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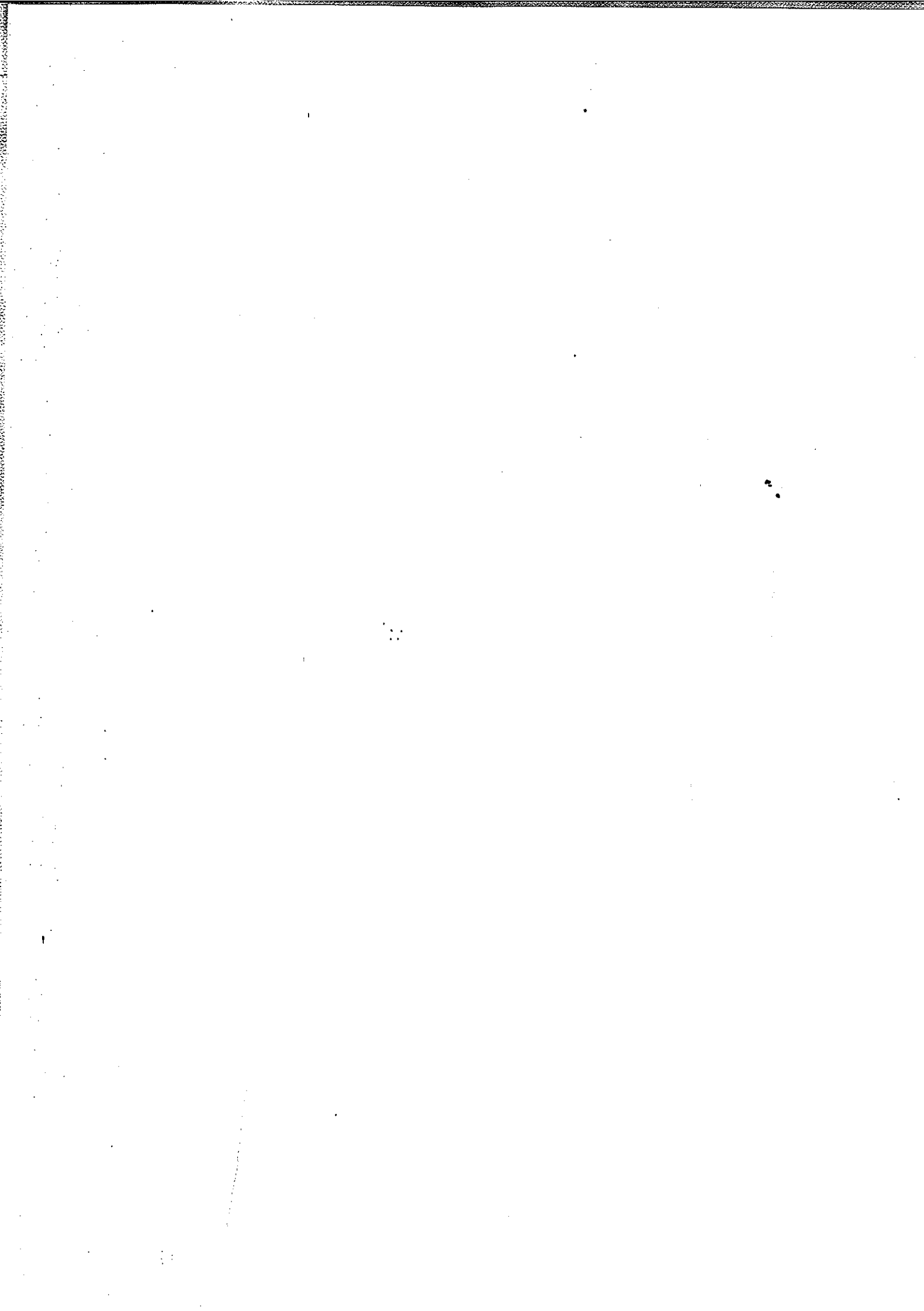
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EDITORIAL

The weakening political and social economy, the increasing incidence of political and even judicial corruption, growing frustration and disillusionment among the masses due to mass poverty, mass unemployment and mass violence is throwing up more and more predicaments in which people find themselves affected by remote actors where there is no leverage to control their actions. The modern technology including computerization of every aspect of life has increased the power of the strong and powerful to manipulate the existing laws and legal entitlements. Masses are bewildered by dramatic increase in lawless violence and standardless use of force both by the agents of the government and dominant groups. Trust in law and legal methods is fast declining. The governors of the people are perceived to be unable to control the corrupt, the oppressors and the violators and are believed to be susceptible to all kinds of illegitimate pressures. For the poor and the victimized, the state, law and its agents are present as oppressors. Promise of liberation is seen as empty. Enduring loyalties to Anglo-Indian adversary jurisdiction, colonial structure of the bar, bench and police, shocking instances of administrative deviance, and growing decline in political morality have remained the pervasive feature of the Indian public life.

The question is: is law the only effective instrument of basic transformation of values and attitudes or are there other agents of social change far more crucial than law? When we employ law as a means of social transformation we somehow tend to think of law as an autonomous and self-sufficient force upon which the rest of the social order depends. Thus, we oversimplify the nature of law and exaggerate its power. But law is neither autonomous nor self-sufficient but is heavily dependant upon other institutions to accomplish its tasks. We rely heavily on formal structures of law composed of the *documents* i.e. constitution, statutes and precedents, the *apparatuses* i.e. legislatures, courts, executive departments and the *personnel* i.e. judges, lawyers, administrators, policemen. We begin to believe that a legislative enactment or a judicial decision aimed at social change would automatically be translated into corresponding social actualities.

This is, however, a mere delusion. We exaggerate the power of law because we have inadequate notion of both what law is and how it acts. Positive law supervenes upon an established social order which is supported by prior facts such as caste, religion, family, morality, habits, beliefs, attitudes, emotions and traditions. Law has to perform the task of

repairing the deficiencies in the social order. For instance law and legal action tries to eliminate social and economic inequalities, social oppression, gender-discrimination, untouchability, child-marriage, dowry, sati, bonded labour and caste-prejudices. These deficiencies in the social order are rooted in various social and religious institutions which law seeks to repair. Traditionally, the most conspicuous and important of these institutions have been family, education and religion which perform the crucial role of transforming human nature. These institutions exert a powerful influence upon the attitudes and behaviour of the people. The effective operation of law as an agent of change depends largely upon the support extended by other social institutions. If the institutions of family, religion and education have not been doing their job properly, law shall be missing support from them and all our attempts at social reconstruction through law will be thwarted or delayed. Law and legal action may not be able to provide the conditions of cultivation, socialisation, sense of obligation, responsibility, sympathy, fellow feeling, and other factors that mould human character in definite ways. These undertakings have to be carried on by other social agencies because they lie within the province of morality rather than law.

