

DELHI LAW REVIEW

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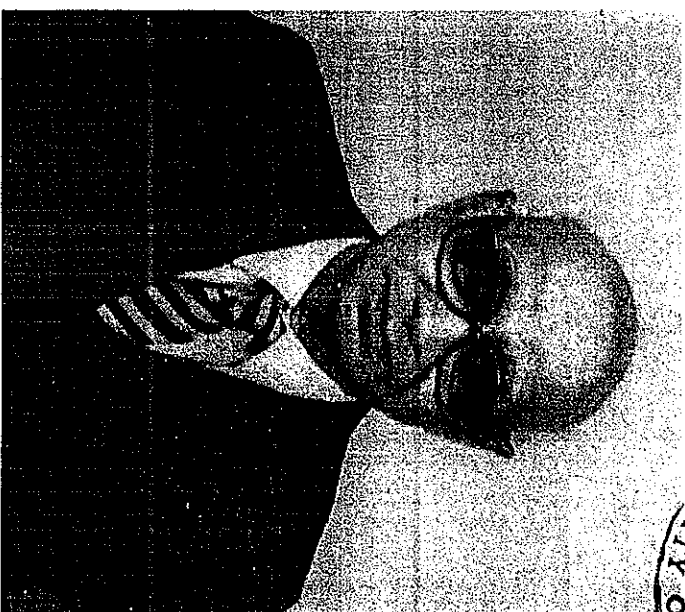
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Faculty of Law
Chhatra Marg
University of Delhi
Delhi-110007
Phone : 011-7667483, 7667725/Extn. 1510
Fax : 011-7666350
E-mail : lawfaculty@vsnl.net

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Pradyumna Kumar Tripathi
(1924-2001)

✓ Doha Declaration and Health Concerns
of Developing Countries

... Surya Deva

145

STUDENT SECTION

The Forgotten Rite : Legal and Vedic
Importance of *Sapipadi*

... Pankaj Bhagat

165

✓ The BALCO Judgement : A Case Comment

... Nandita Govind

177

State v. Chenchu-Sudarshan Hansda :
A Critical Appraisal

... Mrinal Ojha and
Rajat Khosla

186

BOOK REVIEWS

Kanoon Ki Daal Par

... M.P. Singh

194

Copyright and Industrial Designs

... A. K. Koul

196

The Law Relating to Public Service

... Kamala Sankaran

200

Year Book of International Humanitarian
and Refugee Law

... J.L.Kaul

203

Implementation of Basic Human Rights

... V.K. Ahuja

207

EDITORIAL

On behalf of the Faculty of Law and the Editorial committee I present volume XXIII of *Delhi Law Review* to its readers. It is a matter of great satisfaction to us that with this volume the *Review* enters the 30th year of publication. The *Review* was launched way back in 1972 as an annual issue with a view to project the research work of the Faculty so that over the years it could develop into a premier Law Journal of the country. It is difficult to assert that we have succeeded in achieving this goal but one thing is certain that we have been able to sustain the *Review* and it has acquired a prestigious place and is recognised as one of the best law journals. The colleagues and the students of the Faculty have remained the main source of strength of the *Review* and it is my fond hope that more and more colleagues and students would come forward by contributing excellent pieces for further growth of the *Review* reflecting predominantly the research activity of the Faculty.

When I took over as the Dean of the Faculty of Law on October 1, 2001 there was hardly any paper for publication in the *Review*. The Editorial Committee, however, did not lose hope and worked relentlessly to procure good papers for this issue. It took some time for the committee to lay down its own policy and plan to bring out this issue closest to the form and pattern of the standard legal periodicals in the U.S. The delay in the publication of the *Review* is therefore, not deliberate but circumstantial. I beg to apologise to the readers for the delay. The delay may be excusable in view of the special efforts made by Professor J. L. Kaul and his team to further improve the quality of the journal.

The present volume is dedicated to the memory of our beloved colleague Professor P. K. Tripathi who had a long association with Faculty of Law. Professor Tripathi unfortunately passed away in 2001. His sad demise has created a void in the entire legal community. His contributions in the modernisation of legal education in Delhi Law Faculty cannot be expressed in mere words. Professor Tripathi is still respected as the foremost scholar in the field of constitutional law across the globe. He introduced far reaching changes in the structure of legal education in our Faculty and all credit goes to him for innovating case-method of law teaching under a three year law course. He joined the Faculty in 1949 and

DELHI LAW REVIEW

VOLUME XXIII : 2001

CONTENTS

Editorial	v
Professor Pradyumna Kumar Tripathi : A Tribute (1924-2001)	... Upendra Baxi vii
Legal Education and Scholarship in India — Remembering Professor P.K. Tripathi (1924-2001)	... M.P. Singh xx
A Tribute to a Retiring Colleague	... J.L.Kaul xxviii
ARTICLES	
Human Rights of Persons with Disabilities: Some Reflections	... Parmanand Singh 1
Emergence of Cyber Crime : A Challenge for the New Millennium	... Gurjeet Singh Vicky Sandhu 25
Emerging Right to Compensation in Indian Environmental Law	... Vinod Shankar Mishra 58
Law, Public Opinion and Property Relations in India	... Vijay Kumar 80
NOTES AND COMMENTS	
Service Provider's Liability for Defamation	... Farooq Ahmad 91
Fraud Prevention : Detection and Control Strategies in Nigeria	Yusuf Mohammad Yusuf 109
Population Stabilisation vis-à-vis The National Commission to Review the Working of the Constitution	... Usha Tandon 125
Legal Regulation of Atmosphere with Special Reference to Climate Change: International Scenario	... Gianjali Nain Gill 132

second was the invention of a three-year law study programme (with core and optional curricular components); and the third provided for greater academic direction for the reformations of Indian legal education, marking a significant involvement of the University Grants Commission, especially in the development of postgraduate legal education and faculty improvement. The 1961 Advocates Act conferred superintendence of professional legal education specification on the statutory Legal Education Committee within the Bar Council of India. In each of these developments, Professor Tripathi played a determinative role.

Each development marked a greater engagement of the Indian judiciary, legal profession, and the academe in the remaking of Indian legal education. The relationship between the three classes of actors was also marked by not always creative tensions and by struggles for power of control over the direction of change and the pace of transformation. New patterns of social cooperation had to be forged within a legal culture in which the judge and senior lawyer claimed hierarchic, even feudal deference from the law teacher. The reformist law teacher was required to render hierarchic tribute, even while-making scope for the emergence of patterns of grudging respect for the professional academic. This role entailed a whole range of negotiation skills, with Professor Tripathi possessed in abundance.

The Golden Jubilee of the Constitution, and the Supreme Court, has already been variously celebrated. Fifty years after the Indian independence, however, the history of Indian legal education remains in search of gifted raconteurs. As and when that task is seriously addressed, the scope for informed assessment of Professor Tripathi's contributions will also expand.

Professor Tripathi was fortunate to have as wayfarers in the long and risky journey some of India's most eminent innovators: Professors G.S. Sharma (Jaipur), Anandjee (Benaras), A.T. Markose (Cochin) — all eminent scholars who were catalysed by the legendary Professor R.U. Singh (Lucknow). The distinctive feature of their camaraderie, despite all the professional and personal differences, lay in the common cause of professionalizing legal education. If law teachers are today held high in social esteem, they owe much of their institutional *izzat* to the inaugural institutional labours of these five men. Quite simply, modernization of legal education and research would have simply not occurred at the same pace if these men (there were unfortunately very few women academics at that point of time, a fact that imbued the reform agenda with a distinctly patriarchal character) did not happen to it. At the same time, but for the dedication

of a great many scholars of their generation, these five men would have found their role even more arduous.

These Five Horsemen, as it were, through their diverse labours, brought to a decisive end the *ancien régime* of Indian legal education. They insisted that:

- as far as possible, legal studies should be full time; graduation in law must increasingly reflect serious commitment to learning the law;
- the modes of teaching law should imbibe public virtues, that is legal pedagogy and research should be the carrier, the social critique of legal happenings and events;
- legal research may not be divorced from teaching; indeed, good teaching and research form Siamese Twins;
- teachers and students must develop the art of exegesis, without losing sense of the social context of legal decision and states of affairs;
- traditional modes of examination (external and mechanical, modes of third-party assessment, where the examiners remained totally divorced from the daily context of teaching and learning) should give way to internal evaluation;
- new ways had to be found (such as the semester system) of managing imaginatively and efficiently teaching and learning time;
- postgraduate education should be intensive and should primarily be devoted to specialization, in ways that promoted both sound scholarship and a high rate of return to law-teaching career;
- resources should be raised for planned development of library resources;
- continuing faculty improvement should be a high priority.

1. Eminent among them are the names of Professors Ramaswamy (who preceded Professor Tripathi as Dean of Delhi Law School), Charles Alexandrowicz (who founded *The Indian Yearbook of International Studies*, way ahead of traditions of university-based law reviews), S.S. Nigam, M.P. Jain, Lotika Sarkar, T.S. Rama Rao, B.S. Murthy, I.C. Saxena, V.N. Shukla, S.P. Sathie, S.K. Agarwala, R.K. Mishra, Paras Diwan, D.N. Saraf, B.N. Sampat, R.P. Anand, T.K. Tope, Ranganatha Rao, M.K. Nawaz and Pithoze Irani. The happy features of this listing is that it is far from exhaustive.

after having served as Dean for two terms and finally retired in 1989. The contributions made by Professor Tripathi has been very vividly chronicled by Professor Upendra Baxi and Professor M. P. Singh in this issue.

Professor B. Errabi who served the Faculty for more than 35 years retired in June 2001. The Faculty gratefully acknowledges the contribution of Professor Errabi both as an accomplished law teacher and as a Legal Scholar. Professor J.L. Kaul, the learned editor of this issue has been gracious enough to write a brief profile of Professor Errabi. This issue of the *Review* contains the contributions on the contemporary and topical themes penned by distinguished colleagues and students and it is hoped that the readers will enjoy reading the *Review*. The Editorial Committee will, however, gladly accept the critiques and comments, if any from the readers. Ultimately it is for the readers of this volume to form their opinion about the *Review*. Any suggestions for further improving the quality of the journal will be welcomed. With utmost sincerity and gratitude I thank and congratulate all the learned contributors to this volume. I also thank the colleagues who helped the editorial committee in the selecting the papers for the *Review*. The maximum credit of course goes to Professor J. L. Kaul who has ungrudgingly spent long hours in editing, correcting and organising the manuscript. Dr. Kamala Sankaran and Dr. V. K. Ahuja deserve great appreciation and thanks for performing the most arduous task of editing the papers, reading the proofs and correcting the footnotes for uniformity. Mr. S. K. Minocha also helped the Committee in many ways.

Finally, I thank the proprietor of Shivam Offset Press for doing a meticulous and professional job in the publication of this issue with a quality print, finest paper and elegant cover and design.

Parnanand Singh

Delhi

August 1, 2002

PROFESSOR PRADYUMNA KUMAR
TRIPATHI : A TRIBUTE[†]
(1924-2001)

*Upendra Baxi**

I

The recent sad demise of Professor P.K. Tripathi marks an end of an era of pioneering modernizers of Indian legal education and research. It is important, I believe, to recall the context of his achievement if we are to honour the man and the scholar.

When Professor Tripathi came to the task of pioneering leadership of modernization of Indian legal education, the landscape was remarkably bleak. The concept of full-time law studies was virtually unknown. Lawyers, not all of exceptional qualities, and a few with talent for teaching, comprised the bulk of law-teaching profession. Law colleges and university departments offered only part-time two-year LL.B. programme; even LL.M. studies were part-time. Full time law teachers and students were a rare phenomenon; LL.B. degrees the easiest to obtain; no noticeable application of the mind was required to graduate, even with distinction. No practical training programmes existed. The tradition of legal writing, beyond textbooks, was still nascent. Colonial patterns of legal education, firmly in place for decades, made any alternative way of doing legal education almost inconceivable. Quality control and ideas of excellence was remote from the minds of leading lawyers and Judges, who believed that legal education began only after the law degree certificate was somehow at hand.

Three events, occurring within a decade, however, testify to new beginnings; the establishment of the Indian Law Institute, the enactment of the Advocates Act, and the Gajendragadkar Report on Legal Education. The first marked national concern with advanced legal research; the

[†] The memorial article was first published in (2001) 5 SCC(1) 1. The article is reprinted with permission of the author and publishers of Supreme Court Cases. * Professor of Law, University of Warwick, U.K. Formerly Vice-Chancellor and Professor of Law, University of Delhi, Delhi-110007.

All this is, more or less, generally accepted today. It is important to acknowledge that this was not always so. Institutionalisation of new ways of legal education and research entailed creation of new social markets for professional legal education and research and the all-important tasks of carrying conviction to indifferently educated, but still somehow highly successful, law persons (Judges, lawyers, public officials trained in law) that India's "developmental" needs may no longer be served by the colonial patterns of legal education.

As the second generation innovators know, this latter has never been an easy task,² given the utter lack of humility and openness to learning, by the most eminent Indian Justices and the eminences at the Bar and the insouciance of State and Union Law and Education Ministers. Indeed, the first generation of innovators of legal education seem, in retrospect, to have been more fortunate in terms of the potential of multi-sectoral collaboration.

In any event, the legacy of the pioneers beyond this agendum is not easy to summarize. The pioneers were a diverse lot, after all. Their social imagination of the future of Indian legal education and research varied a great deal. Professor Gyan Swaroop Sharma went the farthest in his insistence on sociological understanding of Indian jurisprudence and legal development. Dean Anandjee pioneered teaching and research in labour law and jurisprudence. Charles Alexandrowicz, T.S. Rama Rao, B.S. Murthy, M.K. Nawaz, R.P. Anand, Nagendra Singh (though not a law teacher) and R.P. Dholakia laid the foundations of public international law Indian scholarship. But, given the exploding importance of constitutional and administrative law, the pride of place, among the innovators, was

2. Generational lines are somewhat difficult to draw but by the "second generation", I refer to the following agendum of struggles to:
 - Ensure that State Governments ensure the same level/of funding to law colleges as to arts, science, and commerce colleges;
 - Secure acknowledgement of legal studies as an aspect of social and human sciences;
 - Reshape pedagogy and curriculum in the direction of greater social relevance;
 - Revitalize the LL.M. programme, through the introduction of foundation courses in legal theory and social and legal research methods (and to add a third year for those would pursue the degree on a part-time basis);
 - Introduce clinical legal education and legal services components;
 - Find/create social markets for even a more thoroughgoing renovation of legal education through the 10+2+5 programme;
 - Ensure residential campus-based-single-faculty law universities, the prototype of which, stands furnished by the National Law School University of India, Bangalore.

claimed by public law scholarship, led mainly by P.K. Tripathi, A.T. Markose and M.P. Jain.

The "legacy" that I speak of, however, is one of curricular and pedagogic reforms, which they initiated and had mixed reception. Clearly the most lasting impact is visible, across generations, among the Central and State universities where the Departments of Law remained responsible for undergraduate teaching. These institutions were better poised than most law colleges across the country (with slender full-time staff, underdeveloped libraries and large enrolments) to seize the moment for ushering in some lasting changes. Clearly, in these latter institutions, conditions remained hostile to change. Even today, generations later, too many law schools in India have yet to move towards renovation of Indian legal education.

The crucial aspect of their collective legacy lay in the creation of cadres of competent and dedicated teachers, a vibrant research culture, and in the production of outstanding students who served not only the growing needs of sound legal education and research but also created a cadre of knowledge-based lawyers and public administrators. Many Indian appellate Justices owe their exalted positions, and proud performance, to the collective, and at times unremitting labour of these five men and their honoured colleagues. No tribute to Professor Tripathi would be complete outside this frame of juris-generative collectivity.

Prad (as he very unusually suffered me to call him!), I know, would not have wholly agreed with my privileged construction of this collectivity. He would have had no difficulty with the acknowledgement of his peers. But he would have articulated a sense of injustice. It was his view (which he in several personal conversations, at length, indicated to me) that the Delhi experiment was unique. To be sure, Delhi and Benaras (as well as Chandigarh, Aligarh, Jammu, Cochin, for example) showed the way, Delhi having a situational (cosmopolitan) advantage. But Prad displayed also a very strong sense of selfhood, which marks the ways of "leadership" in India, often manifested as narcissism, a love of the Self, that often overrides the Other. Duties toward a nascent historiography of Indian legal education, however, stand served a whole lot better through this form of contextuality.

II

I arrived at Delhi University far too late for a participant observer status in relation to the "modernization" programme. I had met Professor Tripathi during my first year and half stint at the Indian Law Institute (1967-68). When I invited him to my home in Sydney (1970, when he was

formal or informal opposition or criticism to his leadership style or concrete policy proposals (or even his academic writings) often carried the risk of enduring hostility. "Friends" were colleagues who so internalised this impending hostility as often to become sycophantic, a feature that deeply irritated Prad but one that he still found useful. "Friends" had to be rewarded; "enemies" punished. (A powerful Dean always had enough leverage to distribute rewards and sanctions.) The binary distinction did not, for Prad, mean the lack of space for adversaries, people whom one can respect because of an honest difference of opinion and from whom one may even learn. But the acknowledged these sparsely.

A future biographer of Prad (it is astonishing indeed that there exists no biography of an Indian law teacher!⁴) will have to concern herself with the origins and mutations of this style of academic leadership. Widely prevalent even now, despite substantial degree of democratization of the campus life, academic feudalism was the defining feature of academic culture in which Prad and his equally gifted colleagues, came to maturity.

Professor Tripathi, like his peers, subscribed to a command and control model of directing transformation in legal education. Yet the very reforms he initiated seemed to make this model of leadership increasingly insecure. Management of innovation tormented him because he realized that the very features he so prized as a teacher and educationist contributed to subversion of authority.

The pedagogy he founded (a distinctive Delhi version of the Langdellian "case-method", in itself a fascinating sage of indigenisation of American pedagogic imports) entailed a questioning mindset among teachers and students. Students trained to raise acute questions concerning judicial and legal decisions were bound to carry their interlocution to the Delhi Law Dean's doorstep. Colleagues, so many of them sponsored by him for the Ford Foundation exchange program,⁵ returned with new ideas of collegiality. Trusting them with powers of evaluation of their own students made

4. I suggest to the UGC Panel on Law, as well as my eminent colleagues directing master's and doctoral dissertations, a research agenda directed to individual and social biographies of innovation in legal education and research.
5. He (with Dean Anandjee of Benaras Law School), made the most of the Ford Foundation's inclination, in the sixties, for the Faculty improvement programme involving, rightly, an asymmetrical exchange of the Faculty; under his leadership a considerable number of Indian law teachers earned their doctorates from American law schools. This decisively marked an end to the more generic, University of London lead (under Professor Allen Gledhill) of the Indian post-colonial commonwealth legal education.

visiting the Melbourne Law School), Prad was warm in his appreciation of my work (as well of Krishna Mohan Sharma, still teaching at the University of New South Wales). He advised me to keep up my good work and urged me to return to India when a Chair became available. In his estimate, given my young age, this would happen 15-20 years later. That I would be invited within two years of his forecast did truly astonish both of us: but he was urbane and gracious in his reception of me (by this time he had already moved to the first ever full-time Member of the Indian Law Commission). Our professional interaction was brief, however, since his return to the Law School coincided with my assumption of the office of Vice-Chancellor of South Gujarat University (1982-85). We did not relate institutionally since 1985, when I returned to Delhi, save when he returned to Delhi Law School from the Law Commission. He remained somewhat unhappy that I was not effective in restoring his old house in Cavalry Lane on the Delhi University campus. When he returned to Deanship for a brief while, he cautioned me, in a friendly way, against acceptance of assignment of Vice-Chancellorship of South Gujarat University, Surat.

However, there was times (especially during his long and first ever law academic's tenure as a full-time Member of the Indian Law Commission) when I was privileged with long narrative conversations concerning the School and legal education. I also read everything that he wrote (he made this possible by resisting the temptation to go to print too often) and I always benefited from what I read.

Despite these compensations, I thus missed having a full ringside view of Professor Tripathi's leadership style. But he generated an astonishing wealth of collegial narratives, through which I feel able to situate Prad's claims to his "uniqueness". There is no doubt that he was an intense person, who evoked hero-worship as well as character assassination. If the "loyalists" at Delhi University Law School worshipped him, his detractors had to scrape the barrel, as it were, to discover a virtuous trace! The truth about his personality lay uncomfortably in the middle.

It is a rather harsh thing to say but all narratives, based on anguished experience of his colleagues, suggest that Professor Tripathi himself operated the dichotomous logic of the friend and the enemy.³ The slightest

3. Prad obviously never read Carl Schmitt, who built around this distinction a theory of governance and public law and much else besides; see, for a recent efflorescence, *Symposium: Carl Schmitt: Legacy and Prospects* 21 *CARDOZO LAW REVIEW* 1467-1928 (2000); Jacques Derrida, *THE POLITICS OF FRIENDSHIP* (1997); Chantal Moufée (ed.) *THE CHALLENGE OF CARL SCHMITT* (1999).

hegemonic assertion over them more perilous than ever imagined, in the first flush of reforms.

Mutation of the authoritarian pattern of doing things thus emerged as unanticipated, latent, and to Prad as counterproductive outcome for the reform of legal education. Professor Tripathi sought to advance his pioneering vision and agendum by drawing bright lines between permissible and forbidden academic dissent. "Guided democracy" in the period of transition is not an unfamiliar theme and although he would have criticized this approach in national and regional politics, Tripathi saw very little in enacting a command and control model for managing innovative legal education.⁶

No tribute to Professor Tripathi would be complete without a full rendering of accounts that shaped the transformative moment for Indian legal education as a whole. Nor would be a tribute sincere, which did not accept the enormous intensity of his commitment. There is simply no question that the fact that Delhi Law School retains the edge of academic leadership worldwide owes a great deal to the labours of his commitment and to those colleagues at Delhi who sought to redefine it. To raise necessary questions as to the past, present and future ways and means of academic leadership is one way to describe the full measure of Prad's contribution.

III

Professor Tripathi is among the handful of constitutional law scholars to have transformed its basic structure. His writings on developments in constitutional law showed in a very rich measure the potential of legal exegesis have for reshaping doctrinal practice. Appropriately he titled his Telang Lectures as *Insights*, and his earlier collection of essays as *Spotlights*. *Insights* illuminate the very core of constitutional hermeneutic;

6. My own value preferences lie in the opposite direction and I can honestly say that I was able to enact them at the Law School as Prad's successor to the Deanship and as Vice-Chancellor of Delhi University. I do not believe that values informing the processes of transition can be separated from results that are achieved or follow. But views on such matters may differ, even profoundly, and I respect Prad's way of relating means and ends, even when I could never have practised these myself. As a matter of fact, Prad's legacy in the management of legal education and research seems more institutionally lasting than "ultra-participatory" ways of fostering collegiate responsibility. His lead today is more universally followed by his former students and colleagues, now at the helm of managing yet another transition; indeed, those who may not be counted in this category also show strong allegiance to this model of leadership and management.

