decide personhood for the foetus. Foetus should be treated as a person, a legal person, from the very beginning of conception.

[44] Both (1) unwillingness and no emotional attachment on part of the PW towards the foetus because of deformity in the latter and (2) disability on part of the PW because of mental retardation.

[45] (which is heavily regulated and rightly so in case of India-because abortion is not a matter of right but available only in the limited circumstances mentioned under section 3 of the MTPA, 1971).

[46] This display is more pronounced in case of pro-choice countries where abortion on demand or request is available and abortion as such is a part of the right of self determination. The author maintains, that it is alright to take a pro choice stand, provided it be displayed consistently. It is hypocritical to maintain that a PW can abort as a matter of right (of self determination) and at the same time say that this right is available till the point of viability, as if to display some respect for potential life. It is reasonable to declare oneself as pro-choice and hail the right of self determination as a weapon of liberation in the hands of women. However, it is important to decide where the right of choice commences and when it expires. Like any right in the nature of individual entitlement, the right of self determination should also come with an expiry date. Moreover, it should also have reasonable restrictions imposed on the same so that arbitrary exercise is minimised.

Though the new stand is also producing the same effect namely the position of the foetus would be contingent on the decision of the mother and her doctor in both cases but it would mark a paradigm shift in the reasoning behind the same. (1) While earlier it was apparently foetal centric but hypocritical; now it becomes woman centric and more practical/logical. (2) It would at the same time mark the removal of viability as a criterion for determining 'life' for the foetus and pave a way for personhood of the foetus from conception rather than from viability and (3) The expiry of the right of self determination (already limited in case of India) would not be dependant on 'viability' but rather would become variable and case sensitive-depending on whether the health of the mother permits the same.

B. *Eugenics and Foetal Rights*[47]

In the Indian context, the urge to beget a son is so severe and paramount that there is every reason that the provisions of the MTPA, 1971 governing legal abortions be misused-foeticide may be accomplished on the pretext of ill health of foetus(es). This results in a 'stricter than normal' interpretation or implementation of the Act as happened in *Haresh and Niketa Mehta case*[48] as the health interest of foetus came in question vis a vis legislative and judicial process

***Nikhil Datar* v *Union of India*:** This Bombay High Court case[49] popularly known as *Haresh and Niketa Mehta case*, questioned whether mothers' choice to abort when the tests conducted at advanced stage of pregnancy, (like, beyond 20 weeks in this case) predict a substantial deformity or abnormality, tantamount to killing of a 'person'.

The petitioners in the case sought a declaration from the court that section 5 of the Medical Termination of Pregnancy Act, 1971, be pronounced as bad law, because it does not allow termination in case there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. In the situation the court appeared divided between judgment and sentiment and gave a warped verdict.

In the case, it was in the 24th week that a Foetal Echocardiography test conducted on the expectant mother revealed that the foetus has congenital complete heart block. The medical experts advised that the baby will require permanent pace-maker implantation when delivered.[50] Beyond this, the experts suggested that the pace-maker would have a finite life of 4-5 years and would require replacement subsequently, with the result that the child might require 4-5 surgeries (pace-maker replacements) through its life-span. In general, the experts predicted the quality of life of the child to be poor.

The petitioners expressed their inability to bear the psychological and monetary burden of giving birth to a child suffering from severe health problems. Hence they requested for an

[47] Prof Ashwani Bansal and Sunanda Bharti, 'Health Interests of Foetus and Expectant mother: Visit Abortion Laws and Surrogacy' (2008) 42 JCPS 1.

[48] *Dr. Nikhil D. Datar and others v Union of India and others* (2008) Writ Petition (L) No 1816 (Mumbai High Court).

[49] (2008) Writ Petition (L) No 1816 (Mumbai HC).

[50] Neo-natal pace-maker implantation is a surgical procedure which can be performed but has its own morbidity.

abortion. They were denied the same because the foetus had crossed viability (20 weeks) and the law was against abortion at such later stage.

In India, per practical experience, viability sets in only after 28 weeks. Primarily the question of viability is decided on the basis of available medical technology. The better the technology, lower the limit of viability.[51] However it is important to highlight that in India, the legislative cap of 20 week set by MTPA 1971 is not on this basis. The bases are holistic and moral if any. The author advocates that this is arbitrary and unfair and has to change so that it reflects on proper incorporation advanced technology and causes fewer hardships to the PW.

Conclusion

Through the paper, and particularly through the plight of an orphan, mentally retarded, PW, the author has attempted to highlight how the Indian MTPA, 1971 needs serious amendments.

If the PW herself, being the host, is unfit carry the pregnancy to term because of various reasons or is unwilling to carry on with the pregnancy (as *Nikhil Datar's Case*), there is absolutely no reason why the State should thrust the responsibility upon her. In such cases, it is but practical that the foetal right to life be treated on a lower footing than life of the expecting mother. The author reiterates that though foetus should have a right to life, it must be life with dignity, a meaningful, wholesome life which would not be possible if the mother herself has either not been able to form any emotional bonding with the foetus/ would be child or is simply unfit to form the requisite consent in the true sense of the term.

[51] In the UK, for instance, changes to the 1967 Abortion Act, applicable to England, Scotland and Wales, were introduced in Parliament through the Human Fertilisation and Embryology Act 1990. The viability limits were lowered from 28 weeks to 24 for most cases, as it was claimed that due to advancement in medical technology, it was possible to save a child of premature delivery of 24 weeks gestation. Meaning, superior medical technology claimed it as possible that a foetus of 24 weeks could survive outside mo thers' womb, with/without medical aid.

PASHMINA'S ADVERTISEMENT BY IDEA CELLULAR: A CASE OF MISREPRESENTATION OF GEOGRAPHICAL INDICATION

Dr. Vandana Singh*

Some products are unique because they can be produced only in a certain geographical region and they become reputed because they have certain quality traits. The uniqueness about these products is the link between their quality characteristics and the geographical attributes of the region where they are being produced. Economically, these words are valuable assets as they are able to acquire a high reputation and higher premium. The name of Intellectual Property which indicates that a particular product is coming from a particular geographical area is termed as "*Geographical Indication*".

A Geographical Indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin. Geographic words are efficient means to communicate both (a) a product's geographic origins, and (b) product characteristics besides geographic origin.[1] A Geographical Indication signals a link not only between a product and its specific place of origin but also with its unique production methods and distinguishing qualities.[2] It serves to recognize the essential role geographic and climatic factors and/or human know-how can play in the end quality of a product.

When TRIPS Agreement came into existence in the year 1995, there was no specific legislation in India to deal with the protection of Geographical Indications. After Basmati controversy the Indian Government realised the values of its geographically unique products and its potential market. To meet the obligation under TRIPS Agreement, in the year 1999 the Geographical Indications of Goods (Registration and Protection) Act came into existence, which came into force with effect from 15 September 2003. The objectives of GI Act are three fold, firstly by specific law governing the geographical indications of goods in the country which could adequately protect the interest of producers of such goods, secondly, to exclude unauthorized persons from misusing geographical indications and to protect consumers from deception and thirdly, to promote goods bearing Indian geographical indications in the export market.[3] Till date we have registered around 234 products under Geographical Indications registry from different States.

In the context traditional unique products the State of Jammu and Kashmir is home to numerous artefacts in which shawls, woodcraft products, papier Mache products, scarves, stoles, silk sarees, khatambandh, handknotted carpet, Sozni embroidered crafts are worth mentioning.[4] In the economy of state of Jammu and Kashmir handicrafts industry occupies

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1 J.Hughes, *"The Spirited Debate Over Geographical Indications" 20 Hastings Law review* (2003), available at http://www.chicagoip.com/papers/A-IP09v1.0.pdf, (last visited on 21st July 2008).

2 ITC/p228.E/DMD/SC/09-11, available at http://www.intracen.org, (Last visited on 14 November 2012).

3 Natasha Saqib and Abid Sultan, "An Overview of Geographical Indications in Jammu & Kashmir," 3(4) *Indian Journal of Applied Research*, p. 300.

4 Farooq Ahmad Mir and Farutal Ain, "*Legal Protection of Geographical Indications in Jammu and Kashmir- A Case Study of Kashmiri Handicrafts* ", 15 JIPR, 220 (May, 2010).

an important place. The cold and lengthy winters in the valley have created conditions suitable for creative activities that needed time and patience. Due to long winters the local people prefer to stay indoors, which helps in the growth of handicrafts. The handicraft products have won worldwide acclaim for their exquisite designs, craftsmanship and functional utility. There are six products are registered under GI Act till 2014 from State of Jammu and Kashmir. The Pashmina fabric is one of the registered geographical indications from the state of Jammu and Kashmir. Pashmina was the first item which was registered from the State under the Act in the year 2007. Pashmina is the purest form of the Cashmere.[5]

The Pashmina is one of the finest animal fibres derived from the domesticated goat *Capra hircus* also called Chyagra which is indigenous to Asia.[6] It is always mixed with coarse outer coat known as guard hair which needs to be separated before processing for value-added products.

Kashmir Pashmina which is renowned for its delicacy and the weave has attracted attention of the nations from all over the world since time immemorial. Both national and international markets have tremendous potential for Pashmina. The use of this aesthetically crafted apparel has been the pride of oriental royalty and European lords.[7] In international textile craft market the Kashmiri Pashmina hold the fore front. The Kashmir made Pashmina can neither be imitated accurately nor it can be manufactured by machines, mainly due to certain geographical reasons. The climatic conditions of the valley and the special chemical composition of its water which is rich in minerals are conducive to the production of Pashmina.[8] Several attempts were failed by different communities who tried to imitate Kashmir Pashmina outside the state. In 1821, William Moorcroft, An English veterinary surgeon, sent fifty *Corpus Hircus* goats to England with documentary on making of Pashmina. Out of fifty goats only four survived and they failed to produce same superior quality of wool.

The Kashmiri Pashmina has a special lustre due to its long, fine fibres, which are as thin as 12-16 microns, the fibres from premium sheep's wool, such as Merino extra fine are 23 micro thick, while a human hair ranges upto 200 Microns thickness. Thus Pashmina is exceptionally light, soft and warm and feels luxurious against the skin. The natural colours of the fleece range from white to gray, red, brown and black.[9]

The finest Pashmina used to come to Kashmir via Ladakh which remained the main trade centre for acquisition of raw material for pashmina shawls. Each goat produces

[5] This name came from Persian word 'pashm' which means wool when it is in woven form it called as pashmina. Pashm has a special characteristic due to its long and fine fibres, which are as thin as "12 microns". The natural colours of the pashmina range from white to gray, red, brown and black Cited from Santa Barbara. *Will China dominate the textile market?* http://fecolumnists.expressindia.com/full_column.php?content_id=77003 (last accessed on 23 rd Oct, 2011)

[6] Bergen W V, "Wool Hand Book", 3rd ed., Vol. I, Inter Science Publishers, London, 1963.

[7] Annexure D of Application for GI Registration, dated 9-12-2005.

[8] Annexure D of Application for GI Registration, dated 9-12-2005.

[9] Annexure C of the Application for registration of GI

approximately 100 grams of uncleaned fleece, which is a mix of Pashm and coarser hairs. In summer, Ladakhi traders come to the changtang[10] to exchange the raw fleece with grains, tea and manufactured goods. They transport the fleece to Leh, the capital of Ladaks, where the Kashmiri dealers make their purchases and then forward the wool to Srinagar. In Srinagar, the coarse outer hair is pulled away, by hand, from the fine soft Pashm.

The characteristics of cashmere wool in Kashmir, includes the history of the Kashmir region, as well as traditions, culture of indigenous people, whose quality is the best in Kashmir but this best quality wool has to confront various harms in term of commercial loss, lowering down the reputation and goodwill in the market due to bio piracy done by the various countries.[11]

After the enactment of GI Act, the GI tag over Pashmina is being recognised as an effective marketing tool of great economic value. Depending on proper market strategy. The objectives of the protection of geographical indications are to protect product names from misuse and imitation, to help consumers, by giving them information concerning the specific character and the origin of the products and to encourage diverse agricultural production and rural sustainability.[12] Further geographical indications:

- are an excellent means to promote rural development,
- an effective market-access tool
- a tool to preserve local know-how and natural resources
- an important part of our culture.

But it is often complained by the Kashmiri Pashmina's producers that imitations of original Pashmina undermine the real handicraft sale thereby threatening the entire traditional handicraft industry including livelihood and highly developed skills. For a lay buyer who does not know real qualities of Pashmina which are unique and qualities are attributed due to climate of Kashmir Valley from the Pashmina from Nepal, machine-spun Pashmina from Amritsar or imitated low quality Pashmina by China. Even the visitors to Kashmir failed to differentiate between the hand-made and machine made products.

To add the woes of the Pashmina's producer, seller and distributor, recently the Idea Cellular with its 'No Ullu Banaoing' advertisement mislead the entire country and affected the sale of Pashmina. The unquantifiable loss of business to the shepherds, manufacturers and traders has nullified all the efforts made by the government, the stake holders and efforts personally made by him as an activist for the past several years. "The loss the advertisement has caused as the reach and impact of the advertisement is not only national but international. The advertisement has promoted Idea's brand and service at the cost of so many innocent and hardworking people linked with this trade for livelihood and it appears that un-researched

[10] Changtang is one of the remote area in western Tibet, where nomadic pastoralists known as Drokba tend flocks on high plains.

[11] Yamamoto Koji, Cashmere as Geographical Indications , TED Case Studies: Number 786, 2005, available at http://www1.american.edu/ted/cashmere-gi.htm (last visited on 30th March 2014)

[12] *Supra* note 3 at p. 299.

effort by advertisers has caused not only a huge dent to the lives of traders of the Pashmina but also to the lives of thousands of nomads and shepherds fighting a tough battle of survival because of the fake Pashmina which is destroying the Pashmina industry eco-system. The advertisement has hurt and pained him and all Kashmiris, particularly the shepherds rearing Pashmina goat and the manufacturers of Pashmina shawls,"[13]

In a classic case of ignorance and misinformation, Idea Cellular in promotion of use of internet on mobile phone launched a campaign, which shows series of different situations where the general public saved them from crooks and thugs by gathering information from the internet on phone. In the Idea cellular advertisement on TV it shows that two women came to a shop and asked for a Pashmina shawl, the dealer showed a shawl and said that it's an original pashmina. The two women after checking the qualities of pure pashmina on whatsapp group reject the shawl complaining that it's not a pure pashmina because it did not pass the ring test and they are aware of this fact, so "NO ULLU BANAOING".

The Kashmir Chamber of Commerce and Industry opposed the advertisement and said that it is not Pashmina but the Shahtoosh that should pass the ring test. Due to this misleading advertisement the pashmina dealers from various parts of the country are facing problem because the consumers are asking for ring test which not at all quality test for pashmina. The advertisement not only misinformed the consumers but also affected the sale of Pashmina and reputation of Pashmina's dealers throughout the country. Again this was neither any test for its authenticity nor genuineness but a feature that demonstrated its fine quality.[14]

What is more dangerous is that the synthetic and semi-synthetic low grade shawls manufactured in other parts of India and abroad can pass through a ring sometimes. Thus the entire visualization of the advertisement made shawl vendors victim. According to the artisans the only authorized body to test and certify purity of Pashmina is the "Pashmina Testing and Quality Certification Center" which is a certified and authenticated laboratory set up by Craft Development Institute Bagh-i-Ali Mardan Khan, Srinagar.

The notice reads that artisans being the registered dealers of the Pashmina are facing a lot of problems and loss as the said advertisement is sending a message that Pashmina shawl should pass the ring test which is in fact 'misinforming and misleading' the people.[15] This misleading advertisement damages to each of the more than 3,00,000 registered Pashmina weavers of Kashmir, who are working day and night to promote the authentic Pashmina for the un-quantifiable loss that the advertisement has caused to them.[16]

It was also said by KCCI Chairman that "Idea Cellular company without doing any research has been showing the advertisement without verifying the facts which is extremely

[13] http://www.kashmirtimes.in/newsdet.aspx?q=31506

[14] April 28th 2014, *http://www.risingkashmir.com/now-pashmina-artisans-serve-legal-notice-to-idea-cellular/*

[15] *Now Pashmina artisans serve legal notice to Idea Cellular http://www.risingkashmir.com/now-pashmina-artisans-serve-legal-notice-to-idea-cellular/*

[16] J&K activist serves legal notice to K M Birla, April 23, KT News Service.

unprofessional and highly deplorable act."[17] It is argued by the KCCI that for certifying original Pashmina a ring test burn test[18] are not at all confirmatory test. Rather the shawls made out of synthetic fibre like can also easily pass through a ring.[19]

For the genuineness of pashmina the parameter mentioned for registration of Pashmina as GI are the only testing parameters and as per the Geographcal Indication's application the most unique aspect of Kashmir Pashmina are followings:[20]

1. It is a fabric,
2. The Pashmina fabric is made using yarn that is hand spun out of the fibres from the Pashmina goat. Subsequently the yarn is hand woven into a woollen fabric of extremely soft, fleecy texture that is unparalleled in its fineness,
3. The specification for fineness should be between 12 to 16 Microns but not exceeding 18 Microns. This is in contrast to the finest of sheep's wool which is 23 microns thick and human hair the thickness of which ranges upto 200 microns,
4. The characteristic of the fabric lies in the raw wool and traditional methods should be used for cleaning of the raw material such as using rice flour paste, and
5. Cleaned, spun, and hand woven by craftsmen from the state of Jammu and Kashmir.

The craft technology to produce this exquisite fabric is distinct and thus has a local origin. The pure Pashm wool is so fine and delicate that it can only be hand spun and hand woven into fabric, as it keeps breaking during production process.

All other forms, which do not confirm to the quality manual under GI, can be termed as spurious and, therefore, an infringement of the GI rights of the community registered as the proprietor in the GI Registry.[21]

It was replied by Idea Cellular that the 'No Ullu Banaoing' is part of an ongoing series showing different situations where the use of mobile telephony services is shown to empower the common people. They said that before finalising the campaign the accuracy of the claim was verified by the company. But the question is that from there they have verified the test of pashmina? Pashmina is a registered Geographical Indications and as per the Government of India records the applications for registration of Pashmina was made by

[17] http://www.greaterkashmir.com/news/2014/Apr/21/wrong-idea-sir-ji-shahtoosh-passes-ring-test-not-pashmina-61.asp

[18] If you burn a little piece of the shawl it will smell like hair burning and what is left is just ash. With this test you will be able to distinguish between a wool/cashmere product and one made with synthetic fibres, which has a slightly chemical smell and when you blow out the flame, there will be a little hard particle left which stays attached to the fabric. This is a good test but then any kind of wool shawl will smell that way.

[19] J& K Govt objects to pashmina ring test ad by Idea, asks I&B Ministry to take it off air, NO ULLU BANAWING IDEA PLEASE!, http://economictimes.indiatimes.com/articleshow/34094014.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[20] Application no. 46 for the registration of Pashmina as Geographical Indication, reply to FCR by applicant, dated 15.02.2006.

[21] Govt. Objects to Pashmina ring test ad by telecom company, State Times news, http://www.statetimes.in/news/govt-objects-pashmina-ring-test-ad-telecom-company/

Craft Development Institute, which will be assigned to TAHAFUZ: Society for protection of Kashmir Crafts. As per Geographical Indications Register, which is being discussed above the Pashmina fabric is made of fibres spun out of Pashmina goat called, that is subsequently hand woven in to a woollen fabric of extremely soft, fleecy texture that is unparalleled in its fineness.[22] The uniqueness of the fabric lies in the raw wool which is processed manually in accordance with the traditional values. The craft technology to produce this exquisite fabric is distinct and has a local origin.[23]

Under GI Act no infringement action will lie in respect of an unregistered GI. For infringement action it is necessary that the GI should be registered. In the case of an unregistered GI no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered GI,[24] but at the same time the provisions of the Act[25]explicitly provides that nothing in this Act shall be deemed to affect the rights of action against any person for passing off goods as the goods of another person, or the remedies in respect thereof. In other words, the law provides that while no "infringement" action will lie in respect of an unregistered GI, it recognizes the common law rights of the owner to take civil and criminal action against any person for passing off goods of another person or the remedies thereof.

A registered GI is infringed by a person who, not being an registered proprietor or authorised user thereof uses such GI by any means in the designations or presentation of goods that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the persons as to the geographical origin of such goods. Hence the infringement of registered GI occurs if a person:

- Uses the GI on the goods or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the public; [26] or
- Uses the GI in a manner that constitutes an act of unfair competition;[27] or
- Uses another GI to the goods in a manner, which falsely represents to the public that the goods originate in the territory, region or locality in respect of which such registered GI relates.[28]

Article 22(4) of TRIPS Agreement mandates that the protection of GI must be applied even when the GI is "literally true as to the territory, region or locality in which the goods originate", but "falsely represents to the public that the goods originate in another territory". Section 22(1)(c) gives effect to this mandate.

[22] Application Registration of a geographical indications in part A of the Register; Section 11(1), Rule 23(2), available at http://www.ipindia.nic.in
[23] *Ibid.*
[24] Section 20(1) of GIGA.
[25] Section 20(2) of GIGA.
[26] See section 22(1)(a) of GIGA, see also Article 22(2)(a) of the TRIPS Agreement.
[27] Unfair competition means any act of competition contrary to honest practices in industrial or commercial matters.
[28] See section 22(1)(c) of GIGA.

The following acts will be deemed to be acts of unfair competition:[29]

(i) All acts which create confusion by any means whatsoever with the establishment, the goods or the industrial or commercial activities, of a competitor.