The question is: to what extent can law solve social problems and achieve social goals? What was said by Dean Roscoe Pound in his *Mahlon Powell Lectures* delivered in 1942 holds true even today:

Recognising the limits of the reach of law, he remarked:¹

When we have got so far we must pause to inquire how far, after all, the law in any of its senses can achieve this purpose (of harmonizing human demands, maintaining a social order, and furthering the course of civilizations). We must ask how far social control through politically organized society, operating in an orderly and systematic way by a judicial and administrative process applying authoritative grounds of or guides to decision by an authoritative technique, can stand by itself as self sufficient and equal by itself to the maintaining and furthering of civilization.

Thus we are brought to consider the limits of effective legal action, the practical limitations which preclude our doing by means of law everything which ethical considerations or social ideals move us to attempt.

Dean Pound then proceeds to cite various 'sets of limitations' that weaken the force of legal action for social reform. The first limitation of

¹ Roscoe Pound, *Social Control Through Law* 54 (1942).

the legal action is that redressal of grievance through legal proceeding is limited by "the necessity of appealing to individuals to set the law in motion".² Thus the redressal of grievances depends on individual initiative and sustained legal action. This 'ultra-individualism' of the Common Law and the Anglo-American legal tradition prevalent in the days of Roscoe Pound has to a large extent been modified by liberalizing the rules relating to *locus standi*, but the fact remains that redressal of the grievances of the poor and the victimized groups depends largely on the initiatives and the power of social activists. The second set of limits, in Pound's analysis, arises from the difficulty of ascertaining the facts at issue. Despite relaxed standards of evidence and procedure, the legal process still insists on legal formalism and adherence to accepted rules of evidence and procedure. Third, and final, limitation pointed out by Pound relates to the inability of law and legal apparatus to enforce duties, protect rights and secure redress even by a well disposed judiciary. Here he refers to "the intangibility of many duties which are normally of great moment but defy legal enforcement."³ He gives examples of gratitude, benevolence, and obligation to help those in distress which cannot be enforced by law. Then there are certain rights and interests which are often infringed in ways that are so subtle and difficult to establish that the law and courts cannot protect against them. Alienation of affection, domination and invasion of privacy fall under this category. Dean Pound refers to the inability of law and legal apparatus to inculcate moral righteousness. Legal machinery, according to him, cannot remedy many phases of human conduct and human relations. Law would be helpless to impose many traits of character, and modes of conduct which are morally desirable and socially useful. For character building we have to rely upon other institutions and agencies like the family, religion, education, professional and economic organisations to instill in men and women, the habits and attitudes, the modes of behaviour and the mutual respect and cooperation. It is beyond the law and legal apparatus to inculcate morality and instill the habit of conformity and obedience in men and women and to make them accomplished social persons.

A sense of responsibility is indispensable if we have to live and work together. Responsibility, again is a social virtue, a trait of character and there is very little that law can do in inculcating moral virtues. Law can, of course, make people accountable to their outward actions violating the legal rights of others. This is done by creating legal duties and imposing sanctions for violating the rules of behaviour. Inculcating moral virtue of

² *Id.* at 60.

³ *Id.* at 55.

responsibility is the work of other social institutions which help to make people good. What would happen if family, culture, education, morality, and religion fail to perform their work and their hold on individuals is weakened? The inevitable result would be that defiance of law will increase and law would lose its effectiveness.

It must therefore be acknowledged that law operates at a distance far removed from the people whose lives it governs. The other social institutions like family, school, religion and morality are in more intimate touch with human emotions and thus mould human character. Therefore, unless more intimate social institutions are strengthened to prepare men and women to be law abiding citizens with a sense of responsibility to societal values, law can never be an effective instrument of social change.

The efficacy of the legal action in achieving the goals of social justice is equally affected by the political economy and cultural policies. The politics of "cultural nationalism" nurtured through the vague and controversial conceptions of *Hindutva* appears to be working to the detriment of the interests of the *Dalit*s and other oppressed classes. The economic policies of liberalization and privatization being pursued by the Indian State, has failed to augment wealth in a manner which would eliminate poverty, generate growth with justice and eliminate social and economic inequalities. How can in such a setting, courts achieve social justice simply by acknowledging new positive human rights? Spreading of norms and values and creation of elaborate institutional mechanisms for generating humane, egalitarian, and rationalistic social climate and eliminate pre-capitalist feudal or semi-feudal modes of exploitation and oppression is the task of the political executive and social and economic institutions and professional organizations and not of the judges. Unfortunately, the political economy emerging in globalised India has resulted in the formation of new social classes of landowning prosperous farmers, traders, moneylenders, and bureaucrats which are controlling social and economic institutions and cultural networks and are promoting the capitalist path of development. The economic policies of liberalization and privatization pursued by successive political regimes have provided enormous resources as well as legal and normative value system favourable to the new social classes. But this has also had the negative impacts resulting in massive unemployment, pauperization, atrocities on women, children and *Dalit*s and State repression. The much applauded and publicized judicial activism has not succeeded in checking the growing frustration among the exploited and oppressed classes. Mass production of rights through judicial activism has only resulted in heightened expectations from the judges that they are unable to provide relief from all

miseries and personal misfortunes. But when a stage would come when the gap between what has been promised and what has been performed would become too wide, the outcome will be only confusion, frustration and disenchantment. The courts might then lose persuasive power, draining away the credibility of judicial institutions.