Spotlights bring to full public view the whims and vagaries of judicial process. Light, illumination, was Prad's magnificent obsession, interpretation of the interpreters was the leitmotif of his writing. He had, and rightly so, no difficulty in saying loud and clear to lawyers and Judges that only juristic academic labours may illumine the heart of darkness constitutional interpretation. In exemplary ways, he succeeded in installing a model of constitutional scholarship of judging the Judges.

To do complete justice to Professor Tripathi, it remains necessary to ask at least two questions: in what did this model consist? And what were its impacts on legal pedagogy and the craft of justicing? On the latter question, it is my impression that Justices, even of the Supreme Court, rarely explicitly acknowledged Professor Tripathi's writings. But this is a wholly unreliable indicator in a judicial and forensic culture where the failure to acknowledge scholarly writings while using these is a common "courtesy"⁷! I think his impact, regardless of judicial citations, on the craft of judging was significant. Scholarly citations to him have become rare⁸ perhaps because his own former students who guide research, edit law journals and occupy leadership positions have so internalised Prad's insights that acknowledgment of what he actually said seems superfluous, a scarcely sound academic practice! A wider explanation may also be found in the changing agendum and patterns of the Supreme Court decision-making; for example, the doctrine of "reasonable classification" (which Prad critiqued so remarkably) is no longer at the centre stage of contemporary constitutional jurisprudence. I mention these factors at random here in the hope that some day the question of appropriate measure of impact of Indian legal scholarship on development of adjudication may be thought worthy of research. It remains equally important to ask why contemporary scholarly writing on public law is so forgetful of the work of their predecessors in the field.

More important is the first question concerning the model that Prad evolved. At one level, the level of his literary practice, one may say that

7. The situation has improved noticeably after the late eighties and Justices remain less reticent to cite Indian scholars. Tripathi wrote in an era when it was considered inappropriate by Justices to cite a living author! He nevertheless delighted in culling out passages from the Supreme Court decisions where whole paragraphs appeared from his books without any source acknowledgement!

8. The lack of availability of his text, at this point of time, may provide a part of the explanation. The way, in which textbooks are written, with very little mention of scholarly contribution, may also have contributed to this situation of indifference. A major refreshing exception is provided by a tall constitutional law scholar, Professor S.P. Sathe, who even when he disagrees, directs attention to Professor Tripathi's corpus.

he exemplified the virtues of critical fidelity to judicial discourse.⁹ Argued, Prad never missed internal inconsistencies in judicial decisions; and he felt that it was the duty of scholars to highlight, though in urbane ways, shoddy judicial performances and to acclaim those that responded to the virtue of judicial coherence. But he believed strongly in the institutional integrity of court; Prad believed that each Justice signing an opinion was an equal author of the decision as his remarkable article, in the Journal of the Indian Law Institute, concerning contributions of Justice Gajendragadkar demonstrated.¹⁰ While himself well-versed in comparative constitutional jurisprudence, Professor Tripathi stressed the relative autonomy of the Indian approach to interpretation.

Beyond this, the substantive components of his model are more complex. If Professor Tripathi had a distinctive theory about judicial process, he allowed it to emerge through episodic commentary rather than by its full-fledged articulation. I believe it fair to say of his implicit theory that it was liberal positivist. His corpus presents, overall, a finely nuanced view concerning legitimacy, and therefore the limits, of judicial power.¹¹ This signified that Justices should not be, or seen to be, politicians in judicial robes.¹² Judicial "populism" was anathema to his implicit theory of constitutional adjudication. Professor Tripathi did not think that sociology of law type perspectives were relevant to the craft of judging. What mattered to him were not the raw social political context of legal development but the ability and the potential of judicial power and role that allowed juridical translation of the social.

This having been fully said, it must (in all fairness) also be said that Professor Tripathi remained animated (to evoke Professor Sanford Levinson's germinal phrase) by a "constitutional faith". It was an article of faith with Prad that the constitutional rule of law was an "unqualified public good" (he would have here evoked E.P. Thompson's characterization to so describe the rule of law, in its "progressive" aspects).

9. He showed us the virtues of close reading of decisional texts, at a time when "headnote" reading of cases sufficed even for eminent Justices and law persons.

10. Prad was not overtly troubled by the fact that Brother Gajendragadkar never authored a dissenting opinion, usually considered to offer a window to individual judicial worldview.

11. In his germinal article in Columbia Law Review, on *Precedent in Indian Law* so abundantly suggests, Professor Tripathi adhered to a view of judicial creativity held within the confines of an internal discipline of the tradition of adjudication. See for a bibliography of his writings, Mahendra P. Singh (ed.) *COMPARATIVE CONSTITUTIONAL LAW* (1989).

12. And, I suspected that he felt somewhat affronted by my *THE INDIAN SUPREME COURT AND POLITICS* (1980).

Prad had little use for Marxian critiques of the rule of law model, Indian-style. His corpus does not elaborate Indian constitutionalism as a reign of terror coexisting with the vaunted rule of law. In his view, the task of constitutional scholarship lay in the quest for understanding and explanation of the foundations of Indian constitutionalism, not in the shaking of the foundations. They may use polemics (as he so abundantly did) but not to the point of questioning the authority of authority. For, if you take this away what remains is constitutional chaos. The principal task, according to Prad, of legal scholarship is not to aid and abet this chaos but to bring into being the significant forms of meaning that reinforce legal authority.

These are important insights, which reject constitutionally ordained forms of impatience (like mine) with unconstitutional, and fully violent, patterns of Indian governance and development. From my standpoint, what matters are constituencies of hurt and harm created and sustained by these acts of interpretive collaboration among Justices and jurists.¹³ I recognize that this is an important matrix of creative dissensus. Evaluating constitutional development and interpretation beyond the legal doctrine, extending juristic labours to a fellowship of suffering for the recurrently disenfranchised constitutional underclasses, summons traumatic transformation of inherited modes of doing constitutional theory and practice. I persist in my belief that a "jurist" must at all times be an anguished and engaged citizen. I realize, of course, that neither of us can have the last word, though each one of us would want to have the final say. Even when I fancy that my "final" say is more radically democratic than Prad's. I have also to acknowledge the fragility of this saying. Constitutional theory and practice is produced and consumed by the constitutional haves. To bring to it the tasks of caring for the constitutional have-nots (in Babasaheb Ambedkar's idiom the *atisudras*) is an insurrectionary enterprise, whose future must always remain in peril.

IV

For fifty long years, the constitutional provision, which enables the elevation of a jurist to the Supreme Court of India has been consistently ignored. This has deprived India of its best prospect of conversion of a law Professor into a Justice. The prospect of having our own equivalent of a Felix Frankfurter has been wilfully squandered.

13. See U. Baxi, *Violence, Constitutionalism, and Struggle: Or How Not to Avoid Being a Mahatmooorkha* in S.P. Sathe (ed.) *LIBERTY, EQUALITY AND CHANGE: STRUGGLES FOR A NEW SOCIAL ORDER* (forthcoming).

The analogy, if I may say so, is wholly accurate, Justice Tripathi would have provided a heroic model for judicial self-restraint, like Justice Frankfurter. Like him, Justice Tripathi would have asserted that Judges may not watch election returns in reaching their decisions. Like Frankfurter, Tripathi on the High Bench would have, at the same time, constituted workable boundaries against judicial activism as well as judicial abdication. Like Frankfurter, he would have been discerning concerning creative uses of judicial role and power, held within articulate bounds of judicial self-discipline. Equally, Tripathi would have imparted elegance to the appellate judicial prose.

His non-elevation exemplifies India's constitutional misfortune, by now the custom of the Indian Constitution that says, contrary to its original intention, that *no jurist may ever be elevated to the Supreme Court*. Indian citizens thus remain unaccountably deprived of potential *judicial* contribution of Indian Jurists.

V

By way of a tribute and a memorial to Prad I have to insist we need to revisit his insights into constitutional theory and practice, in the context of the contemporary anxiety concerning the very future of Indian constitutionalism. I can do no more here than to say that Professor Tripathi summons us all, as he did during his tumultuous lifetime, to a faithful historiography of transformative modes of legal education in India. While I do not advocate "ancestor-worship", I do suggest that the massacre of ancestors remains violently inimical to the future of Indian legal education and research.

To end on a rather personal note, I grieve with Dr (Ms) Kusum Tripathi at Prad's sad demise. And I hope that Parag Tripathi, now a successful lawyer, pauses time and again, on the typical (and often tragic for Indian democratic destiny) runaway escalator of appellate lawyer's prosperity track, to return to his illustrious father's anxious interrogation concerning the future of Indian constitutionalism. Nothing is, unfortunately, more corrupting to this cause than a successful career at the Bar and the Bench. I know how proud Prad was at the distinguished potential and performance of Parag, who was also our common student. I want him to know that both he and I look forward to his contributions to the remarking of Indian public law in the midst of a human rights denying rampant economic globalisation, the new theology of development unfortunately so enthusiastically embraced by today's Bench and the Bar.

LEGAL EDUCATION AND SCHOLARSHIP IN INDIA— REMEMBERING PROFESSOR P.K. TRIPATHI (1924-2001)

M.P. Singh*

Professor Pradyumna Kumar Tripathi, who studied and taught at the Faculty of Law, University of Delhi for over four decades and was its two times Dean, unexpectedly passed away on 23 January 2001. Until a few days before his passing away he was living a healthy life, and was absorbed in research and writing. One of his writings appeared only a few days after his passing away.¹ More would have continued to appear had he lived longer. I understand he was engaged in a fundamental work on law, which he thought of discussing only after it was concluded. His untimely and sudden departure from our midst, besides being an irreparable loss to his family and friends, has created a void in the kind of legal education and scholarship he cherished, promoted and pursued throughout his life in thought, action and deed. He was unique in many ways. The void can, therefore, never be filled.

I had the fortune of knowing Professor Tripathi since 1970 when I joined the Faculty of Law, University of Delhi. In no time I developed admiration for him not because he was the then Dean or later held important assignments but because he was the embodiment of ideals I could think of in a university professor and a human being. Those ideals pervaded all aspects of his life, professional as well as private. During my personal and professional contacts with him, I cannot recall a single instance of any distortion of the image I had of him. Until a couple of hours before his death when I expressed my desire of meeting him in the hospital, his response was that let us meet leisurely in the cosy and quiet environ of his house after he was discharged from the hospital. The meeting did take place at his house next morning but only with his mortal remains in an environment full of sorrow and grief. A few weeks before, seeing me off after a long meeting at the same place, in his usual and unmatched cordiality and courtesy associated with extreme politeness

* Professor of Law, Faculty of Law, University of Delhi, Delhi-110007.
1. P.K. Tripathi, *Lawless Withdrawals from Public Funds: Cocking a Snook at Parliament* (2001) 1 SCC (J) 1.

the common law tradition too, despite the legal realism and legislative drive since the nineteenth century, legal scholarship of persons like Bentham, Austin, Hart, Llewellyn, Fuller, Pound, Rawls, Dworkin, Raz, Unger, to name only a few, has played and is playing decisive role in the formation of law. The whole of ancient law of India and much of the law given during the British rule is impregnated with the work of scholars, though most of them were not associated with the universities in the modern sense of the word. Indisputably, time and again law has been brought in line with social requirements through the efforts of scholars, who pointed out its incongruities and inadequacies before the legislators and the judges took them up. Thus we find that while the legislators and judges have found legal solutions to current issues faced by the society, the legal scholars have drawn a general plan of action for law. Undoubtedly the views of these scholars have influenced the judicial decisions and legislations.

Such being the case, Professor Tripathi perceived even a greater need of that kind of work for a country which, while he was still a student of law, had just made a break from the past in 1947 and was going to reconstruct and restructure itself through its first ever Constitution. For whatever reasons the Constitution envisaged a Euro-American model of a democratic republic. Sustenance of that model required the kind of scholarship that has been the hallmark of the Euro-American countries. Like the universities in those countries, universities in India also must perform that task. The universities are, however, not exclusively research centres but also the planners and providers of legal education. The module of law for the society must be developed through legal education, which must be based on serious research.

Professor Tripathi believed in the interdependence of legal education and research inasmuch as neither could survive or flourish without the other. Once he remarked that the Indian Law Institute failed to achieve its laudable goals because fundamentally its conception of legal research was unsound. Legal research could not flourish without a provision for legal education. He did not elaborate and I also failed to ask for it. Later when I saw the functioning of the Max Planck Institutes in Germany, I could realize the depth of his remark. The Max Planck Institutes are autonomous institutes in different disciplines spread all over the country funded by Federal grants. But they are all attached to the university within whose territorial jurisdiction they are situated. The universities are state (*Land*) universities. All the professors of these institutes, though appointed independently for these institutes, are also professors on the respective faculties at the universities under whose jurisdiction they are situated.

he spoke to me: "Singh Saheb aap se mil kar bahut khushi hoti hai, aap aksar aya kariye." But hastened to add: "Although it is unfair on my part to expect you to see me frequently." I was overwhelmed and returned with the fond promise of meeting him as frequently as possible without ever knowing even in my wild imagination that that was our last meeting and that those were his last words to me. Those words continue to give me a sense of accomplishment that I could give joy to someone like him.

Like his last words I could recall many statements from him, which reflected his humaneness and wisdom. A biographical sketch of the man and his achievements and thinking process could be drawn from these statements. Someone could undertake that exercise in the interest of legal education and scholarship. I tried a little bit in the *Festschrift* for him at his sixty-fifth birthday on 24 May 1989.² But it is utterly incomplete and inadequate. Much more needs to be done. I wish to do it. If I fail, someone must do it one day.

I could have availed of the present opportunity to make some progress towards the satisfaction of my wish. But that seems to me too big a task to be undertaken at this point. For the moment I shall try to recount some of the impressions I gathered from him of his concern for legal education and scholarship. Once addressing the students at the Faculty he recalled his entry into the world of teaching and research in law, which I summarise as I could understand him on this issue in the course of my various interactions with him. He could have started legal practice after his basic legal education. But, besides the uncertainty of success in legal practice, he was inspired towards higher studies and research in law because he saw a definite objective in quality legal education and research. That objective could be achieved only in the university life. He did not doubt that most of our laws come from the legislators and judges supported by legal officers and lawyers. But the legislators and judges were only legal source of law. The material for law came from research done by scholars at the universities or even otherwise. He believed that law in society could never take the right course unless backed by research and scholarship. He realised that the place law holds in the western world was due as much, if not more, to legal scholarship as to legislators and judges. In the civil law world definitely, law is considered a product of scholarship in the universities, *professorenrecht* in German. Even in the Far East like Japan and China, where traditionally law did not hold an exalted place in society, the civil law approach to law has become the basis of modern society. In

2. M.P. Singh (ed.) COMPARATIVE CONSTITUTIONAL LAW. Festschrift in Honour of Professor P. K. Tripathi IXff. (1989).

They primarily organise and conduct research in the institute but also teach at the faculty and supervise students for research degrees. All students and researchers attached to the university or the institute are entitled to utilise each other's resources and expertise. In the process both benefit and flourish and the available national resources are put to maximum use. It is not so with the Indian Law Institute. It is not attached to any of the universities in Delhi or elsewhere. Those who work at the Institute are not part of the university system. Nor the university system has anything to do with the Institute. Therefore, if anyone from either of the institutions wants to avail of the facilities of the other she is treated as an outsider. In the process both are disadvantaged. Institute's effort to run diploma classes, apparently for non-lawyers, is no more than diversion of its limited resources for research. In the process neither the legal education nor the research gains. Whether the Institute's effort from time to time to acquire deemed university character goes well with its initial objectives of fundamental research requires serious consideration.

Even on the question of training of lawyers in the universities, Professor Tripathi had his definite views. He believed that the universities must examine and plan what kind of lawyers society needs or, the other way round, what kind of society the lawyers may create or help in creating. Law is not merely a technique. It is a concept, like theology or religion with a social purpose. It cannot be developed and applied mechanically to meet the day-to-day needs. It requires a vision of the society, which comes from deep thought and understanding of the society in its overall perspective, past, present and future. Such perspective requires more than craftsmanship and knowledge of the existing rules. It requires the understanding of the reasons for those rules and the purpose they serve and whether those purposes are still relevant and the rules most suitable for attaining them. These issues require an abstraction, which is different from application. Of course application helps in developing the abstraction, but the two are not one and the same thing. Universities are universally accepted as the most appropriate place for such abstraction. And this is what they are meant for. Traditionally applied sciences were taught outside the universities. Until recently the institutes teaching them were designated as polytechnics. It is only recently that some of them have been converted into or affiliated to the universities. Initially the universities all over Europe had only three faculties, law, theology and medicine. The other faculties are only later additions. Accordingly Professor Tripathi believed that the university law faculties could not be a substitute for or extension of either the bar or the courtrooms. The universities must definitely train lawyers for the bar and the bench but that is not their sole

or even main objective. Their main objective is the development of the science of law in the service of the society. The bar and the courts are definitely most important forums of the application and creation of law in our legal system, but neither they apply nor do they produce all the law. Law is something that pervades the society and concerns as much to anybody as to lawyers. Law, like medicine, does not come into existence only when people get sick. Just as medicine requires planning to save society from the misery of disease, law also requires planning of a society that is strife-free and efficient. Nobody goes to lawyers and courts for pleasure. Nobody, in fact, would like to go to them if one could help it. Law's purpose is not merely to resolve disputes when they arise. Its purpose is creation of a dispute free society as far as possible. Lawyers and courts are not meant to plan and create that society. But the universities are. Therefore, law schools or faculties should not be confused with courtrooms or law chambers. University's goals are much more lofty and fundamental. It is only because the human beings fail to meet the standards evolved by the universities that we need lawyers and judges and not that we need lawyers and judges therefore we create universities. Creation of the universities or law schools on the assumption that they are meant only for training our best lawyers and judges is fundamentally unsound and against the concept of legal education and law. Unfortunately, however, at the moment everybody is racing for producing best-trained lawyers without leaving the slightest space for envisaging a lawyer or court free society. We should know that legal scholarship precedes and is more fundamental than the lawyers and the law courts and that we should not divert our limited resources towards the training of lawyers and judges and converting whatsoever legal scholars we have into trainers. The contest for creating the best training centres must be halted.

Professor Tripathi was also not impressed by the plea of imparting practical training to law students in the universities. He believed that that was something, which could be learnt only by practice in the courtrooms or in the law chambers. The realities of courtrooms and law chambers could not be enacted in the classrooms at the university. The universities could acquaint their students with the realities of the courtrooms and law chambers but they could not be a substitute for them. The fact that the society needed good lawyers and judges was not enough reason for asking the universities something impossible.

The universities, Professor Tripathi believed as I have already noted, were meant for educating students in law as it is and as it ought to be. And for that reason they needed scholars, devoted and committed to that cause. Therefore, he fully endorsed and supported the recommendation of

Gajendragadkar Committee that "teaching of law should be left almost entirely to full-time teachers who are dedicated to the work of teaching, are progressive and forward-looking in their approach and are fully conscious of the radical change which is required to be made" in the content and methodology of legal education in our country today." The Committee added: "Part-time teachers may be invited to join in the task of teaching law only in respect of some subjects which can be usefully left to them."³ It is under the mandate of the recommendations of this Committee that Professor Tripathi started his first tenure of deanship of Delhi Law Faculty in 1965. Not only he looked for the best talent for teaching but he also ensured that the teachers got necessary facilities and devoted their full time to teaching and research. Under the Ford Foundation grants he invited several famous professors from the United States to teach and guide at the Faculty and also sent almost all teachers of the Faculty to US law schools for exposure and learning of best techniques and skills of teaching and research. Already the Faculty was vibrant with the atmosphere of a full-time engagement to teaching and research when I joined it in July 1970. In early 1971 Professor Tripathi gave up voluntarily his deanship. After teaching for some time as professor he went to Australia for a few months and was later invited to be a member of the Law Commission where he served until 1977. Again, after teaching for over a year he was invited to Australia and then to Singapore. On his return in 1981 he was again asked to take up the responsibility of piloting the Faculty as its Dean and Head. By this time the Faculty had changed from what it was during his first tenure. Perhaps by now he had lost the initiative of making any major changes and just took care that no further damage was done to it during his tenure. When he noted that several full-time teachers had started court practice, he also got a clarificatory decision made by the University that full-time law teachers could not practice in courts even for legal aid purpose. But he could not stop the malaise. Recently in a public interest petition on this issue the High Court of Delhi has also decided that court practice by full-time law teachers is

3. The Committee consisting of Justice Gajendragadkar (later CJI) as Chairperson and P.N. Saprú, S.V. Gupte, Arthur von Mehron, Anandjee, M.P. Jain and M. Ramaswamy as members was constituted by C.D. Deshmukh the then Vice-Chancellor of the University of Delhi in 1963 "to study the problem of reorganization of legal education in Delhi University." The Committee submitted its report in 1964 which was also published. An edited version of the report is reprinted in 11A of DELHI LAW REVIEW appended to 16 DELHI LAW REVIEW (1994). The extracts quoted from the report are from page 25 of the REVIEW.

4. *Anees Ahmed v. University of Delhi and Others*, CWP No. 3412/1997, decided in May 2002. Special Leave Petition no. 14287/2000, against this decision is pending before the Supreme Court. (Ed)

against the university as well as bar laws.⁴ Whether the decision would in any way change the situation is yet to be seen. It may be noted that the expression "full-time" is not formal; it means a full time engagement and commitment to legal education and scholarship. Unless that happens nothing is going to change. Professor Tripathi, though, a highly composed person, always lamented the fact that no university including the University of Delhi could do to legal education and research, which it is expected to do. Therefore, he was very apprehensive whether we shall be able to sustain, much less to attain, through law our grand vision of India on the eve of independence incorporated in our Constitution.