(ii) False allegations in the course of trade of such a nature as to discredit the establishment, the goods or the industrial or commercial activities, of a competitor.

(iii) GI, the use of which in the course of trade is liable to mislead the persons as to nature, manufacturing process the characteristics, the suitability for their purpose, of the quantity, of the goods.[30]

Falsifying and falsely applying Geographical Indications[31]

This section enacts as to what amounts to falsifying or falsely applying a GI. This section comprehends two types of offences-

(a) Falsifying a Geographical Indications
(b) Falsely applying geographical indication

A person is deemed to falsify a GI, who –

(a) Without the assent of the authorized user of the GI makes that GI or deceptively similar GI; or
(b) Falsifies any genuine GI, whether by alteration, addition, effacement or otherwise

The law is applicable both to registered and unregistered GIs. The ingredient of the offence is that the accused made the GI or a deceptively similar GI without the assent of the authorized user or falsified any genuine GI, either by alternation or otherwise.

In the case of the registered GIs, the complainant may obtain from the Registrar a certified copy of entry in the register in respect of the GI to establish proprietorship.[32] Where the GI is not registered, as in a normal case of passing off action, evidence of prior use by the proprietor will be necessary to establish title.

Sub-section (2) of section 38 enacts that the person shall be deemed to falsely apply to goods a GI without the assent of the authorized user, when he –

(a) Applies such geographical indication or a deceptively similar geographical indication to goods or any package containing goods;

(b) Uses any package bearing a geographical indication which is identical with or deceptively similar to the geographical indication of such authorized user, for the

[29] Narayanan, *"Law of trademarks and Passing off"*, 997 (4th Ed., 2004)
[30] Narayanan, *op. cit.* p. 997.
[31] See Section 38 of GIGA.
[32] The request has to be made on Form GI-7, along with the copy of the registered GIs (See Rule 96).

purpose of packing, filling or wrapping therein any goods other than the genuine goods of the authorized user of the geographical indication.

Any geographical indication falsified in terms of sub-section (1) or (2) is "a false geographical indication" within the meaning of this section.

The KCCI has already sent legal notice to Chairman of Aditya Birla Group, Kumar Mangalam Birla, and idea demanded immediate withdrawal of the advertisement. The KCCI has also sought 300 crore for loss of business and reputation and another 100 crore for "suffering pain and agony" the traders, dealing in the trade had gone through.[33] At last it can be said that the handicrafts of Kashmir represent Kashmiri heritage and pride. These handicrafts have economic as well as employment incentives. After the enactment of GI Act, the registration of goods facilitated by the Government but the Act is not comprehensive enough to safeguard the interest of the craftsmen and its misappropriation.

[33] "Kashmir commerce body sends legal notice to Idea Cellular over misleading Pashmina ad", http://freshinitiative.net/kashmir-news/news/28638-kashmir-commerce-body-sends-legal-notice-to-idea-cellular-over-misleading-pashmina-ad

PANORAMIC VIEW OF WORKING OF CENTRAL ADMINISTRATIVE TRIBUNAL IN INDIA

Alok Kumar*

I. Introduction

The dominant political philosophy of the 18th and 19th centuries was *laissez-faire* which has been manifested in the theories of individualism, individual enterprise and self-help. The philosophy envisaged minimum governmental control, maximum of free enterprises and contractual freedom.[1] However as a result of the reactions against *laissez faire* doctrine, the political dogma of collectivism emerged which favoured state intervention, social control and regulation of individuals' enterprise. The state started to act in the interest of social justice and collective growth. In course of time, out of the dogma of collectivism there emerged the concept of the social welfare state which lay emphasis on the role of the state as a vehicle of socio-economic regeneration and welfare of the people. The limited role of the state concerning defense and preservation of law and order was not considered sufficient. Instead the state had to concern itself with the welfare of its individual members.[2]

A phenomenon discernible almost invariably in the contemporary society is that the state has become an active instrument of social and economic policy. A necessary concomitant of the vast increase of social and economic functions of the government has been the creation of administrative bodies entrusted with a wide variety of powers including the powers of adjudication of disputes. Therefore, there has been a universal and widely acceptable principle that the judicial functions of the state are no longer the monopoly of the courts of justice alone, but are being increasingly shared by various administrative agencies as well.[3]

The adjudicatory functions of a modern welfare government are so wide and varied that it is difficult to bring them under any bibliographical control. There is no pattern or structural design discernible in setting up of the adjudicatory bodies which make even the peripheral description of them an unmanageable task. However, the most commonly employed technique of administrative adjudication which has achieved almost universality, is adjudication by Tribunals.

II. Concept of Tribunal

The word "tribunal" lacks precision and its meaning is not very articulate and it is difficult to define it scientifically. The word tribunal is a name given to various types of administrative bodies, the only common element running through these bodies is that they are quasi-judicial and are required to observe principles of natural justice while determining issues before them. Tribunal as per dictionary meaning is a seat or a bench upon which a judge sit

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1 M. P. Jain and S. N. Jain, *Principles of Administrative Law* 2 (Lexis Nexis, 2013).

2 J. F. Garner, *Administrative Law* 5 (London, worth & Co. 1979)

3 Noor Mohammed Bilal, *Dynamism of Judicial Control and Administrative Adjudication Towards Speedy Justice by Tribunals for Service Matters* 24 (Deep & Deep Publication, 2004).

in a court.[4] This meaning is very wide as it includes even the ordinary courts of law, whereas, in administrative law, the expression is generally limited to adjudication authorities other than ordinary courts of law.[5]

It may be said that the tribunal are a specialized group of a judicial body which are akin to our courts of law. They are normally setup under statutory power which also governs their constitution, functions and procedures. Tribunal is a body or authority, which is invested with the judicial power to adjudicate the questions of law or fact, affecting the right of the citizens in the judicial matters.

The Categorization in absence of an articulate definition and the resemblance with the courts has become notoriously difficult one. The Committee on Minister's power[6] in England attempted to provide dividing lines, but its views are scarcely regarded as even respectable today.[7] Frank's committee Report which dominated the thinking about tribunals did not define it but observed that:

> *"Tribunals are not ordinary courts, but neither are they appendage to the Government Departments .... We consider that tribunals should properly be regarded as machinery provided by the parliament for the adjudication rather than as part of the machinery of administration. The essential points is that in all these cases parliament has deliberately provided for a decision outside and independent of the Department concerned either at first instance... or on appeal from a decision of a minister or of a official in a special statutory position.... Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the government service, the use of the tribunal in legislation undoubtedly bears this connotation, and the intention of parliament to provide for the independence of tribunal is clear and unmistakable".*[8]

Referring to the position of administrative adjudication in United States, Pillsbury observes that, the administrative tribunals both exercise the power to hear and determine' and also construe and apply the laws' in proper cases. A simpler statement is that where the function of the body is primarily regulatory, and the power to hear and determine is merely incidental to regulatory duty, the function is administrative. But where the duty is primarily to decide questions of legal rights between private parties, such decisions being the primary object and not merely incidental to regulation, the function is 'judicial'.[9]

4 Webester's New World Dictionary, 1972, p. 1517.
5 C. K. Thakkar, *Administrative Law* 224 (Eastern Book Company, 1992).
6 Cmd. (40 60) 1932, pp. 73-74.
7 William A. Robson, *Justice and Administrative Law: A Study of the British Constitution* 33 (London, Stevens & Sons, 1957).
8 *Report of the Committee on Administrative Tribunals and Enquiries* 9 (Cmd. 218-1957), p. 9 (para 40)
9 Worren H. Pilsbury, "Administrative Tribunals" 36 *Harvard Law Review* 419-22 (1922-23).

In India also, although the words court and tribunal have been used in some articles of the Constitution,[10] the term have not been defined. The General clauses Act also does not define these terms. So far as the word court is concerned, though it has been defended in certain statutes, the definition in those enactments seems to have been made for specific purpose of the concerned statues. For example, Sec. 20 IPC defines *'a court of justice 'to mean a 'judge who is empowered by law to act judicially alone. . .*

In the Indian context the word "Tribunal" has at least three meaning.[11] *Firstly*, all quasi-judicial bodies, whether part and parcel of a department or otherwise, are regarded as tribunals. The only distinguished feature of these departmental bodies, as against purely "administrative" bodies, in most cases would be that in process of arriving at their decisions they may have to observe some or all the norms of fair hearing or principles of natural justice.[12]

Secondly, a narrow approach has been taken to view that only such bodies are tribunals as are outside the control of the department involved in the dispute, either because they are under the control of some other department or because of the nature of their composition or because they adjudicate on disputes between private parties. The most important aspects of the judicial mind are the independent mental process of the judge – the psychological process which arises out of his non-identification in the matters in issue before him. The type of bodies as these are endowed to a great extent with the kind of impartiality which the judge has because they are not part and parcel of the government departments which prevents them from being biased towards departmental policies. Perhaps even within this narrow approach, those quasi-judicial bodies which are departmental but which decide disputes between private parties may be regarded as tribunals because of their impartiality in relation to the contesting parties before them.[13]

Thirdly, the word "tribunal" has also been used in article 136 of the Constitution of India.14 In the absence of a definition of a general application, the characteristics of tribunals vis-à-vis courts have been subject of debate before the courts.In the first case[15] which came up for consideration before the Supreme Court, the primary question was to ascertain the exact connotations of the words court and tribunal. J. Mahajan who delivered the principal judgment in the case observed:

> *"It must be presumed that the draftsmen of the institution knew well the fact that there were number of tribunals constituted in this country previous to coming into force of this constitution which were performing certain administrative, quasi-judicial or domestic functions, that some of them have even the trapping of the court, but inspire of those could*

10 Articles 136, 227, Entry 3 List I-VII schedule of the Constitution of India.
11 S. N. Jain, *Administrative Tribunals in India: Existing and Proposed* 6 (1977, N. M. Tripathi Pvt. Ltd.)
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*
15 *Bharat Bank* v. *Employees of Bharat Bank* AIR 1950 SC 188.

not be given that description. It must be presumed that that the constitution makers were aware of the fact that the higher court in this country had local that all tribunals that discharged judicial functions fell within the definition of the expression 'court'. . ."[16]

He then observed that:

"Before a person or persons can be said to constitute a court it is held that they derive their powers from the state and are exercising the judicial powers of the state."[17]

Thereafter, he proceeded to hold that the expression tribunal as used in article 136 of the Constitution of India does not mean the same thing as court but included within its ambit. All adjudicatory bodies provided they are constituted by the state and invested with the judicial powers of State. A body or authority for being characterized as a tribunal for the purposes of article 136 of the Constitution must possess the following features[18]:

(a) It must be a body or authority invested by law with power to determine questions of disputes affecting the rights of citizen.

(b) Such body or authority in arriving at the decision must be under a duty to act judicially. Whether an authority has a duty to act judicially is to be gathered from the provisions of the Act under which it is constituted. Generally speaking, if the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of the facts by means of evidence if the dispute be on a question of fact, and if the dispute be on a question of law on the presentation of legal arguments, and the decision result in the disposal of the matter on findings based upon those questions of law and fact, then such a body or authority acts judicially.

(c) Such a body must be invested with the judicial power of the state. This means that the authority required to act judicially, though not a court in strict sense, should be invested with the "trapping of the court", such as authority to determine matters in case initiated by parties, sitting in public, power to compel attendance of witnesses and to examine them on oath, duty to follow fundamental rules of evidence, provisions for imposing sanctions to enforce obedience to its command. Such trapping will ordinarily make the authority which is under duty to act judicially, a tribunal.

The apex court in *MeenakshiMills's case*[19] reiterated the position held in *Jaswant Sugar Mills Case*[20] regarding the tests to decide whether the body or authority is Tribunal or not in following words:

[16] *Id.* at p. 194.
[17] *Id.* at p. 195.
[18] M. P. Singh, (ed.), *V. N. Shukla's Constitution of India* 511 (Eastern Book Company, 2011).;
[19] *Workmen of Meenakshi Mills Ltd.* v. *Meenakshi Mills Ltd.*, AIR 1994 SC 2696.
[20] *Jaswant Sugar Mills Ltd.* v. *Lashmi Chand*, AIR 1963 SC 677

(a) It should not be an administrative body pure and simple, but a quasi-judicial body as well;
(b) It should be under an obligation to act judicially;
(c) It should have some trapping of the court;
(d) It should be constituted by the state;
(e) The state should confer on it its inherent judicial power, i.e., power to adjudicate upon disputes.

Owing to the absence of any clear cut definition of the very word tribunal it appears to be identical to ordinary court but they are separate from the regular court and constituting in it special court constituted with inherent power of the state. There is no fundamental difference between these two, although tribunals represent to some extent the judicial system rather than a radical departure from it. There are, however, some procedural differences between the two.

III. Growth of Administrative Tribunals in India

A brief survey of various statues clearly demonstrates the fact that tribunals have functioned in India from the middle of nineteenth century. The Public Servants Inquiries Act, 1850 provided for a tribunal to be constituted for inquiring into cases of misbehaviour of public servants. The Opium Act of 1857 authorised the formation of a tribunal for licensing and imposing penalty with regard to cultivation of poppy. The Wastelands Claims Act of 1863, provided for a tribunal to adjudicatory bodies created under different legislations to discharge a number of functions.[21] The prominent amongst them, being the Railway Rates Tribunal under the Indian Railways Act, 1890, to dispose of complaints relating to the railway rates.

With the enormous growth of administrative law in India law in India in the post-Independence period, the government and its various instrumentalities came to exercise a wide variety of administrative powers.The changing role of government in welfare state led to appointment of officers of state who could discharge various functions at any point of time. This resulted in tremendous growth in civil services because without a huge army of civil servants it is not possible to realize its cherished dream which is the cornerstone of the Indian Constitution.

The existing system of courts proved to be inadequate to meet the needs of adjudicating various kinds of disputes that arose in these fields. There are a number of reasons which paved the way for the establishment of specialized administrative tribunals which include want of technical expertise, required to adjudicate a dispute, consumption of more time by the courts, rigid procedural formalities involved and court fees required to be paid by the litigants, etc. However, it would be far from the truth to say that the tribunals in India came to be established only after the Independence. There existed many industrial tribunals, labour courts, income tax tribunals and juvenile courts not only in pre-Independence India, but also in USA and UK. In the post-Independence era there had been a substantial growth

[21] Ganges Tolls Act, 1867; The Sea Customs Act, 1978; The Explosive Act, 1884; The Land AcquisitionAct, 1894; The Indian Railways Act, 1890; The Pension's Collector Act, 1871; The Indian Registration Act, 1908; The Patents and Designs Act, 1911, etc.

of tribunals not only numerically but also from the point of various specialized areas like industrial law, taxation, motor vehicle accidents, customs and excise, consumer protection, environmental matters and service matters.

From the theoretical point of view, the tribunals in India are not different in any substantial manner from the tribunals in England or the agencies in the United States. Tribunals in India are presumed to be free from the executive influence. Judicial trappings are a familiar feature of the tribunals in India. True to its origin, the tribunals in India still follow the British lead.

The Law Commission of India in 1958 made a rapid survey of the developments in the United Kingdom, United States and France. It did not, however, say a single word about the composition, structure and the detailed procedure etc., of adjudicatory bodies in India.[22] The Law Commission acknowledged the value of the work of the tribunals and the need for permitting them to exist as a supplement to the courts in view of certain inherent advantages like speed, cheapness, procedural simplicity and availability of special knowledge.[23] Like the Donoughmore Committee and the Frank's Committee, the Law Commission of India, did not support supplanting the law courts and substituting them by administrative courts on the French model. The commission only emphasized that the administrative tribunals may be imbued with greater judicial spirit and insisted on the observance of the principles of natural justice.[24] The recommendations of the study team on tribunals set-up by the Administrative Reform Commission departed substantially from those of the Law Commission of India. The study team after acknowledging the restricted nature of the constitutional protectionfavoured the installation of tribunals of wide powers which could decide a case on facts as well as Law.[25]

Ultimately The Constitution (Forty-second Amendment) Act, 1976 had made major changes in the settlement of disputes relating to service maters, by introduction of Article 323A in the Constitution. Article 323A empowers the Parliament and State Legislatures to establish service tribunals to deal with the litigation pertaining to service matters. Article 323-A was inserted with effect from 3.1.1977 but no action was taken to undertake legislation to implement it till 1984 and the Tribunals were not established as desired by this Article. As early as in 1980, the rationale behind the tribunal resolving service disputes was described in no better words than those of Y. V. Chandrachud CJI in *Kamal Kanti Dutta* v. *Union of India*[26]:

> *"The constitution of Service Tribunals by State Governments with an apex Tribunal at the Centre, which, in the generality of cases, should be the final arbiter of controversies relating to conditions of service, including the vexed question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. The proceedings of such tribunals can have the merit of informality and if they will not be tied down to strict rules of evidence, they might be able to produce solutions which will satisfy many and displease only a few."*

[22] See, Report of the Law Commission of India (14th Report, 1958).
[23] *Ibid.*
[24] *Ibid.*
[25] See, Report of the Study Team on Tribunals (March, 1967), p. 4.
[26] (1980) 4 SCC 38 at 39.

In pursuance of power conferred upon it by clause (1) of Article 323A, Parliament enacted the Administrative Tribunal Act, 1985. The Statement of Objects and Reasons of the Act indicates that it was in express terms of Article 323A of the Constitution and was being enacted because a large number of cases relating to service matters were being pending before various courts; it was expected that the setting up of such administrative tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons covered by the administrative tribunals speedy relief in respect of their grievances.

IV. Central Administrative Tribunal

To give practical shape to the provisions of the Act, the Central Administrative Tribunal (CAT), with its Principal Bench at New Delhi and Additional Benches at Allahbad, Bombay, Calcutta, Madras was established on November 1, 1985. Subsequently the Benches of Central Administrative Tribunal were established at Jabalpur, Jodhpur, Cuttack, Ahmedabad, Bangalore, Patna, Chandigarh, Guwahati, Hyderabad, Lucknow, Ernakulam and Jaipur. Apart from Central Administrative Tribunal, State Administrative Tribunal has also been established. The State Administrative Tribunal have been working in Andhra Pradesh, Himachal Pradesh, Karnataka, Madhya Pradesh, Maharashtra, Orissa, Tamil Nadu, West Bengal and Gujarat.

Before 1985 the grievances of Central Government employees were tried by ordinary courts, such suits were normally to be instituted in the lower courts of law, however, a direct approach to the High Court was available in exercise of writ jurisdiction under Article 226 of the Constitution. In case of violation of fundamental rights, under Article 14 and 16, even a direct approach to the Supreme Court was possible and still available. Prior to establishment of Administrative Tribunals a quite large number of cases were pending before the various courts in respect of service matters, therefore, the Law Commission, Administrative Reform Commission, Shah Commission, Committees, all recommended for the setting up of Tribunal. In 1976 Part XIV-A was inserted in the Constitution under the name 'Tribunals'. The insertion of Article 323-A and B in 1976 in the Constitution is no doubt an important landmark in the history of service Tribunals.

Steps have been taken to ensure independence of the members of the Tribunals, their salaries, allowances and other conditions of service are prescribed by the Central Government which cannot be varied to the disadvantage of a member after he is appointed. All such rules shall be laid before the parliament and shall be subject to modification, if any, made by both the House. No member can be removed from his office before the expiry of

the prescribed term except on the ground of proved misbehavior or incapacity and that too after an inquiry has been held in the matter by a judge of the Supreme Court. Restrictions have also been placed on them for future employment under the Government and on their right to appear, act or plead before the Administrative Tribunals. Tribunals are not courts in the strict sense of the word; they discharge quasi-judicial functions and are quasi-judicial bodies and having almost all the trappings of a court. They have been given adequate powers to function effectively and enjoy finality of decisions. Central Administrative Tribunal or State Administrative Tribunals are enjoying all the same jurisdiction power and authority in respect of contempt of itself as a High Court has power. This power has strengthened the Tribunal to function independently and effectively. A significant provision is that the Administrative Tribunals are not fettered by technical rules of procedure laid down in the C.P.C or the Indian Evidence Act which bind an ordinary court. The Tribunals thus exercise great freedom to adopt appropriate procedure in accordance with the principles of natural justice, to regulate their own proceedings. However, the Tribunal have been vested with the powers of a civil court, under the Code of Civil Procedure, in essential maters, like summoning and enforcing attendance of any person and examining him on oath, requiring the discovery and production of a document, receiving evidence on affidavits, issuing commissions for the examination of witness or documents, requisitioning public records or documents, requisitioning public records or documents from any office, reviewing its decisions, dismissing a representation for default or deciding it ex-parte or setting aside any such order made by it. The proceedings before a Central Administrative Tribunal or State Administrative Tribunal have been declared to be judicial proceedings within the meaning of section 193,219 and 228 of the Indian Penal Code, which deal, respectively with offences of tendering false evidence, corruptly or maliciously making reports etc. contrary to law, and causing intentional insult interruption to public servants in judicial proceedings. The law laid down by the Supreme Court is binding on the Tribunals. However, it is held that an opinion of the Supreme Court which is not final but only tentative is not binding on subordinate court. The power to issue writs was restricted by the legislation by which they are created. But after the case of *SampathKumar* the Tribunals are enjoying this power and issuing writs as Tribunals are having all the powers and jurisdiction as High Courts were empowered before establishment of Administrative Tribunals. The Tribunals can scrutinize not only '*vires*' of the service rules but may also examine the justification for such provisions, such power to essential to make these tribunals truly effective. The Administrative Tribunals Act, as amended, covers the employees of industries also. Such employees shall now have an alternative remedy available to them before the Central Administrative Tribunal/State Administrative Tribunal or Industrial Tribunal or a Labour Court.