It is beyond the judges to instill in men and women, the habits and attitudes, the modes of behaviour, the mutual respect and cooperation, that are indispensable to a decent social life. They can undoubtedly intervene to correct any form of exclusion, discrimination, exploitation and institutional abuses. The judges have performed this task in a commendable way in upholding the ideology of rule of law. They have unmasked the repressive realities of State and law by providing access to justice to the poor and the victimized people. But the law and legal action can achieve something of real value if other social and economic institution besides law also perform their function in an efficient way in the formation of human character to make men and women acceptable social members.

While writing an editorial note to this volume I have taken the liberty of expressing some of my views about the limits of law in bringing about desired social transformation as I could not compose a full paper for this volume due to my pre-occupations. I am, on behalf of the Faculty of Law and the Editorial Committee handing over this volume of the *Review* to its readers. I thank and congratulate all the learned contributors of the papers and book reviews for their excellent contributions. I thank all my colleagues and office staff and others who undertook and successfully accomplished the task of bringing out this volume. The volume in your hand contains outstanding research articles some of which very aptly highlight the complex and intricate issues and themes of contemporary significance in the age of globalization. The Editorial Committee will, however, gladly accept any criticisms, suggestions and comments for further improvement in the quality of the *Review*.

Of course, the most difficult task had to be performed by the Editorial Committee under the able leadership of Kamala Sankaran who has been the moving force behind this noble venture. All credit goes to the Editorial Committee for the hard work and extreme patience with which its members have brought this issue. The readers will immediately notice that it has been the endeavour of Kamala Sankaran and her team to further improve the quality of the journal. Apart from Kamala Sankaran who ungrudgingly spent long hours and days in editing, correcting and organizing the manuscript, Bushan Tiak Kaul and Bal Krishan Raina equally

deserve great appreciation and thanks for performing arduous task of editing, reading the proofs and correcting the footnotes for uniformity.

In the editorial note to the volume of the last year I had expressed the hope that more and more colleagues and students will come forward by contributing their paper for the *Review*. I am glad that the response from our colleagues and students has been overwhelming for the current issue and this shows great potential and talent in our Faculty which would continue to serve as a model for other law faculties in the country in the field of legal research.

In the end I thank the proprietor of Shivam 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. For the errors which remain I acknowledge oversight and hold myself solely responsible.

Delhi
June 1, 2003

Parnanand Singh

JUST FAMILY LAW: A BASIC HUMAN RIGHT OF ALL INDIAN WOMEN

*Archana Parashar**

India is a country of diversity and for the most part we seem comfortable with differences. It is perhaps a part explanation for the existence of many religious personal laws, governing women of various religious communities, differently in family related matters. In this paper however, I wish to argue for one family law that will be non-discriminatory and just for all Indian women. Family law usually is not associated with a discourse of human rights but unless women gain equality of rights in personal matters they cannot be said to have the basic Human Right. In making this argument I am fully aware of the charge of essentialism and universalism. I however, make my argument in the specific context where for more than half a century a post colonial state has failed to guarantee basic equality to Indian women in the area of family relations. All religious personal laws manage to treat women less favorably than men. History of reforms within religious laws is not promising either for the majority Hindu community or the minority communities of Muslims, Christians, or Parsis. The Constitutional guarantees of sex equality and religious freedom have been interpreted by the Supreme Court in such a manner that discriminatory religious personal laws are not found to be unconstitutional. Adequate legislative changes have not been introduced as in a democratic polity the incumbent governments have chosen to politicize religion and play constituency politics. The civil society has failed women as gender and minority identities have been inseparably tied to religious identities. It is in this context that I wish to argue that we are at an impasse. Feminists and everyone else interested in social justice need to move beyond the religious/not religious characterization of the issue of family law and reconceptualise the issue as one about gender justice.

This paper is divided into three broad parts. The first section gives a brief history of the origin of the concept of religious personal laws. A close analysis of the inviolability of religious laws is examined to demon-

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strate that these arguments are more often reliant on a claim of minority identity. Discourse about the rights of minorities must take into account not only religious but gender claims as well. In the second part an argument is made that the goal of gender justice can be better achieved by law reform. In the third section a tentative model of just family law is developed.

I. ORIGIN OF THE CONCEPT OF RELIGIOUS PERSONAL LAWS

Hindu, Muslim, Christian and Parsi communities are governed by their respective religious personal laws in the matters of marriage, divorce and related issues, as well as succession to property. In all these religious communities women have less than equal rights than men. Hindu law is the only religious personal law that has been extensively modified by the legislature. Hindu women have been the main beneficiaries of these changes but they have not managed to attain a complete parity of rights with men. The starting point of my argument is that denial of equality to women is unjustifiable and we must argue for complete equality. The obvious stumbling block to such a position is that equality is one among many values and equality is supposedly a western value. More specifically, when equality and freedom of religion seem to be in conflict it is far from established that equality should have precedence. I wish to argue that the opposition between gender equality and freedom of religion is a false dichotomy. Religious personal laws as the quintessential expression of religions is a relatively recent development. I will endeavor to establish that religious personal laws have transformed over time and that religious freedom can be enjoyed simultaneously with granting women equality in personal matters.

India was a plural society prior to colonization by western powers. Indian society like other pre-industrial societies, did not make a separation in the institutions of religion and law. Sociological theories of modernization provide that a feudal, agricultural, rural society changes into a modern society with the separation of political, economic and social institutions. In pre-modern societies the place-for-production and-consumption-was-posed to be the household, but gradually the production of commodities and household became separated and markets arose for transactions in commodities. Thus Europe transformed into a modern, capitalist system, with the separation of the household from the place of production.² The

1. For details see my *WOMEN AND FAMILY LAW REFORM* (1992).

2. See Linda Nicholson, *GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF FAMILY* (1986); David Cheal, *FAMILY AND THE STATE OF THEORY* (1991).

colonization of Indian society by Britain introduced ideas about such separation of institutions. Indian society at that stage had not followed the same path of development as Europe, and when British political and legal ideas were imposed they did not create another English system. The tensions resulting from the imposition of alien concepts is something that we still live with today. One such fundamental idea in European thought: the idea of public and private spheres lies at the root of the concept of Religious Personal Laws (RPLs hereafter). Public/private division is a conceptual means of organizing ideas about the rightful scope of state governance, e.g., how far the state can, or should, regulate our lives; what kinds of laws are justified; and what are the legitimate limits of state laws. The conceptual device of public/private spheres answers these questions by nominating the private sphere as the sphere of freedom - freedom from state regulation. Personal or family relations and religion conventionally fall within the private sphere.