Although Professor Tripathi was associated with the plan of national law schools from its very inception and also had all praise for what Professor Madhava Menon did at Bangalore, he was not enamoured of the five-year law course after twelve years of schooling. He believed that legal education required more mature brains and wider exposure to university education at graduation level before entering the law school. The five year law schools did not have enough law programmes for all the years and spend about two years in general courses, which could be better taught in the respective university departments at the under-graduate level. Even the school age, unless parents made the decision, was too early to decide about a career in law. It also excluded the possibility of someone deciding to join the law school at a later stage. In view of these and some other factors he could successfully stem the wave of introducing uniformly and exclusively five-year law course throughout the country including the University of Delhi. Until now the University of Delhi does not find any inherent weakness in three-year course. From my limited experience of legal education I find the concept of national law schools unique, if not incongruous, inasmuch as they are the only single faculty universities anywhere in the world, including India. They have so much narrowed down the concept of the university that their students and faculty have no opportunity to interact with anyone except themselves. Law courses are so much interlinked with other social sciences that in many law schools around the world law students take elective courses in other faculties. Of course inter-disciplinary legal education is not so common in India, but the option is not closed so long as law schools are part of a bigger intellectual community. That possibility is foreclosed in our national law schools. I doubt whether this issue has ever been seriously debated and discussed. The Gajendragadkar Committee made a very different recommendation on this issue. It said:⁵

5. *Supra* n. 3 at 32. Emphasis added.

As we were holding deliberations at the meeting of the committee, some of us felt that it would perhaps be a good idea if three or four model national law schools are instituted in our country in some chosen representative places. It is our hope that the Delhi Faculty of Law will, while carrying out the recommendations of our report, develop into one such national law school. These national law schools, *each of which should be an integral part of a university community*, would be able to attract eminent law teachers who believe in the significance and importance of reorienting legal education in India and who would be prepared to dedicate themselves to that task.

I do not know whether those who designed our so-called national law schools had considered the above recommendation.

True to his belief, rather faith, Professor Tripathi devoted all his time, energy and resources in teaching and research. He also enjoyed it most. He used to say that the pleasure he got in exposing the prevalent myths about the law and its application was immeasurable and incomparable. Therefore, he always wanted to stay in that state of pleasure. He always lamented that he could not get the kind of time he would have liked to spend on research and writing because under the then university system, where normally every law faculty had only one professor, as professor he had to shoulder the responsibilities of head and dean, which took a lot of his time, energy and peace of mind, which he would have otherwise devoted to research. He also lamented the fact that he did not get the kind of support from his peers, as he would have liked in terms of critical research. Whatever he wrote generally remained a lone voice unlike the Western countries where several comments for or against or at variance would appear when anybody takes up any issue or arrives at certain research findings. Consequently he could not get the required feed back for further research and refinement of his views and findings. Nor could he get the required challenge for further work. Therefore, the best in him could also not be utilised.

To me Professor Tripathi never expressed any desire that he would have liked to do anything else other than serious teaching and research. Only he regretted that he was born at a wrong time and place. He took some pride in expressing that he was the first full time academic member of the Law Commission consecutively for two terms, but he never gave any hint that as member Law Commission he served law better than he served it as professor. Even during his membership of the Commission he continued to research and write on subjects of his interest and, among

others, produced a book in Hindi on the constitutional law of India, which was sponsored and published by the Government of India and was later awarded prize for being the best legal publication of the decade in Hindi.

I also do not know how keen Professor Tripathi was in being appointed as a judge of the Supreme Court. Whenever the issue arose he simply said that such appointment of any suitable professor would inspire research and scholarship, which is so important for law. It seems that more than once he was close to being appointed but for one reason or another that did not happen. Once a former Chief Justice told me that his name was considered for appointment but by that time he had reached an age where he would have been a judge at the Court for less than two years. One of the norms for the appointment of judges to the Supreme Court and the High Courts is that one must have at least two years to serve. Therefore, the offer could not come to him. Of course his appointment to the Supreme Court would have brought a sense of pride to the legal scholars. But the kind of scholar he was must be a matter of greater pride for all of us who are in his profession. He has contributed so much to our law through legal education and research that no judge can be proud of.⁶ As professors we are assigned a particular role in the scheme of things, which is no less important than any other role in the society. We must perform it to the best of our abilities. This is what Professor Tripathi did. The best memorial we can create for him is that we follow and strengthen the path he laid down for the legal education and scholarship in this country.

6. For a summary of some of his contributions see *supra* n. 2 at 479 ff.

was never his hallmark; instead he convinced all and sundry by his humility and a mature advice.

Professor Errabi's extraordinary qualities as a human being and as a teacher have been so refreshing to his colleagues, admirers and a generation of his students, that every now and then they would feel his absence. His approach to life, as I discerned was that of self-restraint, indeed a rare quality nowadays. I also realized that he treated with compassion and respect, all those who came in contact with him, even if they disagreed with him. I recall in a faculty meeting chaired by him, how his innocent yet transformative words could overcome any fiery combative colleague. At the end of the meeting he underlined the need for such interactive meetings in which the challenges facing the legal education could be thoroughly discussed. Indeed as he remarked, legal profession is upto a challenging task ahead in view of newer developments in the field of law, which the legal education cannot ignore. If legal profession has to be proficient, it cannot be without the legal education being professionalized, both of them being highly interdependent. He convinced most of us, that no aspect of our life, no human interaction we come across, no problem we face, is to be treated as routine. Everything can be engaged, every thing can be transformed, only if we have the will and commitment of purpose. This applies absolutely to reforming of the legal education as it does to many other walks of life.

Professor Errabi stands as a source of inspiration for generation of students, his colleagues and his admirers. His creative writings demonstrate the characteristic qualities of a law professor's position on many legal issues. His view point was invariably supported by precedents. He was fond of illustrative simplicity in his academic discourses and was equally open to suggestions from his friends and colleagues as well. He was unhesitatingly available for any help or guidance particularly to his younger colleagues, as and when they approached him. I recall after having shown him a first draft of a review article of a book on constitutional law, how forthright in his comments and suggestions on the review, he was. However, these personal interactions apart, he also recommended a fortnightly, if not weekly presentations by colleagues in the Faculty of Law on diverse issues of law.

That indeed is happening in many law schools: I wish such a thing was happening in Delhi Law School too, he sighed!

Professor Errabi's legal scholarship has included a variety of subjects in the legal curriculum. No doubt he has written extensively in constitutional law, but other subjects notably international law and family law etc. have

A TRIBUTE TO A RETIRING COLLEAGUE

J.L. Kaul *

I take this occasion to put on record the great accomplishments of my colleague, Professor B: Errabi who reached his superannuation in June 2001, after a very distinguished teaching career of more than three decades. The task of writing a tribute would have been better accomplished, had someone else having a longer association with Professor Errabi, mapped the finer qualities of Professor Errabi. However, as Editor of the *Delhi Law Review* it is my pleasant duty to write about Professor Errabi on his retirement. In doing so I carry forward the great tradition of *Delhi Law Review*, of having write ups of retiring colleagues of the Faculty of Law in the esteemed journal, as a mark of respect and also as a record of their accomplishments.

Professor Errabi had joined the Faculty of Law, University of Delhi as Lecturer way back in 1965 immediately after completing his Masters in Law. Indeed joining a teaching career must surely have been, a deliberate decision for Professor Errabi. Though other lucrative options were open to him, it was his academic orientation that led him to choose teaching rather than any other career option. His academic bent of mind is evident from the fact that he completed his doctoral degree in law while pursuing his teaching career simultaneously in University of Delhi. His hard work and dedication saw him emerge as an accomplished teacher and a distinguished legal researcher. He pursued his research undertakings uninterruptedly.

I came to know Professor Errabi only in 1997, when I joined the University of Delhi and its Campus Law Centre (CLC), although I had gone through his writings in the field of constitutional and family law even prior to that. While at CLC I realized that there were immense difficulties, which were proving hostile to a genuine work culture. Professor Errabi's encouragement and friendly advice proved quite useful to people like me to overcome those difficulties. In due course of time I found in Professor Errabi, a pragmatist and a mild mannered friend. I soon realized that he demonstrated soft-spokenness and an astute judgement. Aggressiveness

* Professor of Law, Faculty of Law, University of Delhi, Delhi-110007.

as well not escaped his legal analyses. Professor Errabi demonstrated an inclination to confine his inquiry within a narrow compass, particularly when they related to interpretative investigations. He was also perhaps not in favour of empirical approach to the examination of legal conduct. A greater problem inherent in such an empirical research lies in its limited ability to produce predetermined results, when applied to human actions and decisions. Reliance on statistical generalizations in forecasting human conduct may prove perilous, he remarked once. However, he relished comparative law techniques to the understanding and interpretation of diverse legal doctrines. Indeed his approach is demonstrative of explaining the influence of diverse constitutional structures of the world in explaining and interpreting a constitutional program. Needless to say, it depicts a new interdependence of thought and critical evaluation of constitutional interpretations in various countries. The interposition of this approach has got a seminal importance in judicial interpretations of contemporary issues in Indian context as well. It is because of this that Professor Errabi was fond of teaching comparative jurisprudence. His post-graduate students would recall his profundity of thought and interpretations.

I know that Professor Errabi has an unfinished agenda, as is apparent from the fact that he has not stopped writing even after his retirement. I am sure, his thirst for engaging himself more in legal research would not die down, he is presently with Max Plank Institute, Germany on a research fellowship. Also given any chance to engage himself in teaching would also not be missed by him. That is apparent from the fact that immediately after his retirement from the University of Delhi, he found a position of Visiting Professor in the National Academy of Legal Science and Research, Hyderabad. Professor Ranbir Singh, the Director of the Academy hardly misses an occasion of engaging the talent of the genre of Professor Errabi.

In the last, whatever, Professor Errabi engages himself in, henceforth, I and my colleagues wish him very well. We wish and pray for Professor Errabi's happier, active and most engaging post-retirement life.

HUMAN RIGHTS OF PERSONS WITH DISABILITIES: SOME REFLECTIONS

Parmanand Singh*

I. INTRODUCTION

Broadly speaking, approximately over 600 million persons are disabled in the sense that they are restricted in or unable to perform an activity or function considered normal for a human being because of physical, sensory, mental or psychological impairment. People with disabilities have been effectively excluded from economic, social and public spheres of life throughout history and in most cultures.¹ By and large such exclusion has no rational basis whatsoever and rests on either naked prejudice or popular indifference. Disability causes social stigma on the ground that the condition of disability is considered as "undesired differentness" from socially defined norm of "normality".² The society and its institutions are designed for the "normals" and not for the people with stigmatised traits. People with disability generally experience a "spread effect" in which it is assumed that an impairment that affects particular life functions also indicates universal disability.

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UNSR) were adopted by the General Assembly on December 20, 1993 with the purpose of achieving positive and full inclusion of persons with disabilities in all aspects of society under the leadership role of the United Nations.³ The Standard Rules are firmly built on the principles and concepts enshrined in the World Programme of Action

* Head and Dean, Faculty of Law, University of Delhi, Delhi-110007. I wish to thank the Max Planck Institute, Heidelberg, Germany, for granting me Visiting Professorship during the summer of 2000 for pursuing research on disability equality and giving me an opportunity to prepare this paper.

1. V.K. Dixit, *Historical Foundation of Disability Discrimination in Classical Hindu Law XX DELHI LAW REVIEW 65-70* (1998).
2. Samuel R. Bagenston, *Subordination, Stigma and Disability 86(3) VIRGINIA LAW REVIEW 397* (2000).
3. THE UN STANDARD RULES ON THE EQUALIZATION OF OPPORTUNITIES FOR PERSONS WITH DISABILITIES 1993 (UNSR).

concerning Disabled Persons (WPA) of 1982.⁴ The UNSR establish that the States have a responsibility "to create the legal bases for measures to achieve the objectives of full participation and equality for persons with disabilities".⁵ It is hoped that the Rules "can become customary rules when they are applied by a great number of States with the intention of respecting a rule in international law".⁶ Earlier the ILO standards provided guidelines for employment opportunities for the disabled people.⁷ Various instruments of the European Community and the Council of Europe also made aspirational reference to the objective of social integration and equality for disabled workers.⁸

As a corollary of the growing recognition of human rights law, each State is expected to provide legal safeguards against discrimination and secure the equal enjoyment and exercise of human rights of the persons with disabilities. Within the European Union only Germany⁹ and the United Kingdom¹⁰ have passed comprehensive legislations on disability discrimination and in the remaining countries the disability issues are treated as matters of social policy. Amongst the Western countries the United States¹¹ and Canada¹² have passed disability laws. Australia¹³ and New Zealand¹⁴ have also enacted laws. Among the developing Third World countries India is perhaps the first to have enacted a legislation in 1995 in response to the Beijing meeting held in December 1992 to launch the Asian and Pacific Decade of Disabled Persons 1993-2002.¹⁵

4. Bengt Lindquist, *Standard Rules in the Disability Field — A New United Nations Instrument* in Degener and Koster-Dreese, *HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHT INSTRUMENTS* 63 (1995).
5. UNSR Rule 15.
6. UNSR Introduction, para 14.
7. ILO VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION No. 159, 1983.
8. EUROPEAN SOCIAL CHARTER 1961 Part-1, para 15 and Part-II Art 15, E.C. CHARTER OF FUNDAMENTAL SOCIAL RIGHTS OF WORKERS 1989. The new text of Article 15 of the Charter provides that the parties must aim to develop a coherent policy for the people with disabilities and ensure for them a right to independent social integration, personal autonomy and participation in the life of the community. It also states that the disabled people should be provided education, vocational training and rehabilitation.
9. *SCHWERBEHINDERTENGESETZ* 1986.
10. *DISABILITY DISCRIMINATION ACT* 1995.
11. *THE AMERICANS WITH DISABILITIES ACT* 1990.
12. *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 1982, S. 15 HUMAN RIGHTS ACT 1985.
13. *DISABILITY DISCRIMINATION ACT* 1992.
14. *HUMAN RIGHTS ACT* 1993.
15. *THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT* 1995.

II. APPROACHES TO DISABILITY RIGHTS

Today the medical view of disability has been discarded. The medical welfare approach treats disability as an inherent personal characteristics rather than a characteristic that draws its meaning from social context. In such an approach disability is a matter of a personal tragedy. Such a view encourages dependence on doctors, rehabilitational professionals and charity. Apparently the medical paradigm stigmatises the disabled people by describing them as not "normal". The classification of disability made by World Health Organisation (WHO) in 1980 also supports the medical approach. WHO defines 'handicap' as a disadvantage for a given individual resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, social and cultural factors) for that individual. 'Impairment' is any loss or abnormality of psychological, physiological or anatomical structure or function. 'Disability' indicates any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.¹⁶ The WHO classification overlooks the fact that discrimination experienced by a disabled individual is the product of society's negative reaction towards impairment and disability.

According to contemporary thinking disability should be located in the prevailing social context. Disability is not considered as a product of limitation imposed by physical or mental impairment. Rather disability is regarded as a result of interaction between societal barriers and the impairment. A person is disabled not because of his personal tragedy but because of the disadvantages suffered by him by a disabling environment besides the prevalence of stereotypes, prejudices and neglect of the so-called 'normal' individuals.¹⁷ The advocates of social relations model, therefore, insist that the society as a whole has the responsibility to eliminate social and physical structures that exclude people with disabilities in having access to opportunities.

Let us now turn to the concept of disability equality. The demand for equality is based upon the concept of human autonomy, which consists of personal capacities to have an access to the opportunities that society offers to all the people. As has been observed by Joseph Raz¹⁸:

16. *INTERNATIONAL CLASSIFICATION OF IMPAIRMENTS, DISABILITIES AND HANDICAPS*, Geneva, WHO, 1980.
17. Samuel R. Bagenston, *supra* n. 2 at 418-32. Also see Len Barton, *Sociology, Disability Studies and Education: Some Observations*, in *THE DISABILITY READER SOCIAL SCIENCE PERSPECTIVE* 53-59 (1998).
18. J. Raz, *THE MORALITY OF FREEDOM* 369 (1986).

The ideal of personal autonomy is the vision of people controlling to some degree, their own destiny fashioning it through successive decisions throughout their lives.

John Rawls describes personal autonomy "as the ability to frame, to revise and to pursue a conception of the good and to deliberate in accordance with it".¹⁹ The norm of human autonomy is central to civil rights tradition which means self governance. In the context of disability equality the concept of "autonomy" cannot be located to the existence of personal capacities to have an access to opportunities. The ethical principle of equality that all human beings are equal in their self worth, dignity and autonomy would be false for people with disabilities. The disabled people would demand a concept of equality in which society should undertake special efforts in order to equalize opportunities for them. "Disability" and "ability" as well as "difference" and "sameness" are relational concepts. Much depends upon how "difference" and "sameness" are viewed. The problem here is not of "difference" but privileged social norm of ablebodiedness. In other words "sameness" and "difference" are nothing, but social constructions. No one is "different" without a counterpart having some other traits and nobody is "disabled" as long as there is no person to compare with who is differently "abled". "Sameness" and "difference" very much depends upon our point of comparison. We assign the label "normal" to our group and then we compare our group of normals with a counter-example, that we call "different".²⁰ Equality, therefore, is not a synonym for the promotion of "sameness" but implies a right to be "different". The notion of formal equality entails a optimistic view of individual autonomy and rationality and completely ignores the social disparities and social disadvantages and their impact on free competition.

In the context of disability the notion of substantive equality or genuine equality would be more appropriate. Substantive equality seeks to aid the disadvantaged or otherwise vulnerable groups by giving them special treatment in an effort to enhance their equal rights. This notion of equality takes account of both personal and environmental barriers which may inhibit societal participation. Rawlsian concept of maximum justice also supports the notion of substantive equality according to which goods should be distributed equally — as opposed to the "same" — among the members of society unless an unequal distribution will be to the advantage

19. J. Rawls, *POLITICAL LIBERATION* 72 (1993).

20. M. Oliver, *Discrimination, Disability and Social Policy* in M. Brenton, C. Jones (ed.) *YEARBOOK OF SOCIAL POLICY* 74ff (1984-1985).

of less fortunate.²¹ According to Friedland²² the society's obligation to create a fully accessible society for disabled people would be justified by Rawlsian theory of justice. She argues that rational individuals behind a Rawlsian-like veil of ignorance²³ would agree to provide benefits/accommodations to individuals with disabilities in order to insure against the possibility that they themselves would turn out to be disabled. According to her such a notion is the basis for Ronald Dworkin's²⁴ assertion that society has a moral responsibility to assist the individuals with disabilities.²⁵ Dworkin argues that people, if they could have done so before they were born, would have paid into an insurance scheme to compensate them should they turn out to be disabled and that society should therefore set up the equivalent of that insurance scheme now.²⁶

The notion of substantive equality would entitle the people with disabilities a host of social and economic rights such as housing, health, education, employment and also certain "market-participation rights" such as the right to work, the right to fair conditions of employment, right to fair remuneration, the right to organise and the right to social security. Only through the market inspired rights the people with disabilities can achieve economic empowerment and independence.

WPA adopted by the General Assembly in 1982 describes the principle of equality as follows.²⁷

The principle of equal rights for the disabled and non-disabled implies that the needs of each and every individual are of equal importance, that their needs must be made the basis for the planning of societies and that resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.

The World Conference on Human Rights²⁸ confirmed that "all human rights and fundamental freedoms are universal and thus unreservedly

21. J. Rawls, *A THEORY OF JUSTICE* 303 (1971).

22. Michelle T. Friedland, *Not Disabled Enough: The ADA's "Majority Activity" Definition of Disability* 52 *STANFORD LAW REVIEW* 171, 191 (1999).

23. J. Rawls, *supra* n. 21 at 136-42.

24. R. Dworkin, *What is Equality? Part 2: Equality of Resources*, 1022 *PHILOSOPHY AND PUBLIC AFFAIRS* 283, 296-304 (1981).

25. Friedland, *supra* n. 22 at 191-92.

26. Dworkin, *supra* n. 24 at 297.

27. *WORLD PROGRAMME OF ACTION CONCERNING DISABLED PERSONS*, General Assembly of the United Nations Resolution 37/52.63, December 1982, para 25.

28. *VIENNA DECLARATION AND PROGRAMME OF ACTION*, U.N. Doc. A/CONF. 157/23 Title II para 63 (1993).

include persons with disabilities... The World Conference on Human Rights calls on all Governments, where necessary to adopt or adjust legislation to ensure access to these (life, welfare, education, work, living independently and active participation in all aspects of society) and other rights for disabled persons."

The people with disabilities should be protected against both direct and indirect discrimination. Direct discrimination occurs when the disabled people are singled out for differential treatment in jobs, schools, transportation, etc. Indirect discrimination occurs against persons with disabilities when an employer or service imposes a condition or requirement which is applied universally in terms of formal equality but such condition or requirement has a discriminatory impact of effect on the disabled individuals.²⁹ Reasonable accommodation goes beyond a simple equal treatment principle to require changes in some practices and structures to alleviate the disadvantageous effects of physical differences. The duty to provide reasonable accommodation ought to be a legally enforceable duty with a corresponding right of disabled persons to require positive action to lift the barriers that obstruct their societal participation. Reasonable accommodation may be defined as "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity".³⁰ Examples of "reasonable accommodation" include the instalment of ramps and elevators, the introduction of part-time work-schedules, and availability of readers as well as sign translation. These accommodations seek to ensure equality and social integration by breaking down environmental barriers.

III. GLOBAL CONCERN FOR DISABILITY RIGHTS

Declaration of the Rights of the Disabled Persons adopted by the United Nations in 1975 was the first important step towards disability equality.³¹ The Declaration's objective is to promote "the dignity and worth of the human person and the necessity... of assisting disabled persons to develop their abilities in most varied fields of activities and promoting in so far as possible of ... their integration into... normal life"³²

29. For an incisive discussion of direct and indirect discrimination see. M. David Lepofsky, *The Charter's Guarantee of Equality To People with Disabilities: How Well is it Working?* 16 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 155, 172 (1998).

30. Ch. G. Bell, R. L. Burgdorf, *Accommodating the Spectrum of Individual Disabilities*, UNITED STATES COMMISSION ON CIVIL RIGHTS, Publication No. 81, Washington D.C.

31. DECLARATION OF THE RIGHTS OF DISABLED PERSONS, 9 December 1975, U.N.G.A. Resolution 347 (XXX).

32. *Id.* Preamble.