Though the Administrative Tribunal is a creation of law of Parliament alone under Article 323-A of the Constitution, states can also create the Administrative Tribunal by legislation by the Parliament. No power of legislation in this regard has been conferred on to any State legislatures. Thus if a State Government wants to create Administrative Tribunal, it has to seek approval of Central legislature. Therefore, the establishment of Administrative Tribunal both at the Centre and at the states rests with the Central Government alone except for the states of Jammu and Kashmir. The receipt of request from the State Government to establish

the Tribunal in that State is an essential requirement for establishing a tribunal and is subject to approval of the Central Government. The Staff of armed forces of the Union, Officers of Supreme Court and High Courts and Secretarial Staff of the Parliament and legislatures in the states are kept out of the purview of the Tribunal.

As early as 1993, Supreme Court had proposed for study of certain Tribunals including CAT with a view of ensuring their independence and improving the quality of their performance.[27]

V. Working of Central Administrative Tribunal

Central Administrative started functioning in November 1985, and since then almost 30 years have passed which is sufficient period for any meaningful evaluation of the system. Unfortunately much research has not been undertaken in this area. However, from whatever material is available, a few significant from whatever trends in the working of Central Administrative Tribunal (CAT) may be discussed.

Central Administrative Tribunal established for Central Government employees. This Tribunal works in 18 places through its Benches. Besides these, Circuit Benches are also held at other places particularly, where the seat of High Court is located. The basic purpose behind the establishment of these tribunals was to provide expeditious justice to the civil servants, which was not available through the traditional system. How far this purpose has been achieved is the moot question. If available data is any indicator, the trend which was discouraging in the beginning has now shown increasing trends.

After the constitution of the Tribunal in 1985, in the beginning, under Section 29 of the Administrative Tribunals Act, 1985, the Tribunal received on transfer from the High Courts and Subordinate Courts 13,350 cases, which were pending there. Thereafter, till November 2001, 3,71,448 cases were instituted in the Tribunal. Out of these, 3,33,598 cases have already been disposed of. The total number of cases received on transfer as well as those instituted directly at various Benches of the Tribunal till 30.06.2006 is 4,76,336, of which the Tribunal has disposed of 4,51,751 cases leaving a balance of 24585 cases which constitutes disposal of 94%.[28]

But due to infirmities in the appointment process of the members of the tribunals, and the absence of constitutional safeguard which can ensure their independence, Administrative Tribunal have not performed a substitutional role to the high court whose jurisdiction was transferred to them.

From the above discussions, it is clear that Central Administrative Tribunal (CAT) was created for adjudication of disputes with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or other local authorities within the territory of India or under the control of Government of India and for matters connected therewith or incidental thereto. Thesetting up of such

[27] *R K Jain* v *Union of India* (1993) 4 SCC 119 at 134 and 175.

[28] http://cgat.gov.in/intro.htm visited on March, 2014.

Administrative Tribunals exclusively would go a long way in reducing the burden on the various courts and reduce pendency and would also provide to the persons covered by the Administrative Tribunals, a speedy, relatively cheaper and effective remedy. The enactment of the Administrative Tribunals Act 1985 opened a new chapter in the sphere of administering justice to the aggrieved government servants in service matters. The setting up of the Administrative Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialized knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-root experience would best serve this purpose.[29]

The principal consideration leading way for the creation of the tribunal for service matters is one of the growing complexities of law and with increasing tensions in society and in governmental organization which led increasing volumes of litigations between government department and civil servants every year and imposing heavy burden on the courts. Therefore, it was often found necessary to create special agencies for adjudication of complex disputes. Tribunals being special courts have certain features. This includes features like less expensive, accessible, freedom from technicality, expeditious and expertise i.e. knowledge of particular subject which gave them advantages over courts, are expected to reduce the burden of the courts and to bring to bear upon their work specialized knowledge.

Apart from this aspect, it was also felt that service matters could be more conveniently disposed of by a specialized tribunal, which lead to speedy and efficient disposal of disputes. The disputes that arise between government and civil servants generally involve an examination of technical rules and service manuals which often entail identical or similar issues. Such types of disputes can be dealt with by those enriched with expertise, instead of burdening the courts. In the light of above mentioned necessities the Central Administrative Tribunal has been created with two-fold objectives.

> *First*, it will reduce the burden of various Courts and thereby give them more time to deal with other cases expeditiously.
>
> *Second*, the employees covered by the Act will also get speedy relief in respect of their grievances.

Theoretical propositions were attempted to be in action. This was done by collecting the information from Principal Bench of Central Administrative Tribunal, regarding institution, disposal and pendency of cases during the last five years by 2009-13. The secondary sources of information have been tabulated statistically to see exactly the functioning of these Tribunals particularly Principal Bench at New Delhi, Allahabad Bench, Chandigarh Bench and Patna Bench of Central Administrative Tribunal.

[29] Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Seventeenth Report on the Administrative Tribunals (Amendment) Bill, 2006, December 2006.

The data of all four benches[30], New Delhi, Allahabad, Chandigarh and Patna has been represented by way of tables. Every table is followed by a brief explanation to give the trend and overall view regarding the institution, disposal and pendency of cases. Percentage rate of disposable has been detailed out to understand the variation in disposal of cases. Apart from this a comparative view of these three categories of cases has been given to appreciate the trends and differences. Also a comparison has been drawn between the State wise distribution of Central Government employees[31], and the total number of cases (instituted and backlog) in this regard and cases disposed off, on the basis of collected data.

The data obtained includes the number of cases instituted, disposed off and pending cases in a year. However the total number of cases has been calculated on the basis of number of cases instituted in a year together with the number of pending cases of the last year. For example the total number of cases in the year 2009 has been calculated by adding to the number of instituted cases the number of pending cases of 2008.

A. Analysis of Functioning of Principal Bench, New Delhi

Table 1:Year wise Total No. of Cases Instituted in Principal Bench, New Delhi

Year	Total No. of Cases Instituted
2009	6359
2010	6007
2011	6489
2012	6574
2013	5779

Table 1 reflects the data of total number of cases instituted before Principal Bench. The minimum number of 5779 cases has been reported in year 2013 though there does not appear to be much variation all over the years. Maximum cases have been reported in Year 2012.

Table 2:Year wise Total Disposal of Cases by Principal Bench, New Delhi

Year	Total No. of Cases Disposed
2009	5457
2010	6303
2011	6558
2012	4970
2013	3339

[30] Provided by Principal Bench, Central Administrative Tribunal, New Delhi.

[31] Census of Central Government Employees as on 31st March, 2009 published in May, 2012 by Directorate General of Employment & Training Survey & Study Division, Ministry of Labour& Employment, Government of India, http://dget.nic.in/publications/ccge/ccge-2009.pdf visited on March, 2014.

Table 2 discusses the total number of cases disposed offover the span of 5 years. 2011 shows the maximum number of disposed cases which is 6558. Year 2013 cuts a dismal figure with the lowest number of such cases being 3339 of the total. A close analyses of Table 1 and Table 2 shows that more than half of the total number of cases in the year 2011 have been determined whereas 2010 not far behind with 6303 cases being disposed.

Table 3: Year wise Total Pendency of Cases in Principal Bench, New Delhi

Year	Total No. of Pendency of Cases
2009	3008
2010	2712
2011	2643
2012	4247
2013	6687

The next table, Table3 shows data of the pending cases before the bench. As it is clear that year 2012-13 sees a sharp rise in the number of pending cases with as high as 6687 cases in the year 2013 only. The lowest number of pending cases is in 2011 which also incidentally had the highest number of determined cases.

Table 4: Year wise Total No. of Cases (Instituted and Backlog) in Principal Bench, New Delhi

Year	Total No. of Cases (Instituted +Backlog)
2009	8465
2010	9015
2011	9201
2012	9217
2013	10026

Table 4 gives an overall view regarding the total number of cases in the Principal Bench of CAT at New Delhi in last 5 years. The table shows an increase in the number of cases over the years, with minimum variations over 2010-12 suggesting that more and more cases are being filed by or against the civil servants, 2013 being the year with maximum cases so far.

Table 5: Year wise Comparative Chart of Total No. of Cases, Disposal and Pendency in Principal Bench, New Delhi

Principal Bench

Year	Total No. of Cases Disposal	Total No. of of Cases	Total No. of Pendency
2009	8465	5457	3008
2010	9015	6303	2712
2011	9201	6558	2643
2012	9217	4970	4247
2013	10026	3339	6687

Table5 shows a comparative analysis of the total number of cases before the bench, disposed off cases and pending cases over the span of 5 years. 2012 shows almost 50% rate as far as disposal of cases in eoncerned. 2013 is the most interesting as it has the highest number of cases before the bench, the lowest number of cases disposed off and the highest number of pending cases. However in 2013 the number of fresh cases instituted is lowest at 5779. The high rate of total number of cases can be attributed to the high number of pending cases in 2012 which were later carried forward.

Table 6: Yearly Percentage Disposal Rate of Cases by Principal Bench, New Delhi

Year	Percentage Disposal Rate
2009	64.46
2010	69.91
2011	71.27
2012	53.92
2013	33.30

Table 6 gives the percentage calculation of the rate of disposed off cases indicating that the year 2011 has the highest disposal rate with 71.27% followed closely by year 2010 with 69.91%. However 2013 cuts a sorry figure with just 33.30% as the disposal rate even though it has the highest number of cases before the bench.

B. Analysis of Functioning of Allahabad Bench

Table 7: Year Wise Chart of Total No. of Cases Instituted in Allahabad Bench

Year	Total No. of Cases Instituted
2009	2315
2010	2624
2011	2194
2012	2464
2013	2150

Table 7 shows an account of total number of instituted cases in the Allahabad bench. Without much of a variation the trend over the spa of five years is more or less the same. However the most number of cases have been filed in 2010 with 2624 cases followed by 2012 with 2464 cases. Year 2013 has reported the least number of cases with the number reaching as low as 2150 cases only.

Table 8: Year wise Total Disposal of Cases by Allahabad Bench

Year	Total No. of Cases Disposed
2009	2888
2010	2328
2011	2094
2012	2264
2013	1251

A surprising trend has come out of the data regarding disposal of case is concerned. There is decrease in number of disposed off cases as against the increase in the number which is of instituted cases. The maximum number of cases was determined in the year 2009 only which is higher than the number of instituted cases. 2013 puts a poor show with only 1251 cases disposed off which is almost fifty percent of the instituted cases.

Table 9: Year wise Total Pendency of Cases in Allahabad Bench

Year	Total No. of Pendency of Cases
2009	2909
2010	3205
2011	3305
2012	3505
2013	4404

Again Table 9 shows a gradual increase in the number of pending cases even though not much of an increase has been seen in the instituted cases. From 2909 cases in year 2009, the number of pending cases has reached 4404 in year 2013 which is almost double the number of instituted cases.

Table 10: Year wise Total No. of Cases (Instituted and Backlog) in Allahabad Bench

Year	Total No. of Cases (Instituted+Backlog)
2009	5797
2010	5533
2011	5399
2012	5769
2013	5655

If we analyze the total number of cases in Allahabad then it can be seen that there is not much of a disparity in them. The numbers remain almost constant with minimal changes. However out of the all these five years the number of cases in the year 2011 remain relatively lower than the rest with 5399 cases.

Table 11: Year wise Comparative Chart of Total No. of Cases, Disposal and Pendency in Allahabad Bench

Allahabad Bench

Year	Total No. of Cases	Total No. of Disposal of Cases	Total No. of Pendency
2009	5797	2888	2909
2010	5533	2328	3205
2011	5399	2094	3305
2012	5769	2264	3505
2013	5655	1251	4404

A comparative analysis suggests that the number of cases instituted and the number of pending cases is increasing over the period of time. Also the disposed off cases are decreasing year by year with 2013 showing the least number of such cases to only 1251.

Table 12:Yearly Percentage Disposal Rate of Cases by Allahabad Bench

Year	Percentage Disposal Rate
2009	49.81
2010	42.07
2011	38.78
2012	39.24
2013	22.12

Although the percentage disposal rate of Allahabad in the last five years has never been even 50% at any time, it has failed to remain constant or even closer to the highest figure of 49.81%. In fact over the years the percentage has substantially decreased and has been reduced to as low as 22.12%.

C. Analysis of Functioning of Chandigarh Bench

Table 13: Year Wise Chart of Total No. of Cases Instituted in Chandigarh Bench

Year	Total No. of Cases Instituted
2009	1496
2010	1420
2011	1756
2012	1985
2013	2212

Table 13 shows that there has been a slight increase in the number of instituted cases over a period of five years. 2009-10 have an almost constant figure of 1400 cases every year. This number has only increased to 2212 cases in 2013.

Table 14: Year wise Total Disposal of Cases by Chandigarh Bench

Year	Total No. of Cases Disposed
2009	1474
2010	1509
2011	1727
2012	1513
2013	1797

Table 14 gives a clear detail of number of disposed off cases. This number is very much close to the number of instituted cases. A slight increase over the years is also evident from the available data. The data shows a gradual increase from 1474 to 1727 in 2009-11 with a dip in the number of cases in 2012 to 1513. However in 2013, once again the number rose to 1797.

Table 15:Year wise Total Pendency of Cases in Chandigarh Bench

Year	Total No. of Pendency of Cases
2009	1167
2010	1078
2011	1107
2012	1579
2013	1994

This table gives the trend of pending number of cases. As in the cases of previous benches here also the pending number of cases as increased over the period of time. Also the pending cases have risen to 1994 in 2013 itself whereas it was almost constant in 2009-11.

Table 16: Year wise Total No. of Cases (Instituted and Backlog) in Chandigarh Bench

Year	Total No. of Cases (Instituted+Backlog)
2009	2641
2010	2587
2011	2834
2012	3092
2013	3791

Again Table 16 shows total number of cases before the bench in last five years where the maximum number of cases were reported in the year 2013.

Table 17: Year wise Comparative Chart of Total No. of Cases, Disposal and Pendency in Chandigarh Bench

Chandigarh Bench

Year	Total No. of Cases	Total No. of Disposal of Cases	Total No. of Pendency
2009	2641	1474	1167
2010	2587	1509	1078
2011	2834	1727	1107
2012	3092	1513	1579
2013	3791	1797	1994

A comparative chart shows that with passing years the number of instituted cases is increasing. Also the number of disposed off cases has been also almost equal to the half the number of instituted cases. There is also an upward trend of the pending cases.

Table 18: Yearly Percentage Disposal Rate of Cases by Chandigarh Bench

Year	Percentage Disposal Rate
2009	55.81
2010	58.33
2011	60.93
2012	48.93
2013	47.40

The data in Table 18 reflects the percentage disposal rate in Chandigarh with not much of a variation. A surprising trend can be observed where one can see the graduat increase from 2009 to 2011, which has the maximum percentage rate of 60% among all the years. However after 2011 the rate is decreasing with 48.93 in 2012 and 47.80 in 2013.

D. Analysis of Functioning of Patna Bench

Table 19: Year Wise Chart of Total No. of Cases Instituted in Patna Bench

Year	Total No. of Cases Instituted
2009	1237
2010	1358
2011	1477
2012	1563
2013	1155

Table 19 shows the total number of cases instituted before the Patna Bench. 2012 reflects the maximum number of cases. However in 2013 a sudden dip in the number of cases has been observed and the least number of cases have been reported at 1155 on the span of last five years.

Table 20: Year wiseTotal Disposal of Cases by Patna Bench

Year	Total No. of Cases Disposed
2009	1367
2010	1284
2011	1047
2012	1310
2013	1176

The data reveals that there is not much of a variation in the number of disposed of cases. Though there appears to be a decrease in the number of cases from 2009-11 but year 2012 sees an increase. However the cases have once again decreased in 2013.

Table 21:Year wise Total Pendency of Cases in Patna Bench

Year	Total No. of Pendency of Cases
2009	1833
2010	1907
2011	2337
2012	2590
2013	2569

The number of pending cases over the years in 2009-13 has increased. The number of cases in 2012-13 is almost constant and only a little dip can be seen in from 2590 to 2569 cases. But overall increase in pending cases has been found.

Table 22: Year wise Total No. of Cases (Instituted and Backlog) in Patna Bench

Year	Total No. of Cases (Instituted+Backlog)
2009	3200
2010	3191
2011	3384
2012	3900
2013	3745

The total number of cases in Patna remained highest in the year 2012 with 3900 cases.

Table 23: Year wise Comparative Chart of Total No. of Cases, Disposal and Pendency in Patna Bench

Patna Bench

Year	Total No. of Cases	Total No. of Disposal of Cases	Total No. of Pendency
2009	3200	1367	1833
2010	3191	1284	1907
2011	3384	1047	2337
2012	3900	1103	2590
2013	3745	1176	2569

The comparative of the three types of cases suggests that the disposed off cases is decreasing with the increase of instituted cases. And even though there has not been a great increase in the instituted cases, the number of pending cases is coming very much closer to the total number of instituted cases.

Table 24: Yearly Percentage Disposal Rate of Cases by Patna Bench

Year	Percentage Disposal Rate
2009	42.71
2010	40.23
2011	30.93
2012	33.58
2013	31.40

The table depicts a sharp decline of almost 10% in the disposal rate of cases over the last five years, from 42.71% to 31.40%. Even though the number of cases instituted has not increased drastically but a constant decrease can be seen disposal rate and at no time he disposal rate has increased beyond 43%.

E. A Comparative Analysis of Functioning of All Four Benches of Central Administrative Tribunals

Table 25: Comparative Chart of Yearly Percentage Disposal Rate of Cases by Principle Bench, Allahabad, Chandigarh and Patna Bench

Percentage Disposal Rate in different Benches

Year	Principal Bench	Allahabad Bench	Chandigarh Bench	Patna Bench
2009	64.76	49.81	55.81	42.71
2010	69.91	42.07	58.33	40.23
2011	71.27	38.78	60.93	30.93
2012	53.92	39.24	48.93	33.58
2013	33.30	22.12	47.40	31.40

This table depicts the comparative analysis of the disposal rates of all the four benches in the last five years. It brings out a clear picture as to the working of the administrative tribunal in these areas. The average rate of disposal is highest in Delhi followed by Chandigarh, Allahabad and Patna. In Delhi we see a steep decline in the year 2013 where the disposal rate is as low as 33.30%. Similarly in Allahabad a decline has been observed and the rate has dipped to a surprising figure of 22.12% only although the average rate of disposal has never gone beyond 50%.

A similar decrease can also be observed in Chandigarh and Patna though it is not in sharp contrast. In New Delhi and Chandigarh the disposal rate has been the highest in the year 2011 with 71.27% and 60.93% respectively. However in Allahabad and Patna here has been a gradual decline in disposal rate with a minor increase in the year 2012 only. Year 2013 paints a very dismal picture for all the four benches as the disposal rate is all time low as compared to the percentage rate in each city.

F. Analysis of Cases and their Disposal in Comparison to Distribution of Civil Servants (Central Govt. Employee)

Table 26: Comparative Table of Number of Cases and their Percentage in all the Four Benches with Respect to Total Number of Civil Servants and the Percentage Disposal Rate in the Year 2009

Benches of CAT	Distribution of Central Govt. Employee in 2009 (State-wise)	Total Cases (Instituted+ Backlog) in 2009	Percentage of Case w.r.t to Number of Employees	Disposal of Cases in 2009	Percentage Disposal Rate
Principal Bench, New Delhi	203100 (Delhi)	8465	4.16	5457	2.68
Allahabad Bench	294800 (Uttar Pradesh)	5797	1.96	2888	.97
Chandigarh Bench	121800 (Punjab, Haryana, Himachal Pradesh, Jammu & Kashmir and Chandigarh)	2641	2.16	1474	1.21
Patna Bench	77700 (Bihar and Jharkhand)	3200	4.11	1367	1.79

As it is clear from the table the highest number of civil servants at time in 2009 has been reported in Uttar Pradesh alone. So with respect to them the number of cases is only 5797 which make up for only 1.96% of cases. Also the lowest disposal rate has been recorded at less than 1%, i.e .97% for the same. In Delhi itself the highest cases have been reported even though the total number of civil servants is less than those in Uttar Pradesh taking the percentage to 4.16% followed by Patna Bench with 4.11 %.

Delhi Bench records the highest percentage disposal rate of 2.68% followed by Patna Bench with a close 1.79%. As far as Chandigarh is concerned the figures when compared to Allahabad are relatively better. However it is taking cases for four states and one union territory. Compared to all the four it finishes third with the percentage of cases at 2.16%, 2641 cases, and a disposal rate of a low 1.21% only.

Comparative Chart of Percentage Disposal Rate and Total Cases

Table 27: Table of Comparative Chart of Percentage of Total Cases its Disposal by different Benches of CAT in Compare to Distribution of Central Govt. Employee

	Principal Bench	Allahabad Bench	Chandigarh Bench	Patna Bench
Total Cases in %	4.16	1.96	2.16	4.11
Total Disposal in %	2.68	.97	1.21	1.79

The table represents the comparative chart of percentage rate of total number of cases and the cases disposed off in the year 2009 when the data for civil servants was recorded last for the census 2011. As evident from the data Principal Bench recorded the highest number of cases with respect to the total number of civil servants as well as the highest rate of disposal of cases. It is then followed by Patna with the second highest percentage disposal rate of cases. We can however infer that the performance of the Patna bench is equally remake as it is dealing with only one territory as against the Delhi Bench. Allahabad has the lowest percentage disposal rate with a dismal figure of .97%only even when it has the largest number of Civil Servants as compared to the rest of the three. Even in Chandigarh the result is not very good, though the figures are better than from Allahabad, for a simple reason that Chandigarh Bench takes up Cases from Four other States and One Union Territory.