The British administrators came to an Indian society where all aspects of life were subject to religious rules whether enforced by the political rulers or not. The English administrators in the early periods of colonization made a distinction between personal laws and all other laws. All other laws were legitimately made subject to the political state. Only the RPLs were nominated as not subject to state control because of their religious nature.³ It is worthwhile emphasizing that this legitimization of state intervention was only ever valid for the colonizers. Any Indian in the then contemporary society would have found it incomprehensible that their religion was so constrained that it only regulated the 'personal' affairs or that the colonizers were legitimately regulating other 'non-religious' areas. Once the division between RPLs and other laws was made, it did not necessarily mean that the RPLs were left entirely unregulated. Legislative and judicial actions nevertheless transformed the nature and content of these formerly religious laws. To start with, the exact ambit of RPLs was ambiguous and changed over time. For example, initially contracts were considered a matter for religious rules but later made subject to legislation. The Hindu practice of *sati* was only gradually came to be regulated as the British administrators initially accepted the religious sanctity argument.⁴ So too Hindu widows' remarriage, native converts' remarriage, the removal of caste disabilities, are

3. M. P. Jain, *OUTLINES OF INDIAN LEGAL HISTORY*, 561-2 (1966).

4. Lata Mani, *Production of an Official Discourse on Sati in early Nineteenth Century Bengal* 21 *ECON. & POL. WEEKLY*, WS 32-WS 38 (1986). She persuasively argues that the colonial discourse designated as 'religion' that part of indigenous culture which it did not choose to oppose.

examples of assumption of specific legislative authority.

English law influences came via judicial contact even in the areas of laws that were left unlegislated. The judicial officers were essentially trained in the common law system, and even when applying the rules of Hindu and Muslim laws, they necessarily interpreted them according to their understanding and training. The common law rules of evidence and procedure managed to transform the nature of religious rules. The Privy Council specifically held that the formulae of justice, equity and right and justice and right present in various British charters implied the application of English law if found applicable to Indian circumstances.⁵ These decisions in turn formed binding precedent and thus ensured incorporation of the principles of English law into the rules of RPLs. The courts adjudicated personal matters but they gradually came to realize that the religious laws were not necessarily scriptural laws. Thus Hindu law incorporated a complex interrelation of sacred texts and actual usages or customs. While Islamic law did not give a similar importance to custom the courts recognized the customary claims of Muslims.⁶ The immunity to change of RPLs thus turns out to be a fiction but it is a fiction that has a strong hold on our collective imaginations. The issue for contemporary legal thinkers is whether it is a sufficient reason for allowing the status quo to remain, especially when women are denied equality in the process.

II. RELIGIOUS OR LEGAL CHANGE

The dominant discourse in India, since independence from colonial rule has been whether RPLs, as an aspect of religion can be modified by a secular state. There are two kinds of objections to any modification of RPLs, one is a theological argument; the second however, relies on the public/private conceptual device to claim immunity from state regulation. If as argued above, the concept of RPLs is a construct, and the so called religious nature of RPLs does not stand up to scrutiny, it may be possible to transcend the difficulties of determining the relative powers of a secular state vis-à-vis religion.

Theological Argument and Religious Change: Religious autonomy or freedom of faith is undoubtedly an integral part of a Liberal democracy.

5. See *Collector of Madura v. Mootoo Ramalinga* 1868, 12 Moore's Indian Appeals, 397 at 436; *Mohammad Ismail v Lala Sheomadh* AIR 1922 PC 59.

6. *Magnolia Kayesani v. Sheikh Mastudin* 1887, LR 14 IA at 89. Duncan Derrett, *Justice, Equity and Good Conscience* in J. N. D. Anderson (ed.), *CHANGING LAW IN DEVELOPING COUNTRIES* (1963), provides a detailed analysis of the effect on RPLs of the formulae of justice, equity and good conscience.

However, like all other freedoms it is not an absolute freedom. The real contention is with regard to determining how far does or should religious freedom extend. Those claiming the immutability of RPLs draw the demarcation so as to put RPLs in the sphere of religious freedom. As a corollary, any change if at all possible, will be religious in nature.

In this argument the modification of RPLs is a task of changing religious rules and the state as well as academics - whether legal, feminist or philosophers - or those seeking social justice, have no *locus standi*. The legitimate authority either to interpret, or modify such rules belongs to specific experts within different religious traditions. If the religious experts or spiritual leaders of a religious community work to 'reform' some aspects of their religious practice or doctrine, the outcome is commonly understood as religious reform. Religious reform movements are a constant feature of history but whenever religious reform happens it struggles for legitimacy vis-à-vis the traditional or orthodox versions and only ever gets partial endorsement.

However, even this partial legitimacy for the changes brought from within a tradition is a welcome development. Outsiders to the tradition, while not authorised to introduce changes, may be able to rely on such changes for pursuing social justice for women. This much is not in dispute. Problems arise when no change is forthcoming from within the religious tradition and it is argued either that the religious rules are sacrosanct and eternal or that no one else but the religious experts may introduce change if they think it is possible and necessary. This is precisely the situation we are faced with in India.

There is no scope for further argument if it is accepted that RPLs represent eternal religious rules which cannot be modified. This is an interpretation I must disregard as it is contrary to the factual evidence of changes in RPLs and as it claims an exclusivity that does not allow any possibility of debate or change. Rather than making religious change the focus of attention it is possible to restate the argument as one about gender justice. The fundamental starting point for discussion then is that gender equality is a desirable goal. It may not be subjected to any other competing goal or right. The obvious next question is whether every religion, in its personal law provisions, can be expected to embrace gender equality? If not, should it be open to the state to modify religious rules or replace them with state enacted laws? I argue that every religious tradition ought to be able to conform to this 'external' standard of lose state protection.