The Declaration proclaims the rights of disabled persons to dignity, self-reliance, medical and rehabilitational treatment, assistive aids, educational and vocational training, and social integration.³³ Entitlement to live with one's family, to participate in social and recreational activities and to freedom from discrimination with respect to accommodation are also enumerated.³⁴

The World Programme of Action concerning Disabled Persons (WPA) in December 1982 and the period 1983-1992 being designed as the United Nations Decade of Disabled Persons marked a significant global strategy for achieving equality to the people with disabilities.³⁵ "Equalization of Opportunities" had been the main theme of WPA. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities were adopted by General Assembly on December 20, 1993.³⁶ As stated in the Preamble the purpose of UNSR is:

- (a) to stress that all actions in the field of disability pre-supposes adequate knowledge and experience of the conditions and special needs of the people with disabilities;
- (b) to emphasise that the process through which every aspect of societal organization is made accessible to all is a basic objective of socio-economic development;
- (c) to outline the crucial aspects of social policies in the field of disability; including as appropriate, the active encouragement of technical and economic co-operation;
- (d) to provide models for the political decision-making process required for the attainment of equal opportunities, bearing in mind the widely differing technical and economic levels, the fact that the process must reflect keen understanding of the cultural context within which it takes place and the crucial role of persons with disabilities.³⁷

The UNSR recognise four pre-conditions for equal participation by persons with disabilities in society, namely, the raised awareness in society about rights, needs, potential and contributions of persons with disabilities the provision of effective medical care and rehabilitation services to people with disabilities and finally the development and supply of support services including assistive devices for persons with disabilities.³⁸

33. *Id.* Art. 6-8.

34. *Id.* Art. 9.

35. *Supra* n. 27.

36. U.N. Doc A/Res/48/96.

37. UNSR Preamble.

38. UNSR Rules 1-4.

Eight target areas are recognised. These include accessibility, in terms both the physical environment and information and communication, education, employment, income maintenance and social security, family life and personal integrity, culture, recreation and sports and religion.³⁹

The Standard Rules contain fundamental principles of the international disability movement and is based on the social model of disability equality. These rules acknowledge that environmental barriers are a great impediment to participation in society than functional limitations and barrier removal through legislation, universal design, provision for accommodation and other means, has been identified as the key to equalization of opportunities for people with disabilities. The Rules recommend to the governments of the member States to take measures to eliminate the real causes of disadvantage and vulnerability and should remove all the environmental barriers that inhibit disabled persons from exercising their human rights. The Standard Rules contain a powerful message to the World. The message is that the concept of equality implies the notion of the indivisibility, interrelation and interdependence of the two sets of human rights: civil and political rights on the one hand and economic and social rights on the other hand. The Rules proclaim⁴⁰:

Equalization of opportunities means the process through which the various systems of society and environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity of participation. People with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.

It is hoped that the Standard Rules will "become customary rules when they are applied by a great number of states with the intention of respecting a rule in international law".⁴¹ Within the European Union the most significant event has been the amendments to the Treaty of Rome, 1957 in October 1997 which took effect from May 1, 1999 by which the

39. UNSR Rules 5-12.

40. UNSR Introduction, paras 24-27.

41. UNSR Introduction, para 14.

member States have been enabled to pass legislations to protect the human rights of the disabled people. However, the potential provided by the Treaty of Amsterdam for the advancement of disability rights within the European Community is substantial. The system of the law of the European Union is unique in the sense that the protected rights are made accessible to the individual. The role played by the European Court of Justice in developing disability jurisprudence would be of great significance.⁴²

In most of the countries of the European Union the protection of human rights of the disabled people is a matter of social policy rather than a matter of social legislation. In Belgium, the disability policy focuses on education, social integration, entry into labour market, the improvement of living conditions and greater independence for people with disabilities.⁴³ There is no direct legislation on disability. In Denmark⁴⁴ the government accords high priority to the U.N. Standard Rules in the national handicap planning of activities. The government has set up Equal Opportunities Centre For Disabled Persons in 1993. In Spain⁴⁵ an action plan for disabled people was adopted in 1996 for social integration of people with disabilities. In Austria⁴⁶, the Federal Ministry for Labour, Health and Social Affairs defends the interests of disabled people and implements the constitutional commitment to the people with disabilities. In July 1997 Article 7 of Austria's Federal Constitution was extended to include the prohibition of discrimination on ground of disability. Article 7 of the Constitution also includes a national commitment to ensure that people who are disabled are treated in the same way as non-disabled people. Sweden⁴⁷ has designated the Disability Ombudsman to evaluate the measures adopted by the government to implement the U.N. Standard Rules.

42. Richard Whittle, *Disability Rights After Amsterdam: The Way Forward*, 1 EUROPEAN HUMAN RIGHTS LAW REVIEW 33-48 (2000). Whittle argues that the newly introduced Articles 13 and 137 to the Treaty of Rome 1957 at Amsterdam in 1997 provide legislative bases for disability discrimination legislations within the European Union. However, these articles do not create any effective enforceable rights to the individuals with disabilities but are in the nature of enabling provisions urging the community institutions to introduce secondary legislations conferring enforceable rights to the disabled individuals before the national courts.

43. *Compendium On Member States' Policies on Equality of Opportunity for People With Disabilities: Employment and Social Affairs: European Commission* (1998). This information can be accessed through the Europa server (<http://europa.eu.int>).

44. *Id.* at 17-21.

45. *Id.* at 35-40.

46. *Id.* at 71-76.

47. *Id.* at 89-94.

The Disability Ombudsman can hear complaints of disabled people but has no power to take action before the court. The policies for vocational rehabilitation, employment, accessibility and social integration of disabled people have also been adopted. In France⁴⁸, the disability rights are laid down in two basic texts namely Act of 30 June 1975 on guidance for people with disabilities and the Act of 10 July 1987 on the promotion of the employment of disabled people. The principle underlying French policy is priority for integration of the disabled people into an ordinary environment. The Greek Parliament has ratified WPA by Act No. 2430 of 1996 and a Committee has been set up to prepare a national action plan for the people with disabilities.⁴⁹ In Ireland⁵⁰ the government has undertaken a number of initiatives since 1993 for promoting equal opportunities for people with disabilities including the establishment of the Commission on the Status of the People with Disabilities and Irish Council of People with Disabilities. The government has also promised to pass a Disability Act. Italy⁵¹ has issued a statement of policy under the title "Framework Law On the Care, Social Integration and Rights of the Disabled People" (Law 104/92) encompassing matters relating to prevention and diagnosis, treatment and rehabilitation, right to educational, vocational, and social integration. In Luxembourg⁵², the Minister for Disabled People coordinates disability policies in the field of education, employment and social integration of the people with disabilities. Disabled Workers Act of 12 November 1991 seeks integration of disabled people in the labour market. In Netherlands⁵³, The Vocational (Re) integration of Disabled People Act came into force on 1 July 1998 which seeks vocational rehabilitation of people with a disability. The Facilities for the Disabled Act take care of social integration of disabled people. Portugal⁵⁴ has passed Law No. 35.96 of 2 May 1996 for implementation of policies relating to rehabilitation and integration of people with a disability. In Finland⁵⁵ the National Council on Disability published a national disability programme in 1996 on empowerment of disabled people in the fields of education, employment and social integration.

In 1996 the European Union made a crucial policy shift to right-based approach in the disability field. The present policy focuses on integration

48. *Id.* at 41-46.

49. *Id.* at 29-33.

50. *Id.* at 47-52.

51. *Id.* at 53-58.

52. *Id.* at 61-63.

53. *Id.* at 65-70.

54. *Id.* at 77-82.

55. *Id.* at 83-87.

of people with disabilities. The disability policy goes beyond the provision of social and medical services in order to reduce functional limitations and increase independence of people with disabilities.

* A. United Kingdom

In the United Kingdom the disabled workers were protected by Disabled Persons (Employment) Act 1944 by which a system of statutory job quota prevailed upon employers of twenty or more employees. With some exception this quota was fixed at three percent. In effect, however, the quota system did not work well and had not produced tangible results. The latest legislation in U.K. is Disability Discrimination Act 1995 (DDA).⁵⁶ DDA prohibits discrimination against disabled persons in respect of provision of goods, services, facilities and in relation to disposal and management of premises.⁵⁷ The quota system has been repealed. DDA demands new accessibility standards for disabled users of taxis, public service vehicles and rail vehicles.⁵⁸ Educational institutions have been placed under a duty to encourage access for and the integration of the disabled pupils and students at all levels of education.⁵⁹ The Act also prohibits disability related discrimination in respect of employment and contract work⁶⁰ or by trade unions, employer's associations and trade or professional organisations.⁶¹

DDA makes it unlawful for employers to discriminate against disabled individuals in recruitment and selection, in terms of employment⁶² and in employment opportunities generally.⁶³ According to DDA discrimination means "for a reason which relates to the disabled person's disability" the employer "treats or would treat others to whom that reason does not or would not apply".⁶⁴ However, the employer can take the plea of justification where it can be shown that "is both material to the circumstances of a person is a reason that "is both material to the circumstances of a particular case and substantial".⁶⁵ The employers have also a duty to

56. Brian Doyle, *Disabled Workers Rights, the Disability Discrimination Act and the U.N. Standard Rules 25* INDUSTRIAL LAW JOURNAL 1-14 (1996).

57. *Id.* DISABILITY DISCRIMINATION ACT 1995 Ss. 19-24.

58. *Id.* Ss. 32-49.

59. *Id.* Ss. 29-31.

60. *Id.* Ss. 4-12.

61. *Id.* Ss. 13-15.

62. *Id.* Ss. 17-18.

63. *Id.* Ss. 4(1) and (2).

64. *Id.* Ss. 5(1) (a).

65. *Id.* Ss. 5(1) (b).

make reasonable accommodation.⁶⁶ The examples of reasonable accommodation include making adjustment to premises and alteration or adjustment to policies and practices. An employer discriminates if it unjustifiably fails to comply with the duty to make reasonable adjustments.⁶⁷ The employment provisions of DDA are enforceable by litigation in the industrial tribunal system. The tribunal can make an award of unlimited compensation to a successful complainant. The tribunal can also make recommendations to prevent future discrimination.⁶⁸ DDA applies to all employers with 20 or more employees. From 1998 the employment provisions have been extended to employers employing 15 or more employees. The Act defines disabled person as "a person who has (or has had) a disability" and a person has a disability "if he has a physical or mental impairment which has substantial and long term adverse effect on his ability to carry out day to day activities".⁶⁹

According to Brian Doyle, DDA falls short of social model of disability recognised by UN Standard Rules and reflects the medical model of disability which has been totally rejected by disability rights activities.⁷⁰ The DDA makes no reference to the UN Standard Rules although it meets many objectives of the Rules. Nevertheless DDA creates a strong moral commitment for equalization of opportunities for disabled persons.

B. Germany

Since the birth of the present post World War II German Government, the Federal Republic of Germany, the Federal Parliament (Bundestag) has approved comprehensive legislations protecting disabled persons in 1953⁷¹, 1961⁷², 1974⁷³, 1976⁷⁴ and 1986.⁷⁵ In World War II thirty two million German soldiers and more than 500,000 civilians lost their lives and many were rendered physically handicapped. Thousands of disabled people remained

66. *Id.* S. 6.

67. Exclusion of employers employing less than 20 employees from the purview of DDA is regarded as a flaw in the law. See Brian Doyle, *supra* n. 56 at 14.

68. DDA, Ss. 8(2)(a) and (b).

69. *Id.*, Ss. 1-2, Schedules 1-2. The term "impairment" has however not been defined in the Act.

70. See Brian Doyle, *supra* n. 56 at 12-13.

71. *GESETZ UBER DIE BESCHAFTIGUNG SCHWERBESCHADIGTER* 1953, BGB I | 389.

72. *NEUFASSUNG DES SCHWERBESCHADIGTENGESETZES* 1961, BGB I | 1233.

73. *GESETZ ZUR WEITERENTWICKLUNG DES SCHWERBESCHADIGTENRECHTS* 1974, BGB I | 1481.

74. *DAS ACHTE GESETZ UBER DIE ANPASSUNG DER LEISTUNGEN DES BUNDESVERSORGUNGSGESETZES* 1976, BGB I | 1481.

75. *SCHWERBEHINDERTENGESETZ OR SCHWBG.* BGB I | 1110.

unemployed. The impact of two world wars was so devastating for German people that the German Government was the first to take initiative to pass disability laws.⁷⁶

In 1986 the German Parliament or "Bundestag" approved a major amendment to its existing comprehensive law affecting the disabled, the *Schwerbehindertengesetz* or *SchwBG*. The main aim of *SchwBG* is to eliminate employment discrimination and prejudices against the disabled and to promote their employment opportunities. Even the German Constitution, called Basic Law (*Grundgesetz*) contains clause (3) in Article 3 to the effect that "no person shall be disadvantaged on account of his or her disability".⁷⁷ The extension of the disability discrimination provision in the Basic Law has consolidated the position of the people with disabilities because it contains a provision that it is the duty of the state to take steps to ensure that people with disabilities can participate in the life of the society on equal footing. In Germany every person with a physical, mental or psychological disability is entitled to claim a social right to the assistance necessary to prevent the disability or to remove it. The 'social right' is the legal and guiding principle for Germany's rehabilitational and disability policy. The government has provided a comprehensive social benefit system to achieve equality for the disabled people.

The German disability law (*SchwBG*) is completely coherent and all encompassing leaving very little for judicial law making which is quite alien in a civil law system. According to *SchwBG*, any public or private business which has atleast 16 positions for employees is required to fill 6 percent of those places with disabled persons.⁷⁸ Failure to comply with the quota obligations entails civil penalty of DM 200 per month (since 1990) for every job not filled by a disabled person and in a serious case of breach, criminal fine upto DM 5000 might be imposed. The proceeds of this penalty are spent on disabled employment policies.

A disabled person in an individual who suffers from a functional disability (*Behinderung*) which affects his or her capacity for social integration, as a consequence of the effects of an irregular physical, mental or psychological condition. The disability must have duration of at least six months and limits functional freedom of ability by atleast 20 per

76. For a brilliant comparison between American and German legislations see Carol D. Rasnic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States* 9(2) ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 283 (1992).

77. The amendment to the Basic Law was introduced in 1994.
78. *SchwBG*-5 Abs. 1.

cent. To qualify under the quota law as a disabled person (*Schwerbehinderter*), disability is measured at 50 per cent or more whatever the actual effect upon life activities. A disabled person who is unable to find or retain employment, without assistance or whose disability is measured at 30 per cent or more is also treated as disabled (*Gleichgestellte*). Disputes about a persons's disability are heard by a social court rather than a labour court. The German law provides adequate safeguards to a disabled worker against wrongful dismissal.

The *SchwbgG.* is a classical affirmative action law which mandates every employer to comply with the provision of the statute. The employers are not only bound by 6 per cent quota but also by the procedure prescribed in the statute for terminating a disabled worker. As stated by Carol D. Rasic, the development of German disability law has been influenced by three major factors; (1) Germany's extensive obligatory involvement with European regional and international organizations; (2) the German government's basic assumption of responsibility to make amends for most of the social ills of its people, and (3) the impact of the two world wars fought in large part of German soil.⁷⁹ One of the basic principles set forth in the Grundgesetz declares Germany to be a democratic and social welfare state⁸⁰, a principle to protect the weaker members of Germany's society.

"The federal government has undertaken a *parens patriae* task of sorts, bearing the responsibility of caring for its people in nearly all areas of need"⁸¹

The basic flaw, in German law, however, lies in its methodology in determining disability. The determination of disability has been left to the non-medical administrative personnel. The other flaw is its statistical nature. Once a business has hired its 6 per cent quota of disabled workers, it has no remaining duties. This method does not accord any benefit to those disabled workers who have been denied jobs. The non-compliance of law simply entails monetary punishment which goes to the government, the proceeds do not benefit the disabled people.⁸² The German law treats disabled people as a class to be statistically assisted. The disabled people do not receive individualized treatment and relief. And in Germany affluent business will prefer to pay a paltry sum of DM200 per month per violation instead of complying the statutory quota.⁸³

79. Carol D. Rasic, *supra* n. 76 at 325.

80. Basic Law Art. 20 Abs. 1.

81. Carol D. Rasic, *supra* n. 76 at 331.

82. *Id.* at 327.

83. *Id.* at 329.

C. *United States of America*

The Americans with Disability Act 1990 (ADA) states that its primary purpose is "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities".⁸⁴ ADA also articulates the goal of ensuring that individuals with disability have "equality of opportunity".⁸⁵

The term "disability" means with respect to an individual : (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment, or (C) being regarded as having such an impairment.⁸⁶ If an individual cannot demonstrate that she meets this definition of disability, then she receives no protection of ADA. Dismissal of claims brought by a plaintiff whose conditions fail to qualify as a disabled individual under ADA has led to a widespread critique of the American disability law.⁸⁷

The definition of "disability" under ADA is identical with the definition of "handicap" under the provisions of Rehabilitation Act 1973 (RA 1973). The ADA is intended to supplement not supplant the RA 1973. The RA 1973 affected government contractors and private entities that are the beneficiaries of Federal financial aid but ADA extends even to private employers. The Equal Employment Opportunity Commission (EEOC) has defined "major life activity" to include walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself and carrying out manual tasks. A "substantial limitation" means significant restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.⁸⁸ The EEOC

84. THE AMERICANS WITH DISABILITIES ACT 1990 (ADA) 42 U.S.C., S. 12101(b) (f).

85. *Id.* 42 U.S.C., S. 12101(a) (8).

86. *Id.* 42 U.S.C., S. 12102(2).

87. For a critique of some controversial decisions of the Supreme Court (*Bragdon v. Abbott*, 524 U.S. 624 (1998), *Sutton v. United Airlines*, 119 S.Ct. 2139 (1999), *Albertsons Inc. v. Kirkingburg*, 119 S.Ct. 2162 (1999), *Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999) see Samuel R Bagenstos, *supra* n. 2, Elizabeth A. Crawford, *The Court's Interpretation of a Disability under the Americans with Disabilities Act: Are They Keeping Our Promise To the Disabled?* 35(4) HOUSTON LAW REVIEW 1207 (1998), Michelle T. Friedland, *supra* n. 22. ADA leaves many terms within the definition of "disability" ambiguous. It excludes several conditions such as illegal drug users, homosexuals, bisexuals etc.

88. 29 CFR, S. 1630 2(i) (1998).

regulations have also defined physical or mental impairment.⁸⁹

The ADA prohibits discrimination on the ground of disability in employment, housing, public accommodation, education, transport, communications, recreation, institutionalisation, health services, voting etc. It requires all new public transport to be accessible to the disabled people and existing public rail system must be made accessible during the course of time. Architectural barriers in existing buildings must be removed and new construction projects must be designed and built to be accessible to individuals with disabilities.

Under Title I of the ADA no employer may discriminate against a qualified individual with a disability because of disability of such individual.⁹⁰ This anti-discrimination law applies to all aspects of employment as well as pre-employment hiring process⁹¹. The ADA is binding on all employers with atleast 15 employees. These employers are required to provide reasonable accommodation for qualified individuals with a disability unless they can show that it would impose an undue hardship on that business⁹². The term reasonable accommodation may include (1) making existing facilities used by the employees easily accessible to and useable by individuals with disabilities and (2) job restructuring part-time or modified work schedules, re-assignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision for qualified readers or interpreters and other similar accommodations for individuals with disabilities.

The ADA incorporates the same powers, remedies and procedures as employed in Title VII of the Civil Rights Act 1964. An aggrieved individual under ADA can file a charge with EEOC within 180 days of the

89. Physical of mental impairment means (1) any physical disorder or condition, cosmetic disfigurements, or anatomic loss affecting one or more of the following body systems, neurological, muscular-skeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, haemic and lymphatic, skin and endocrine or (2) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. 29 CFRs, S. 1630 (h) (1998).

90. 42 U.S.C., S. 12112(a).

91. *Id.* S. 12112(b) (6).

92. *Id.* S. 12112 (b) (5)(A). A qualified individual with a disability is one who with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires, *id.* S. 12112(8). If the individual cannot perform such essential functions of the employment position, then in deciding what job functions are essential, ADA gives deference to the employer's judgement.

alleged discriminatory act. EEOC has no enforcement powers but may allow the aggrieved individual "a right to sue". The aggrieved individual can then file a suit against the employer in a federal district court within 90 days from the issuance of the letter from EEOC.⁹³ Remedies available under DA include equitable relief requiring hire, reinstatement, back pay, and seniority, cessation of unlawful employment practice and such affirmative action as may be appropriate.⁹⁴ A plaintiff who proves intentional discrimination shall be entitled to compensatory and punitive damages from 50,000 US dollars to 3,00,000 US dollars depending upon the number of employees. These damages are in addition to any back pay already awarded in conjunction with equitable relief.⁹⁵

D. Canada

Section 15 of the Canadian Charter of Rights and Freedoms grants constitutional protection to the people with disabilities.⁹⁶ Disability is one of the forbidden grounds of discrimination in section 15's equality guarantee clause. The goal of the Canadian Constitution is to achieve a right to full inclusion and participation of the people with disabilities in a barrier free society. Discrimination is prohibited both on grounds of mental and physical disability. The right to full participation includes the right of a disabled individual to have his needs accommodated where necessary.⁹⁷

The Canadian Human Rights Act 1985 prescribes a number of grounds for discrimination and prohibits certain discriminatory practices.⁹⁸ Disability is one of the proscribed grounds of discrimination.⁹⁹ Disability denotes "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug".¹⁰⁰ The Act addresses both direct and indirect discrimination in all aspects of life including employment.¹⁰¹ It also describes discriminatory employment practices and policies.¹⁰² The Canadian Human Rights Commission is

93. 42 U.S.C., S. 2000 e-5(f)(1)(1988).

94. 42 U.S.C., S. 2000 e-5(g) (1991).

95. Carol R. Rasic, *supra* n. 76 at 325-30.

96. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS came into force in April 1982.

97. For a fuller discussion, see M. David Lepofsky, *supra* n. 29 at 155-214. In *Eaton v.*

Brant County Board of Education (1997) 142 DLR 385 (SCC), the Canadian Supreme

Court has offered important protection to the disabled children.

98. HUMAN RIGHTS ACT 1985, S. 2.

99. *Id.* S. 3(1).

100. *Id.* S. 25.

101. *Id.* S. 7.

102. *Id.* Ss. 10, 12, 44.

charged with making general recommendations to the employers to provide reasonable accommodation to the people with disabilities.