A close study of the available data reveals startling figures regarding the disposal of cases in CAT benches. The number of cases filed is quite very less as compared to the number of civil servants present in the territory. A dismal picture is painted when we see the rate of disposal of cases. And an equally worrying condition is that of the increasing pending cases each year.

As clear from the available data the most important reason for the existence of setting up of the tribunal itself is not being met with. Pendency and backlog were the major concerns

at the time of their establishment and it is quite evident that the rate of disposal of cases and the rate of pendency are inversely proportional. Pendency is increasing far beyond imagination in CAT. This is the data for four benches only. The reasons for the same need to be enquired into and solutions are to be sought for the effective working of the Central Administrative Tribunals.

VI. Conclusion

The main controversy involved was-whether the power conferred upon the Parliament and the State Legislature by Article 323A (2)(d) of the Constitution to totally exclude the jurisdiction of 'all courts' except that of the Supreme Court under Article 136 in respect of disputes and complaints relating to service matters, runs counter to the power of judicial review conferred on High Courts under Article 226/227 and on the Supreme Court under Article 32 of the Constitution? To answer this question we must understand the reasons for establishment of service tribunal, concept of judicial review, whether out constitutional scheme permits the setting up of such tribunals as substitutes for High Courts, whether the service tribunals created under Article 323A were intended to perform a substitutional role with regard to the High Courts and the actual working of service tribunals.

In view of the doubts expressed by Supreme Court in *L. Chandra Kumar* v. *Union of India*,[32] regarding the validity of *Sampth Kumar* and the issues raised by a Full Bench of the Andhra Pradesh High Court in *SakinalaHarinath* v. *State of A.P.*[33] the theory of Alternative institutional mechanism was considered afresh by a larger Bench in *L. Chandra Kumar* v. *Union of India*[34]. The Supreme Court in this case states that the power of judicial review conferred on the High Courts under Article 226and upon the Supreme Court under Article 32 as well as the power of super-intendance vested in the High Court under the Article 227 forms an integral and essential part of the constitution constituting part of the basic structure. Therefore, Article 323-A 2(d), 323-B, 3(d) and section 28of the Administrative Tribunals Act, 1985 were declared unconstitutional to be the extent they excluded the jurisdiction of the Supreme Court and High Court under Article 32 and 226/227 respectively. In the process, the Supreme Court downgraded the role and status of the tribunals from substitutional to supplemental to the High Courts. It may be pointed out that the Supreme Court in this case has upheld the objectives for which such tribunals have come into existence. Though this craftsmanship, apart from declaring Article 323-A, 2(d) and 323-B, 3(d) as unconstitutional, the original jurisdiction of the Tribunals, the writ jurisdiction of the High Courts and the jurisdiction of the Supreme Court under the Article 136 has been restructured by the judicial process. The power can be exercised in spite of the specific provisions for appeal contained in the constitution or other laws.[35]

But as after *Chandra Kumar* pronouncement, the orders of administrative tribunals are being routinely appealed against in the high courts, whereas this was not the position before,

[32] AIR 1955 SC 1151.
[33] 1993 (3) ALT 471.
[34] AIR 1997 SC 1125.
[35] See *Durga Shankar* v. *Thakur Raghu*, AIR 1954 SC 520 at 522.

the status of tribunal has undergone a change; the tribunal is no longer an alternative to high court but subject to scrutiny of high court.[36] The real concern was the Chandra Kumar dictum that judicial review by high courts is part of the basic structure and that the constitutional amendment and the legislation in relation to administrative tribunal violate the doctrine of basic structure.[37]

In India the institutional link between the court and the tribunal is nominal. Retired judges appointed invariably as chairman or members of the administrative tribunal get too short a term to do productive work. This is a convincing reason to discontinue the practice. Instead, one may find a welcome change if sitting judges are deputed or appointed to the tribunal as it goes a long way in raising the status of the administrative tribunals to the level of high courts. In addition, the quality, status and the tenure of members will improve if lawyers between the ages 45 and 50 as recommended by the Law Commission are inducted as judicial members. For providing a long tenure for the members and the chairman and uniformity among different classes of tribunals, it is now recommended that chairpersons and members retire at the age 70 and 65 years respectively.[38] The amendment of Administrative Tribunal Act in 2006 has raised the status of members of the tribunals by making a minimum incumbency in the high echelons of administration necessary for appointment as administrative members.[39] The amendment has equated the status of members, both judicial and administrative with that of judges of high court. There has been a demand for a nodal agency to monitor the working of the tribunal. Different tribunals, whether examining service mattes or other issues, may render different interpretation on questions of law and jurisdiction. Even two service tribunals one to look after the Central Government personnel and the other to examine state services, may stand at different poles on identical issues. In more times than one, the apex court expressed its view that all tribunals should be brought under one single monitoring agency.

After *L.Chandra Kumar* the Supreme Court in a later case closely watched the steps taken by the Central Government in this direction.[40] The nodal agency brings in more benefits than one.[41] It is essential that a member of the administrative tribunal should be free from any undue influence and be professionally efficient, totally independent for discharge his functions, morally upright and be assured of complete disassociation with

[36] *Id.* para.4.5at 99. The commission had cited the example of a retired judge of the High Court of Karnataka resigning the chairmanship of the tribunal soon after Chandra Kumar decision feeling that the status of the tribunal was downgraded.
[37] The Law Commission of India, 215th Report on L. Chandra Kumar be Revisited by a Larger Bench of Sureme Court (2008)
[38] The Law Commission of India, 232nd Report on Retirement of Age of Chairpersons and Members of Tribunals – Needs for Uniformity para.2.1 (2009).
[39] The Administrative Tribunals (Amendment) Act, 2006.
[40] *B. Ramanjini* v. *State of Andhra Pradesh* (2002) 5 SCC 533. However, the Supreme Court did not approve that such a direction could be given by the high courts. In the case the high court issued a direction in what manner a retirement vacancy should be filled. It should not have done so when the Supreme Court was seized of the matter. The apex court said that the high court had been carried away by some kind of adventurism and virtually tried to overreach what this Court has states which course should have been avoided at all costs. *Id.* at 541.

anti-social elements.[42] An upper quasi- legislative monitoring agency can be formulated for selection of the members and disposal of cases.

As far as Indian position is concerned after*L Chandra's Case* the court made arelevant observation for determination of this issuein *Union of India v. Madras Bar Assn.*[43] The court in that case emphasised that unless wide-ranging reforms, as were implemented in the United Kingdom and as were Suggested by *L. Chandra Kumar*[44] are brought about, tribunals in India will not be considered as independent.[45]

The Court Summarised the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals.

(c) Whether there is need for 'tribunals', there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve and technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members.

(d) The legislature can reorganize the jurisdiction of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (a standard example is the variation of pecuniary limits of the courts).[46]

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[41] For example , see *Rajendra Singh Yadav* v. *State of UP* (1990) 2 SCC 763. The Supreme Court is of the view that service tribunals set up in UP under the UP Public Service Act 1976 should give way to those under ATA for the purpose for uniformity of functioning of administrative tribunals as well as relief to the high court from dealing with service disputes. Instead of administrative officers in the species of tribunals, adequate number of Judges should man the Tribunals. *Id* at 765, 766.

[42] *Union of India* v. *Kali Das Batish* (2006) 1 SCC 779. The list of lawyers selected for membership did not contain a few names recommended by the selection committee. Adverse report b Intelligence Bureau was the cause for their exclusion. Justifying the process of IB verification, the Supreme Court added that the verification of antecedents of nominees is essential and it should "include various factors like association with anti-social elements, unlawful organizations, political affiliations, integrity of conduct and moral uprightness." *Id.* At 787.

[43] (2010) 11 SCC 1, 24 para 27.

[44] (1997) 3 SCC 261.

[45] M. P. Singh, "Administrative Justice in India: The Urgency of Reforms" (2013) 1 SCC (J) 65.

[46] *Madras Bar Assn.* (2010) 11 SCC 1, 57-58, para 106.

In *KihotoHolllhan*v.*Zachillhu*[47] even direct exclusion of jurisdiction of all courts including the High Courts and the Supreme Court in Para 7 of the Eight Schedule to the Constitution introduced by the Fifty-second Amendment of the Constitution was invalidated only on the ground of non-observance of procedure provided in the proviso to clause (2) of Article 368 and not on the ground that such exclusion was against the basic structure of the constitution. If the alternative arrangement for the tribunals, as discussed above, is as good as the High Courts, which it would definitely be at the level of the upper level tribunals, we would expect to overcome *L. Chandra Kumar*[48] and justify the amendment being consistent with the basic structure of the Constitution.[49]

VII. Suggestions

It is very clear as to why the system of tribunals was introduced. Expedient disposal of service matters was the underlying principle. However over the period of time it has been seen that these tribunals are now getting burdened with cases, there is delay in disposal, gradual decline in number of disposed off cases and an increase in pendency. This is going totally in the reverse direction to what was sought to be achieved. It is now a reason for concern and a deep study to set it right in accordance with the basic idea with which the tribunals were established. In light of this and the study of the data the following suggestions are submitted

1. As discussed above (according to the data and tables) the pendency before the tribunals is increasing day by day. Therefore it has become necessary that the entire system of administrative adjudication be fully investigated into so that suitable adjustments and improvements which have taken place in other common-law countries as well as in France may be adopted to suit the Indian conditions. There is an urgent need to appoint a commission which would undertake a full-fledged study of various aspects of the working of the adjudicatory system as a whole, on the same lines as has been done by the Frank's committee in Britain.

2. The system of tribunals in India should be put on the lines of United Kingdom to facilitate a better working and administration. This can be done by introducing a two tier system for Tribunals. These can be designated as administrative courts to bring them at par with the regular courts as far as independence in their working is concerned like it is done in Germany. The first level can take up cases directly for any service matter according to the jurisdiction and the second level tribunal can be made equivalent to high court as a court of record. The two levels of courts must retain the power to review their own judgments.

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[47] 1992 Supp (2) SCC 651.

[48] (1997) 3 SCC 261.

[49] In this regard the following observation of the Court in *S.P. Sampath* v. *Union of India*, (1987) 1 SCC 124, 130para 3: (1987) 2 ATC 82is also worth noting: 3..... Therefore, if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court.

3. The judges of these tribunals can be appointed by a special committee having the requisite qualification and expertise.

4. As far as the question of inclusion of powers of High Courts under article 226-227 is concerned, it can be completely done away with. This can be made possible only when the second level court, as discussed above, is designated as a court of record. It is just like the way in which Supreme Court cannot exercise the power of review under article 32 over the High Courts for they are also designated as courts of Record.

5. Tribunals can only function efficiently when the members are appointed without the interference of the government. It is suggested that the power to make appointment should be exercised in consultation with the chief Justice of the Supreme Court or respective High Courts in case of tribunals established under a central or state legislation, respectively. There can be another alternative which may be adopted by the government for making such appointment. The alternative of setting up of a High Powered Selection Committee headed by the Chief Justice of India or a sitting judge of the Supreme Court was suggested by the Supreme Court in Sampath Kumar's case.

   Both these modes of appointment will ensure selection of proper and competent persons to man the tribunal and given them the prestige and reputation which would inspire confidence in the public mind in regard to the competence, objectivity and impartiality of those manning such tribunals. However in *Chandrashekharaiahv Jenekere C Krishna* (2013) 3 SCC 117, the Supreme Court held that the 'consultation' should not be a mere formality but meaningful and effective and primary opinion must be vested with the CJIs when the appointee has to discharge judicial functions.

6. The government interference should be minimized. Inclusion of Section 12 (2) must be revisited. After the abolishment of post of Vice Chairman, the Central Government has been given the power to '*designate*'any member as the Vice Chairman to discharge such function as may be given by the Chairman itself. On the face of it this provision is vey arbitrary as it gives power of 'selection' to the government. The approach of the Supreme Court appears to be paternalistic in this regard because recently in *A K Beherav Union of India* (2010) 11 SCC 322, the court upheld section 12 (2) and said that it does not violate independence of judiciary. However it is submitted that when the matter pertains to a person discharging judicial functions and to ensure independence careful considerations must be made in such an appointment or 'designation'.

7. There must be complete exclusion of the bureaucrats and retired judges from the system of tribunals as there is likelihood of biasness and that is per se against the very idea of establishment of the tribunal system.

8. The Chairman must ensure that the procedures are applied uniformly in all the benches and the principles of Natural Justice are wholly complied with. Though amongst all the diversities in procedures, the principles of natural justice set the limits, yet the rules of natural justice vary with the nature and constitution of the tribunal concerned and the functions performed by it. Thus it is suggested that a legislation providing a uniform and simple procedure embodying the principles of natural justice may be enacted. Recently in *Union of India* v *B V Gopinath*(2014) 1 SCC 351, the Supreme Court upheld the decision of CAT and High Court where they quashed a charge memo which was not approved by the disciplinary committee. This goes to show that the principles of natural Justice have to be complied with in reality not as an empty formality in service matters.

9. The tribunals must be allowed to exercise discretion in some cases, particularly when the matter concerns an industrial dispute and CAT is available as an alternate to Industrial Tribunal if the affected person comes within the definition of 'workman' under Industrial Disputes Act. This discretion can be exercised in cases like fixing of pay scales or minimum wages.

10. To make the right of appeal completely meaningful, the tribunals should be required to give 'reasoned decisions'. The reasons given for a decision must be sufficient and precise to enable the appellate tribunals or courts to exercise their jurisdiction effectively and expeditiously.

11. Since the courts in India continue to maintain that the review courts are not appellate forums, the sufficiency of evidence is not generally measured by them. Therefore, in order to make the judicial control more meaningful, there is need to introduce some flexibility in determining the sufficiency of evidence. It is suggested that the 'substantial evidence' rule as obtains in United States may be adopted in India as well.

12. The members of the tribunal must be accorded the same status and the security of tenure as is enjoyed by the judges of the judges of the High Courts.

13. A study of the working of tribunal shows that there is a tendency in their procedure towards the increased judicialisation. Such judicialisation as engenders rigidity, formality and delay needs to be avoided as it goes against the very purpose of establishing such bodies. In this context, the procedure adopted by the Administrative Tribunals in France can serve as guidance.

14. To avoid delay, role of advocates becomes very important. The advocates for service matters must be specialized and must have the expertise to deal with these matters so that they do not have to take adjournments to work upon the technicalities of the issue.

15. It is suggested that in depth functional study of the Central Administrative Tribunal may be conducted by an expert body like the law commission of India. The said

body may investigate in detail the quality of justice administered by various benches of the Central Administrative Tribunal. This body may further investigate the causes of delay in disposal of cases by the tribunal. The accumulation of arrears is bound to give a reverse jolt to the notion to the speedy justice by the tribunal.

16. Periodical review by Supreme Court every five years, of the functioning of CAT, is also suggested so that timely changes can be introduced to improve the system.

17. Lastly, the tribunals can be supported by a Tribunal Service System.It would raise their status, while preserving their distinctness from the courts. It would also bring greater administrative efficiency, a single point of contact for users, improved geographical distribution of tribunal centers, common standards, an enhanced corporate image, greater prospects of job satisfaction, a better relationship between members and administrative staff, and improved career patterns for both on account of the size and coherence of the Tribunals Service.

"In a Kalidas like action of cutting the branch of the Constitutional tree on which the judiciary is sitting and what in less picturesque language one can describe as judicial sell out to the Executive, the Supreme Court has upheld the legislations establishing tribunals in a number of decisions subject to certain 'adjustments' in law which are more in the nature of sops to the concept of judicial independence rather than an assertion of it."[50]

This observation made by Justice Ruma Paul clearly goes to show that the system of Tribunals in India is not free from defects and is in a period of transition. On one hand we want tribunals to lessen the burden of regular courts and on the other we are hesitating to bring them at par with them. Whatever may be the approach they are here to stay and the only reason behind it is speedy disposal of cases. However there are some questions that still remain to be answered. Issues like independence of tribunals, role of judges in appointment of the members of the tribunal, presence of non judicial members that dilutes judicial character, control of high courts etc. still need to be addressed. As tribunals replace the courts in most ways therefore they need to be institutionally strong.

[50] Ruma Pal J, former Supreme Court judge, while delivering V.M. Tarkunde Memorial lecture on "An Independent Judiciary", November, 2011. "Whose Tribunal Is It Anyway?" *The Hindu*, 15th November, 2013.

SUSTAINABLE DEVELOPMENT; A HISTORICAL AND CONCEPTUAL REVIEW

Dr. Huma B.Khan*

INTRODUCTION

"The Concept of Sustainable Development is the overriding and global political concept…..What we have undertaken is to elaborate upon this concept, to analyse, what it should mean and to draw conclusions as to how our behaviour must change so that development can be sustainable…."[1]

Sustainable development is, "Development that meets the needs of current generations without compromising the ability of future generations to meet their needs and aspirations" – can be pursued in many different ways. Sustainable development as defined by UN-sponsored World Commission on Environment and Development (WCED) report, *Our Common Future*, does not distinguish among the different concepts of growth and development. While development can and should go on indefinitely for all nations, throughput growth cannot. Sustainability will be achieved only when development supplants growth; when the scale of human economy is kept within the capacity of the overall ecosystem on which it depends. If we acknowledge the finite nature of our planet, sustainable growth is oxymoron.[2]

Despite its acclaimed vagueness and ambiguity, the WCED definition of sustainable development has been highly instrumental in developing a "global view" with respect to our planet's future. Since then, thousands of initiatives have been taken at local, national, and global levels in an attempt to address different aspects of the environmental challenges. A number of encouraging local outcomes have ensued from these activities. However, their impact in shaping "our common future" on a more sustainable basis seems to be minimal when measured against the enormity of the global environmental challenges. This has led to an increasing level of frustration and disenchantment, even among the different groups promoting the concept of sustainable development.

In the 1980s, some proclaimed that sustainable development was no more than a catch phrase that eventually would wither out as the concept of appropriate technology of the 1970s did. Contrary to this belief, the influence of the concept has increased significantly in national and international policy development, making it the core element of the policy documents of governments, international agencies, and business organizations. This has led to a widening of the discourse on the concept of sustainable development, resulting in wide variety of definitions and interpretations.[3]

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1 Address by Mrs. Gro Harlem Brundtland,Chairman,at the closing ceremony of the "*World Commission on Environment and Development*" 5(27th Feb,1987,Tokyo,Japan).

2 Daly HE, *Towards some operational principles of sustainable development* 2:1-6 (1990).

3 Mebratu, Desta, "*Sustainability And Sustainable Development: Historical And Conceptual Review*" 18 *Environment Impact Assessment Review* 493, (1998)

The report, *Our Common Future*, published by WCED, is taken as a starting point for most current discussions on the concept of sustainable development. This report, a comprehensive one produced through a global partnership, constituted a major political turning point for the concept of sustainable development. But it is neither the starting point nor the possible end of the conceptual development process. As any conceptual process governed by general evolutionary theory, there are some significant conceptual precursors that have led to the WCED's definition of sustainable development, which in turn is followed by other conceptualization efforts.

More than 200 years ago, the first question arose regarding the impact of the evolution of our civilization could have on the environment and resources of our planet. In 1798, Thomas Robert Malthus (1766-1834), demographer, political economist and country pastor in England wrote an essay on the Principle of Population. He predicted that the world's population would eventually starve or, at the least, live at a minimal level of subsistence because food production could not keep pace with the growth of population. He believed that the population was held in check by "misery, vice and moral restraint". Malthus wrote that "population, when unchecked, increased in a geometrical ratio and subsistence for man in an arithmetical ratio".[4]

Technological advances since that time have proved him wrong. Through better farming techniques, the invention of new farming equipment, and continuing advances in agricultural science, "production has increased much more rapidly than population, so much so that in real terms, the price of food is much lower today than it was two hundred years ago, or for that matter, even fifty years ago".[5]

The 1972 UN Conference on Human Environment in Stockholm represents a major step forward in development of the concept of sustainable development. Even if the link between environmental and developmental issues did not emerge strongly, there were indications that the form of economic development would have to be altered. There, a group of 27 experts articulated the links between environment and development stating that: "although in individual instances there were conflicts between environmental and economic priorities, they were intrinsically two sides of the same coin".[6]

Another result of the Stockholm Conference was the creation of the United Nations Environmental Program (UNEP) which has the mission "to provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations".[7]

4 Rogers Peter, Jalal K., Boyd J, *An Introduction to Sustainable Development* 20 (Earthscan, London 2008)

5 Baumol William, Litan R., Schramm C. *Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity* 17(Yale University Press, New Haven & London, 2007)

6 Vogler, John , *The International Politics of Sustainable Development", published in Handbook of Sustainable Development* 432 (Edward Elgar Publishing Limited, Cheltenham, 2007)

However, "the Stockholm Conference was limited in its effectiveness because environmental protection and the need for development, especially in developing countries, were seen as competing needs and thus were dealt with in a separate, uncoordinated fashion". Some critics concluded that "the conference was more concerned with identifying trade-offs between environment and development than with promoting harmonious linkages between the two".[8] Even UN documents acknowledged after the Stockholm conference that little was accomplished to concretely integrate environmental concerns into development policies and plans. A more integrated perspective that incorporated both economic development and environmental sensitivities was clearly needed.