A. *Religion and External Standards* —
Public and Private Spheres

An obvious objection to this proposition is that whether religion is understood as eternal or a product of socio-historical change, either way it is not open to scrutiny and modification by reference to 'external' - non-religious or secular standards. This argument relies on the stance that religion is a private sphere activity and therefore, should remain free of state regulation. The separate spheres ideology has featured in various forms in political theory since the classical times. The conceptual device of public and private spheres helps demarcate the legitimate limits of state regulation and thus helps check the proliferation of state powers. An important aspect of the check on state powers is that the private sphere is the sphere of freedom - admittedly freedom from state regulation. Thus the argument that in matters of religion and therefore, religious laws the state does not have legitimate authority to intervene because these are private sphere activities.

But a vast amount of feminist literature also exists that exposes how the public/private divide keeps women under patriarchal control in the purportedly free private sphere. Carole Pateman is the most well known feminist for analyzing the ideological functions of defining women as the inhabitants of the private sphere and thus not subject to the values operative in the public sphere.⁷ Family provides the most familiar illustration of this argument that as a private sphere institution it operates with values of love and altruism rather than those of individualism and competition that operate in the sphere of the market or the values of justice and equality that are supposed to organize the public sphere. Women as inhabitants of the private sphere of family are thus denied justice and equality, and family relations are expected to be about love and giving rather than about individual rights.

Okin has most convincingly argued that the characterization of family as a private sphere institution does not mean that justice cannot be a relevant value for organizing family relations.⁸ Okin's argument, I believe, has a direct relevance to the issue of the private nature of religion and religious rules of personal relations. She provides a detailed argument for making justice an operative principle in the organization of the family. I cannot reproduce the argument in all its detail, but briefly she uses Rawls's

⁷ Carole Pateman, *The Sexual Contract* (1988).

⁸ See also Margaret Thornton (ed.), *Public and Private: Feminist Legal Debates* (1995).

⁹ Susan Moller Okin, *Justice, Gender and the Family* (1989).

argument that justice is the primary moral virtue. This claim is linked to a prior assumption that human society is characterized by the 'circumstances of justice'. These include the condition of moderate scarcity of resources and while people have complementary needs and interests they also make conflicting claims on natural and social resources. These claims need to be resolved by reference to rules that are just. In family relations it is equally relevant that rules of justice apply.

Thinkers who claim that in the family love or altruism and not justice are the highest values misunderstand what is meant by justice as the primary moral virtue. Justice is not the only value, and it is not antithetical to love or altruism, but justice is the most essential value. It is in the conditions of scarcity, and when interests conflict, that justice needs to be operative. For instance, maybe wives would never have an occasion to ask for their fair share of property because of the generosity and spontaneous affection of their husbands, but if they did ask for it they should be entitled to it. There is simply no reason to assume that justice somehow takes away from intimacy, harmony and love that are supposed to prevail within families.

The minority communities in India have consistently put forward this argument with regard to changes in the religious personal laws, namely, that religion, as a private sphere institution, is the exclusive concern of the community. Unlike the earlier theological version of the argument that only those with religious credentials may interpret or modify religious rules the argument here is that it is a matter for the religious community and no one else. Such religious communities making this claim are invariably minority communities as well and maintaining their distinct identity becomes merged with the argument about the religious immutability of personal laws.

B. *Religion, Cultural Identity and Essential Capabilities*

The concept of essential capabilities is developed by Amartya Sen and utilized by Martha Nussbaum.⁹ The idea that religion forms the basis of an ethical life and is an essential capability, in Sen and Nussbaum's terminology, is not controversial. What is controversial is how to balance the claims in the name of religious autonomy with other liberties/freedoms/capabilities. Nussbaum develops a nuanced argument about the scope of legitimate 'interference' with religion.¹⁰ I will explain her argu-

⁹ Martha Nussbaum, *Women and Human Development* (2000), chap. 1.

¹⁰ *Id.* chapter 3 at 167-240.

ment very briefly, but I wish to disagree with her. Nussbaum says that any account of the tension between religion and women's interests that fails to recognize the complexity of both religion and women's interests is worthy of scepticism. She argues for the intrinsic value of religious capabilities then goes on to explore how religious capabilities of each person could be enhanced in constitutional regimes. The US Constitutional principles of non-establishment of religion and free exercise of religion operate together to uphold the citizen's liberty of conscience against the pressures of groups. Nussbaum agrees that we should refuse to give deference to religion when its practices harm people in areas covered by the major capabilities. However, it is difficult to determine this issue with regard to matters internal to the religion itself. When religious actors and groups claim prerogatives it is difficult to judge whether they are really talking about religion. While the principle of moral constraint may allow us to judge such claims, it is only right that such assessment should be made socially rather than by the state or the judiciary. For example, the Indian Constitution uses the political version of the principle of moral constraint, makes no pronouncements of what Hinduism is or is not, but it simply makes untouchability illegal. Socially moral constraint arguments do valuable work.

Nussbaum goes on to examine whether sex discrimination within a religion is permissible. She agrees that the very singling out of women for differential treatment in a central area of human functioning is itself unacceptable. But she then goes on to say that some choices internal to the religion should still be protected. For instance the lesser rights of women within Islam should not be modified by the state. The rationale for this is that even though the non establishment clause is meant to protect the individuals free exercise it is not always the case. In the particular historical and contemporary context of Muslims in India, state support for their religion is essential. In their specific circumstances disestablishment would amount to Muslims not being treated as equal citizens and in fact nonestablishment would be defacto a type of Hindu establishment.

I disagree with Nussbaum's suggestion that in view of the current dominance of Hindus both politically and socially it is imperative that the state refrain from modifying Islamic religious personal laws, firstly because it accepts the 'religious nature' of personal laws. This is at least a contentious issue as I have tried to show above. Secondly, it gives too much ground to the claims of religious leaders, that only they can decide whether something is internal to or an essential core of their religion. Thirdly, it gives too much weight to the claims of minority identity and not enough attention to gender justice.