E. Australia

In Australia the Disability Discrimination Act 1992 seeks to eliminate disability based discrimination in all walks of life, including employment. The Act applies throughout Australia and to both public and private sector employment and recognises the principle that people with disabilities have the same fundamental rights as the rest of the community.¹⁰³ The Act prohibits both direct and indirect discrimination on the ground of disability. The definition of disability includes past, present and even imputed disability and disability which may exist in future. HIV positive individuals are also covered. Disability discrimination is prohibited in recruitment, selection, employment offers, terms and conditions, opportunities for promotion, transfer, training, dismissal, etc.¹⁰⁴ However, the disabled person must be able to carry out the "inherent requirement of the job".¹⁰⁵

F. New Zealand

In New Zealand the Human Rights Act 1993 aims to empower people with disabilities by providing legal protection against discrimination on the ground of disability. The employment provisions prohibit discrimination against disabled people in all aspects of employment process including hiring, training, compensation and benefits. The Act also requires an employer reasonably to accommodate a qualified individual with a disability to perform a job. Such accommodation is not required if it would be unreasonable or the individual would pose a direct threat to the health and safety of the individual or other employees in the workplace. Disability includes physical disability or impairment, physical illness, psychiatric illness, intellectual or psychological disability or impairment, any loss or abnormality of psychological, physiological or anatomical structure or function, reliance on guide dog, wheelchair or other remedial means etc.¹⁰⁶ The Act prohibits both direct and indirect discrimination on the ground of disability. In New Zealand the Employment-Services Workbridge Programme assists the employers for providing reasonable accommodation to the disabled workers. Human Rights Act applies only in open employment. Those disabled people who fail to qualify for a job in open

103. DISABILITY DISCRIMINATION ACT 1992, Ss. 3(b) and (c).

104. *Id.* Ss. 15 (1) and (2).

105. *Id.* S. 15(4)(a).

106. HUMAN RIGHTS ACT 1993, S. 21.

employment can seek job in labour market. For them the Disabled Persons Employment Protection Act 1960 provides for sheltered workshops where disabled people are employed.¹⁰⁷

IV. THE INDIAN DISABILITY ACT 1995

The Constitution of India, like the German Constitution does not contain any provision in the chapter on fundamental rights that no person shall be disadvantaged on account of his or her disability and that no person shall be subjected to disability discrimination.¹⁰⁸ In India the persons with disabilities are the most neglected and least served strata of the society. The root causes of disability in this country are poverty, ignorance, superstition, poor housing, lack of health care, low educational level and lack of political will. It occurred only in 1995 for the Parliament to pass a law entitled The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 which came into force on February 7, 1996.

The Persons with Disability Act simply requires the appropriate government to "endeavour", "ensure", and "promote" equality for the people with disabilities.¹⁰⁹ The Government is also expected to frame "schemes" for the rehabilitation of the disabled people. And above all, the promised affirmative or equalizing measures are subject to the economic capacity and development of the Indian State.

The Act provides that the State shall "ensure that every child with disabilities has access to free education in appropriate environment till he attains the age of 18 years" and "promote setting of special schools" for such children.¹¹⁰ The State shall also frame schemes "which shall make provisions for transport facilities to children to enable them to attend

107. See Stephanie Cowdell, *Employment Law and People with Disabilities* 8(3) *THE TATA KOI AUCKLAND UNIVERSITY LAW REVIEW* 806 (1998).

108. CONSTITUTION OF INDIA, Seventh Schedule, List II, Entry 9 contains a sub-heading "Relief of the Disabled and Unemployable." Art. 41, an unenforceable directive principle contains a reference to the "public assistance in cases of disablement." Beyond this the CONSTITUTION OF INDIA contains no protection to the people with disabilities.

109. In India more than 60 million people suffer from physical, mental or other kinds of disabilities out of which 80 percent live in villages.

110. THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT 1995, S. 2(i) defines disability which means blindness, low vision, leprosy cured, hearing impairment, locomotor disability, mental retardation, mental illness.

111. *Id.* S. 26.

schools" and "for removal of architectural barriers from schools, colleges and other institutions imparting vocational and professional training."¹¹² Schemes shall be made to provide aids and appliances to disabled people and also to allot land to them on concessional rates for house, setting up business etc.¹¹³

There are numerous disability friendly schemes envisaged under the Act which will be accomplished within the limits of economic capacity and development of the State. For example, measures to be taken by the government for prevention and early detection of disabilities,¹¹⁴ for adaption of rail compartments, buses, vessels, air crafts to make them accessible to wheel chair users,¹¹⁵ for installation of auditory signals at red lights on the roads for the visually handicapped people¹¹⁶ will be subject to the economic capacity and development of the State. Similarly, the ramps in public buildings, adaption of toilets to wheelchair users, Braille symbols and auditory signals in elevators and lifts, ramps in hospitals etc. shall be subject to the economic resources which renders the whole exercise a promise of unreality. The arguments of economic constraints will always be available with the government for denying reasonable accommodation to the people with disabilities.

However, in the field of education and employment the Act envisages a statutory quota. All government and government aided educational institutions have an obligation to reserve three percent of seats for persons with disabilities.¹¹⁷ "Every government shall appoint in every establishment such percentage or vacancies not less than three percent, for persons or class of persons with disability of which one percent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment (iii) locomotor disability or cerebral palsy in the post identified for each disability".¹¹⁸ The State within its economic capacity and development shall also provide incentives to employers both in public and private sectors to "ensure that at least five percent of their work-force is composed of persons with disabilities".¹¹⁹ Then, no promotion shall be denied to a person merely on the ground of disability and no disabled

112. *Id.* S. 30.113. *Id.* Ss. 42-43.114. *Id.* S. 44.115. *Id.* Ss. 66-68.116. *Id.* S. 45.117. *Id.* S. 39.118. *Id.* S. 33.119. *Id.* S. 41.

employee shall be removed or reduced in rank who acquired a disability during his or her service.¹²⁰

However, three percent reservation will cover only a microscopic minority among the disabled persons from the well-to-do families who have acquired prior accomplishment due to congenial home environment. The reservation provision applies only to the identified jobs which account for one-third of all categories of jobs. Thus in actual practice, three percent becomes one percent of the total vacancies. Reservations are largely confined to Group C and D levels of positions except in some States where reservation scheme has been extended to Group A and B level positions. Reservation of posts which applies to individuals with disabilities outside quota regime. The Act does not cover employees in public and private sector. The position is gloomy even in educational field. As the disabled persons can hardly reach the level of higher education, the reservation of three percent in government and government aided educational institutions is of no avail.

Shockingly, the Committees which have identified jobs for the three categories of disabled — the visually impaired, hearing impaired and the orthopaedically challenged, have effectively excluded disabled persons from more than 95 percent of jobs available in the government sector.

Despite the provisions enshrined in the Act barrier free environment in the buildings, lifts and other places, the architects and builders have paid scant regard for making reasonable accommodation for the disabled people. The building, rail compartments, buses, vessels, public toilets, are not accessible to wheelchair users. The road crossings, zebra crossings etc. do not have audio-signals to inform the hearing and visually impaired persons. The transport system is not at all disabled friendly. The disabled people are still being considered to be an object of pity and charity. Paucity of funds remains the standard answer for inaction of the authorities in implementing the provisions of the Act.

The Indian disability law does not offer any hope of constituting a shift from charity and welfarism to civil rights and social integration of people with disabilities. The Act suffers from some major flaws. First, unlike German, American and United Kingdom's laws, it does not cover

120. *Id.* S. 47. In *Pushkar Singh v. University of Delhi* 90 (2001) DELHI LAW TIMES 36, the High Court of Delhi issued directions to Delhi University to implement its 1994 decision to reserve 3% of teaching posts for blind and orthopaedically handicapped candidates. Also see *Javed Abidi v. Union of India* AIR 1999 SC 512.

employment in private sector. Second, there is no enforcement of the rights of the disabled people through any disability tribunal or special disability court to provide relief to the individuals against disability discrimination. Third, there is no provision in the Act for imposing sanctions or fine for non compliance of the provisions of the Act. Fourth, it is not mandatory for the government to remove structural and environmental barriers for the integration of the disabled people. Finally, the definition of disability is still based on medical approach outrightly rejected by UNSR.

V. CONCLUSION

The persons with disabilities are also human beings entitled to our respect and concern. The effects of disability are felt directly in the medical and health dimensions and then indirectly in the spheres of education, transports, physical access and the built environment, social and welfare schemes, housing, health services, leisure activities and social interaction and above all in the field of employment. The disadvantages suffered by the people with disabilities are largely the product of prejudice, ignorance, neglect and sheer thoughtlessness.

The disabled persons need strong laws and strong remedies to achieve the goal of their social integration. The domestic legislations addressing the rights of the disabled people have to be measured against the yardstick of the United Nations Standard Rules. The UNSR enshrine the "principle that persons with disabilities must be empowered to exercise their human rights" and recognize that the "equalization of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilize human resources."¹²¹ The UNSR accord priority to employment rights of the disabled people. This is reflected in the requirement that "laws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment" and that "any discriminatory provisions against persons with disabilities must be eliminated."¹²² The Rules also address the problem of harassment and victimization of the employees with disabilities.¹²³ The duty to make reasonable accommodation has been recognised as an example of affirmative action.¹²⁴

121. UNSR Rule 7, Introduction, para 15.

122. UNSR Rule 7.1 and 15.2.

123. UNSR Rule 15.2.

124. UNSR Rule 15.3.

The rules also require State support for measures to design and adapt work places and work premises and to provide auxiliary aids and equipment.¹²⁵ Most importantly, the UNSR place nation states "under an obligation to enable persons with disabilities to exercise their rights... on an equal basis with other citizens" and "national legislation should provide for appropriate sanctions in case of violations of the principles of non-discrimination."¹²⁶ UNSR recognise a social model of disability a concept that indicates "the close connection between limitation experienced by individuals with disabilities, the design and structure of their environment and the attitude of general population."¹²⁷ Disability embraces "a great number of functional limitation" and individuals "may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness (which may be) permanent or transitory in nature."¹²⁸ It is hoped that the domestic legislations would meet the standards set by UNSR in every respect so that the Rules really becomes international customary rules as envisaged by the Rules. The main objective of the nation states should be to remove the obstacles to achieve equal opportunities for people with disabilities.

Persons with disabilities are vulnerable to discrimination and disadvantage in all walks of life. Disadvantage and inequality of opportunity represent the everyday experience of individuals with disabilities. Disability discrimination is institutionalized and is interwoven in the fabric of our society and culture. However, the environmental barriers are a greater impediment to participation in society than functional limitation. Barrier removal through legislation, provision for accommodation, universal design and other means have to be identified as the key to equal opportunities for the disabled person. And the responsibility for elimination of structural and environmental barriers remains with the nation states. Law has only partly succeeded in empowering disabled persons, largely because of inadequate enforcement, conflicting interpretation and limited scope. But it would be right to end upon a note of optimism and positive expectation.

Equality implies that unnecessary and avoidable differences should be prevented and once they have occurred, they should be remedied. In the case of disabled persons the inequality may both reflect and be the result of the discriminatory attitudes of the able bodied persons. Besides direct form of discrimination the disabled persons experience indirect forms of

125. UNSR Rule 7.3.

126. UNSR Rules 15.1 and 15.2.

127. UNSR Introduction, para 5.

128. *Id.* para 7.

discrimination. It is imperative that the states should introduce affirmative action programmes to ensure that disabled people can effectively enjoy and exercise their human rights on an equal footing. The persons with disabilities should be bestowed with an enforceable right against all forms of discrimination, including discrimination that results as a result of the failure to provide reasonable accommodation. There is an urgent need for every nation State to develop programmes which effectively eliminate the real causes of disadvantage and vulnerability.

EMERGENCE OF CYBER CRIME : A CHALLENGE FOR THE NEW MILLENNIUM⁺

*Gurjeet Singh**

*Vicky Sandhu***

"The long arm of the law does not yet reach across the Global Internet."

—McConnell International

I. INTRODUCTION

The present phase in the history of mankind has ushered in various new technological advancements which are going to have a far-reaching impact on the present as well as the future of human existence. The world is now passing through an unprecedented phase of an unparalleled metamorphosis in the arena of information technology designed and destined to effect drastic and dramatic changes in the day to day lives of the people and to replace the conventional snail pace systems of communication. New communication systems and digital technology in particular have made dramatic changes in the way we live. Further, a revolution is occurring in the way people transact business. For instance, business community and consumers are increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper documents. The new information technology explosion would further generate exodus of creativity reducing time and distance and our globe would seem to be shrunk and much shorter than it has been thought to be hitherto.¹ Such is the impact of technological advancements and innovations that today we cannot imagine our lives without them. The

⁺ This is a revised and enlarged version of the paper presented at the International Conference on, International Law in the New Millennium: Problems and Challenges Ahead, organised by the Indian Society of International Law, New Delhi on 4-7 October 2001.

* Reader and Head, Department of Laws, Guru Nanak Dev University, Amritsar.
** M.B.A. Part One student, Department of Commerce and Business Management, Guru Nanak Dev University, Amritsar.

1. Shakil Ahmed Syed and Rajiv Raheja, A GUIDE TO INFORMATION TECHNOLOGY (CYBER LAWS AND E-COMMERCE) (2001).

modern day technology has shrunk distances around the world and made the inflow and outflow of information across borders much easier than ever before.

It was during this period that the wonder machine 'computer' made its mark. Computers have been dominating the technological scenario world over since the early 1970s. In general terms, a computer is an electronic device used to process the data and converting the data into information that is useful to people. These electronic devices have certainly made us more efficient by doing the repetitive tasks themselves. They, *inter alia*, help us create, design, programme and communicate. Computers have now entered all walks of life. As a matter of fact, we have entered the 'Information Age'. We find ourselves dependent on cellular phones, computers, electronic diaries and organisers and pagers in a way that we wonder how we managed without them in the past.

The Internet and the World Wide Web blossomed in the 1980s. Through the medium of Internet, it is possible to have a world of information and connectivity at the click of a mouse. Internet is thus an irreversible phenomenon that has set new benchmarks for the entire mankind. As the world enters the threshold of the 21st century and the third millennium, almost half of all the spheres of human activity the world over has got wired into a unique connectivity that has transcended national frontiers, geographical boundaries and cosmic contours.

Behind this new dimension of rapid advances in technology is the shady Internet criminal. Exceedingly rapid advances in technology also leave certain loopholes for the criminal mind and slow legal reform adds risk to the technology for consumers. When Internet was developed, its founding fathers did not probably imagine that Internet could also be misused for criminal activities. However, today there are many disturbing things happening in cyberspace, especially the cyber crimes. It will not be out of place to mention here that cybercrime has acquired international dimensions and that today the cyber criminals can move at the speed of light on a highway on which there are no traffic signals, no constables, and no custom or immigration authorities to check them for anything.

Broadly speaking, 'cyber crime' refers to all activities done with the criminal intent in cyber space. Computer related crime has virtually no boundaries and does or may affect every country in this world. These could either be the criminal activities in the conventional sense or the activities newly evolved with the growth of Internet. Thus the crucial question that arises in this context is as to what has led to the worldwide spurt in cyber crimes? There are various reasons for this which will be

discussed later. First of all, it is important to discuss the concept and nature of cyber space.

II. CONCEPT AND NATURE OF CYBER SPACE

The computer's ability to share data with other computers over a network linked through telephone has led to a major telecommunication revolution in the contemporary world. A computer network is a network consisting of a central computer (server) and a number of remote stations. This network working has led to the concept of 'cyber space'. The word 'cyber space' was never known to the world until 1984. As a matter of fact, the origin of word 'cyber' in the context in which we are referring to today, is credited to a scientific fiction novel, *Necromancer*, by William Gibson that was published in 1984. According to Gibson, 'cyber space' refers to that imaginary space which is created by computers when they communicate. 'Cyber space' is thus an abstract concept that represents an area where a kind of activity takes place in which the computers connected through a network are engaged. It is that invisible realm in which one particular computer is linked to other computers in the world, and retrieving or sending almost any information anywhere in more than 150 countries cheaply, quickly, and reliably. Cyber space is real time, online communication through high speed data links that crisscross the globe. It is often referred to as the 'Information Highway'.²

One of the major components of cyber space is the Internet, or just the Net. It is a network of millions of computers that can dial up each other through a maze of connected communication technologies. The Net has acquired a sort of suprahuman existence. It is not owned by any country or organisation and it is free. In other words, nobody owns the Net. Somehow, it continues to expand, estimated to be doubling (in volumes of transactions) every two months. The Net is often dubbed as the 'Network of Networks'.³

Cyber space is, therefore, not the computer, nor the telephone cables, routers, servers or any other piece of hardware. It is also not any of the software that is running in any of these hardware gadgets. All these, as well as the people who use them, exist in the 'non-cyber space' or the 'meta space'. Between them is an invisible virtual space of Internet the existence of which can only be felt in its impact on those who traverse this space. One may not be able to enter, traverse or exit from this virtual

2. K. Aswathappa, *ESSENTIALS OF BUSINESS ENVIRONMENT* 8 (2001).

3. *Ibid.*

space without the meta world objects such as the computers, the connecting device etc.⁴

III. CONCEPT OF CYBER CRIMES.

A. Concept and Definition

As a matter of fact, there is no exhaustive and universally accepted definition of the term 'cyber crime'; rather functional definitions have been adopted. There has been a great deal of debate amongst the legal experts as to what constitutes a 'cyber crime' or 'computer crime'. Generally speaking, computer crime is a form of white-collar crime, meaning thereby, that it is usually committed by the individuals/professionals or organisations during the course of their occupation/profession etc. Nevertheless, some of the commonly spelt out definitions of 'cyber crime' are:

- A criminal activity that involves unlawful access to, or utilization of, computer systems.
- Any illegal action in which a computer is used as a tool or object of the crime; in other words, any crime, the means or purpose of which is to influence the functions of a computer.
- Any incident associated with computer technology in which a victim suffered or could have suffered loss and a perpetrator, by intention, made or could have made a gain.
- Any violation of the law in which a computer is the target of or the mean for committing crime.

The Organisation for Economic and Cultural Development (OECD) however, has adopted the following definition as the working definition for computer-related crime or computer crime:

Computer abuse is considered as any illegal, unethical or unauthorised behaviour relating to the automatic processing and transmission of data.⁵

On the basis of the above definitions, one could broadly argue that any activity which involves the unauthorised and unlawful access to or utilisation of computer systems or networks in order to tamper with the data or to intentionally transact anything illegal with the help of computers and the Internet can broadly be called as 'cyber crime'.

4. The word 'Meta Space' has been evolved in order to distinguish it from the word 'Cyber Space'. 'Meta Space' or 'Meta World' refers to the 'Real World', while the word 'Cyber Space' refers to the virtual 'World of Internet'.

B. Elements of Cyber Crime

Strictly speaking, crime is an act or omission, which is prohibited by the law particularly by the criminal law. The basic definition of 'crime' is that it is an activity which the society considers as wrong or any action which is likely to be harmful to the society is dubbed as crime. It is one of the cardinal principles of the criminal law that there must be guilty mind (*mens rea*) behind that act which is sought to be labelled as a crime (*actus reus*). Thus, a crime essentially consists of two elements, namely, *actus reus* and *mens rea*. Cyber crime is the latest, dynamic and most often used terminology in the field of cyber laws.

The first constituent of cyber crime is *actus reus* or the wrongful act. In case of the Internet crimes, it is relatively easy to identify *actus reus* but usually difficult to prove. It can be said that all those acts which are specifically prohibited by the cyber legislations, such as the Information Technology Act 2000 constitute *actus reus* in cyber crimes. They are difficult to prove because of various difficulties encountered in identifying the culprit, e.g. anonymous and transnational nature of the Internet, jurisprudence issue, weak laws, lack of international consensus regarding cyber crimes etc.

The second essential constituent of a crime is guilty mind or *mens rea*. *Mens rea* in case of cyber crimes presupposes on the part of the offender that he or she is aware at the time of causing the computer to perform the function that the access is unauthorized. Thus the cyber crime must be committed knowingly or intentionally. Like in ordinary crimes, *mens rea* is assumed in the commission of cyber crimes if it is proved that the cyber crime was committed intentionally or knowingly. Thus this ingredient of cyber crimes is relatively easier to prove.

C. Distinction between Cyber Crime and Terrestrial Crimes

Undeterred by the prospect of arrest or prosecution, cyber criminals around the world lurk on the Net as an omnipresent menace to the financial health of businesses, to the trust of their customers, and as an emerging threat to nations' security. Headlines of cyber attacks command our attention with increasing frequency. Moreover, countless instances of illegal access and damage around the world remain unreported, as victims

5. Suresh T. Vishwanathan, *The Criminal Aspect in Cyber Law*, in *THE INDIAN CYBER LAW* 81 (2001).

fear the exposure of vulnerabilities, the potential for copycat crimes, and the loss of public confidence.⁶

Cyber crimes which are harmful acts committed from or against a computer or network, differ from most terrestrial crimes in four ways. They are easy to learn how to commit; they require few resources relative to the potential damage caused; they can be committed in a jurisdiction without being physically present in it; and they are often not clearly illegal.

Strictly speaking, the laws of most countries do not clearly prohibit cyber crimes. Existing terrestrial laws against physical acts of trespass or breaking and entering often do not cover their "virtual" counterparts. Effective law enforcement is complicated by the transnational nature of cyberspace. Mechanisms of cooperation across national borders to solve and prosecute crimes are complex and slow. Cyber criminals can defy the conventional jurisdictional realms of sovereign nations, originating an attack from almost any computer in the world, passing it across multiple national boundaries, or designing attacks that appear to be originating from foreign sources. Such techniques dramatically increase both the technical and legal complexities of investigating and prosecuting cyber crimes.

In order to protect the future of the networked world there is a need of a more proactive approach, whereby governments, industry, and the public work together to devise enforceable laws that will effectively deter all but the most determined cyber criminals.

D. Classification of Cyber Crime

Broadly speaking, cyber crimes can be divided into three broad categories:

(i) Cyber Crimes Against Individual

Amongst others, the major kinds of cyber crimes committed against individuals generally include:

1. Harassment Via E-Mails

Cyber harassment is a distinct type of cyber crime. Various kinds of harassment can and does occur in cyberspace, or through the use of

6. McConnell International, REPORT ON CYBER CRIME AND PUNISHMENT: ARCHAIC LAWS THREATEN GLOBAL INFORMATION (2000), available at <http://www.mccconnellinternational.com/services/cybercrime.htm> (visited on 20 September 2001).

cyberspace. Harassment can be mental, physical,⁷ racial, religious, sexual or other. Persons perpetuating such harassment are also guilty of cyber crimes. Cyber harassment as a crime also brings us to another related area of violation of privacy of netizens (users of the Internet). Violation of privacy of online citizens is a cyber crime of a grave nature. No one likes any other person invading the precious and extremely touchy area of his or her own privacy which the medium of Internet grants to the netizen.