The theme of sustainable development was picked up a few years later by the WCED. The report of WCED (also known as the Brundtland Commission), *Our Common Future*, holds the key statement of sustainable development, which defined it as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" .[9] This definition marks the concept's political coming of age and establishes the content and structure of the present debate.[10]

The conceptual definition of the Brundtland Commission contains two key concepts:

- The concept of "needs," in particular the essential needs of the world's poor, to which overriding priority should be given; and
- The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

By doing so, the Commission underlines the strong linkage between poverty alleviation, environmental improvement, and social equitability through sustainable economic growth. In that period the concept of sustainable development acquired political momentum "through rising public concern in the developed countries over the new and alarming phenomenon of

7 The United Nations Environment Programme (UNEP) is an international institution (a programme, rather than an agency of the UN) that coordinates United Nations environmental activities, assisting developing countries in implementing environmentally sound policies and practices. It was founded as a result of the United Nations Conference on the Human Environment in June 1972 and has its headquarters in the Gigiri neighborhood of Nairobi, Kenya. UNEP also has six regional offices and various country offices.Its activities cover a wide range of issues regarding the atmosphere, marine and terrestrial ecosystems, environmental governance and green economy. It has played a significant role in developing international environmental conventions, promoting environmental science and information and illustrating the way those can be implemented in conjunction with policy, working on the development and implementation of policy with national governments, regional institutions in conjunction with environmental Non-Governmental Organizations (NGOs). UNEP has also been active in funding and implementing environment related development projects.UNEP has aided in the formulation of guidelines and treaties on issues such as the international trade in potentially harmful chemicals, transboundary air pollution, and contamination of international waterways.The World Meteorological Organization and UNEP established the Intergovernmental Panel on Climate Change (IPCC) in 1988. UNEP is also one of several Implementing Agencies for the Global Environment Facility (GEF) and the Multilateral Fund for the Implementation of the Montreal Protocol, and it is also a member of the United Nations Development Group. The International Cyanide Management Code, a program of best practice for the chemical's use at gold mining operations, was developed under UNEP's aegis.

global environmental change, and in some ways it replaced fears of nuclear war that had prevailed in the early 1980's".[11]

The other major stumbling block after WCED is the UN Conference on Environment and Development (UNCED), which is also known as the "Rio Conference," or the "Earth Summit." Preparation for the Conference, held in June 1992, began in 1989. There were four International Preparatory Committee (PrepComs) meetings held in different parts of the world. Parallel to the PrepComs, each UN member country was expected to produce a national report covering current national environmental and developmental aspects and drawing up an action plan for promoting sustainable development within the national context. The conference itself proved to be an international event on an unprecedented scale as heads of government tried to make their mark on what was dubbed the *Rio Earth Summit*. The association in the title, "connecting Environment *and* Development, was indicative of North–South bargaining at the UN, in which demands for international action on the environment were set against claims for additional development aid and technology transfer".[12] The key outputs of the Conference were: *the Rio Declaration,*[13] *Agenda 21*[14], and the Commission on Sustainable Development.[15] All are quite explicitly concerned with sustainable development and it is thus, at the conclusion of the Earth Summit that the concept truly arrives on the international scene.

While sustainable development was the unifying principle for the entire Rio conference, there was disagreement about its meaning and implications. Some critics argue that "implementing the principles of equity and living within ecological limits can only be accomplished if social, political, and economic systems have the flexibility to be redirected toward sustainability as well as integrated with each other and the environment".[16] In the 1997 Kyoto conference on climate change, developed countries agreed on specific targets

8 Prizzia Ross, *Sustainable Development in an International Perspective* 21(CRC Press, Boca Raton,2007)

9 "*Our Common Future,* the Brundtland Report ," World Commission on Environment and Development, (Oxford University Press,London, 1987)

10 J., Kirkby, P., O'keef, and L. Timberlake *Sustainable Development: The Earthscan Reader. (*London: Earthscan Publications,1995)

11 Vogler, John, *The International Politics of Sustainable Development* 435(Edward Elgar Publishing Limited, Cheltenham,2007)

12 Vogler, John, *The international politics of sustainable development* 436 (Edward Elgar Publishing Limited, Cheltenham, 2007)

13 The Rio Declaration on Environment and Development, often shortened to Rio Declaration, was a short document produced at the 1992 United Nations "Conference on Environment and Development" (UNCED), informally known as the Earth Summit. The Rio Declaration consisted of 27 principles intended to guide future sustainable development around the worlds.Some of the principles contained in the Rio Declaration may be regarded as third generation rights by European law scholars.

14 Agenda 21 is a non-binding, voluntarily implemented action plan of the United Nations with regard to sustainable development. It is a product of the UN Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, in 1992. It is an action agenda for the UN, other multilateral organizations, and individual governments around the world that can be executed at local, national, and global levels. The "21" in Agenda 21 refers to the 21st Century. It has been affirmed and modified at subsequent UN conferences.

for cutting their emissions of greenhouse gases, resulting in a general framework, which became known as the Kyoto Protocol. In September 2000 at the Millennium Summit held in New York, world leaders agreed on the *Millennium Development Goals*,[17] most of which have the year 2015 as a timeframe and use 1990 as a benchmark. These goals are both modest and ambitious. The Millennium Development Goals demonstrate that "the livelihoods and well-being of the world's poor are now conceptualized in terms of access to opportunity and absence of insecurity and vulnerability".[18] They represent a more practical expression of the principle of equilibrium between the economic, social and environmental pillars of sustainable development.

The World Summit on Sustainable Development (WSSD) in Johannesburg in 2002 was a landmark in the business of forging partnerships between the United Nations, governments, business and NGOs to gather resources for addressing global environment, health and poverty challenges.[19] Some authors consider the summit a "progress in moving the concept (of sustainable development) toward a more productive exploration of the relationship between economic development and environmental quality".[20]

The Johannesburg Conference confirmed a trend, which appeared since the 1992 Conference, of the increasing importance of the socioeconomic pillars of sustainable development. WSSD incorporated the concept of sustainable development throughout its deliberations and was initially dubbed "the implementation summit". Inevitably "demands for additional financial resources and technology transfer continued but much of the debate had already been pre-empted by the establishment of the Millennium Development Goals in 2000".[21]

United Nations Conference on Sustainable Development (UNCSD), or Earth Summit 2012[22] was the third international conference on sustainable development aimed at reconciling the economic and environmental goals of the global community, hosted by Brazil in Rio de Janeiro from 13 to 22 June 2012. The conference had three objectives:

1. Securing renewed political commitment for sustainable development
2. Assessing the progress and implementation gaps in meeting previous commitments.
3. Addressing new and emerging challenges.

15 The United Nations Commission on Sustainable Development (CSD) was established in December 1992 by General Assembly Resolution A/RES/47/191 as a functional commission of the UN Economic and Social Council, implementing a recommendation in Chapter 38 of Agenda 21, the landmark global agreement reached at the June 1992 United Nations Conference on Environment and Development/Earth Summit held in Rio de Janeiro.

16 *Supra* note-8

17 The Millennium Development Goals (MDGs) are eight international development goals that were officially established following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. All 189 United Nations member states and at least 23 international organizations have agreed to achieve these goals by the year 2015. The goals are:1.Eradicating extreme poverty and hunger, 2.Achieving universal primary education, 3. Promoting gender equality and empowering women,4.Reducing child mortality rates,5.Improving maternal health, 6.Combating HIV/AIDS, malaria, and other diseases,7.Ensuring environmental sustainability, and 8.Developing a global partnership for development. Each of the goals has specific stated targets and dates for achieving those targets.

The official discussions had two main themes: How to build a green economy[23] to achieve sustainable development and lift people out of poverty, including support for developing countries that will allow them to find a green path for development. The Rio+20 conference on sustainable development was the biggest UN conference ever and a major step forward in achieving a sustainable future – *the future we want*.[24]

The General Assembly, Recalling its resolution 64/236 of 24 December 2009, in which it decided to organize the United Nations Conference on Sustainable Development at the highest possible level in 2012, as well as its resolution 66/197 of 22 December 2011, endorsed the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want".

The primary result of the conference was the nonbinding document, "The Future We Want." In it, the heads of state of the 192 governments in attendance renewed their political commitment to sustainable development and declared their commitment to the promotion of a sustainable future. The document largely reaffirms previous action plans like Agenda 21.

Some important outcomes include the following:

- Green Economy and Eradication of Poverty.
- Ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.
- Need to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions.

18 *Supra* note- 11,p.194

19 The World Summit on Sustainable Development, WSSD or Earth Summit 2002 took place in Johannesburg, South Africa, from 26 August to 4 September 2002. It was convened to discuss sustainable development by the United Nations. WSSD gathered a number of leaders from business and non-governmental organizations, 10 years after the first Earth Summit in Rio de Janeiro. (It was therefore also informally nicknamed "Rio+10".)

20 Asefa, Sisay ,"The Concept of Sustainable Development: An Introduction",p.1, ESD (W.E. Upjohn Institute for Employment Research, Michigan, 2005)

21 Vogler, John, "*The international politics of sustainable development*,"p.439 (Edward Elgar Publishing Limited, Cheltenham.2007)

22 The United Nations Conference on Sustainable Development (UNCSD)2012, also known as Rio +20 , was a 20-year follow-up to the 1992 Earth Summit / United Nations Conference on Environment and Development (UNCED) held in the same city, and the 10th anniversary of the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg.

23 The green economy is one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities. Green economy is an economy or economic development model based on sustainable development and a knowledge of ecological economics. See; Brand, Ulrich (2012), "Green Economy - the Next Oxymoron? No Lessons Learned from Failures of Implementing Sustainable Development. GAIA 21(1): 28-35. http://www.ingentaconnect.com/search/article?option2=author&value2=Ulrich+Brand&sortDescending=true&sortField=default&pageSize=10&index=1

24 http://www.un.org/en/sustainablefuture/accessed on21/7/2014 / 12.04 pm

- Poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development.
- Need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting integrated and sustainable management of natural resources and ecosystems that supports, inter alia, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.
- To make every effort to accelerate the achievement of the internationally agreed development goals, including the Millennium Development Goals by 2015.(http://sustainabledevelopment.un.org/futurewewant.html)
- Sustainable development must be inclusive and people centred, benefiting and involving all people, including youth and children. We recognize that gender equality and women's empowerment are important for sustainable development and our common future. We reaffirm our commitments to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision-making.
- The attempt to shore up the UN Environment Programme (UNEP) in order to make it the "leading global environmental authority" by setting forth eight key recommendations including, strengthening its governance through universal membership, increasing its financial resources and strengthening its engagement in key UN coordination bodies.
- Nations agreed to explore alternatives to GDP as a measure of wealth that take environmental and social factors into account in an effort to assess and pay for 'environmental services' provided by nature, such as carbon sequestration and habitat protection.
- Recognition that "fundamental changes in the way societies consume and produce are indispensable for achieving global sustainable development." EU officials suggest it could lead to a shift of taxes so workers pay less and polluters and landfill operators pay more.
- The document calls the need to return ocean stocks to sustainable levels "urgent" and calls on countries to develop and implement science based management plans.
- All nations reaffirmed commitments to phase out fossil fuel subsidies.

The conceptual analysis identifies different concepts which together synthesize and assemble the theoretical framework of 'sustainable development'. Each concept represents distinctive

meanings and aspects of the theoretical foundations of sustainability. The concept of ethical paradox rests at the heart of this framework. The paradox between 'sustainability' and 'development' is articulated in terms of ethics. In other words, the epistemological foundation of the theoretical framework of sustainable development is based on the unresolved and fluid paradox of sustainability, which as such can simultaneously inhabit different and contradictory environmental ideologies and practices. Consequently, sustainable development tolerates diverse interpretations and practices that range between 'light ecology',[25] which allows intensive interventions, and 'deep ecology',[26] which allows minor interventions in nature.[27]

The concept of green economy focuses primarily on the intersection between environment and economy. Sustainable development emphasizes a holistic, equitable and far-sighted approach to decision-making at all levels.[28] It emphasizes not just strong economic performance but intragenerational and intergenerational equity.[29] It rests on integration and a balanced consideration of social, economic and environmental goals and objectives in both public and private decision-making. The concept of natural capital represents the material aspect of the theoretical world of sustainability. Natural capital represents the environmental and natural resource assets of development and preservation. The theoretical framework of sustainability advocates keeping the natural capital constant for the benefit of future generations.

The concept of equity represents the social aspects of SD. It encompasses different concepts such as environmental, social and economic justice, social equity, quality of life, freedom, democracy, participation and empowerment. Broadly, sustainability is seen as a matter of distributional equity, about sharing the capacity for well-being between current and future generations of people.

The concept of political global agenda represents a new worldwide political environmental discourse reconstituted around the ideas of sustainability. Since the Rio Summit, this discourse has extended beyond purely ecological concepts to include various international issues, such as security, peace, trade, heritage, hunger, shelter, and other basic services.

The concept of integrative management represents the integrative and holistic view of the aspects of social development, economic growth and environmental protection. According

[25] Light or Shallow ecology has a shallow outlook on the environment and believes that we should only do something if it is for our interests, for example, we should save ecosystems but only if they are of value to us. The view is completely self-centred. It suggests an anthropocentric approach to ecology and sees environmental issues in terms of human-centred reforms rather than any deep change in relationships between humans and the Earth. The term 'light green' has been applied to the beliefs of so-called shallow ecologists. Shallow ecologists believe that different aspects of the natural world are interconnected, so the way that we treat nature should take this into account. Subsequently, they believe that the existing political and economic structures must be transformed so that they place environmental issues at the centre of their concerns. They believe that ecology is largely scientific in nature. Shallow ecologists place humans on a higher level than the rest of the Earth.(Naess, Arne(1973) 'The shallow and the deep, long-range ecology movement. A summary', Inquiry, 16: 1, 95 — 100 URL: http://dx.doi.org/10.1080/00201747308601682)

to the theoretical world of sustainability, the integration of environmental, social, and economic concerns in planning and management for Sustainable Development is essential. It is believed that in order to achieve ecological integrity, *i.e.* to preserve the natural capital stock,[30] we need integrative and holistic approaches to management.

The concept of eco-form represents the ecologically-desired form of urban spaces and communities. This concept represents the desired spatial form of human habitats: cities, villages and neighbourhood. 'Sustainable' design aims to create eco-forms, which are energy efficient and designed for long life. Its common principles could be explained through the concept of 'time-space-energy compression,[31] which requires reductions in time and space in order to reduce energy usage.[32]

Sustainable Development in India

In India, post Stockholm and particularly, post Rio, a plethora of laws has been enacted and implemented pertaining to the three pillars of sustainable development. The Bhopal disaster of 1984 is a landmark in the evolution of jurisprudence in this regard. The Indian Supreme Court has in a number of cases held that environmental principles enshrined in international conventions and treaties are an intrinsic part of the municipal laws of the country.

The modern legal framework governing the environment in India came largely in the wake of the Stockholm Conference of 1972, which required states to adopt measures to protect and improve the environment. Post Stockholm, the 42nd amendment to the Constitution of India was made in 1976. Through this amendment, Article 48A was incorporated, whereby protection and improvement of the environment and the safeguarding of forests and wildlife became a part of the Directive Principles of State Policy. A Fundamental Duty was thrust upon citizens of the country to 'protect and improve the natural environment, including forest, lakes, rivers and the wildlife, and to have compassion for living creatures'.[33] While lacking the enforceability of other constitutional provisions and being largely of a prescriptive

[26] Deep ecology is a contemporary ecological and environmental philosophy characterized by its advocacy of the inherent worth of living beings regardless of their instrumental utility to human needs, and advocacy for a radical restructuring of modern human societies in accordance with such ideas. Deep ecology argues that the natural world is a subtle balance of complex inter-relationships in which the existence of organisms is dependent on the existence of others within ecosystems. Human interference with or destruction of the natural world poses a threat therefore not only to humans but to all organisms constituting the natural order. Deep ecology's core principle is the belief that the living environment as a whole should be respected and regarded as having certain legal rights to live and flourish. It describes itself as "deep" because it regards itself as looking more deeply into the actual reality of humanity's relationship with the natural world arriving at philosophically more profound conclusions than that of the prevailing view of ecology as a branch of biology. The movement does not subscribe to anthropocentric environmentalism (which is concerned with conservation of the environment only for exploitation by and for human purposes) since Deep ecology is grounded in a quite different set of philosophical assumptions. Deep ecology takes a more holistic view of the world human beings live in and seeks to apply to life the understanding that the separate parts of the ecosystem (including humans) function as a whole. This philosophy provides a foundation for the environmental, ecology and green movements and has fostered a new system of environmental ethics advocating wilderness preservation, human population control and simple living. (*Supra* note-25)

nature, the Supreme Court in several cases has increasingly upheld the principles enshrined in Article 48A[34] and as complementary to the Fundamental Rights.[35]

The cumulative effect of Articles 48A and 51A (g) seems to be that the state as well as the citizens are now under constitutional obligation to conserve, protect and improve the environment, with every generation owing a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way.[36] In the wake of the Stockholm Declaration, India also enacted primary environmental legislation across a number of important sectors. The Wildlife (Protection) Act of 1972 is a comprehensive legislation for the protection of wild animals, birds and plants and also lays down the law for the setting up of protected areas—sanctuaries, national parks and closed areas. The Water (Prevention and Control of Pollution) Act, 1974 has as its aim the prevention and control of water pollution and of restoring the wholesomeness of water quality. The Water (Prevention and Control of Pollution) Cess Act of 1997 sought to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. The Forest Conservation Act 1980 strictly restricts and regulates the dereservation of forests or use of forest land for non-forest purposes without prior approval of central government. The Air (Prevention and Control of Pollution) Act, 1981 provides for the prevention, control and abatement of air pollution and explicitly states in its Preamble that the Act represents an implementation of the decisions taken at Stockholm. As a response to the Bhopal disaster of 1984, environmental jurisprudence in India reached a new high, owing largely to judicial activism, new interpretation of existing legislation, amendments and procedural laws and new legislation. The Air (Prevention and Control of Pollution) Act, 1981 went through a major amendment in 1987. A key legislation of this period is the Public Liability Insurance Act, 1991 that has been enacted to provide for immediate relief to persons affected by accidents from handling of notified hazardous substance, on a 'no fault basis'. It is mandatory for industries involved in operation or processes of hazardous

27 Jabareen, Yosef, "A New Conceptual Framework for Sustainable Development", 10 *EDS*, 179-92 (Published online: 9 July 2006_ Springer Science+Business Media B.V. 2006)

28 http://www.uncsd2012.org/index.php?menu=62#sthash.xQk0l2DN.dpuf

29 Intragenerational equity is concerned with equity between people of the same generation. This is separate from intergenerational equity, which is about equity between present and future generations. Intragenerational equity includes considerations of distribution of resources and justice between nations. It also includes considerations of what is fair for people within any one nation. *Intergenerational equity* in economic, psychological, and sociological contexts, is the concept or idea of fairness or justice in relationships between children, youth, adults and seniors, particularly in terms of treatment and interactions. It has been studied in environmental and sociological settings. (Foot, D. & Venne, R. (2005) "Awakening to the Intergenerational Equity Debate in Canada.")

30 Natural capital is the extension of the economic notion of capital (manufactured means of production) to goods and services relating to the natural environment Natural capital is thus the stock of natural ecosystems that yields a flow of valuable ecosystem goods or services into the future. For example, a stock of trees or fish provides a flow of new trees or fish, a flow which can be indefinitely sustainable. Natural capital may also provide services like recycling wastes or water catchment and erosion control. Since the flow of services from ecosystems requires that they function as whole systems, the structure and diversity of the system are important components of natural capital." The Encyclopaedia of Earth, (See. http://www.eoearth.org/article/Natural_capital)

substances in quantities notified under the Act to take Public Liability Insurance cover for immediate relief to victims or damage to property, on a scale prescribed in the Schedule to the Act. Also, the National Environment Tribunal Act, 1995 and the National Environment Appellate Authority Act, 1997 were enacted during this time to give effect to the Rio Declaration's call upon States to develop national laws regarding liability and compensation for the victims of pollution and other environmental damages. These have been subsequently repealed and replaced by the new National Green Tribunal Act of 2010. The Environment (Protection) Act was enacted in 1986 as an umbrella legislation with three fold objectives—(i) protection of the environment (ii) improvement of environment and (iii) prevention of hazards to human beings, other living creatures, plants and property. Within the broad framework of this Act, a series of rules, notifications and other secondary legislation have been enacted in a number of areas. The Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-Organisms Genetically Engineered Organisms or Cells Rules, 1989 were enacted under the Environment Protection Act. The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996 were also notified under the Environment Protection Act. Rules formulated under the Environment (Protection) Act also sought to arrest pollution at source, ensure that the polluter pays and involve the public in decision-making. Under the Environment (Protection) Act, the Central Government through a notification in 1991 declared coastal stretches as coastal regulation zone (CRZ) where activities connected with the setting up and expansion of industries, operations or processes etc. are to be regulated. The Environmental Impact Assessment (EIA) Notification, 1994 under the EPA made an EIA mandatory for 29 different activities, which was earlier necessary only for mega projects undertaken by the government and PSUs. A major amendment to the EIA notification was made in 2006 making an EIA mandatory for environmental clearance for a number of activities and industries and lay down procedure that requires public participation in the process . There have been a number of amendments to the EIA Notification, 2006 with the latest amendment in 2009. Other important legislation pertaining to the environment includes the Motor Vehicles Act, 1988, which recognizes the need to arrest vehicular pollution. The Bio-Medical Waste (Management and Handling) Rules were notified in 1998. Post Rio, environmental principles, such as precautionary principle, polluter pays principle, public trust law doctrine, inter-generational equity and absolute liability came to be accepted in India as part of Article 21 (Right to Life) in a number of judicial pronouncements by the Supreme Court.[37]

31 Time-space compression refers to the set of processes that cause the relative distances between places (i.e., as measured in terms of travel time or cost) to contract, effectively making such places grow "closer." (Decron, Chris. *Speed-Space*. Virilio Live. Ed. John Armitage. London: Sage, pp 69–81,2001)

32 *Supra* note-27

33 Article 51A (g),The Constitution of India

34 *M C Mehta* v. *Union of India*, AIR 1988 SC 1037.