The makers of the Indian Constitution acknowledged the importance of religion and guaranteed freedom of religion as a fundamental right. The authority to determine whether any matter constitutes an essential or non essential aspect of religion has at times been given to the community but at other times the matter has been scrutinized by the court. As yet there is no clear pronouncement whether RPLs form an essential part of religion that cannot be legitimately modified by the state.¹¹ The Supreme Court has upheld the validity of social reform legislation even with regard to what are claimed to be the essentials of a religion, e.g. the right of a Hindu denomination to decide who could enter their temple.¹² But when the Supreme Court held that maintenance provisions of the Code of Criminal Procedure 1973 were available to Muslim women as well as other women, the public reaction of a section of the Muslim community compelled legislative intervention by the government of the day.¹³ The distinction between the two examples is not in the difficulty of defining the essential or core aspects of religion. Rather it is in the majority and minority status of the Hindu and Muslim communities. So too the legislative history shows that the issue is not about conflicting fundamental rights. It is the claims of minority identity that explain why the 'religious' laws of Hindus could be extensively modified but not those of minority communities. It seems obvious that the debate ought to be framed differently - rather than being about religious sanctity it is really about cultural identity which is linked to the minority status. If this reality can be accepted, then the inquiry is no longer about the legitimate authority of a secular state vis-à-vis religion but is about the responsibility of a state to safeguard the minority identity of certain communities. If so, the reasons put forward by Nussbaum for leaving alone Islamic RPLs need to be read as arguments about the claims of communities to distinct identity.

The right to maintain a distinct cultural identity is however much less clearly theorized than the right to freedom of religion. The question whether the right to a distinct cultural identity is compatible with the fundamental right of sex-equality must be answered by reference to different arguments.

11. For a detailed analysis of these issues and Supreme Court judgments see Parshar, *supra* n. 1 at 217-222.

12. *Sri Venkataramana Devaru v. The State of Mysore*, AIR 1958 SC 255.

13. *Mohammad Ahmad Khan v. Shah Bano*, 1985 (1) SCALE 767. See also A. A. Engineer (ed.), *THE SHAH BANO CONTROVERSY* (1987).

III. MINORITY IDENTITY

Religious and minority identities intersect and give rise to the argument that whatever may be the case for the majority community at least the minority communities must be allowed immunity from state modification of their religious laws. The claim of autonomy to maintain a distinct religious identity however, simultaneously denies the option of claiming gender equality as part of that identity. This issue of minority/distinct cultural identity can only be meaningfully discussed in conjunction with the factor of gender. Historical evidence in India, and in a number of Islamic countries, is that religious community or political leaders have invariably strengthened patriarchal control over women in the name of Islam. I am not for a moment suggesting that Islam is particularly non-friendly to women. All world religions would be hard-pressed to pass this test. But the argument at the moment is about the link between religious and minority status. I suggest that it is naive to believe that the religious community leaders of Muslim, or any other community for that matter, will work for attaining gender equality.

For example, the *Shah Bano* case and the enactment of the Muslim Women's (Protection of Rights on Divorce) Act 1986 (MWA), brought into open the complicity of religious community leaders and political leaders in perpetuating gender discrimination against women in the name of religion.¹⁴ Therefore, any argument that places its faith in the respective religious communities to ensure even basic non-discrimination for women misjudges the alliance between patriarchal interests and religious political leaders.¹⁵ Minority identity arguments are a version of group rights even if not explicitly characterized as such. In these arguments women's rights become secondary to those of the group. Gender justice, therefore, may not be achievable by pursuing distinct cultural identity. With the ascendance of postmodernism in academia, impressive theoretical arguments are made for recognizing differences. In the specific

14. The MWA was supposed to be a protective legislation in so far as divorced Muslim women could not claim ongoing maintenance from their former husbands, the maintenance of such women was declared to be a community responsibility. The claim that the Waqf Boards would discharge this community responsibility was sadly, but predictably an empty claim. Whether and how the wider Indian community might discharge this responsibility has never become an issue of public or scholarly debate.

15. This is not a problem faced only by Indian women. See for an account of women's rights under Islamic law in other contexts, Farida Shaheed, *Networking for Change: The Role of Women's Groups in Initiating Dialogue on Women's Issues in Mahrez A-Rhami* (ed.), FAITH AND FREEDOM: WOMEN'S RIGHTS IN THE MUSLIM WORLD 78-103 (1995).

context of political and social theory, there are arguments in favour of recognizing minority cultures.¹⁶ However, as Okin points out there is a distinction between claims of 'identity politics' and group rights: 'I will rely on her analysis'¹⁷ to question how group interests are constituted, whose voices are heard and who is silenced and what are the institutional mechanisms for ascertaining and enforcing such group rights? Significantly, Okin faults not only the male theorists of group rights, but feminists as well for not paying sufficient attention to the consequences flowing from recognizing group rights.

Okin argues that minority cultures that demand special protection make insufficient differentiation amongst those within a group or culture so that gender differences are not acknowledged. Moreover, the content of culture is very significantly constructed in the private sphere and the gender based constructions of cultural identity more often than not disadvantage women. Feminists who shy away from examining these issues show hyper-sensitivity to the charge of cultural imperialism and thus fall into the trap of debilitating cultural relativism.

Many proponents of cultural identity do not even expect the cultural groups to adhere to certain Liberal values, but Kymlicka does. Yet Okin shows that his injunction that any cultural group demanding group rights must not discriminate overtly against its women members does not even acknowledge the reality that most sex discrimination is informal and not overt. In most cultures strict control of women is enforced in the private sphere. For one to be able to make choices about the life one wants to lead it is not enough to have one's culture protected. Okin argues that one's place within one's culture is at least as important to the development of self respect and self esteem as that culture itself. When that culture is patriarchal the healthy development of girls is endangered.¹⁸

The claim that minority communities and specially women should be free to live by their RPLs places a lot of reliance on the free choice of minority women and demands that the state should enforce such freedom. In the Indian context the religio-political leaders have invariably been men, they manage to be the exclusive voice of the community and have not acquitted themselves particularly well with regard to attaining equality for women. As Uma Narayan says 'Feminist commitment to autonomy or equality for women can be portrayed as 'western values' by the same

16. See for example, Will Kymlicka, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

17. See Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions in Dan Avnon and De-Shalit Avner* (eds.), *LIBERALISM AND ITS PRACTICE* 81-105 (1999).

18. *Id.* at 97.

fundamentalists who discern no paradox, for instance, in appropriating the language of rights when it suits their interests.¹⁹ But it is still common place to maintain that an 'insecure' minority should be treated with caution.²⁰ However, that is possible only if the disadvantageous position of women is ignored. The minority identity and religious sanctity discourses come together and their conjunction gives them a 'reality' that is too obvious to be questioned. I argue that this is where deconstruction should be used by Indian feminists and legal feminists in particular, to question the legitimacy of such claims. This should not be read as denying autonomy to minority women but as an effort to make relatively genuine free choice possible.