2. Dissemination of Obscene Material

The dissemination, distribution, posting, and trafficking of obscene material including pornography, indecent exposure, and child pornography constitute one of the most important cyber crimes known today. The potential harm of such a crime to humanity can hardly be overstated. This is one cyber crime which threatens to undermine the growth of the younger generation as also leave irreparable scars and injury on the youth if it is not checked and controlled.

In India, publishing, distributing or causing distribution of obscene material on the Internet has been declared as an offence under Section 67 of the Information Technology Act 2000. A conviction can result in imprisonment of up to 5 years and a fine of rupees one lakh, which can go upto 10 years imprisonment and a fine of rupees two lakhs in respect of second and subsequent commission of the offence.

3. Cyber Stalking

Cyber stalking is a term used for following a person while he is on the Net observing where he goes and what he does on the Net. This can be done by a marketing agency to profile a potential customer or by a potential criminal in search of information that can be used to commit further crimes. Cyber Stalking is normally considered as a privacy invasion and if it is done with the intention of committing a crime, the normal laws have to take care of the punishments. Laws are yet to be developed specifically for controlling this type of crime.

In the United States, Federal laws are being attempted to punish online stalking. Several states in the US have some laws for the real world which can be invoked for cyber stalking. In California, for instance, the

7. According to a recent newspaper report, a mysterious e-mail message was received wherein the sender had threatened to eliminate the Delhi Chief Minister Sheila Dikshit. For further details, See *E-Mail Threat to Delhi CM* THE TRIBUNE, January 11, 2002.

criminal penalty for stalking is imprisonment for up to a year and/or a fine of up to \$500. If a stalker pursues the victim in violation of a previous court order, the punishment may be the imprisonment for two to four years. In California, one may request to be notified 15 days before his stalker is released from prison. Similarly in Canada, stalkers may be imprisoned for up to five years.

4. Impersonation

Impersonation could usually be a means of committing a financial fraud. In the simplest form, it could be a case of entering an ISP service using a stolen password. In a more serious version, it could be using somebody else's credit card information to buy on the Net. In another version of impersonation, it could be a means of disguising and committing a crime such as hacking or virus introduction.

In all such cases, the criminal, when asked, provides an identity that is false and is aimed at depriving the genuine owner of a right. It would involve telling a lie to get financial gain and therefore would tantamount to a fraud.

Indian laws through the Information Technology Act 2000 club this offense under Section 43.

One of the ways impersonation is done at the computer level is called 'Spoofing', where the IP address of the computer is made to appear different so that access can be gained to other restricted Networks working with IP filters.

(ii) Cyber Crimes Against Property

The second category is that of cyber crimes against all forms of property. These, *inter alia*, include:

1. Hacking and Cracking

Hacking and cracking are amongst the gravest forms of cyber crimes known till date. Hacking is a generic expression in the computing world and can be applied in many contexts. For the purpose of convenience or probably our fascination for the term, we have termed all kinds of illegal activity as hacking. Hacking is an unauthorised access by any person using a computer and any other communication device to break computer security or circumvent it to enter into a computer system. It is an infringement that is at par with "break and enter". The gravity of hacking

is to be weighed against what is actually done upon illegally entering the computer system. Data may be stolen or integrity of the information may be affected which is at par with sabotage and in both cases there is damage. Some hackers may do nothing but browse. If the intention of the hacker is to destroy files, there is a crime by electronic means. In other words, the motive behind hacking is criminal in nature. A crime is a crime by whatever means it is perpetrated. At this point it will be useful to distinguish between hackers and crackers.

Hackers

Hackers break the security of computer network, by using their skill in a way which is illegal. Their activities involve denial of service, or entering a secure area by subverting its security cordon. Denial of service is attempted by flooding the web server with false requests for pages to engage it in processing such requests leaving hardly any time to respond to legitimate requests and thereby affecting its ability to respond and perform its internal functions. Entry in secured area is obtained by setting up programmes that tries millions of passwords until one is accepted. They invade the private data and further invade the network to reach the sensitive data. Once hackers get into the machines that host networks, they can alter and remove files, change information and erase evidence of those activities.⁸

Crackers

Cracking is another form of hacking. It involves breaking the security on software applications. Crackers develop their own software that can circumnavigate or falsify the security measures that keep the application from being replicated on a PC. For example, if a registry access is permitted to everyone, passwords could be cracked. An employee could be able to dump password registry contents, if he is allowed access, and crack them at leisure. Password dumping and cracking is not difficult. Plethora of tools for that purpose are available on the Internet. Password having been cracked, it permits the cracker to log on to the server with cracked user name and password. He then gains a legitimate access to the restricted system resources.⁹

Thus, protection is needed against theft of equipment, loss of software or data, virus incidents, internal system attacks and hacking. Loss of

8. D.P. Mittal, LAW OF INFORMATION TECHNOLOGY (CYBER LAW) 35 (2000).
9. *Ibid.*

software or data and virus incidents have been the main cause for loss of computerised information.

It may be appropriate to mention here that Section 66 of the Information Technology Act 2000 has defined hacking and has proceeded to prescribe punishment for the same. It states as follows:

Hacking with Computer System

- (1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking.
- (2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

Simultaneously, Section 43 of the Act states as under:

Penalty for damage to computer, computer system, etc.

If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network:

- (a) accesses or secures access to such computer, computer system or computer network;
- (b) downloads, copies or extracts any data, computer database or information from such computer, computer system or computer network including information or data held or stored in any removable medium;
- (c) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder; he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.¹⁰

It is unanimously agreed that any and every system in the world can be hacked. Using one's own programming abilities as also various programmes with malicious intent to gain unauthorised access to a computer or network are very serious crimes. In order to prevent hacking, it

10. See THE INFORMATION TECHNOLOGY ACT 2000.

would be necessary for the system owner to install a suitable hardware or software 'firewall' that is configured to allow only authorised persons to the computer.

2. Virus Contamination

The second most prevalent cyber crime is creating and distributing computer virus which causes damages of various kinds. The loss could be on account of viruses, worms, trojan horses and logic bombs. It will be worthwhile to differentiate between these terms.

Viruses

Virus by definition is a computer programme that can reproduce itself while residing in a target computer (host). Subsequently it may attack causing destruction of data. It may also distribute itself, enter other computers in the network through an e-mail or otherwise and later repeat the process in the new host computer. Computer virus has become very common because the transfer of infected file from one computer to another causes the viruses to replicate. There are thousands of different types of viruses, each having its own characteristics. Some of the viruses are benign. An example is the 'Ping-Pong' virus whose effects are limited to causing the image of a bouncing ball to move continually across the computer screen. Other viruses such as the 'Friday 13th', and 'Mictangelo' can result in the permanent loss of data stored in the victim computer.¹¹ Over the years, virus has become a matter of great concern to the society and is being used as a tool for hacking or for disabling vital e-commerce services and corporate networks. Virus incidents have been the main cause for the loss of computerised information. All organisations must protect themselves against these viruses through anti-virus scanning software which must be updated every fortnight.¹²

Worm

A worm is a program whose purpose is to duplicate itself. An effective worm will fill the entire disks with copies of itself, and it can spread to multiple computers on a network, essentially clogging the entire system with copies. They use the network to spread themselves. Worms are commonly spread over the Internet via e-mail message attachments and

11. Gurbax Singh Karkara and S.K. Sharma, *Law of Cyber Crime in India* 29 JOURNAL OF THE LEGAL STUDIES 14 (1988-99).

12. *Supra* n. 8 at 36.

Internet Relay Chat (IRC).¹³ Worms may also invade a computer and steal computer's processing resources to replicate themselves. 'Love Bug' is a recent example. It was spread by making copies of itself and sending them out to listing in victim's e-mail address book. It did shut down many corporate and government networks.¹⁴

Trojan Horses

A trojan horse is a malicious program that appears to be friendly. For example, some trojan horses appear to be games. Because trojan horses do not make duplicates of themselves on the victim's disk, they are not technically viruses. However, since they can do harm, they are also considered viruses. A trojan horse virus is the most destructive type of virus. It is program which appears useful and purports to perform some constructive task, but it is actually destructive and malicious. It is a dangerous code inserted or hidden in some authorised programme. Within the host program is a section of computer code (the virus) which performs a secret task. The task may be as simple as transmitting the virus into another program. Destructive functions may destroy or alter data, or provide a means of security breach. It is used to cover the tracks of the hackers.¹⁵

Logic Bombs

A logic bomb is a dormant virus which is activated by some signal to attack the host computer. Its attack is triggered by an event like computer clock reaching a certain date, a change to a file or a particular action taken by a user or a program. Chernobyl and Melissa viruses are the recent examples.¹⁶

The advent of viruses and similar mechanisms whereby computer software can be made to act almost on its own initiative poses a new and significant threat. Sophisticated viruses and devices such as 'logic bombs' and 'trojan horses' can be targeted for specific objectives at specific industries to commit a variety of traditional criminal offences from mere mischief to extortion. These crimes, furthermore, can be committed immediately or can be planted to spring at a future date.¹⁷

13. Peter Norton, INTRODUCTION TO COMPUTERS 539 (2001).

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*

17. Gulshan Rai, *Computer Related Crimes*, available at <http://www.m.i.t.gov.in> (visited on 12 March 2000).

Creating a virus and leaving it in the world is a recognised cyber crime which calls for a strong punishment. In India, it is covered under Section 43(c) of the Information Technology Act 2000. It provides that if any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network causes virus contamination shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected. In order to protect oneself against the attack of a virus, it is essential to install the latest virus protection software (popularly called as the 'Anti-Virus Software') and keep it updated. Not providing a network with the appropriate virus protection could be construed as negligence of a network manager and consequent damages if any.

3. Copyright Infringement

Copyright infringement arises when the rights of the owner of a copyright material are infringed by another. In the cyber world, it can happen through copying of web content without permission.

Copyright infringement takes place either as piracy or violation of rights. Piracy occurs when there are no rights and the material is put to commercial use. Violation happens when there is some right but there is a dispute as to whether the use is within the interpretation of the permitted rights or not. Where there is no specific contract the benchmark would be what is called 'fair use'.

The main remedy for copyright infringement is compensation to the copyright owner. However, most copyright laws including the Indian Copyright Act as well as the Digital Millennium Copyright Act of USA provide for imprisonment and fine in certain cases. It is a matter of debate when the harsher punishments are to be awarded. According to experts, it should be ideally left to the discretion of the judge who could decide about the quantum of punishment depending upon the facts and circumstances of each and every case.

4. Patent Infringement

Patent is a right created out of specific registration of an invention with an appropriate authority. Patents can be registered within the jurisdiction of a country. Priority for the date of invention and common examination system can however be invoked through international treaties such as the Patent Cooperation Treaty (PCT). India is a party to the PCT but has not yet established a full software patent system. The remedy to a patent owner for infringement of patent rights is compensation for the

loss caused by the infringement. The Information Technology Act 2000 does not cover the patent infringements.

5. Impersonation or Cyber Fraud

Impersonation could usually be a mean of committing a financial fraud, especially in case of sale and purchase transactions through the use of credit cards etc. on the Internet. As mentioned above, in its simplest form, it could be a case of entering an Internet Service Provider (ISP) using a stolen password. In a more serious version, it could be using somebody else's credit card information to buy on the Internet. In another version of impersonation, it could be a mean of disguising and committing a crime such as hacking or virus introduction.

In all such cases, the criminal provides an identity, which when asked is false, and is aimed to deprive the genuine owner of the identity of a 'right'. It would involve telling a lie to get a financial gain and would, therefore, tantamount to a fraud. Indian laws through Information Technology Act 2000 again club this offence under Section 43(h). This section provides that if any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network, charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

6. Cyber Squatting

In simple words, 'cyber squatting' is a term which has come to be associated with the registration of domain names without the intention of using them in the names of popular brands or personalities solely for the purpose of making money. As long as the cybersquatter owns the domain name, the trademark owner cannot register its own trademark as a domain name. In this sense, the cybersquatter breaches the legal rights of the trademark owner to use its trademark.¹⁸ Thus, its key ingredients are that name belongs more appropriately to another entity. Secondly, the registrant is intending to trade the name.

Domain names are assigned at present by the Internet Corporation for Assigned Names and Numbers (ICANN) on behalf of the National Science Foundation of the U.S. on first come first served basis. This has led to cyber squatting which involves buying of domain names which have a close resemblance to a similar or identical recognizable trade mark like

movie titles, company names and products with a view to sell them to the trade mark holder at exorbitant prices. Cyber squatting raises the question whether such practice should be prohibited or not. Since cyber squatting results in consumer fraud and public confusion impairing the economy by depriving the legitimate trademark owners of substantial revenues and goodwill, many domain name disputes are arising in cyber space.

In this connection, it needs to be mentioned that the domain name registration system started on the basis of the first come first served basis. However, as the Internet became more popular, large popular companies wanted to enter the Internet with their own web sites and often found that the domain name they were seeking had already been booked. Some of these companies brought the names for a price which were sometimes astronomical.

In an effort to prevent cyber squatting, some countries have imposed rather arbitrary limitations on domain names. These limitations include restrictions on the choice of domain name, such as requiring the domain name to match the registrant company's name or to contain no generic terms. Also, some countries have imposed limits on the number of domains that a registrant may own, making it difficult for companies to register multiple brands. USA has passed a specific law regarding the domain names called the Anti-Cyber Piracy Act to define the rights on domain names. The Act establishes that a registrant of a domain name may be liable to the owner of a trademark or others that may be affected by the 'bad faith' of the domain name registrant.

In the absence of any law, disputes regarding domain names are resolved through the Uniform Dispute Resolution Mechanism that the registrants have agreed to practice. The World Intellectual Property Organisation (WIPO) has been supporting the dispute resolution based on trademark rights. Disputes are mainly resolved through an arbitration process.

In India there have been cases like *Rediff Communications Ltd. v. Cyber Bööth*¹⁹; *Yahoo! Inc. v. Akash Arora and Another*,²⁰ and

18. For further details, see C.J. Ravandale and Abhijeet Sinha, *Domain Name Disputes: Problems and Prospects* SOUVENIR OF THE NATIONAL CONFERENCE ON CYBER LAWS AND LEGAL EDUCATION 27 (2001). Also see John D. Meter, *Cyber Squatting: Blackmail on the Information Superhighway* 6 BOSTON UNIVERSITY JOURNAL OF SCIENCE AND TECHNOLOGY LAW 11-30 (2000).

19. AIR 2000 Bom 27.

between ICICI and LIC on www.jeevanbhima.com which have come up for scrutiny in courts. The *Rediff* case was decided in their favour and the name www.radiff.com was held to be confusingly similar to their name and forced to withdraw. Similarly Yahoo also won its case against an Indian registrant of yahooindia.com. ICICI and LIC settled their disputes out of court. Another case between an Indian registrant of www.indiainfospace.com was decided in favour of infospace.com, through an uncontested arbitration in WIPO. These could be conceptually like cyber squatting disputes.

(iii) Cyber Crimes Against Government

The category of cyber crimes against government mainly includes cyber terrorism.

1. Cyber Terrorism

Everyone seems to be talking about the menace of terrorism after the September 11, 2001 attack on World Trade Towers and Pentagon in USA which has been termed as the worst act of terror and, closer to home, the December 13, 2001 attack on the Indian Parliament. Just as terrorism is a stigma in the real world, it is also a bane in the cyber space. The growth of Internet has shown that the medium of cyber space is being used by individuals and groups to threaten the governments worldwide as also to terrorise the citizens of a country.

The concept of 'cyber terrorism' may be best explained by saying that it is the 'convergence of terrorism and cyberspace.' It is generally understood to mean unlawful attacks against computers, networks, and the information stored therein when done to intimidate or coerce government or its people in furtherance of political or social objectives.²⁰ Since the main motive behind such attacks is to paralyse the use of information crucial to government or society (for some time or permanently), hence it is also known as the 'information warfare.'

Further, information technology developments will no doubt increase the speed, scale and complexity of computer crime. And that isn't all. The next generation of cyber-criminals will certainly be even more skilled and better funded, and more of them will choose to go it alone - so tracking them down will be even harder.

20. 1999 PTC (19) 210 (Delhi).

21. Aarti Dubey, *Cyber Law and Terrorism* SOUVENIR OF THE NATIONAL CONFERENCE ON CYBER LAWS AND LEGAL EDUCATION 39 (2001).

The latest instances of cyber terrorism have, thus, become all the more hazardous as they are intended on not only to "wipe out crucial information" but also to cause acute violence against persons or property. Both attacks that lead to or threats to cause death or bodily injury, explosions, plane crashes, water contaminations, or severe economic losses would be the some instances of cyber terrorism.

This crime manifests itself into terrorism when an individual "cracks" into a government or military maintained website. Information warfare is seen by most as a war fought over computer networks where legions of hackers are looking for weak spots in the enemy's computer system and trying to bombard them with hordes of viruses, worms, logic bombs and trojan horses. The cyber terrorist may be a personal rebel who may plant virus to attack unknown destinations. He may plant a mail bomb which keeps sending and resending worthless mails, clogging and crashing systems over a network.

Information warfare is also perceived as psychological manipulation through the media. The whole idea is to effect the psychology of government and people by creating an element of "fear" in their mind.

The recent virus attacks have led the US Federal Agencies to believe that there are a number of underground hacking groups operating in the Third World countries who are thriving on international virus propagation and subversive hacking activity.

Countries like India have seen organized attacks on the website of the countrymen by the enemies of the physical country. The Internet with its worldwide connectivity is an ideal medium for an information or rather disinformation campaign, e.g. Kashmir-related propaganda by Pakistan. Sometimes the freedom of speech is also misused to run rogue sites that carry messages aimed at hurting the sentiments of sections of the society or affecting the sovereignty and integrity of a country. The Governments have in turn reacted with cyber patrolling and censorship, which has been decried as privacy invasion.

The handling of such anti-social elements on the net is a challenge before the governments across the globe. To handle such high-tech crimes, the enforcement authorities in each country are creating special cells with appropriate skills. Besides the Cyber Police, countries are creating a network of Cyber Informers who help them patrol the cyber space.²² Some countries have also come up with 'Computer Emergency

22. For further details, see Vishal Verma, *Net Police and Cyber Lawyer Will Soon Be Here* THE TRIBUNE, December 11, 2000.

Response Teams' that provide technological support to the community to fight cyber crimes. However in the future, it may be necessary for governments to create a 'Cyber Army' to protect and counter attack organized gangs of terrorists who attack the cyber space belonging to citizens of a country.

India has taken various meaningful steps in this direction. For instance, hacking of the Bhabha Atomic Research Center (BARC) and other similar incidents had prompted the National Association of Software and Service Companies (NASSCOM) to set up the country's first anti-hacker Organisation called the 'National Cyber Cop Committee' consisting of senior policemen, government officials, young experts apt in the art of hacking and representatives of NASSCOM.²³

It is also worthwhile to mention here that India's first police station to exclusively handle cyber crimes such as computer hacking, data damage and Internet fraud has also started working in Bangalore since September 2000. Similar initiatives are also underway in other states of India as well.

IV. REASONS BEHIND THE INCREASE IN CYBER CRIMES

The topic of cyber crime leads us to a very crucial question as to what are the reasons behind the commission and frequency of such crimes. As a matter of fact, there are a variety of factors behind this increase. Some of them are discussed below.

A. Anonymous Nature of the Internet

Internet enables transactions between people who do not know, and in many cases cannot know each others' physical location. Thus, Internet is anonymous in nature and this is perhaps the main reason that it is possible to engage into a variety of criminal activities. As a result, people with criminal bent of mind have been using this aspect of the Internet to perpetuate criminal activities in cyber space.

The field of cyber crime is just emerging and new forms of criminal activities in cyber space are coming to the forefront with the passing of each new day.

B. Global Spread of Internet

The transnational expansion of large scale computer networks and the ability to manipulate content including images from remote login and

access to systems through regular telephone lines increases the vulnerability of these systems and the opportunity for misuse or criminal activity. The potential extent of computer crime is as broad as the extent of the international communication system. The consequence of computer crime may, therefore, have serious economic impact on social as well as human fabric of the society.

C. Lack of Effective Laws Relating to Cyber Space

Laws, criminal justice systems and international cooperation have not been able to keep pace with technological advancements. Only a few countries have drafted laws to address the problem. However, none of the countries has resolved all the issues concerning legal, enforcement and prevention of problems arising out of technological changes.

D. Unclear Issues of Jurisdiction

Jurisdiction is the competence of a court to hear and determine a case. It requires determination of whether a claim (in case of subject matter jurisdiction) or person (in case of personal jurisdiction) is subject to the court in which the case is filed. The territorial rules of determining jurisdiction do not apply in cyber space. The Internet's decentralised nature makes it likely that any given Internet transaction will involve parties from more than one jurisdiction. Thus a general consensus on the issue of jurisdiction among countries is difficult to arrive, as it might amount to surrendering some amount of sovereignty of a country.

It is a well-established principle of international law that control over physical space and people is an attribute of sovereignty and statehood. However, cyberspace challenges this assumption. Cyberspace is a borderless environment. It has no territory-based boundaries. The Internet address has no relation to the physical location of computers and individuals accessing them thus render geographical borders of nations meaningless. The geographical boundaries of nations and the electronic frontiers do not have any co-relationship. Since nations assert authority on the basis of territorial nexus over individuals, events and happenings occurring within its jurisdiction, when territorial borders lose their meaning, the main question that arises is: on what basis states can exercise jurisdiction in cyberspace over persons who may not be within its territory or over events and transactions, which have no meaningful nexus with the state seeking to exercise jurisdiction?²⁴

24. For further details, see *Cyber Frontiers and the Path of Law* THE HINDU, July 4, 2000.

23. For further details, see THE TRIBUNE, June 16, 2000.

E. Lack of International Consensus for Regulation of Cyber Crimes

Internet crimes are likely to continue to proliferate as territorial regulations are insufficient to counter them in the absence of a general agreement among nations on the issue of jurisdiction. Computer crime is a new form of transnational crime and its effective addressing obviously requires concerted international cooperation. And this can only happen if there is a common framework for understanding what the problem is and what solution there may be.

F. Lack of International Harmonisation

Also the need of the hour is to bring about international harmonisation, that is, to ensure that legal protection from computer crimes is synchronised globally. Over recent years, such attempts have been made through international organisations to create a "global machinery" to fight against the terror of cyber crimes. In this connection, it may be appropriate to mention that the members of the Council of Europe have signed the first ever International Cyber Crime Convention, an international treaty designed to harmonise laws against crimes committed via Internet on 23 November 2001 at Budapest (Hungary). Its main aim, as set out in the Preamble, is to pursue "a common criminal policy aimed at the protection of society against cybercrime, *inter alia* by adopting appropriate legislation and fostering international co-operation."²⁵ The Convention represents an initial legal response to the menace of cyber crime, which is increasingly affecting the security of the citizens of the world.