35 *Somprokash Rekhi* v. *Union of India* AIR 1981 SC 212.

36 *State of Tamil Nadu* v. *Hind Store*, AIR 1981 SC 711.

37 *Indian Council for Enviro-Legal Action* v. *Union of India* (AIR 1996 SC 1446), *Vellore Citizens' Welfare Forum* v. *Union of India* (AIR 1996 SC 2715)).

Legislation enacted post 1998 and amendments to existing legislation, done to achieve compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) have also sought to incorporate principles of the Convention on Biological Diversity (CBD), such as conservation of bio-resources, access and benefit sharing, rights of indigenous communities, local producers and farmers. In fact, achieving TRIPS – CBD reconciliation has been the focus of many of India's submissions at the TRIPS Council. The Biological Diversity Act, 2002 and the Rules framed under it seeks to give effect to the two key principles of the Convention on Biological Diversity: the sovereign right of countries of origin over their genetic and biological resources and the acceptance of the need to share benefits flowing from commercial utilization of biological resources with holders of indigenous knowledge. The Patents (Amendment) Act of 2005 has a provision to prevent misappropriation of indigenous knowledge of communities by making it non patentable. It also mandates disclosure of the geographical origin of biological resources used in the invention. The Protection of Plant Varieties and Farmers' Rights Act, 2001, while seeking to protect the rights of plant breeders, as mandated under TRIPS has, in an innovative fashion, managed to provide 'rights' to the Indian farmer. In fact, it is the only legislation in the world, which accords comprehensive rights to the Indian farmer in recognition of his contribution to agro-diversity and plant breeding.

The Geographical Indications of Goods (Registration and Protection) Act, 1999 facilitates protection of the collective rights of the rural and indigenous communities in their unique products. A number of laws have also been enacted in the economic domain. Post liberalization of the Indian economy in the early 1990s, there was recognition of the need to regulate as well as develop foreign trade in India, leading to the Foreign Trade (Development and Regulation) Act, 1992. The Competition Act, 2002 seeks to prevent anti-competitive practices and to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. Reducing fiscal deficit is the goal of the Fiscal Responsibility and Budget Management Act, 2003. Equity and inclusiveness in economic development is the principle governing the Micro, Small and Medium Enterprises Development Act, 2006 designed with the objective to develop these industries as 'engines of inclusive growth and development'. This period also continued to be characterized by priority to environmental concerns and saw a number of secondary legislations being framed under the Environment Protection Act, including the Municipal Solid Wastes (Management and Handling) Rules, 2000; the Recycled Plastics Manufacture and Usage Rules, 1999; the Manufacture, Storage and Import of Hazardous Chemical (Amendment) Rules, 2000; the Batteries (Management and Handling) Rules, 2001; the Ozone Depleting Substances (Regulation and Control) Rules, 2000; and a series of notifications delegating power to state River Conservation Authorities to deal with water pollution. The Noise Pollution (Regulation and Control) Rules, 2000 were notified under the Environment (Protection) Act. Recognizing the need for efficient use of energy and its conservation, the Energy Conservation Act, 2001 was enacted, which provided for the setting up of the Bureau of Energy Efficiency, with the primary objective of reducing energy intensity of the Indian economy. The Electricity Act of 2003 has tried to ensure

better coordinate development of the power sector in India, seeking, among other objectives, to promote efficient and environmentally benign policies. It also contains key provisions relating to renewable energy. Balancing of the needs of forests and development, with compensatory afforestation (CA) being an important mechanism to compensate for forests cleared for development purposes developed as a consequence of the Supreme Court (SC) order dated October 2002 in T N Godavarman v. Union of India,[38] mandates providing a comprehensive scheme, while seeking approval for proposals of de-reservation or diversion of forest land for non-forest uses. On 30 October 2002, in the T N Godavarman case, the Apex court passed an order for the creation of a Compensatory Afforestation Management and Planning Agency (CAMPA), to which funds received by states and union territories towards compensatory afforestation and penal compensatory afforestation, based on net present value were to be transferred. In 2004, CAMPA was established. The Compensatory Afforestation Fund comprises all the funds mentioned above, unspent balance of the same with state governments, net present value and other money recoverable pursuant to SC orders.

Post Rio, an active civil society and pro-active government has played a key role in the enactment of landmark legislation, which seeks to establish a legal regime that is socially just and equitable and in certain instances, has even gone beyond Rio principles. This right based approach gained particular momentum with the enactment of the Right to Information Act in 2005. The rights of the traditional forest dwellers have been codified in the Forest Rights Act, 2006. Through amendments in 1991, the Wildlife (Protection) Act, 1972, enacted with the objective of protecting wildlife through creation of inviolate protected areas, has sought to provide an exemption for the activities of the Scheduled Tribes dependent upon forests. The amended Wildlife (Protection) Act, 2002 seeks to provide for participatory management of the buffers around the National Parks and Sanctuaries and introduces the concept of 'Community Reserves'. The Panchayats Extension to Scheduled Areas Act, 1996, has sought to facilitate the establishment of a decentralized structure of governance in the Scheduled Areas, conferring radical governance powers to the tribal community. It acknowledges the competence of the Gram Sabha, the formal manifestation of a village community, to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. The Right to Information Act, 2005 enacted with the objective to promote transparency and accountability in the working of public authorities, empowers the ordinary citizen of the country to play an important role in establishing good governance and functional democracy in the country.

This period has also seen a continued focus on the environment with the Environment Impact Assessment Notification of 2006, and the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 being notified under the Environment (Protection) Act. E-Waste (Management and Handling) Rules, 2011 have been framed under the EPA, with the objective of ensuring the environmentally sound management of all types of e-waste and to enable the recovery and/or reuse of useful material from e-waste. The National Green Tribunal Act of 2010 seeks to give effect to the promise made

[38] AIR 1998 SC 769; AIR 2005 SC 4256

at Rio and to provide for the effective and expeditious disposal of cases related to environmental protection, forests and natural resources and provide relief and compensation for damages. The Act lays the framework for the setting up of a dedicated environmental dedicated adjudicatory forum – the National Green Tribunal for the same.

In pursuance of Rio+20 India launched the Twelfth Five Year Plan whose explicit theme was a 'faster, more inclusive and sustainable growth' process. It was the first time that a five year plan had sustainability as a prominent focus. The Twelfth Plan outlined lower carbon growth strategies adding momentum to the ongoing policies and programmes of the government on environment and climate .With these developments, it is clear that sustainable development and climate change issues are being addressed on a priority basis.[39]

India has a plethora of laws, which deal with the three pillars of sustainable development—environment, social and economic (including trade and IPR legislation). Most of these show a high degree of integration or interrelationship between the different pillars of sustainable development, an important feature of sustainable development law. While there has been remarkable progress in Indian legal provisioning on sustainable development, a few challenges continue to exist particularly with respect to implementation.[40]

Conclusion

While sustainable development is intended to encompass three pillars, over the past 20 years it has often been compartmentalized as an environmental issue. It is generally accepted that sustainable development calls for a convergence between the three pillars of economic development, social equity, and environmental protection. Sustainable development is a visionary development paradigm; and over the past 20 years governments, businesses, and civil society have accepted sustainable development as a guiding principle, made progress on sustainable development metrics, and improved business and NGO participation in the sustainable development process. Yet the concept remains elusive and implementation has proven difficult. While sustainable development is intended to encompass three pillars, over the past 20 years it has often been compartmentalized as an environmental issue.

Moving to new path of green economy will require taking *sustainable development out of the environment "box"* and considering wider social, economic, and geopolitical agendas. Many of the needed decisions and actions will take place outside the environment community in the fields of energy, security, trade and investment, and development cooperation.[41] It will mean breaking down the silos between ministries and looking at "growth" in an integrated perspective. It is undeniable that the concept of "sustainable development" received higher

39 http://indiabudget.nic.in/es2012-13/echap-12.pdf, accessed on 10.06.2014 at 2pm

40 "*Sustainable Development in India: Stocktaking in the run up to Rio+20*" Report MOEF,2011, Prepared and published by TERI (The Energy and Resources Institute), New Delhi.

41 " Sustainable Development: From Brundtland to Rio 2012" Background Paper prepared for consideration by the High Level Panel on Global Sustainability at its first meeting, 19 September 2010 September 2010 United Nations Headquarters, New York Prepared by John Drexhage and Deborah Murphy, International Institute for Sustainable Development (IISD). http://www.un.org/wcm/webdav/site/climatechange/shared/gsp/docs/GSP1 6_Background%20on%20Sustainable%20Devt.pdf

currency and prominence after the publication of the *World Conservation Strategy* of IUCN (1980) and the report of WCED (1987), *Our Common Future*. Since 1987, the world and the humanity have changed a lot and now the development defined by Brundtland Report is no longer sustainable because the environmental, social and economic impacts that the meeting of our needs is carrying. A new sustainable development definition is required that takes into account the sustainable use of resources. A new definition could chart a development path that truly is concerned with equity, poverty alleviation, reducing resource use, and integrating economic, environmental, and social issues in decision making.

DIMINISHED RIGHTS OF CHILDREN OF IMPRISONED MOTHERS: NEGATION OF CONVENTION OF RIGHTS OF CHILD

Namita Vashishtha*

INTRODUCTION

The legal rights of children under international law have been developing since 1919, with both regional and global treaties safeguarding their interests. Yet many of these rights, enshrined in the Convention on the Rights of the Child and other texts, are put at risk when a parent is imprisoned. The child's rights to survival and development can be hampered both by their incarceration with an imprisoned parent and by being deprived of contact with a parent, as the forcible family separation that often accompanies imprisonment impacts on the child's right to the care and company of their parents.[1]

It is estimated that 9.25 million people are imprisoned throughout the world.[2] Such imprisonment affects both the lives of those within the prison walls and those beyond. There is, in particular, a dearth of legislation and empirical research on the effects of incarceration on the children of prisoners, referred to by Roger Shaw as *the orphans of justice*.[3]

The following dilemma presents itself: what should be done with the millions of children facing a situation in which one or both parents are imprisoned? This dilemma was articulated in a report published by the Parliamentary Assembly of the Council of Europe, which found that "prisons do not provide an appropriate environment for babies and young children, often causing long term developmental difficulties. Yet if babies and children are forcibly separated from their mothers, they suffer permanent emotional and social damage."[4]

Will Richardson[5] said

> *"In your untapped potential lies the power to create the future.*
> *But first you have to choose the future."*

Nobody can deny the fact that children are our future and it is our responsibility to nourish

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1 Jean Tomkins "Orphans of Justice- In Search of Best Interest of the Child When the Parent is Imprisoned: A Legal Analysis" *Human Rights and Refugees Publications QUNO* (2008)

2 World Prison Population List. The list was first published in 1999 by the Research, Development and Statistics Directorate of the Home Office of the UK as Research Findings No. 88 by Roy Walmsley. The seventh edition was published in 2006. The World Prison Brief, a comprehensive database of information on the prison systems of the world, developed out of this list and is available atwww.prisonstudies.org. It is produced by the International Centre for Prison Studies, King's College, University of London.

3 Roger Shaw, *Fathers And The Orphans of Justice*, 41-48 (Routledge, London, 1992)

4 Parliamentary Assembly of the Council of Europe (2000) Doc. 8762: Mothers and babies in prison, available at http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8762.htm, (accessed 10 February 2014)

5 Will Richardson, Educator, Blogger and Author of Why School? How Education Must Change When Hearing And Information are Everywhere, 2012.

the same. What is worrisome is that a substantial number of 'our future' is languishing in jails for no crimes. These are children leading deplorable lives inside jails not only in India but all over the world. And they are not there because of their own delinquent activities but because their mothers are locked in those jails. Millions of children worldwide are affected by having a parent in prison. Incarceration of either parent particularly mother adversely affects a child and may hinder his growth physically as well as mentally. When adults dread prisons imagine what would be the effects on a child when he is put behind these walls for crimes committed by the mothers. Are we suppose to treat them like this only and is it really necessary to send them along with their mothers and if yes, then how do we ensure that they remain unaffected by the tough and dreading conditions inside the jails. There are answers and so many that we need to find. interaction

It was proclaimed that motherhood and childhood are entitled to special care and assistance and it is their right to have an adequate standard of living for their health and well-being.[6] It also states that human beings are born free; having right to life and liberty as well as the right not to be subjected to torture or to cruel inhuman or degrading treatment or punishment and these basic rights are recognised as legally binding International Human Rights Convention.[7]

For small and dependent children the deprivation of liberty of the main care giver has adverse effects on their lives and on the enjoyment of their basic human rights- all fundamental human rights given in the almost universally ratified Convention on the rights of the child, adopted by the United Nation General Assembly on 20th November, 1989.[8]

INTERNATIONAL LEGAL FRAMEWORK

Children's rights have been a part of the human rights discourse since 1919, when the International Labour Organisation produced a number of conventions relating to labour standards for working children. However, generally applicable rights for children only began to gain widespread recognition following the Geneva Declaration of the Rights of the Child, adopted by the League of Nations in 1924. Notwithstanding the ideological differences between those rights and the rights recognised and championed worldwide today, the 1924 Declaration served as an important foundation for children's rights. These were further developed in 1959 through the United Nations Declaration of the Rights of the Child.

These early provisions were protectionist and welfare orientated in character. The tone of the rights was that the child was "not in a position to exercise his own rights; adults exercised them in place of the child and in doing so were subject to certain obligations. Thus it could be said that a child had special legal status resulting from his inability to exercise his rights."[9] Illustrative of such an approach to children's rights was a judgment delivered in the 1979 Irish case of the *State (M)* v. *The Attorney General*.[10] Here, the Irish Supreme Court

6 Article 25, Universal Declaration on Human Rights (UDHR).

7 *Id.* Articles 1,3 and 5.

8 Somalia has signed but not ratified the convention.

9 French delegate to the Commission on Human Rights in 1959, as quoted in Philip Veerman, *The Rights of The Child and The Changing Image of Childhood* 164 (Dordrecht, 1992)

10 (1979) I.R. 73.

recalled that "the courts have consistently construed the right of liberty of [a child], as being a right which can be exercised not by its own choice (which it is incapable of making) but by the choice of its parent, parents or legal guardian, subject always to the right of the courts in appropriate proceedings to deny that choice in the dominant interest of the welfare of the child".[11]

Subsequently, however, the rights of the child gradually evolved towards empowering the child. In particular, the 1989 Convention on the Rights of the Child (CRC) signals a clear move towards recognising that the child is an active holder of rights and not merely a passive object of the rights bestowed upon her or him.

The Committee on the Rights of the Child noted, in General Comment 5, that active participation is one of the four general principles of the Convention.[12] Furthermore it stated that the implementation of Article 12 is an integral part of the implementation of the other articles, as well as a free-standing right of the child.[13] It requires States Parties to ensure, where a child is capable of forming her or his own views, that the child may express those views freely in all matters that may affect her or him and that those views are given due weight in accordance with the age and maturity of the child. Article 12 is illustrative of the fundamental shift in the ideology of the rights of the child over the seventy-five years of its development. The Committee found that the basis of the rights of the child turned on the rights of children to speak, to participate and to have their views taken into account. Central to this right was what the Committee referred to as *a new social contract,* where children are fully recognised as rights holders entitled to receive protection, but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights holders.[14]

There is a dearth of legal provisions specifically addressing the needs of children whose parents have been imprisoned. An exception to this legislative deficit is the African Charter on the Rights and Welfare of the Child, Article 30(1) of which expressly provides for children of imprisoned mothers. The provision requires that non-custodial sentences always be considered first and that alternatives be established and promoted. In particular, Article 30(1) (f) states: "the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation". Other regional instruments remain silent on this issue. The result of this silence is that courts have been required to adapt and apply legal provisions of a more general nature when examining the rights of children in any given case.[15]

11 *State (M)* v. *The Attorney General* [1979] IR 73

12 Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, p.4. The Committee on the Rights of the Child highlights four general principles that can be distilled from the CRC. These are: firstly, *the right to life, survival and development*; secondly, *the best interests of the child*; thirdly, *participation*; *and fourthly, non-discrimination*.

13 Committee on the Rights of the Child, Final Recommendations after the Day of General Discussion on the Right to be Heard, September 2006

14 Committee on the Rights of the Child, the Preamble of the Final Recommendations after the Day of General Discussion on the Right to be Heard, September 2006, also emphasised in Committee on the Rights of the Child, General Comment No. 12, CRC/C/GC/12, para.2

15 *Id.* at para1

Although the CRC is the primary source for children's rights in international human rights law, it is not the only one. The Committee on the Rights of the Child noted that the Convention "reflects a holistic perspective on early childhood development based on the principles of indivisibility and interdependence of all human rights".[16] The wealth of international treaties, agreements and conventions all apply to children. The Human Rights Committee's General Comment No. 17 on Article 24 of the International Covenant on Civil and Political Rights (ICCPR) notes that children benefit from all of the civil rights recognised in the Covenant by virtue of their being individuals.

There are numerous instruments recognising and securing the rights of individuals deprived of liberty. These instruments exist on an international, regional and national level, in the form of declarations, agreements and conventions. The preamble of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty (Inter-American Principles) notes the precarious situation of those detained in prisons and the critical conditions endured. Principle X provides that

> *"Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, paediatric, and nutritional services, in order to protect the best interest of the child".*

A recent Indian Supreme Court judgment[17] outlined similar recommendations regarding educational facilities and nutritional provisions for children living in prisons with their parents. Principle XVIII of the Inter-American Principles also provides for maintaining regular contact with the families and children of parents who are separated as a result of a custodial sentence. However there has been little by way of practical application and implementation of measures to protect the rights of children in prison with their parents, or those that maintain contact through visits and correspondence.

The Committee on the Rights of the Child highlights four general principles that can be distilled from the CRC. These are: firstly, *the right to life, survival and development*; secondly, *the best interests of the child*; thirdly, *participation*; *and fourthly, non-discrimination*.[18]

General Principles of Convention on Child Rights

1. *The right to life, survival and development*

Article 6(1) of International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the CRC recognise children's right to life, survival and development. An observer from

16 Committee on the Rights of the Child, Day of Discussion on Implementing Child Rights in Early Childhood. 17 September 2004, para.1

17 *R D Upadhyaya* v *State of AP* 2006 (4) SCALE 336

18 *Supra* note 12 at paras.3-5

the World Health Organisation explained that the term "survival" in this context includes growth monitoring, oral rehydration and disease control, breastfeeding, immunisation, child spacing, food and female literacy.[19] Article 6(1) of the CRC provides that the child has the inherent right to life and that States Parties shall ensure, to the maximum extent possible, the survival and development of the child. The use of the word "inherent" denotes that it is not a right bestowed upon the individual by society but rather an existing right that society is under an obligation to protect.[20] Articles 6(1) and 6(2) are rights that are interrelated, interdependent, and connected to and defined by the other rights articulated by the CRC.[21] The right to life is evidently a fundamental human right, without which all the other rights in the CRC become meaningless.[22] This inherent right to life, as recognised in the ICCPR, is further elaborated upon by the CRC. The State has a positive obligation not only to protect the life of the child but also to provide adequate resources to ensure the child's survival and development.

Many international and regional human rights instruments give specific protection to pregnant women imprisoned or in danger of being executed. This applies both in International Human Rights Law and in International Humanitarian Law. Article 76(3) of Additional Protocol 1 to the Geneva Conventions of 1949 prohibits the execution of pregnant women and mothers with infants and young children. Article 6(5) of the ICCPR provides that pregnant women must not be sentenced to death. In Europe, Article 1 of the Thirteenth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[23] and Article 2 of the Charter of Fundamental Rights of the European Union[24] formally abolish the death penalty, thereby making redundant any special recognition of pregnant women or women with dependents in this respect. Article 7(2) of the Arab Charter on Human Rights[25] similarly provides that a pregnant woman or nursing mother shall not be executed. Finally, Article 4(5) of the American Convention on Human Rights[26] prohibits the capital punishment of pregnant women. These rights, designed to protect expectant mothers or mothers of infants, recognise the inherent right to life of the child that is expressed in Article 6(1) of the CRC. It is, however, interesting to note that during the negotiations government delegates expressly requested that debate be avoided concerning the moment at which life begins.[27]

Article 19 of the CRC obliges States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

19 Sharon Detrick, *The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires'* 122 (Dordrecht:Nijhoff, 1992)

20 Sharon Lynn Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* 126 (Kluwer Law International, 1999)

21 Manfred Novak, *Article 6 – The right to life, survival and development* 13-14 (Leiden: Nijhoff, 2005)

22 *Id.*

23 The Convention entered into force on 3 September 1953.

24 It was proclaimed on 7 December 2000 by the European Parliament but came into force with the Treaty of Lisbon on 1 December 2009.

25 Adopted by the Council of the League of Arab States on 22 May 2004.

26 It was adopted by many countries in the Western Hemisphere San José, Costa Rica, on 22 November 1969. It came into force after the eleventh instrument of ratification (that of Grenada) was deposited on 18 July 1978.

27 Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1988/28, para.18

Furthermore, Article 20 calls on States to ensure that any child deprived of her or his family environment is protected and provided for by the State. Articles 32 to 38 also include safeguards, such as Article 33, which protects the child from the illicit use and trafficking of narcotic drugs.