The postmodernist emphasis on non-essentialising theorizing may help in questioning the categories of minority or religious identity but it also carries with it the danger of relativism.²¹ If categories and meanings are always contingent and it is not possible to fix definite meanings for any of them, our knowledge can only be relative and always subject to revision. More over, there is no way normative standards can be posited to judge the legitimacy or even the desirability of any interpretation.²² Thus, for a postmodernist, in the particular case of minority RPLs it is not an undisputed good to demand gender non-discrimination. Furthermore, if minority women do not ask for such change it is not for anyone else to suggest it to them for that amounts to imposition of universalist ideas. I argue that postmodern positions can and should carry the responsibility of justifying the consequences that follow from any theoretical stance.²³ In the case

19. It is not only the minority community leaders who want to withhold equality from women in the name of tradition. Uma Narayan is here talking about the Hindu fundamentalists. See Uma Narayan, *Dislocating Cultures: Identities, AND THIRD WORLD FEMINISM* 22 (1997).
20. Bhiku Parekh, *Balancing Unity and Diversity in Multicultural Societies* in Dan Avnon and De-Shalit Avner (eds.), *supra* n. 17 at 122.
21. There is no uniformly accepted definition of postmodernism but Barrett explains that even though the term has different connotations in different disciplines it generally refers to the trend to critique universalism. Michelle Barrett, *Words and Things: Materialism and Method in Contemporary Feminist Analysis* in A. Phillips (ed.), *DeStabilizing Theory: Contemporary Feminist Debates* 210-219 (1992).
22. For example, Seyla Benhabib points out that theorists of difference do not usually point out which differences ought to be recognised. See Seyla Benhabib, *Democracy and Difference: Reflections on Rationality, Democracy and Postmodernism* 21, in *Pol. Philosophy* 6 (1994).
23. See Nicola Lacey, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY* 157 (1998). She mentions the following authors who combine an ethical concern with their critical analyses: Christine Littleton, *Reconstructing Sexual Equality* 75 *CAL. LAW REV.* 1279 (1987); Jennifer Nedelsky, *Reconceiving Autonomy* 1 *YALE J.L. & FEMINISM* 735 (1989); Iris Marion Young, *Throwing Like A Girl* (1990).

of minority women and RPLs we have no evidence of how many women do want change. But even if, for argument's sake, it was true that minority women do not want change, the role of academics, analysts, or cultural workers²⁴, can hardly be to sit back and let things be. The enormity of this suggestion would become apparent if the example of RPLs was replaced with that of domestic violence. Even though at one time it was acceptable to 'not interfere' in others' domestic affairs, this is no longer the case. Feminists have successfully discredited the idea that private violence is not the concern of everyone. As a consequence it now rings a bit hollow to say that domestic violence legislation amounts to an external imposition of notions of sex equality. Similarly, minority RPLs ought to be the concern of everyone interested in social justice. It has been correctly said that a non-judgmental tolerance of brutality and oppression under the guise of cultural difference or tradition is an ultimate form of ethnocentrism if not an outright ethical surrender.²⁵ Therefore, I argue that legal thinkers must bear the responsibility of generating a discourse of non-discrimination. The postmodern concern with essentialism and not imposing universal values should not convert into an apology for maintaining the status quo. While some postmodern analysts insist that textual analysis itself is transformative,²⁶ I am of the opinion that most of them do not construct any argument for social transformation. Thus in most contemporary postmodern legal critiques the existing state of affairs may be analysed but not purposively modified. That is understandable if one is a beneficiary of the present status quo but really debilitating for those unfairly burdened and oppressed.²⁷ In feminist legal analysis such an argument is presented by African-American writer Patricia Williams who maintains that the trashing of rights is a dangerous game for the oppressed sections of society, for rights based arguments are the only means available to them to redress their wrongs.²⁸

Therefore, in the particular context of minority women and RPLs, the role of legal analysts has to be to develop arguments for ensuring gender justice and sex equality. It is worthwhile to remember that the claims of minority status and religious sanctity are also only arguments. We are the

24. The term used by Cornel West in *The New Cultural Politics of Difference* 53 *OCTOBER* 93-126 (1990).
25. Elizabeth Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual* 53 *J. OF ANTHRO. RESEARCH* 319-347 (1997) at 336.
26. Peter Goodrich, *READING THE LAW* (1986) esp. 218.
27. Hank Bromley, *Identity Politics and Critical Pedagogy* 39 *EDUCATIONAL THEORY* 207-223 (1989).
28. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights* 22 *HARV. C. R.-CL. REV.* 401-447 (1987).

ones who choose to adopt some of these arguments and not others.²⁹ The consequences that flow from our choices are most definitely our responsibility. Thus if my theoretical stand helps maintain discrimination against minority women who else but I am complicitous in legitimizing the situation? My feminist credentials or aspirations are not enhanced by absolving myself of the charge of imperialism by not 'imposing' notions of sex equality on minority women. The task is much more complex as it involves responsible reconceptualisation of legal categories of analysis. It should be possible to avoid paternalism but still maintain an open-ended commitment to the ideal of non-discrimination for all women.

Legal feminists are in a unique position to show how the discourse of community or cultural identity holds no more promise of gender equality than that of the private sphere of religion. Therefore, just as Okin argues for extending the value of justice to the private family, I suggest a similar extension of the principle of justice to the private sphere of religion. We meet up again with the issue that 'justice' does not have a unitary meaning. At this point I wish to argue that gender justice as individual autonomy and the right to non-discrimination must be the minimum any religious tradition ought to deliver. Non-discrimination does not have to equate to sameness but at the same time different treatment of men and women must be justifiable and not amount to disadvantage or less favourable treatment.

The implication of this argument is that, in a plural society, claims in the name of religion or religious minority identity ought to be scrutinized for justice, and only then given recognition by the state. This avoids giving a *carte blanche* to religion, it maintains diversity in the form of distinct minority and religious identities but also opens up the possibility of attaining gender justice.