G. Technological Developments

Computer crime is also facilitated by the tools provided by the computers, printers, modems, scanners, the Internet, the web and the programming tools that enable people to have access to money, mail and thoughts of others stored in the computer. The incidents of computer crime have increased considerably in the last ten years because the tools of committing computer crimes have become more and more technologically advanced with time.

Nowadays, it is possible to change or erase computer data with minimum chances of detection, like in case of virus or logic bomb.

25. Available at [http://press.soe.int/cp/2001/875a_\(2001\).htm](http://press.soe.int/cp/2001/875a_(2001).htm), 30 States Sign the Convention on Cyber Crime at the Opening Ceremony, 23 October 2001 (visited on 15 December 2001).

Anybody can easily modify the files and then cover the evidence of the offence thus committed. Data can be duplicated on floppies/tapes without any audit trails. By wire tapping, the computer can be intercepted or false commands may be generated to change the data and the files. Cases have been reported where electromagnetic radiations emitted by the computer have been intercepted to capture the data, delete or manipulate the program files without physically logging on to the system. Moreover, all hardware is susceptible to failure through aging, physical diameter and environmental change. These factors result in a problem of reliability, environmental dependency and vulnerability to interference and interception.²⁶

Needless to say that within the next decade or so, it will be necessary for all developing nations to enact cyber legislation to cope with the numerous challenges thrown by the rapid technological advancements in the post-globalised world.

V. WORLDWIDE IMPACT OF CYBER CRIMES

A. The Global Scenario

There is a great concern world over regarding various types of crimes being committed through computers and the Internet. Almost everyday there is an international story about some or the other portal that has been attacked, credit card fraud, or some virus bringing down the system. Business is the prime target — but public authorities and even individuals are vulnerable too.

It has generally been acknowledged by the experts that there is hardly any computer in the world that is hacking proof. The most mentionable of these cases was the 'denial of service' of giants like Yahoo.Com, Buy.Com, Amazon.Com, eBay, the shutting down of the website of World Trade Organisation, 'stealing' of www.web.net and www.bali.com, the infamous losses caused by the 'I Love You' virus and 'Melissa' virus, among others.

A survey of US business firms showed that 85% of those covered had at some time been targeted by hackers. In Great Britain, a report by the Communications Management Association (CMA) states that a third of the country's major businesses and public authorities have been hit. In the US, the Pentagon's systems alone were attacked more than 22000 times—

26. *Supra* n. 17.

in one year. And the FBI has identified 5000 systems as being "highly vulnerable" to cyber-crime, which has — according to Ronald L. Dick, the FBI's new director — the capacity "to destabilise a country's whole economy".²⁷

Gauging the economic impact of cyber-crime is complicated by the fact that reported offences are merely the tip of the iceberg. Several studies carried out in Europe and the US suggest that only a third of the victims call the police. Credit card fraud is thought to cost some 400 million dollars every year — and virus attacks some 12 billion. Finally, profits lost by firms whose patents and trademarks are stolen reportedly amount to 250 billion dollars every year, or nearly 5% of world trade.²⁸

B. *The Indian Scenario*

Computer crimes had not emerged as a major problem area for the law enforcement agencies in India until recent past. The main reason for low incidence of computer-related crimes in India was that computerisation of banks and other financial institutions were still in early stages. Further, the networking of computers had not yet taken place in any big way in the sensitive sectors which could be vulnerable to theft and alteration of data. But as the process of computerisation has now picked up significant increase in computer crime is expected in the near future.²⁹

Cyber crime has now become a reality in India. Difficult to detect, seldom repeated and even more difficult to prove, computer-related crime lacks a traditional paper audit trail, is away from conventional policing and requires specialists with a sound understanding of computer technology. Furthermore with the country poised to enter the information superhighway-over three million computers in place — and industry and banks networked, the realisation of the dangers and threats is finally sinking in.³⁰

The major areas of concern, which are highly vulnerable to the threat of computer crimes, include critical infrastructures like banks and other financial institutions, telecommunications, airlines, railways, power sector

27. Available at : http://www.coe.int/TE/Communication and Research/Press/Themes/Files/Cybercrime/le_cybercrime.asp, *Cyber Crime — The Target It Hits, The Damage it Does* (visited on 15 December 2001).

28. *Ibid.*

29. Balwinder Singh, *Cyber Crime — A New Challenge for the Police* CBI BULLETIN, 35 (February 2000).

30. Krishna Kumar, CYBER LAWS - INTELLECTUAL PROPERTY AND E-COMMERCE SECURITY 295 (2001).

and other crucial departments of both the Government of India and numerous states etc.

As regards incidents of computer crimes in India, a few examples would give an idea about the nature of cases which have occurred so far.

- (i) In New Delhi Municipal Corporation, a private agency entrusted with the responsibility of preparing and collecting electricity bills, embezzled Rs. 6.5 crore by creating duplicate set of bills showing lower receipts.
- (ii) In Railway Computerised Reservation System, a few cases of false accounting by wrongly categorising upper class seasonal tickets has come to notice.
- (iii) Subscribers of Videsh Sanchar Nigam Ltd.'s (VSNL) Internet service in Mumbai were pleasantly surprised on the morning of 2 March, 1999 as they received an email from Mr. Amitabh Kumar, the acting Chairman and Managing Director of VSNL, stating VSNL's aggressive price cuts. From Rs. 3,500 for 100 hour account the rates had been slashed to Rs. 1,800 for 100 hours and for 500 hour account the rates were down from Rs. 10,000 to Rs. 6,500. However the email turned out to be nothing but the first instance of a system breakdown in at VSNL that hurt its pride.
- (iv) Indian Airlines was defrauded of several lakh rupees when open-ended tickets for shorter sectors were issued in fictitious names by some staff members. Computer records were tampered with to show longer sectors and refunds obtained.
- (v) In the Purulia Arms Drop case, the main players used the Internet extensively for international communications, planning and logistics.
- (vi) Post-Pokhran, hackers gained access to the Bhabha Atomic Research Centre computer system and pulled out vital data. It was like a bolt from the blue. Scientists at the Bhabha Atomic Research Centre (BARC) got the shock of their lives when they found rude anti-nuclear messages splashed across their computer screens. Someone had breached the centre's advanced security system and stolen sensitive mail. The hackers were later traced to be based in New Zealand.
- (vii) Computer professionals who prepared the software in an MBBS examination were found responsible for altering data by manipulating the computer's corrector reader. They had been giving an upward revision of scores to students in return for a hefty fee.³¹

31. *Ibid.*

illegally — to all users, without impediment, from anywhere in the world; thirdly, because the networks carry within them the promise of a new age of “online trade”, the value of which will soon go beyond hundreds of billions of dollars.³⁴

However, this virtual world full of promise is under threat from a new kind of crime. Computer networks now make it possible to distribute at phenomenal speed and to an unlimited number of users unlawful content, such as child pornography, computer viruses, or even the encoded orders of terrorist organisations. Through these networks, confidential information is spied upon and stolen, information which is often of great economic value, or governments’ and private companies’ computer systems are attacked from far-off by people who are completely anonymous, causing a very significant degree of damage.³⁵

Not all of this is done by the young computer whiz kids trying out their knowledge; it is frequently deliberately done by pirates, cyber-terrorists or cyber-spies who are professionals, acting for other individuals, companies or even governments, in return for payment. Consequently, the advantages offered by a worldwide information network can rapidly disappear if impunity is the only response to these criminal abuses.³⁶

As mentioned above, nowadays Internet is also emerging as a popular medium for doing business, thus giving rise to the concept of ‘electronic commerce’ (popularly called as e-commerce). The activities in cyber space have influenced almost all branches of laws, like banking law, commercial law, intellectual property law and law of evidence. As we move from the paper-based society to the digital era, the need for laws to govern and regulate this society becomes imperative.

While the legal systems of different countries are grappling with the issue of developing cyber law to meet novel challenges posed by the Internet, time alone will tell whether progress made in the cyber law would be adequate to meet evolving business needs of the global community. A variety of new challenges are coming up for those who use the Internet for business purposes. Under the circumstances a new stream of law-cyber law has emerged. In simple words, cyber law is a stream which refers to legal and regulatory aspects of the Internet and the world wide web.³⁶

34. *Ibid.*

35. *Ibid.*

36. A.S. Anand, *Cyber Law Needed to Meet IT Challenge* THE TRIBUNE, January 21, 2001.

(viii) The websites of the Indian Parliament, Zee TV, Punjab Police etc. have also been broken into by anti-India hackers at one time or the other.

(ix) Pakistan’s disinformation campaign on Kashmir has been highly active and a number of Kashmir-related websites, replete with radical fundamentalist ideas are doing the rounds of the World Wide Web.³²

Above mentioned are some of the instances which indicate the vulnerability even of the most sophisticated computer networks to hacking and cracking. These instances also amply demonstrate the ability and reach of cyber criminals and hackers to manipulate the systems and walk away freely from the long arm of the law. Hence there is a pressing need for stringent cyber laws to deal with problem of such magnitude and dimension. It is right time that we wake up from our slumber and take positive action against the growing challenge of cyber crime.

VI. NEED FOR CYBER LAWS

The spread of Internet has brought forth a number of legal issues which cannot be handled by the criminal law designed to deal with the physical world. Some of the vital questions that arise are e.g. can the traditional criminal law designed to deal with the physical world be applied to offences committed in the virtual one? Can the Internet remain an area where no law applies, a space where freedom is absolute? It is now clear that the virtual impunity from which criminal conduct in cyberspace has seemed to benefit hitherto could no longer continue, at risk of jeopardising both the future and the potential of computerised networks, and particularly of the Internet at the risk of leaving unprotected the individual rights of all Internet users in the face of attacks committed against or through the networks by certain pirates of cyber-terrorists.³³

There is an urgent need to combat cybercrime for several reasons. Firstly, because the world has become a global information society which no longer has any borders for either legitimate activities or offenders; secondly, because all information has become accessible — legally or

32. For further details, see Prashant Bakshi, *And Now Cyber Rogues* THE TRIBUNE, July 23, 2000.

33. Guy De Vel, *The Cyber Crime Convention: A Pioneering Effort of Wide Legal Scope*, opening address at the Conference on Cyber Crime, Budapest, 22-23 November, 2001, available at http://www.coe.int/T/E/Communication_and_Research_I_Press_I_Themes_Files_I_Cybercrime_I_s_Discours_De_Vel_Nov_2001_.asp (visited on 15 December 2001).

It is in this background that we have to appreciate the importance of cyber laws. More than anything else, India, by its sheer numbers, as also by virtue of its extremely talented and ever growing IT population, is likely to become a very important Internet market in the future and it is important that we enact cyber laws in India to provide for a sound legal and technical framework which, in turn could be a catalyst for growth and success of the Internet revolution in India.

The Government of India has rightly responded by coming up with the first cyber law of India — The Information Technology Act 2000 which is based on the UNCITRAL Model Law recommended by the General Assembly of the United Nations by a resolution dated 30th January 1997. Its object is to give effect to the resolution of the United Nations which recommended giving favourable consideration to the said Model Law while enacting or revising their laws so that uniformity of law applicable to the alternative to the paper based methods of communication and storage of information is achieved. Its other object is to promote efficient delivery of Government services by means of reliable electronic records. The preamble to this Act gives a very clean picture in this regard. It says:

An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act 1872, the Banker's Book Evidence Act, 1891 and the Reserve Bank of India Act 1934 and for matters connected therewith or incidental thereto.³⁷

In essence, the Indian Information Technology Act 2000 gives legal recognition to electronic records by granting legal validity to information stored in the form of an electronic form.

VII. CYBER CRIME AND LEGAL REGIME

Today, cyber law is at an early stage of its development. Though Internet access is growing rapidly throughout the world, yet a majority of countries are debating on whether or not to legislate regarding regulating cyber space within their national territorial boundaries. Even amongst the

different nations, there is a diversion of opinion on the issue of how much to legislate in the field of cyber laws. While some countries like Malaysia believe in the philosophy of legislating on every conceivable issue of cyber space. Others are in favour of a more balanced approach of "crossing the bridge when it comes" and legislating cyber laws only where and when necessary.³⁸

A. Cyber Crime Legislation Worldwide

To meet the challenge posed by new kinds of crime made possible by computer technology including telecommunication, many of the countries largely industrialised and some of those which are moving towards industrialisation, have in the past ten years reviewed their respective domestic criminal laws from the point of adaptation, further development and supplementation so as to prevent computer related crime. A number of countries have already introduced more or less extensive amendments by adding new statutes in their substantive criminal law. These are Australia, Austria, Canada, Denmark, Finland, France, Germany, Greece, India, Italy, Japan, Sweden, Switzerland, Turkey, and USA. United States has made numerous amendments to the law of federal and constituent level. Countries like Malaysia, Portugal, Singapore, Spain, and UK have made isolated supplements by enacting new Acts to prevent computer-related crimes.³⁹

The salient features of the legislations enacted by different countries are briefly summarised below:

Australia has covered offences related to computers in the Australian Crimes Act. The offences covered are: (a) unlawful access to data in computers; and (b) damaging data in computer etc. The penalty for the former is imprisonment upto 6 months to 3 years while for the latter imprisonment is upto 10 years.

Canada on the other hand has covered three computer crimes, namely: (a) possession of device to obtain unauthorised telephone facilities; (b) unauthorised access to computer; and (c) committing mischief with data. The imprisonment varies from upto 2 years to 10 years depending upon the crime.

Germany has classified the following computer crimes as offences: (a) data spying; (b) computer fraud; (c) forgery of prohibitive data;

38. Pavan Duggal, *Cyber Law — An Overview*, available at <http://www.cyberlawindia.com> (visited on 31 August 2001).

39. *Supra* n. 17.

information; (c) unauthorised access of computer of a government department or agency; (d) unauthorised access of computer of federal interest with intent to defraud; (e) knowingly causing transmission of data/program to damage a computer network, data or program or withhold or deny use of computer, network etc.; (f) knowingly causing transmission of data/program with risk that transmission will damage a computer network, data or program or withhold or deny use of computer, network etc.; and (g) unauthorised access of computer with intent to defraud.⁴⁰

B. Indian Legal Regime on Cyber Crimes

The Indian legal regime on cyber crimes is created by the Information Technology Act 2000. This Act, passed with the objective of promoting a secure electronic environment, deals with issues subsidiary to this electronic environment such as contraventions relating to electronic transactions and information technology offences. It also seeks to set up various authorities to help regulate an information technology regime. Moreover, it also amends the Indian Penal Code 1860 and the Indian Evidence Act 1872 in the light of the electronic transactions.

This enactment deals with civil wrongs in chapter IX providing for liability to pay damages by way of compensation for wrong doings against the computers and wrong doings by means of computers. Computer crimes have been dealt with in chapter XI in this enactment. Tampering with computer documents, hacking of computer systems, publication of obscene information in electronic form, breach of confidentiality and privacy, misrepresentation and suppression of material before the controller or certifying authorities and publication of digital signature certificates without such certificate having been issued by the authority or accepted by the person and use of digital signature certificates for a fraudulent purpose, have been declared to be offences under the Act.

Section 75 of the Act gives it extra-territorial operation by making it applicable to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

A police officer not below the rank of Deputy Superintendent of Police or any other officer of the Central or State Government duly authorized have been empowered to enter any public place for the purpose of search, seizure and arrest without a warrant. Section 81 gives the

⁴⁰ *Supra* n. 5 at 105-06.

(d) alteration of data; and (e) computer sabotage. The punishment ranges from 2 years to 5 years depending upon the nature of crime.

Japan while amending its penal code has classified following activities as computer crimes: (a) false entry in an authentic deed; (b) false entry in permit licence or passport; (c) electronic record made wrongfully; (d) electronic record made wrongfully by public servant; (e) interferences with business by destruction or damage of computer; (f) interferences with computer; (g) destruction of public document; and (h) destruction of private document.

Singapore in its Computer Misuse Act 1993 has classified the following activities as computer crime: (a) unauthorised access to computer material; (b) unauthorised access with intent to commit or facilitate commission of further offences; (c) unauthorised modification of computer material; and (d) unauthorised use and interception of computer services. The punishment ranges from imprisonment up to 2-5 years with fine up to Singapore \$ 2,000-20,000.

United Kingdom in the Computer Misuse Act 1990 has included (a) unauthorised access to computer material; and (b) unauthorised access with intent to commit or facilitate commission of further offences as the computer crimes. The punishment is imprisonment from 6 months to 5 years with fine.

United States has created a formidable legal framework to deal with the peril of computer crimes. Following are some of the top Internet-related laws that have been framed for this purpose: The Federal Fraud and Abuse Act 1986; The Computer Misuse Act 1991; The Data Collection Improvement Act 1996; The Digital Signature Legislation 1996; The Electronic Fund Transfer Act (EFT) 1996; The Federal Trade Marks Dilution Act 1996; The Intellectual Property Protection Act 1996; The National Information Infrastructure Protection Act 1996; The Telecommunications Act 1996; The Electronic Communications Privacy Act 1997; The Electronic Theft Act 1997; The Child Online Protection Act 1998; The Digital Millennium Copyright Act 1998; The Internet Tax Freedom Act 1998; The U.S. Trademark Cyberpiracy Prevention Act 1999; The Electronic Signatures in Global and National Commerce Act (E-Sign) 2000; The Uniform Computer Information Transactions Act (UCITA) 2000; and The Children's Internet Protection Act 2001.

These Acts classified computer crimes as: (a) wilful unauthorised access of computer related to national defence or foreign relation; (b) intentional access of computer without authorisation to obtain financial

Act overriding effect.

This enactment has to keep itself abreast with legal and technological complexities, which are bound to arise, and its shortcomings removed. The extra territorial operation of the enactment in relation to contraventions and offences in this Act could become meaningful only when backed with provisions recognizing orders and warrants for information issued by competent authorities outside their jurisdictions and measures for co-operation for exchange of material and evidence of computer crimes between law enforcement agencies.

VIII. CYBER CRIME AS A CHALLENGE FACING THE INTERNATIONAL COMMUNITY

Cyber crime is one such kind of crime where different societies are likely to rule differently. As a result what may be a crime within the jurisdiction of one country may not be so in the jurisdiction of another. This would, very obviously, create unique problems in the enforcement of law. Since electronic crimes can simultaneously be committed across borders, questions of national sovereignty are also the important issues to be taken into consideration. Today's computer networks have removed barriers for the cyber criminals. Police officials, investigators, prosecutors and judges alike are struggling hard to catch up with the emerging situation. In some cases, countries are requesting for the extradition of computer hackers who have never even physically entered the country whose laws they have allegedly broken. Law enforcement officials are contending with new computer-based evidence that must convince a court of the authenticity and show that it has not been electronically altered. Internet communications, as a matter of fact, can easily be routed through many different jurisdictions, thus making tracing of the cyber rogues indeed very difficult. Electronic evidence or proceeds from electronic transactions can easily be moved to locations where a lack of effective laws or technical expertise puts them beyond the legal recourse. Data can be encrypted to make it difficult for law enforcement agencies to read. The spread of networks in the developing world is proceeding at a slower pace. Many developing countries are caught in between the need to go "on line" to spur economic development and the desire to prevent cyber crime. The lack of a legal framework creates greater opportunities for offenders to commit economic crimes beyond their home countries.⁴¹

41. See *Transnational Computer Crimes: The Crimes of Tomorrow are on our Doorsteps*, available at <http://www.undcp.org/palermo/cybercrime.htm>. (visited on 22 October 2001).

Addressing all these problems will require a concerted effort from national governments and the international community as a whole. The need for universality and for a forum in which all countries can participate in drawing up policies, legal reforms and technical solutions suggests that international organisations like the United Nations and its subsidiary agencies will be called upon to play an important role in this arena, too.

It may be appropriate to mention here that one of the most important developments in the field of cyber law in the year 2001 relates to cyber crimes, 11 September attacks on the World Trade Center, and the consequent signing of the International Cyber Crime Treaty. Since the beginning of the Internet, cyber crime has emerged as a major source of concern for governments across the world. The absence of any international law on cyber crime further complicated matters with different countries assuming distinct national approaches for controlling, regulating and preventing cyber crime.

As a matter of fact, the September 11th attack saw the turning point in the history of the World Wide Web and the Internet. The attacks on World Trade Center's Twin Towers were an example as to how terrorist acts had been discretely conceived, meticulously planned and perfectly committed using the means of Internet. That singular instance of September 11th changed the way we use the Internet and the way Internet is going to be regulated.

The scenario emerging post-September 11th 2001 saw the adoption of the International Cyber Crime Treaty on 23 November 2001 in Budapest, Hungary. The Treaty deals in particular with offences related to infringements of copyright, computer-related fraud, child pornography and offences connected with network security. It also covers a series of procedural powers such as searches of and interception of material on computer networks. This international treaty, being a baby of the European Union, was adopted after 29 drafts and more than 4 years of intensive work. Thirty members of the European Union apart from the Canada, Japan, South Africa and the United States have already signed the International Cyber Crime Treaty.

Its main aim, as set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, *inter alia* by adopting appropriate legislation and fostering international co-operation. It will have an Additional Protocol making it a criminal offence to disseminate racist or xenophobic propaganda via computer networks. The drafting of this Additional Protocol was to begin in December 2001.

IX. CONCLUSION

The benefits of electronic revolution have reached in each and every nation of the world, but most nations do not, however, have got separate domestic law to deal with the problem of cyber crimes. Nor are there any mutual agreements and treaties between the nations except the aforesaid. The absence of all these have made countries vulnerable to the threats of cyber crimes. Therefore, there is no denying the fact that an international agreement on the ways and means of dealing with cyber crime is urgently required to address the problem in a holistic manner. Cyber crimes are the 'crimes against humanity', 'crimes against development' and above all 'crimes against civilisation'. To sum up, it can be stated that as the contemporary world is basking in the achievements in the field of communications and information technology it has become highly imperative to check the emergence and growing menace of cyber crime.

The International Cyber Crime Treaty promises to become the first international benchmark for controlling and regulating cyber crime and for ensure cooperation amongst different signatory nations for exchanging information concerning cyber crime and cyber criminals. The International Cyber Crime Treaty is yet to come into implementation. However, almost single handedly the Treaty promises to fill up the void about the need for having an international regulatory mechanism for controlling cyber crime that has existed since the beginning of Internet.