The Committee on the Rights of the Child has noted that the right to development under theCRC was to be defined in a similar way as human development is defined in Article 1 of the UN Declaration on the Right to Development 1986.[28] This right to development entails a comprehensive process of realising children's rights to allow them to "grow up in a healthy and protected manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities."[29] The Committee also found that the term "development" should be "interpreted in a broad sense, adding a qualitative dimension: not only physical health is intended, but also mental, emotional, cognitive, social and cultural development".[30]

Now in the case of children whose parents, particularly mothers, are imprisoned, there are various risks to the right to education provided for by Article 26 of the Universal Declaration of Human Rights (UDHR), Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Articles 28 and 29 of the CRC merit consideration. As all these rights are interdependent violation of any of them also infringes the others including right to development. Therefore, the CRC calls upon States Parties to respect the parents' role as primary carers of the child, provided that the environment is such that it is suitable for the child to realise her or his full potential. Also the relationship of the child with her or his parent is essential to develop the child's sense of security and place in society. Therefore, forcibly separating the child from her or his parents may negatively impact upon the child's social development.

2. *The right to the company of parents, family and society: Best Interests Principle*

The best interests principle features in many international conventions and declarations. This principle is the lens though which all other rights are viewed.[31] Yet it is in the CRC where the principle is both a right in itself and one through which the other rights are viewed and interpreted. Article 5(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides that in the "upbringing and development of their children … the interest of the child is the primordial consideration in all cases". Article 16(d) of CEDAW specifies that in all matters relating to marriage and family relations, it is the interests of the child that are paramount. Furthermore, Alston notes that although the phrase does not appear in the ICCPR, the Human Rights Committee refers to the paramount interests of the child in two General Comments.[32] The application of the principle

28 Manfred Nowak, *Article 6 – The Right To Life, Survival And Development* 2 (Leiden: Nijhoff, 2005)

29 *Ibid.*

30 Office of the High Commissioner for Human Rights, Fact sheet No. 10, available at http://www.unhchr.ch/html/menu6/2/fs10.htm (accessed february 2014)

31 Philip Aston, "The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights" 8 *IJLPF* 5 (1994)

32 *Id.* at 4

internationally is indicative of its wide acceptance.[33]

The primary source for the best interests principle is Article 3(1) of the CRC. But the principle is referred to in numerous other provisions within the Convention. Article 9 provides that where the child is separated from the parent, it must be in the best interests of the child. Article 20 states thet where it has been found to be in the best interests of the child to remove the child from the home environment, the child is entitled to special protection by the state. Article 18 sets outs that both parents are responsible for the upbringing and development of the child, and that their basic concern must be the best interests of the child.

Article 3, comprising three sections, is the key provision regarding the best interests principle. It has been referred to as an "umbrella" provision, one used to "support, justify, or clarify a particular approach to issues arising under the Convention."[34] It reads as follows:

> Article 3
>
> *(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
>
> *(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures*
>
> *(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

One must assess, however, whether the imprisonment of one or both parents does indeed *concern* the child for the purposes of Article 3(1). The wording once again becomes relevant. How broadly or narrowly should the term "concerning" be construed? Article 3 should be broadly interpreted so that "concerning" includes any act affecting or impacting upon children. The next provision Article 3(2) The provision caters for children in particularly difficult circumstances. Freeman cites the plight of street children as an example of a vulnerable category of children to whom the State has a duty of protection.[35]It is submitted that children whose parents are in prison are a further example of such a category. Article

[33] *K and T v Finland* (2000) ECHR 174
[34] *Supra* note 19
[35] Freeman, Michael, *Article 3: The Best Interest of the Child 66-67* (Doredrecht:Nijhoff, 2007)

3(3) of the CRC obliges States to ensure that all facilities and institutions responsible for the care of children are of an adequate standard. This provision, though lacking in detail, is of particular importance with respect to children whose parents are in prison. Courts and other relevant bodies should have regard to the provisions of Article 3(3) when deliberating on whether a child should remain with the parent in prison or be separated from the parent and provided with alternative care. Those charged with the care of children, whether they are staff in prisons in the former case, or guardians/alternative carers and childcare workers in the latter, must be suitably trained and competent to provide the necessary care to safeguard the well-being of the child.[36]

The fact that Article 3 of the CRC fails to define exactly what is considered to be the best interests of the child may at first sight seem to be a considerable failure, given that the best interests of the child is a primary consideration through which the rights of the child are assessed.Thus the best interests principle seems to safeguard the child's development while recognising the cultural differences that may exist. John Eekelaar describes the best interests principle as related to realising one's life chances.[37]

In a landmark case, the South African Constitutional Court, Justice Sachs is illustrative of the challenges courts are confronted with when interpreting broad principles: "*Once more one notes that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus the concept of 'the best interests' has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it.*"[38]In Canada, the Supreme Court noted that while the best interests of the child was an established legal principle in both international and domestic law, it was not so fundamental to the dispensation of justice that it should trump all other considerations.[39]

The courts in the UK have found that the judge must act not *qua* judge but rather as the prudent parent acting with regard to her or his own child.[40] The best interests principle has been referred to as the "golden thread running through the court's jurisdiction".[41]

It is a well known fact that he best interests of the child can be best protected by the family only. The right of the family to privacy free from interference by the State, as provided for *inter alia* under Articles 17, 23 and 24 of the ICCPR, recognises the importance of the family as an institution. It is problematic that by the use of custodial sentences the State impinges on the very institution that it is obliged to protect and limits some of the most fundamental and basic rights that would otherwise be accorded to families.

[36] *Ibid.*
[37] John Eekelaar, "The Interest of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" 8 *IJLPF* 16-17 (1994)
[38] *S v M* (CCT 53/06) (2007) ZACC 18 (26 September 2007), at para.23
[39] *Canadian Foundation for Children, Youth & the Law v Attorney General & Ors.* Canadian Supreme Court (30 January 2004)
[40] *R v Gyngall* (1893) 2 QB 232 3; Re O'Hara (1900) 2 IR 232
[41] Richard Volger, "The child, the imprisoned parent and the law" in Shaw, Roger (ed.), *Prisoners' Children: What are the Issues?* 101 (London: Routledge, 1992)

The importance of the right of the child to the care and company of her or his family is reflected in its universal recognition. The right is contained in international conventions, specifically in Article 9 of the CRC, as well as in regional instruments, namely Article 19 of the American Convention on Human Rights (ACHR), which implies the right of the child to be part of a family, Article 16 of the Additional Protocol to that Convention and Article 19 of the African Charter on the Rights and Welfare of the Child.[42]

The fundamental right of the child to the care and the company of her or his family was examined in the Irish Supreme Court case of *Re J.H., an infant*. Here, the Chief Justice, referring to the Irish Constitution, noted that it was a right to "belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law".[43]

The African Charter on the Rights and Welfare of the Child mirrors, to a certain extent, the right contained in the CRC under Article 9 and provides that "*the child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determined in accordance with the appropriate law, that such separation is in the best interest of the child.*" The UN Standard Minimum Rules for the Treatment of Prisoners (SMRs) note that where nursing infants are allowed to remain in the prison with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers. However, as with much of the SMRs, the provisions are limited both in precision and in protection.[44]

(3) *Principle of Participation*

Article 19 of the ICCPR, Article 13 of the ACHR and Article 10 of the ECHR enshrine freedom of expression. When considering a child's right to express an opinion on matters that affect her or him, and for that opinion to be given due consideration, one must look to Article 12 of the CRC, which is the source from which participatory rights of the child derive. Article 12 provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child … for this purpose, the child shall in particular be provided the opportunity to be heard". Article 9(2) of the CRC provides that all interested parties should be given an opportunity to participate in the proceedings that concern the separation of parent and child.[45]

In a general report by the Committee on the Rights of the Child, it was noted that *all interested parties* should include the child concerned, who must be afforded an opportunity

42 African Charter on the Rights and Welfare of the Child (1990), Article 19
43 *Re J.H., an infant* [1985] IR 375, at para.390
44 Jaap Doek *Article 8: The right to preservation of identity. Article 9: the right not to be separated from his or her parents* 23 (Leiden, Nijhoff, 2006)
45 *Supra* note 1 at p. 18.

to have her or his views known during the proceedings.[46] In order to fulfil these legal obligations, the Committee on the Rights of the Child identified a number of key strategies that should be implemented, including providing training to all branches of the judicial system such as prison officers, lawyers, and judges, and that when there is a question of providing alternative care that the views of the child concerned are, through appropriate legislation, guaranteed to be heard and considered.[47]

(4) *Principle of Non Discrimination*

Every child must be protected against discrimination and punishment. The principle of non-discrimination is fundamentally rooted in human rights instruments and is set out in Article 2 of the ICCPR and ICESCR. The Human Rights Committee noted that the concept of discrimination encompasses any distinction, exclusion, restriction or preference.[48]

In a 2006 Indian Supreme Court judgment, Chief Justice Sabharwal set out the following guidelines in this respect: "As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned."[49]

CHILDREN IN PRISON

Children get into prison in one of two ways: the move there or they are born there. In all situations the decision to allow the child to remain in prison for an extended period should not be taken lightly. Policies and practices applicable to children in prison affect their lives to a great extent. Some prisons having restrictive regimes with little or no control of prisoners over their lives are not appropriate places to grow and develop. Child's best interests, the key issue, is to be kept in mind by the officials and policy makers and it should always be remembered that they are not criminals and should not be treated as such.[50]

There are several reasons why children are forced to live in prisons. Some states do not allow to children to live in prisons at all. However others do where they can stay with their mothers up till the school age. Whatever may be the approach but certain issues like conditions in the prison, quality of care received and the age and situation of the individual child must be considered. Though living in prisons with their mothers is considered the least 'bad' option, these children very often face and cause problems not only for their mothers but also themselves the prison staff, other prisoners and their families outside.

46 Committee on the Rights of the Child, General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under Article 44, paragraph 1 (b), of the Convention, CRC/C/58, para.69
47 Committee on the Rights of the Child, General Comment No. 12, CRC/C/GC/12, para.49
48 Human Rights Committee, General Comment 3 (thirteenth session, 1981), available at http://www.unhchr.ch/tbs/doc.nsf/0/c95ed1e8ef114cbec12563ed00467eb5?OpenDocument (accessed 10 July 2007)
49 *Supra* note 17.
50 Oliver Robertson, "Children Imprisoned by Circumstances" *QUNO* 2 (2008).

Children in prisons live in very restrictive conditions than they did outside even when they are not prisoners and should never be treated as such. Damage is caused to their personalities due to less or no interaction with the outside world especially their families. Therefore it is important to decide whether the child should actually be in prison or not. We have to strike a balance between the benefits of maintain mother-child relationship and the negative effects of a prison environment.

The child undergoes the hardships from the very beginning when the mother is accused of a crime to the final outcome where she is convicted. The problems faced at police stations and during under trials are even worse than the actual conviction. And therefore an all round study and solution is required to properly implement the various legal instruments in providing special and better care to these unfortunate 'victims' of the crimes with which they had nothing to do.

(a) *Arrest and Investigation*

The first time when a child comes into contact of the criminal justice system is when the mother is arrested for subsequent investigation by the police and this surely affects them profoundly irrespective of the fact that they will subsequently live with the mother or not. Whether or not the mother is eventually charged, if she is held for hours or days then her children may end up staying with her in the police station.

Police stations are definitely less suited to these children to live there than prisons. Obviously they are exposed to varied kinds of people conditions and the 'language'. Tender children are often scared at the very sight of the official in uniform. The condition in police stations in Nepal are considered so bad that one organisation recommended that woman with children should stay in prison rather than police stations.[51] Children may become distressed, tearful and frightened if they are present while their mothers are photographed and fingerprinted and are held in cells.[52] The presence of police adds to the uncertainty and trauma of parental arrest and questioning.[53]

In Kyrgyzstan when a woman is arrested her children are given to relatives on production of identity documents though no records are maintained to that effect. Such specific regulations are followed by many countries. However it cannot be denied that these and other regulations are not always followed. Woman arrested in Punjab state, India, were allowed to bring children up till five years of age upon arrest in 2003. But police committed violations of the same regularly without allowing the woman to communicate with their families. As a result children 'outside' these prisons spent several days alone unaware of the arrest. The justification was unconvincing as it was said that these woman were well aware of their rights and there was no need to inform them.[54]

51 *Ibid.* Nepalese non governmental prison worker personnel communication.

52 Jane Woodrow, *Mothers in Prison:The Problem of Dependent Children.* 96-97(Cambridge University, 1992).

53 Oliver Robertson, "The impact of parental imprisonment on children" *QUNO* 15-16 (2006) and Case study in Kyrgyzstan (QUNO). The level of fear children have for police officers in Kyrgyzstan is said to be because the police commit offences against children.

54 Unknown author, "Women prisoners' children suffer most" (2003) in *Times of India,* quoted in case study India (QUNO)

(b) *Pre-trial Detention*

Sometimes women in pre trial detention are held in same facilities as convicted women and even with males instead of dedicated homes. Often they are subjected to stricter regimes and their freedom is more heavily restricted.[55] This may happen to various reasons like unwillingness to devote resources to a population that may soon leave prison, lack of staff and facilities or restrictions placed on the detainee while an investigation and the trial is ongoing. Those 'remanded in custody' or 'under trials' vary enormously with country.

In India alone there were three-quarters of children living with their mothers awaiting trial.[56] 428 Women Convicts with their 497 children and 1,063 Women under trials with their 1,166 children were reported to be in prisons in the country at the end of 2010. 383 Women Convicts with their 440 children and 1,177 Women under trials with their 1,289 children were reported to be in prisons in the country at the end of 2011. A total of 344 women convicts with their 382 children and 1,226 women under trials with their1,397 children were lodged in various prisons in the country at the end of 2012.[57]

It is needless to say that a mother is unable to arrange for a child to stay with her (especially when the numbers are so high) because she has to meet many regulatory requirements depending upon the length of detention, space and location of prison. Regulations may differ for convicted and pre-trial mothers. For example in England and Wales, there are special Mother and Baby Units which allow only temporary admission with relatively better conditions.[58] Holding a mother in pre-trial stage for long can be very harmful for the child as the conditions in these facilities can be inappropriate. It also very discomforting to know that many a times a mother is forced to keep her child during pre-trial because in many countries like Zimbabwe[59]if a child is weaned even involuntarily the mother may lose the chance to have the child in prison after conviction. At the same time there are commendable efforts being made in some parts of the world. Like in Nepal there are cases of individual police officers allowing women with children to be given bail rather than pre-trial detention.

Pregnant women or those with new born babies when detained face different kinds of problems. Additional nutrition may be given to them. In India proper medical facilities along with clean drinking water must be given to pregnant women during pre-trial. However many a times pre-trial detention facilities are less likely than prisons and these women are forced to live with convicts. This is a clear violation of rules that convicted prisoners and unconvicted detainees must be kept separate.

It is quite clear that either at birth or later pregnant women in pre-trial detention is not in the baby's best interest. The importance must be on the welfare of the children living in prison

55 See further Laurel Townhead, " Pre Trial Detention of Women and its Impact on their Children" QUNO (2007)

56 S.P.Pandey and Awdhesh KR.Singh, *Women Prisoners and their Dependent Children: The Report of the project Funded by Planning Commission. Government of India. New Delhi.* 33-34 (Serials Publications, 2007)

57 Figures from the Indian National Crime Records Bureau, 2010-12.

58 H M Prison Service, Mother and Baby Units, 9 (2007)

59 Chiedza Musengzi and Irene Staunton *et al* (eds.) *A Tragedy of Lies: Women in Prison in Zimbabwe, 58* (Weaver Press, Harare 2003)

from the child rights and needs viewpoint rather than seeing it as ap art of mother's punishment. Additionally women who commit crimes may still be good mothers and their ability to care for their children should not be automatically linked to their offending behaviour.

Also pregnancy affects many areas of a woman's life including health diet and exercise requirements. Pregnant women may have genuine and legitimate reasons from being exempted from the regular prison regimes and the authorities must ensure that they are given proper places and adequate facilities to give birth to their children. It cannot be denied that once the children are born in the prison environment, steps should be taken to minimise the negative effects of living there. Stunted emotional, physical, social and/or intellectual development, as well as stigma from those outside prison, is some of the ways in which these children can be affected.

(c) ***Trial and Sentencing***

Conviction of mothers surely has adverse effects on the children both on those who go to live inside the prisons as well as those who are outside. Awareness of this and of the requirement under international law to take the best interest of the child into account in all actions concerning them[60]mean that some countries either require or empower the judges to take into account the children's needs and best interest when sentencing. Adequate legal representation and fair trial are equally important for the children who would ultimately go with the mothers to the prison. Illiteracy, unemployment, weak institutions and extreme poverty as well as a general lack of legal support and understanding of complex legal system contribute to the prevention of access to justice.[61] Additionally a shortage of well qualified lawyers and high cost of legal representation also contribute to the cause.[62]This results in protracted hearings and delays in judicial decisions.

Some courts do consider the impact of a sentence on children while sentencing. Judges in Kyrgyzstan and Nigeria take into account, the impact of prisonisation on children. However Nepalese judges do not.[63] Within Wales and England judges can request pre-sentence reports on the likely impact of a prison sentence on children, though again this depends on the judge's discretion.[64] In India no such report system exists though various guidelines have been laid to be followed while taking special care of such children.[65]

In September 2007, the South Africa's Constitutional Court declared that Section 28(2) of the country's constitution which states that (a) child's best interest are of paramount importance in every matter concerning the child, applies when sentencing the mother. It issued the following guidelines:

60 Article 3(1), Convention on the Rights of the Child.
61 *Supra* note 50. Case study Sierra Leone (QUNO)
62 *Ibid*
63 *Supra* note 50. Case studies (QUNO).
64 The Corston Report, a major study on women prisoners in Wales and England, recommended that a pre-sentence report on the impact of custodial sentence on children should always be provided, but this was rejected by the UK government on the ground that the existing optional system was working well.
65 *Supra* note 17.

1. The sentencing court should find out whether a convicted person is the primary caregiver whenever there are indications that this might be so.
2. The court should also ascertain the effect on the children of custodial sentence if such a sentence is being considered.
3. If the appropriate sentence is clearly custodial and the convict is the primary caregiver; the court must apply its mind to whether it is necessary to take steps to ensure that children will be adequately cared for while the caregiver is incarcerated.
4. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence bearing in mind the interest of the child.
5. Finally, if there is a range of appropriate sentences, then the court must use the paramount principle concerning the interests of the child as an important guide in deciding which sentence to impose.[66]

Sometimes the judges are unable to give the consideration, which they must, for lack of one specific legislation governing the impact of prison sentence. And therefore many a times they fail to take into account the wider family situation and rarely suspend sentence.

Since the 2006 ruling of Supreme Court, judges in the country have been required to decide the cases of pregnant women in pre-trial detention on priority basis.[67] Additionally before sending a pregnant woman to jail, the authorities must ensure that the jail has basic minimum facilities for delivery and pre-natal care for both mother and the child.[68]

CONDITION IN PRISONS

Although efforts are made by the prison authorities to mimic the surroundings outside the jails but it cannot be denied that the physical world and the restrictions placed on the children inside the prisons make their lives much different than from those living outside them. These children are treated differently along with their mothers. On paper, additional food, separate facilities, separate accommodation etc Sparse provision of women's prisons means that children living with their mothers will often be imprisoned far from home; this is particularly likely if they are in one of a limited number of child-friendly facilities. Within the UK, half of women are imprisoned over 50 miles (80km) from their homes[69] and there are women who have chosen not to reside in Askham Grange women's open prison in York (which has a Mother and Baby Unit, 'state-of- the-art nursery and fantastic atmosphere') because they are from London and do not want to be so far from home.[70] However, there are those who argue that 'better run and specialised institutions would always be more

66 *Supra* note at para.36
67 Unknown author 'Court guidelines on children of undertrial women' (2006) in The Hindu. http://www.hindu.com/2006/04/14/stories/2006041410331700.htm
68 http://www.infochange.org/analysis128.jsp
69 Action for Prisoners Families (2006) Press release: Record numbers call helpline as families face Christmas with a loved one in jail at http://www.prisonersfamilies.org.uk/opus719.html (accessed March 2007).
70 British non-governmental prison worker, personal communication. York is about 280 kilometres (175 miles) away fro London.

sought after by users e.g. children voluntarily came from distant districts [in India] in order to be in the model juvenile home in Hyderabad.'[71] are to be given to such children. In practice some countries give little or no support to children living in prison, either due to lack of resources or a failure by officials to prioritise them and their needs.

However, many prisons do not provide even the services they should. The lack of state support may be filled by NGOs and religious groups such as local churches, who often provide material assistance to children living in prison. Children in Zimbabwe have 'churches' and people from abroad [who] give them cereal, peanut butter and clothes',[72] while Nigerian children living in prison are given 'childcare kits' either on entry or at a later time. Imprisoned mothers in Egypt have had to use their own resources to acquire such goods as food, medicine, milk, clothes and blankets, whereas many of those in other countries are unable to buy things for their children, either due to a lack of goods or a lack of money. One Egyptian NGO working with children living in prison provides one-time payments to mothers to improve their situation.[73]

Conditions for both expectant and new mothers and their children may be inappropriate. One US facility available for heavily pregnant or newly delivered women nearing the ends of their sentences was discontinued because the facility was based in a nursing home for the elderly; when the nursing home needed all the space for old people, the prisoners had to stop using it.[74] Again within the USA, there are cases of babies being kept in the prison infirmary, with children living in prison being a temporary measure.[75] Health services in prison are often related to screening and diagnosis, rather than treatment, meaning that the health needs of pregnant and newly delivered women and their children will need to be addressed by outside services.