The International Cyber Crime Treaty also becomes the first international treaty to be in place for any issue concerning cyber laws. The treaty may not be perfect, and no treaty is perfect. However, it does give a very strong starting point for international efforts to regulate and control cyber crime. The Treaty also promises to possibly change the way cyber crime would be investigated, regulated and punished on a global scenario, in the context of increasing cooperation and exchange of information between signatory member countries on the issue of regulating cyber crime.⁴²

The strategy for combating computer crime would have to incorporate investigative powers which could be used to obtain evidence from anywhere on a computer network-regardless of national jurisdiction — more quickly than offenders can either move or erase evidence. At the same time there should be national and international requirements for the protection of privacy, freedom of expression and other basic human rights. This will be particularly difficult because at present the most effective human rights protections in criminal cases are codified in national laws and constitutions and enforced by national courts ill-equipped to deal with transnational cases.

Perhaps the greatest challenge to developing an effective global strategy will be to train skilled investigators and prosecutors and keep them up to date on the latest technological developments relating to cyber crimes. This effort strains even wealthy and technically advanced countries, and expertise will be needed to avoid legal loopholes which electronic offenders can exploit. In the ultimate analysis, our goal should be to ensure that everyone can participate in the electronic community without the fear of being victimised.

42. Pavan Duggal, *Cyberlaw 2001: Two Dramatic Developments* available at <http://www.zdnet.com>. (visited on 15 January 2002).

individual by a private person or public authorities through their acts, omissions and commissions.

The basic question regarding the existing rule of civil law sanctions and particularly, the rule on civil liability, is whether existing rules on civil liability and compensation provide an effective remedy to an individual in case of environmental pollution? S. Ercman has a very convincing and lucid explanation.⁶

The procedural shortcomings renders the system inefficient e.g., the need to prove fault under the fault liability system, the potential difficulty of proving a causal link between the activity and damage, the difficulty of identifying tortfeasor and the problem of multiple polluter and multiple victims. Moreover, the environmental damage affects the socially weak, who are often reluctant to initiate action against the economically powerful polluter, for that reason, environmental action under the civil law have been comparatively rare.

II. THE INDIAN APPROACH AND PRACTICE

A. General Development

Article 32 (1) of the Indian Constitution provides for the right to move to the Supreme Court by appropriate proceedings for the enforcement of fundamental rights. The Supreme Court under Article 32 (1) is free to devise any procedure for the enforcement of fundamental right and it has also the power to issue any process necessary in a given case.⁷ Generally, the Constitutional Courts are not willing to entertain claim for damages under the writ jurisdiction because it involves the disputed question of fact.⁸ In a trend setting judgement in *Rudal Shah v. State of*

6. S. Ercman, 'European Environmental Law: Legal and Economic Appraisal' 488, 489 (1977). See also, Michael R. Anderson and Anees Ahmad, *Assessing Environmental Damage under Indian Law* in 3 LAW AND JUSTICE 141-51 (1996). The Constitution, however, no where defines what are appropriate proceedings. In *Daryao Singh v. State of U. P.* AIR 1961 SC 196, 199 the Apex Court observed: the expression "appropriate proceedings has reference to proceedings which may be appropriate having regard to the nature of the order or direction which the petitioner seeks to obtain from this court. This appropriateness of the proceedings would depend upon the particular writ or order which he claims, and it is in that sense that the right has been conferred on the citizen to move this court by 'appropriate proceedings'."

8. This traditional view is indicated in *Jivan Kocher v. Union of India* AIR 1983 SC 1107.

EMERGING RIGHT TO COMPENSATION IN INDIAN ENVIRONMENTAL LAW

Vinod Shankar Mishra*

I. INTRODUCTION

In India, the concept of compensation for environmental pollution goes as far back as 1857, when an attempt was made to regulate the pollution produced by the Oriental Gas Company by imposing fines on the company and giving a right to compensation against the company for fouling water.¹ In India, the civil courts played a limited role to combat pollution and offered no relief for violation of enviro-legal right. In personal injury cases, the Courts hardly awarded compensation for non-pecuniary loss. However the Courts made awards for pain and suffering or loss for amenities of life but the compensation awarded was notoriously low.² However, there was an exception when a substantial sum was awarded as a compensation against a persistent industrial polluter in Calcutta where the Calcutta High Court awarded damages of rupees one thousand.³ Of late, in *Bhopal Mass Disaster case* the civil court awarded compensation to victims of industrial mass disaster.⁴ Thus a claim or action for compensation⁵ is result of harm which has been caused to an

* Lecturer, Law School, Banaras Hindu University, Varanasi-221005.

1. Ss. 15-17, ORIENTAL GAS COMPANY ACT 1857 as referred to in A. Rosencranz, S. Divan and M.L. Noble, ENVIRONMENTAL LAW AND POLICY IN INDIA: CASES, MATERIALS AND STATUTES 37 (1992).

2. *Id.* at 78.

3. *J.C. Galstain v. Dunia Lal Seal* 9 CWN 612 (1905).

4. The District Court of Bhopal on 17th December, 1987 ordered that the defendant Union Carbide Corporation would deposit in that Court a sum of Rupees three thousand five hundred million for payment of substantial interim compensation and welfare measure. *Union Carbide Corporation v. Union of India* AIR 1988 NOC (50) M.P.

5. In *Monogahela Navigation Company v. U.S.* (1892) 149 U.S. 312. It was stated that "The non-compensation standing by itself carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages as distinguished from punitive or exemplary damage, the former being the equivalent for the injury done and the latter by way of punishment". (*Id.* at 326). It is necessary to make apparent distinction between the words compensation and damages. While the former is used by Indian Courts to denote the monetary redress and it is a public law remedy, damages is its equivalent in western world. Therefore, a reference to these term means one and the same.

*Bihar*⁹ the Apex Court devised a new remedy for awarding monetary compensation for enforcement of fundamental rights under Article 21.¹⁰ The decision in *Rudal Shah* was further reiterated in two other cases¹¹ where the Court granted compensation to the citizens whose rights had been violated by the State and; with these rulings *compensation* as a remedial measure was firmly established in India. Indian courts have been frequently awarding compensation in many cases where fundamental rights of the citizens have been infringed or violated.¹²

This missionary zeal found reflection in *SAHELI*,¹³ where a writ petition was admitted by the court under Art. 32, even though it was not mentioned which of the fundamental right, if any had been violated.¹⁴ In the instant case the Supreme Court directed the Delhi Government to pay Rs. 75000/- as compensation to the mother of a victim, a boy of 9 years who died because of beating by police officer. Thus, it may be said that Indian judiciary has made unique contribution in the field of compensatory jurisprudence by forging new remedy to compensate the poor people

9. AIR 1983 SC 1086. The petitioner in a *habeas corpus* writ petition prayed the Supreme Court to pass an appropriate order for payment of compensation for his illegal detention of 14 years.

10. The Supreme Court formulated a general guideline to award compensation to victims of state violence which included;

(i) Art. 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of the Supreme Court is limited to passing orders of release.

(ii) The violation of right guaranteed under Art. 21 can reasonably be prevented and due compliance of Art. 21 secured, is to mulct the violators in the payment of monetary compensation.

(iii) The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the power of State as shield.

(iv) The respect for rights of individual is the true bastion of democracy. Therefore the State must repair the damage done by its officer to the petitioner.

11. *Sebastin M Hongray v. Union of India*, AIR 1984 SC 1026 and *Bhim Singh v. State of J. & K.* AIR 1986 SC 494.

12. *State of Maharashtra v. Ravikant Patil* (1991) 2 SCC 373, *Kumari v. State of Tamil Nadu* AIR 1992 SC 2069, *Niabati Behera v. State of Orissa* AIR 1993 SC 1960, *Haranjit Kaur (Smt) v. Union of India* (1994) 2 SCC 1, *Miss Radha Bai v. Union of India* AIR 1995 SC 1476, *Bodhisatwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490, *D.K. Basu v. State of W.B.* (1997) 3 SCC 416, *PUCL v. Union of India* (1997) 3 SCC 433.

13. *SAHELI v. Commissioner of Police*, Delhi AIR 1990 SC 513.

14. It indicates the evolution of a fundamental right to compensation. See also *Rural Litigation and Entitlement Kendra v. State of U.P.* AIR 1985 SC 652.

against the mighty power of the State.¹⁵ The new remedy was extended to the jurisdiction of high court¹⁶ under Article 226. Bhagwati J. made it clear in *Bandhua Mukti Morcha v. Union of India*¹⁷ that same powers must be exercised by High Courts while exercising jurisdiction under Article 226.¹⁸ In India, High Courts have awarded monetary compensation in number of cases.¹⁹ It is interesting to note that the courts have taken the help of the compensation awarded under the Motor Vehicle Act 1988²⁰, salary and also the status²¹ of the victim. In these cases the compensation has ranged from Rs. 5000²² to 10,00,000 lacs.²³

Keeping in view the aforesaid developments in the field of compensatory jurisprudence in India, an attempt is made to study environmental law position under the following heads:

III. WHO CAN CLAIM COMPENSATION

Under Public Liability Insurance Act 1991 (PLIA) and National Environment Tribunal Act 1995 (NETA) a victim may claim compensation for injury resulting from industrial disaster. However, the PLIA saves the right of claimant to plead for compensation under, any other law subject to deduction for awards made under the instant Act.²⁴ Under the NETA the claim for compensation can also be brought by legal representative of the victim.²⁵ The Tribunal can also initiate *suo motu* action.²⁶ The Tribunal has also incorporated the basic philosophy of public interest litigation, by

15. See generally, P. Leela Krishnan, *Compensation for Governmental Lawlessness* 27 COCHIN UNIVERSITY LAW REVIEW 52 (1992), K.C. Joshi, *Compensation through Writs* 30 JILI, 69 (1988) P.K., Tripathi, *Article 32 and Compensation Conundrum* (1984) 2 SCC (J) 51, S.N. Jain, *Monetary Compensation for Administrative Wrong through Article 32*, 25 JILI, 118 (1988), B.P. Diwedi, *From Shah to Saheli* 36 JILI, 99 (1994), Vikram Raghavan, *Compensation Victims of Constitutional Torts* AIR (J) 100 (1998).

16. *R. Gandhi v. Union of India* AIR 1989 Mad. 205.

17. AIR 1984 SC 802.

18. Awarding of compensation in appeal cases under Article 136 is another innovation *Jwala Devi v. Bhoop Singh* AIR 1989 SC 1441.

19. *C. Ram Konda Reddy v. State of A.P.* AIR 1989 All 235, *Kalawati v. State of H.P.* AIR 1989 HP 5, *R. Gandhi v. Union of India* AIR 1989 Mad. 205, *Indar Puri General Store v. Union of India* AIR 1992 J. & K. 11.

20. *Kalawati v. State of H.P.* AIR 1989 H.P. 5.

21. *Nilabati Behera v. State of Orissa* AIR 1993 SC 1960.

22. *Ganga Das v. State of Orissa*, 1993 (2) SCALE 989.

23. *Chairman Railway Board v. Chandrima Das* (2000) 2 SCC 465.

24. S. 4(1)(C) NETA and S. 6 PLIA.

25. *Id.* 4(1)(C).

26. *Id.* 4(2)(C).

The Supreme Court put emphasis on the word appropriate cases. It observed:

We are deliberately using the words in appropriate cases because we must make it clear that it is not in every case where there is breach of fundamental right committed by the violator that compensation would be awarded by the Court in a petition under Article 32.³¹

The Court left the question open as to what are the appropriate cases. However, the compensation cases referred³² to above give a clear indication that it should affect a large number of persons and, in particular, the poor. Rajeev Dhavan says that what seems to be emerging as a general theory that 'damages' may be awarded in "appropriate cases" where³³ fundamental rights are affected or there has been breach of statutory duty, the government action has been found to be ultra-vires (but not necessarily mala fide), or where the citizen has been adversely affected. He has further pointed out that all this is sought to be done not by way of an ordinary civil suit in an action by way of alleging a constitutional tort but fundamental right and public interest petition determined by a summary procedure before the Supreme Court and High Courts.³⁴

However, in *Oleum Gas Leak case*³⁵, the court directed the Delhi Legal Aid and Advice Board to take up the cases of all those who had suffered on account of gas leakage and to file action on their behalf in the appropriate court for compensation. It is interesting to note that the court could not award compensation to victims under its writ jurisdiction as it failed to decide whether Shriram, the polluting industry, was 'a State' within the meaning of Article 12 of the Constitution.³⁶

IV. RIGHTS OF UNBORN TO CLAIM COMPENSATION

The rights of unborn to claim compensation has been recognized in western countries. In this connection, the report of Law Commission of U.K. is worth quoting which states that liability already exist under common law. In India the unborn's right to compensation got judicial

31. *Supra* n. 29.

32. *Supra* n. 12.

33. Rajiv Dhavan, *Promises Human Rights in India* 39 JILJ 149, 184 (1997).

34. *Id.* at 184.

35. AIR 1987 SC 1086.

36. *Id.* at 1099. See also, *M.C. Mehta v. Kamal Nath* (2000) 6 SCC 213, 224.

granting access to representative body or organisation, to file an application on behalf of victim. It also gives power to any representative body or organisation functioning in the field of environment or recognized by central government under all or any heads specified in the schedule to the Act to make an application for claim of compensation.²⁷ It means that central government has unfettered discretionary power to recognise or derecognise organisation to be entitled to make an application for compensation. It is submitted that this requirement would discourage the take person to move the tribunal to protect their private interest. The Act also makes provisions for claims of compensation by the central or state government or local authority under all or any of heads specified in the schedule.

The evolution of public interest litigation has liberalised the doctrine of *locus standi* in India. It allows, a publicly conscious individual to file a suit under extraordinary writ jurisdiction of the High Court and the Supreme Court. It has been extended to embrace all interest of public minded citizen and organizations or associations. Since 1985, public interest litigation has played a important role in majority of environmental pollution cases and it has significantly contributed to the development of the law relating to environmental compensation.

The Indian judiciary has concretized the right to live in clean environment through bold and innovative interpretation of Article 21. The *Maneka* wave has opened doors for neo-fundamental rights and in this dynamism, developed the right to get compensation against environmental pollution.

In the *M.C. Mehta Case*,²⁸ the Apex Court took the stand that apart from issuing directions, it could forge new remedies and fashion new strategies designed to enforce the fundamental right under Article 32. The court pointed out that a contrary position would robe article 32 of all the efficacy and render it impotent and futile.²⁹ Emphasizing its role under Article 32, the Supreme Court made it is clear that it could award compensation in writ petition itself. The Court further pointed out, "we can not adopt a hyper technical approach which would defeat the end of justice".³⁰

27. *Id.* S. 4 (1)(e).

28. AIR 1987 S.C. 1086.

29. *Id.* at 1091.

30. *Id.* at 1089.

cognizance for the first time in the Bhopal Settlement case.³⁷ It is interesting to note that Union of India invoked doctrine of *parens patriae* for future generation of victims before American Judge Keenan. The Apex Court while reviewing the settlement arrived in *Bhopal Mass Disaster* case suggested that a medical group insurance cover could be taken from the General Insurance Corporation of India or the Life Insurance Corporation of India for compensation to this contingent class of possible prospective victims. The apex court emphasized that 'there shall be no individual upper monetary limit for the insurance liability.'

It is humbly submitted that Indian Parliament should enact a law which would equip the unborn with a right to compensation for pre-natal injuries.

V. WHO SHALL PAY COMPENSATION

Under the PLIA and NETA, no distinction has been made between public sector and private sector or between an individual or a government official. National as well as multinational are equally liable. Any person who has control of any hazardous substance is liable to pay compensation under the Act.

It is gratifying to note that Parliament in order to implement the provision of the PLIA in letter and spirit amended the Act in 1992 and provided for the establishment of an Environment Relief Fund. Under the amended provisions, owner shall contribute an amount equal to the premium money. Initially this amount will be deposited with the insurer who shall remit the money to the appropriate authorities within a prescribed period. The collector shall arrange to pay from the fund to the affected persons.

The PLIA in order to compensate victims to a reasonable extent, requires that even after the payment from the insurer and the Environment Relief Fund, if the victims are not adequately compensated, the remaining liability shall shift on the owner of hazardous industries. This provision, it is submitted intends to compensate the victim in a true sense.

Section 3(3) of the NETA provides the apportionment of compensation on those who are responsible for the pollution on the equitable basis. Although the quantification of compensation has not been clearly specified, it is expected that a proper application of this provision would ensure a fair deal to every section of the society.

37. AIR 1990 SC 273. See also, C.M. Jariwala, *Complex Enviro-Techno Scientific Issue: The Judicial Direction* 42 JIL 1 37-39 (2000).

38. S. 7A of PLIA.

Coming to the case of industrial disasters, the *Bhopal Settlement case*³⁹ is a classic example, the Bhopal District Court passed an order against the Union Carbide Corporation for depositing Rs. 350 crore as interim compensation.⁴⁰ On appeal the Madhya Pradesh High Court⁴¹ reduced the compensation to Rs. 250 crore. When the matters ultimately came up before the Supreme Court, it passed a final order of settlement comprising all the claims civil and criminal and quantified the amount to 470 million U.S. dollars.⁴² This settlement order of 470 million U.S. dollars was again challenged before the Constitutional Bench of Supreme Court on October 3, 1991⁴³ which unanimously upheld the settlement and directed the Central Government to make good deficiency if the settlement fund was found insufficient. Thus the apex court used its good offices to compel the polluter to provide relief to victims of industrial disaster.

It has been said that judge made law of environmental protection in India recognizes international law principles which tend to be treated in a more circumspect manner in other common law jurisdiction.⁴⁴ Indian judiciary has incorporated the polluter pays principle, the precautionary principle and the principle of sustainable development into the domestic law and applied in deciding the claim for compensation.

The Apex Court first introduced the polluter pays principle in the *Bichari Village (H'acid)* case⁴⁵, invoking Article 130(2) of European Community Treaty and text of European Community Fourth Action Programme on the Environment. The Apex Court read the principle into provisions of environmental statutes, thus requiring the central government to issue order against factories producing highly acidic waste. The immediate significance of this decision was that it shifted the cost of remediation from the government to polluting industries. The principle was linked to Indianized principle of absolute liability. In the subsequent

39. AIR 1990 SC 273.

For interesting literature on the Bhopal case, see generally, Upendra Baxi, *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE, THE BHOPAL CASE* (1986); Upendra Baxi and Thomas Paul, *MASS DISASTER AND MULTINATIONAL LIABILITY* (1986); Upendra Baxi, *et. al. VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE* (1990).

40. *Supra* n. 4.

41. *Ibid.*

42. *Supra* n. 39.

43. AIR 1992 SC 298.

44. *Infra* n. 47.

45. AIR 1996 SC 1446.

'Vellore Citizen Welfare Forum' case⁴⁶, the court affirmed this principle as an incorporated rule of customary international law. The court also affirmed the principle by requiring the polluter to pay compensation to injured parties as well as to cover the cost of remediation of damaged environment. It has been pointed out that this view of principle goes well beyond the formulation which are found in international instruments, which generally confine the liability of polluter to lower standard.⁴⁷ Moreover, it is strange that an Indian court could seek guidance from a regional treaty to which India was not a party.

The apex court has applied the polluter pays principle in number of cases to defray the cost of remedial measures for damage done to environment. In *S. Jagannath* case,⁴⁸ the court ordered to close down all aqua/shrimp culture industries within the CRZ notification areas and pay compensation to reverse the damage done to environment. It may be said that the apex court has activated itself to contain the damage done to environment. In this process, it has invoked principles of international customary laws to fix the accountability on the ecosider and compelled him to pay the cost of remedial measures.

It is interesting to note that the apex court through Justice Kuldip Singh in *Kamal Nath* case⁴⁹, ordered for compensation against the private companies without any caveat, for the damage done to environment and did not refer to the scope of jurisdiction under Article 32 (2). However, the court in subsequent order modified its earlier order and pointed out that in addition to damages, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as deterrent for others not to cause pollution.^{49a}

VI. PROCEDURE TO AWARD COMPENSATION

The NETA makes provision that complainant shall deposit a fee not exceeding, one thousand rupees but exempts the poor persons and the non-governmental organisation for depositing mandatory fees for filing an application for claims of compensation.⁵⁰

46. AIR 1996 SC 2715.

47. Michael R. Anderson, *International Environmental Law in Indian Courts* 7 RECIEL 28 (1998).

48. (1997) 2 SCC 87.

49. (1997) 1 SCC 388.

49a (2000) 6 SCC 213, 224.

50. S. 4 (5) NETA.

The objective of the Act is to facilitate the filing of a complaint but the ceiling imposed on the income of such person is not realistic. It is important to note that an award made by the Tribunal under the Act shall be executable as a decree of civil court but it shall not be bound by procedure laid down by Civil Procedure Code 1908 but guided by principle of natural justice. Moreover, it shall have power to regulate its own proceeding, including fixing appeals and times of inquiry.

Under the PLIA a claim for relief in respect of death of, or injury to, any person or damage to any property shall be disposed as expeditiously as possible. It specifically provides that every endeavour shall be made to dispose of such claim within three months of receipt of application of claim of compensation.⁵¹

It is important to note that Indian judiciary has also laid down the procedure to award compensation.

In *Indian Council for Enviro Legal Action v. Union of India*⁵² a writ petition was filed by an environmental organization, projecting the miseries of people living in the vicinity of chemical industrial plants. The court was of the view that so far as the claim for the damages for the loss suffered by villagers or concerned affected area was concerned, it was left to them or any organization on their behalf to institute suits in the appropriate civil court. If they filed the suit or suit *in forma pauperis*, then the State should not oppose their application.

The question of awarding compensation again came up before the Supreme Court in *Vellore Citizens Welfare Forum v. Union of India*.⁵³ The writ was filed by the Vellore Citizens Welfare Forum against pollution caused by enormous discharge of the untreated effluents from the tanneries in the State of Tamil Nadu. The apex court laid down the following procedure:

- (i) The central government shall constitute an authority under section 3(3) of the Environment Protection Act 1986 by September 30, 1996 and shall confer on the said authority, all the powers necessary to deal with situation created by tanneries and other polluting industries in the State of Tamil Nadu. The authority shall be headed by a retired judge of a High Court and it may have other members,

51. S. 7(7) PLIA. See also, Vikram Raghavan, *Public Liability Insurance Act: Breaking New Ground for Indian Environmental Law* 39 JILJ 96-115 (1997).

52. *Supra* n. 45.

53. *Supra* n. 46.