Sometimes promised services may not materialise. A report by the Indian government found that in the jails they observed pregnant prisoners received no special attention,[76] which may mean that problems affecting the mother or baby go unnoticed. Healthcare services and dietary supplements for pregnant prisoners and nursing mothers in Egypt are not always provided in practice. Extra food rations for pregnant women in Sierra Leone's biggest prison, including items such as eggs, are not reliably provided. Sometimes this may

71 A Report: Women and Institutionalisation, 22 (Coordination Unit, World Conference on Women) (2005)

72 Musengezi and Irene Staunton (eds.) *A Tragedy of Lives:Women in Prison in Zimbabwe* 76 (Weaver Press, Harare 2003)

73 *Supra* note 50. Case study Egypt (QUNO). Specifically, the Association for the Protection of Children Imprisoned with their Mothers (APCIM) has supported ten families with one-time payments of 10,000 Egyptian pounds and has helped to pay for one pregnant woman to get out of jail so she could deliver her baby outside the prison. The organisation also supports the children of imprisoned parents with supplies and occasional money. It is reported that this extra support is necessary for prisoners' families because, although the government provides pensions for these families under the 'social security scheme' enacted by Law No. 30 in 1977, in many cases families are still struggling with inadequate means to live. See also Community and Institutional Development (2007) Final Report: A Rights-Based Analysis of Child Protection in Egypt (Save the Children UK)

74 Parents in Prison: Addressing the Needs of Families 13 (American Correctional Association, 1996)

75 *Ibid.*

76 *Supra* note 56.

be due to a lack of resources or ignorance of prisoners' rights; sometimes corruption of the officers. Whatever be the situation constant efforts must be made to provide the facilities to the children in prison with their mothers.

Who decides whether a child will go to live in prison differs in different countries. Within England and Wales the prison governor decides whether a baby should be allowed to live in prison, based on the recommendation of an admissions board.[77] In France it is the children's custodians who make the decision; once there, the mother makes all the health and socialisation decisions about her child, so as to empower her and create more links to the community.[78] Similarly, in Nigeria a child's parents will make the decision over whether the child will enter prison, a decision with which the authorities must comply (providing the child is below the upper age limit of 18 months).[79] Within India, the mother, family and courts may all be involved, though the small survey carried out for this research suggested that mothers are the most likely to make the decision themselves.[80] In Chile, the mother requests that her child be allowed to join her, with a Family Court judge making the decision. In Venezuela the director and social worker at the penal institution make the final decision after the mother makes her request. In both these countries, one of the considerations is whether there is sufficient space and facilities. Sierra Leonean policy is that magistrates often make the initial decision to place children in prison, with the prison service then required to implement these decisions. In Australia, the designated Superintendent makes a decision based upon 'the recommendation of a "Paediatric Committee" consisting of prison management staff, uniformed staff, a nurse or a medical practitioner and the Assistant Superintendent Prisoner Management'; prisoners allowed to bring their children into prison must sign a contract acknowledging the conditions, accepting full responsibility for the care of the children and acknowledging having been informed about restrictions that may apply.[81]

After Prison

There are greater problems faced by the children when they leave the prison. Many women have difficulty in reintegrating into the community and children of such mothers have to share the trauma and adjustment issues along with the released mothers. Returning home can be difficult both for the woman and the child in absence of necessary support. If the child leaves the premise alone, due to reaching the required age or developmental stage, then also he/she will have o learn to live with the new caregiver at the same time as adjusting to the new environment. In such cases contact with the mother as far as possible

77 H M Prison Service (2005, updated 2008) Prison Service Order 4801:The Management of Mother and Baby Units, Section 12.1

78 James Boudrais, *Parents in Prison: Addressing the Needs of Families* 14 (American Correctional Association, 1996) According to Marlene Alejos, "Babies and Small Children Residing in Prisons" *QUNO* 37 (2005) Judicial authorities are nevertheless required to make all efforts to find alternative solutions "to prevent" a child accompanying his/her mother in prison. But if the mother refuses to be separated from the child, neither the judiciary nor the penitentiary authoritiescan interfere or oppose the decision of the mother except where the child is at risk

79 *Supra* note 50. Nigerian Prison Service official, personal communication.

80 *Supra* note 50. Case study India, (QUNO) 19 women responded to the survey; of these, in 14 cases the mother had made the decision, in two the court and in three the family.

81 *Supra* note 50. Case Studies in Chile, Venezuela and Sierra Leone (QUNO)

should be continued so that the child can be comforted all through his rehabilitation.

Some might leave even prior to attaining the requisite age for variety of reasons may be due to transfer or death of the lady or when the authorities decide in the interest of the child. This is even more dangerous as the child might not be mentally prepared for such a separation or there are no arrangements for him/her outside the prison. If that be so it is absolutely detrimental to the overall development of the child. Adequate arrangements must be made to accustom children before leaving the prisons with or without mother.

Family members in the community may themselves disown the woman, either because of the stigma attached to her from having committed a crime and/or being in prison or to avoid being stigmatised themselves by association with an ex-prisoner.[82] Case studiesconducted by QUNO revealed that in both Sierra Leone and Kyrgyzstan there are major problems of women being abandoned by boyfriends or husbands and their families; in Kyrgyzstan it was estimated that of 360 women in prison, only about three were visited by their partners. (Wives and girlfriends of prisoners, in contrast, were far more likely to visit their imprisoned male partners.) For this reason, some women try to hide their imprisonment from their families, by methods such as pretending they are working elsewhere or by having photographs taken in prison but against a non-prison backdrop.[83] Such practices by either party obviously hinder family and community reunification and produce negative outcomes in terms of lost support networks for the mother.

The position in India

Last few decades have seen great progress in recognising children as subjects of rights, particularly after adopting Convention on Rights of Child in 1989. At international, national and regional level also development has taken place in respecting, protecting and fulfilment of children's rights. Protective legal frameworks and environment has been created for the same. But the reality is quite different. Protection of human rights of Children of incarcerated mothers and children residing in prisons need extra attention and special legislation.

The main human rights instruments setting protection and assistance frameworks and mechanisms which have been developed at the international level, and which are relevant to persons deprived of their liberty, include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[84]

Additional international instruments that provide guidance for States to comply with binding instruments include the 1957 UN Standard Minimum Rules for the Treatment of Prisoners

82 *Supra* note 50 p 21

83 Currently there are no formal links between prisons and local government, though this is expected to change as part of the country's reform of children's policies.

84 These instruments are applicable in all countries even where States have not signed or ratified the treaties. States can be considered in violation of international law even if they have not ratified any human rights treaty.

(SMR)[85], the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ('the Body of Principles'), the 1990 Basic Principles for the Treatment of Prisoners, the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (known as 'The Beijing Rules'), the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (known as "JDL's' or 'Havana Rules') and the 1997Guidelines for Action on Children in the Criminal Justice System, and others. While not all these instruments, which have been adopted and welcomed by States, are legally binding instruments, those that are not contain generally accepted principles in other 'legally binding instruments'. Efforts to draft a more comprehensive instrument, a 'Charter' for the human rights of persons deprived of their liberty, are also underway at the international level.[86]

Official statistics claim that there are only 0.00058 percent children in the prison.[87] This figure does not represent the total number of children of prisoners. It represents only those children who are inside prisons with their mothers. A huge category of children of imprisoned mothers who are not living with them in jails but in the community, are left out. No statistics is available on the numbers of children left behind in family, with other care givers or who fend for themselves after the imprisonment of their parents or either of them. Additionally, the figure of nearly 1700 children may not be reliable as there are no regular monitoring mechanisms to account for these children. Besides the missing data, one main reason attributed to the indifference of the state on formulating policies and programmes for the children with imprisoned mothers is their smaller number. Complete marginalization in the development agenda make the children vulnerable to all forms of exploitation and is violation of their fundamental rights. What is of primary importance is to recognize and address these children as 'children' instead of labelling them as 'children of prisoners' which label them as offenders.[88]

At national level also a comprehensive effort has been made to stabilise the condition of these children and bring the laws in conformity with the international legal instruments. Jail manuals that govern the running of prisons do not contain any special provisions for children of women prisoners who constitute a particularly vulnerable category. The women are in prison either as under-trials accused of an offence, or as convicts. Unlike other inmates, the children are in jail not for any delinquent behaviour but because their mothers are in jail. Either they are born in jail, or they are too young to stay away from their mothers, or there is no one to look after them in the absence of their mother.[89]

85 Adopted by the First UN Congresses on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

86 Reference to a draft 'Charter' for the human rights of persons deprived of their liberty, which was discussed during the Eleventh UN Congress on Crime Prevention and Criminal Justice held in Bangkok from 18 to 25 April 2005, was made in the intervention of Penal Reform International to the 60th Session of the Commission on Human Rights, agenda item 11(a) on Torture and Detention, Geneva 2 April 2004.

87 1700 children out of total 158.8 million child-population aged 0-6 years as per Census 2011.

88 D. B Chattoraj, *Children of Women Prisoners in Indian Jails*. New Delhi: Lok Nayak Jayaprakash Narayan National Institute Of Crminology and Forensic Sciences (2002)

89 Rakesh Shukla "Looking after Children of Women Prisoners" at *Infochange news and features* (2006) available at http://www.infochange.org/analysis128.jsp (accessed on 12 April 2014)

Though there is no separate legislation in this regard but the Constitution of India aims at protecting the rights of children inside and outside the prison. The Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. However, it allows special provisions for women and children.[90] It provides for free and compulsory education to all children from the ages of six to 14 years[91] and prohibits employment of children below 14 years in mines, factories or any other hazardous employment.[92] The court also took note of Article 14 guaranteeing equality, and Article 21 providing that a person cannot be deprived of life and liberty except according to procedure established by the law. Similarly, Article 23 prohibiting human trafficking and forced labour was also referred to in the court's judgment.

Moving away from fundamental rights to the directive principles, the court pressed into service provisions relating to the health of women and children which directs the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that childhood and youth are protected against exploitation and moral and material abandonment.[93] It also directs the State to make provisions for just and humane conditions of work, and maternity beliefs.[94] Article 45 stipulates that the State shall provide early childhood care and education for all children until the age of six. It also lays down the raising of level of nutrition and standard of living of people, and improvement of public health as a primary duty of the State.[95]

In response to a public interest litigation dealing with undertrial prisoners, the Supreme Court in *R D Upadhyaya v State of Andhra Pradesh*,[96] carried out an in-depth examination of the issue and gave extensive directions with regard to the children of women prisoners, in a judgment delivered on April 13, 2006. The court took note of various provisions in the Constitution as well as laws enacted for the benefit of children.

The judgment refers to the existence of around 12 laws,[97] which make provisions for the benefit of children. The court took note of the national policy for children, directing the state to provide adequate services for children both before and after birth, and during the growing stages, for their full physical, mental and social development. The policy suggests a comprehensive health programme, supplementary nutrition for mothers and children, promotion of physical education and recreational activities, special consideration for children of weaker sections, and the prevention of child exploitation

Firstly, the judgment makes it clear that a child shall not be treated as an undertrial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care,

[90] Article 15, Constitution of India
[91] *Id.*, Article 21A
[92] *Id.*, Article 24
[93] *Id.*, Article 39 (f)
[94] *Id.*, Article 42
[95] *Id.*, Article 47
[96] 2006 (4) SCALE 336
[97] Ranging from the Guardian and Wards Act and Child Marriage Restraint Act, 2006, to the Juvenile Justice Act, 2000 and Immoral Traffic (Prevention) Act, 2006.

clothing, education and recreational facilities as a matter of right. The court directed that before sending a pregnant woman to jail, the authorities must ensure that the jail has the basic minimum facilities for delivery as well as prenatal and post-natal care for both mother and child. If a woman prisoner is found to be pregnant at the time of her admission, or afterwards, arrangements must be made to get her examined at the district government hospital. The state of her health, pregnancy and probable date of delivery should be ascertained and proper prenatal and post-natal care provided in accordance with medical advice.

The judgment directs for arrangements of temporary release/parole or suspended sentence, in the case of minor offences particularly to enable a pregnant prisoner deliver her baby outside prison. And it can be denied exceptionally only. Births that take place inside the prison must be registered with the local birth registration office. However, the fact that the child was born in prison should not be recorded; only the locality must be mentioned in the birth certificate. As far as circumstances allow, facilities for the naming rights of children born in prison should be extended.[9898]

The court referred to a study on children of women prisoners in India, carried out by the National Institute of Cr iminology and Forensic Sciences available at http:// www.nicfs.nic.in/ (accessed on 15 April 2014)

The sa lient features of this study were

Most children were living in difficult conditions and suffered deprivation relating to food, healthcare, accommodation, education and recreation.

There were no programmes for the proper bio-psycho-social development of children in prisons. Their welfare was mostly left to the mothers. There were no trained staffs to take care of the children.

In many jails, women inmates with children were not given any special or extra food. In some jails, extra food was given in the form of a glass of milk; in others, separate food was being provided only to children over the age of five. The quality of food supplied was the same as that given to adult prisoners.

Initially the age up to which female prisoners were allowed to keep their children varied between two and six years, according to various state laws. In Bihar, children were allowed to live with their mothers up to the age of two and, in special cases, up to the age of six. In

- No separate or specialised medical facilities for children were available in jails.
- Most mother prisoners felt that the stay in jail would have a negative impact on the physical and mental development of their children.
- A crowded environment, lack of appropriate food and shelter, deprivation of affection by other members of the family, particularly the father, were perceived as stumbling blocks in the development of these children in their formative years.
- Mother prisoners identified food, medical facilities, accommodation, education, recreation and the separation of children from habitual offenders as six areas that require urgent improvement.
- There were no prison staff specially trained to look after children in jails. Also, no separate office with the exclusive duty of looking after the children or their mothers.

the Andaman and Nicobar Islands, a child could stay with the mother up to the age of five; in Himachal Pradesh, the age was four years. In Tamil Nadu, Delhi and Karnataka, a child is allowed to live with his/her mother up to the age of six. The Supreme Court[99] has laid down a uniform guideline applicable to all prisons in the country: female prisoners will be allowed to keep their children with them in jail until they attain the age of six years. After the age of six, the child will be handed over to a surrogate, in accordance with the mother's wishes, or put in an institution run by the social welfare department. Children above the age of six must be put in an institution in the same city as the prison and must be allowed to meet the mother at least once a week. In case a female prisoner dies leaving behind a child, the district magistrate must arrange for the child to be properly looked after, either by a concerned relative or a responsible person, or put into a social welfare department home.[100]

The judgment lays down that children in jails should be provided with adequate clothing suitable to the local climate. States and union territories were directed to lay down dietary scales for children, keeping in mind the calorific requirements of growing children in accordance with medical norms. Prisons have been directed to make arrangements to provide separate food, fulfilling the nutritional needs of children, separate utensils, clean drinking water and adequate and clean sleeping facilities. Regular medical examinations to monitor physical growth, timely vaccinations, and alternative arrangements for looking after a child should the mother falls ill form part of the guidelines laid down. Children of prisoners were also accorded visitation rights.

The judgment observes that proper educational and recreational opportunities must be provided to children of female prisoners. It directs that a crèche and nursery be attached to prisons. Children below three years of age should be put into a crèche, and from three to six years in a nursery, creche and nurseries should, preferably, be located outside the prison premises. These facilities must also be extended to children of warders and other female prison staff. Women with small children must not be put into jails where proper facilities for the biological, psychological and social growth of the child cannot be provided. Staying in crowded barracks amidst convicts, under trials and offenders was held to be harmful to a child's development. The judgment also incorporated a dietary scale prepared by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children up to the age of six.[101]

The court directed the amendment of jail manuals and rules within three months, to implement the guidelines. Courts dealing with cases relating to women prisoners whose children are in prison with their mothers were directed to give these cases priority and decide on them expeditiously. The problem of implementation of judgments or laws is an acute one. Although there have been earlier judgments regarding prison conditions and prisoners' rights, in practice little has changed, though at times the court does attempt to evolve mechanisms to try and

[99] *Supra* note 17
[100] *Ibid.*
[101] R Singh Pandey, A Kumar, R K Jain. & B S Yadav, "Childhood Parental Lose and Subsequent Adult Depression" 7 *AJPE* 2 (1981).

ensure implementation. In the present case, the state legal services authorities were directed to periodically inspect and see that the directions regarding mothers and children in jail were being followed. The court also directed that the central government, state governments and union territories file affidavits with respect to the judgment's implementation, within four months. Courts, however, do not have an independent machinery to crosscheck implementation.

Conclusions and Suggestions

The above analysis demonstrates that state of women prisoners and their young children in jails is far from protection of their rights. Their conditions in jails are pathetic despite legal provisions. There are no minimum facilities for over all development of minors in jails since very limited resources are available for correctional measures. The effects of incarceration can be catastrophic on the children and costly to the state. It is ironical that the justice system itself does injustice to the children of prisoners. There is no dearth of policies and programmes for the children in India, but this subset of children, hardly has any visibility in the eyes of policy makers. They suffer for years together for no fault of their own. Nonetheless, children of prisoners also have Fundamental Right like any other citizen-child of India. However the following steps can be taken for the proper implementation of the already existing laws and policies.

(1) *Sensitivity of Law Officers Towards The Children of The Mothers who are Arrested.*

Officers should try to have children put in another room in order to not witness the arrest of the mother and should not pull out weapons unless necessary. Law enforcement should also explain to women that they have the legal right to bring children younger than 6 with them to prison so that small children are not separated from their mothers. If police have arrested the sole caretaker or both parents, then officers must explain the situation to the children in a sensitive and age appropriate way. Officers should also make arrangements for the children to be taken care of by the person of the arrestee's choosing. If no one is selected or the appointed person is unwilling, then the officers should send the child to a responsible relative. If no relative is found or willing to care of the children, then to a social institution. Law enforcement should keep track of the children of the arrested to ensure their safety and security and to keep the prisoner informed on their whereabouts.[102]

(2) *Uniformity of Understanding of the Circumstances in which Children must be allowed to Accompany their Mothers in Prison.*

There must be set standards regarding the kind of facilities that a pregnant woman and children living with their mothers must have so that they do not feel that they are growing up "imprisoned" and are prepared for the world outside the prison when the time comes for them to leave (In India for example it is at the age of six). While living in prisons children must have access to health, nutrition, crèches and other services essential for their healthy

[102] "Educational Assistance to Children of Prisoners," Social Welfare Department: Government of Kerala, 19 July 2011 <http://www.swd.kerala.gov.in>

physical and cognitive growth. Non-governmental organizations may be encouraged to work with the jail authorities in providing these services.[103]

(3) *Separate Accommodation for Women*

Children are entitled to shelter as a matter of right. The shelter should be safe and conducive to a healthy environment. Children should not be exposed to women that use abusive language, behave violently, or might be dangerous. They should not share cells with female inmates that are not their mother. Also, children need sufficient space to move around. They should not have to stay in over-crowded cells that may prove detrimental to their healthy growth.[104]

(4) *Educational Assistance to Children In Prisons.*

Education is a fundamental right. Children of prisoners have a difficult time going to school because they cannot afford it or schools will not let them attend. NGO's have been helping children of prisoners receive educational assistance and some have been able to pay for college. However, NGO's have limited financial resources. The burden should be on the state to ensure children are going to school and able to attain higher education.[105]

(5) *Special Attention for Children of Prisoners in the Community*

Children of prisoners living in the community are children in need of care of special care and protection. In the absence of both parents, their living conditions need to be carefully monitored to see that they are not being treated in any discriminatory manner in case they are with relatives and stigmatized for being child of prisoners. In case they do not have a safe place to live, options of foster care need to be explored. In case the principal earning member is in prison, putting the family into economic distress, sponsorship possibilities must be explored for the child/children and employment possibilities for the remaining adult, unless it she or he is too old as can be case with children living with grandparents. If all fails, as a last resort they should be looked after in a child care institution meant for children in need of care and protection.[106]

(6) *Prisons Should be Sensitive to Imprisoned Parents Maintaining Contact with Their Children.*

Prisons should encourage imprisoned parents maintaining contact with their children. Therefore, parents should be kept in prisons close to the children. This would reduce any geographical or financial burden in visitation. Plus, prisons should be more flexible with visitation restrictions for children. This would mean allowing private time between children and parents, and letting children touch and talk to their parent in a room. Staff should also

[103] *Ibid.*
[104] *Ibid.*
[105] "India: Children Stay in Indian Prisons With Their Mothers," ACR Weekly Newsletter 3.15, 14 April 2004, 18 July 2011 http://acr.hrschool.org (accessed on 10 April 2014)
[106] Charlene Wear Simmons, "Children of Incarcerated Parents" California Research Bureau, March (2000)

be more sensitive to the needs of the children and be friendly, explain to the children the different security checks, and have toys and books for children while they are waiting.[107]

(7) *Inspection and Regular Audits of Prisons and the Facilities and Conditions of Children is a Must.*

Many jails are found housing children above 6, lacking the proper diet, medical care, recreational and educational facilities that by the law they should have. Independent organizations must be part of the inspection teams, and their mandate must include the inspection of and facilities for children living in prisons. They should conduct regular audits of prisons and see to it that prisons comply fully with the laws of the state which include meeting the nutritional, medical, recreational and educational needs of the children.[108]

When good policies exist they should be known, shared and practised. Copies of the policies, legislations and judgements should be made readily available and free of charge to prisoners, staff and others in a language they can understand.[109] It is vitally important that these children, who are not themselves offenders and should not be treated as such, receive the assistance necessary to succeed in life and, hopefully, never return to prison again.

[107] *Ibid.*
[108] *Ibid.*
[109] *Supra* note 50 at p 33