IV. LEGAL CHANGE FOR A JUST FAMILY LAW

The discussion so far has established that the claims of religious sanctity of RPLs and the minority identity arguments are not valid reasons for refraining from creating a just family law. In a pluralistic, democratic and secular polity that can only be done by the state law. It is therefore, incumbent upon legal feminists and thinkers to create a discourse of a just

29. See for a very persuasive argument Seyla Benhabib, *Cultural Complexity, Moral Interdependence, and the Global Dialogical Community* in Martha Nussbaum and Jonathan Glover (eds.), *WOMEN, CULTURE AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 235-258 (1995).

family law as a basic human right of every Indian woman. This demand for a gender just family law must be radically independent of any religious legitimization.

This is not a particularly onerous move because it treats every one equally. It does not prevent anyone from being a good Hindu, Muslim, Christian or the follower of any other religion. It does not however, invoke state support to be a devout religious person. This is not a novel suggestion either. For example, in most Roman Catholic countries the family law allows divorce while the church does not permit or recognize it.³⁰ No serious argument is put forward that in these instances some devout Christians' freedom of religion is curtailed. The only difference between this example and the contemporary Indian situation is that in India a dubious legitimacy is granted to the assertion that it is somehow the responsibility of the state to make one a religious person, especially if one belongs to a minority community.

Therefore it is imperative that we create a discourse that compels the state to construct a totally secular family law. In this way the state can walk away from the quagmire of RPLs. The RPLs will not be declared invalid, but nor would they be enforced by the state. This can create the possibility of achieving gender justice in family law while allowing a certain amount of religious autonomy.

Certain assumptions about the nature of law underpin such an argument for legal change and they must be explicitly articulated. Legitimation of legal knowledge is dependent on the ideas about law presented in various theories of law. Jurisprudential theories conceive abstract ideas while sociological theories posit a connection between law and any given society. I suggest that we need to adopt a sociological analysis in order to conceptualise a gender just family law.

The Indian Supreme Court has played a rather disappointing role in that it has declined to address the issue of the compatibility of religious autonomy with sex equality. The reluctance of the Supreme Court however, has not generated sustained academic critique. As a result, the possible compatibility or otherwise of two fundamental rights in the Indian constitution has remained a non-issue even in the legal scholarship. I am here primarily concerned with the failure of the legal scholars, as they are the ones who have the professional role of creating legal knowledge and

30. For a history of divorce reform see Roderick Phillips, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* (1988); see also Mary Ann Glendon, *THE TRANSFORMATION OF FAMILY LAW* (1989).

discourse. Their exclusive task is to analyse how the legal system operates and how legal knowledge is constructed. It is disappointing that for the most part legal analysis in India remains doctrinal and focuses on the judicial pronouncements as the last word.³¹ This exclusive concern with legal doctrine ignores a very rich tradition of alternative views about the relationship between law and society. Feminists, among others, have focused on the link between the kind and content of law and the prevailing socio-economic structures.³² Laws both construct and reflect social reality and for the most part law and society are mutually influenced and influence the other.

If RPLs are examined in the light of sociological theories of law it is apparent that there exists a serious misfit between such laws and contemporary society. As discussed above, RPLs are a curious amalgam of religious rules and English legal concepts. But these English legal concepts are frozen in time in the RPLs. While the English law has moved on, Indian personal laws are fossilized in the name of religious inviolability. When it is claimed that cultural identity of any minority community is absolutely entwined with such RPLs, the feminists should not simply accept any such claim on its face value but they should help to deconstruct these claims. It must be emphasized again and again that we are not dealing with the religious sanctity of personal laws but with family laws that have a connection with religion. The inquiry primarily should be about the nature of law.

Maintenance of wives or former wives under various RPLs provides a suitable illustration of my argument. It is not difficult to argue that post-divorce maintenance is or should be a basic component of a non-discriminatory family law. Every society finds the means of maintaining its members. Across societies and in all historical periods economic dependence of women and children is very often the norm and the responsibility to maintain them typically belongs to the family, or more precisely to the father or the husband. In Indian society there never has been any provision for community support of women or children. Religious and social customs enjoined that a woman was always reliant on the natal or conjugal family for support. However, with time the organic unity of small societies has been eroded and the former social and community con-

straints on behaviour do not operate adequately. Many single women who could formerly expect to be maintained by their families now face the likelihood of destitution. Women without family support face an unenviable prospect of hunger and poverty as very often they do not possess any skills or training for economic independence.

What does Indian society have to offer these women? In particular the RPLs present a bleak picture. There are no social welfare or community programs. The ideology of femininity, whether expressed in the ideals of middle and upper class housewife or as seclusion of women, signifying higher social and/or caste membership, prevents women from engaging in economic activity.³³ And the RPLs step in to make a mockery of their need for maintenance. Even the much-reformed Hindu law falls short of securing women's maintenance rights. Substantive provisions vacillate between portraying men and women on par with each other and equally responsible for the other's maintenance (Hindu Marriage Act 1955, Section 25), to acknowledging that the husband has the responsibility of maintaining his wife (Hindu Adoption and Maintenance Act 1956 Section 18). However, in either case the enforcement of court orders granting maintenance are notoriously difficult.³⁴ The limited rights given in the substantive provisions are taken away by the lack of enforcement. The Code of Criminal Procedure 1973, further makes a mockery of this need by specifying a legislative limit on the maximum amount of maintenance payable.³⁵ The MWA, goes furthest in capping the right to maintenance to three months or the period of *iddat*. The recent Supreme Court decision in Daniel Latifi's case³⁶ is a valiant effort at reading the MWA as a progressive Act but this interpretive exercise has severe limitations. It epitomizes the relative disadvantages of introducing change through judicial rather than legislative channels. The Supreme Court in declaring the MWA Constitutional simply disregarded the socio-political storm created by the decision in *Shah Bano's* case. Instead the court has interpreted the MWA as giving legislative form to the judicial view on maintenance for Muslim women incorporated in *Shah Bano* case. It has

31. I develop this argument in greater detail in the *Introduction*, Amita Dhanda and Archana Parashar (eds.), *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 1-26* (1999).

32. See for a concise analysis of this literature Roger Cotterell, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* (1984).

33. Martha Chen, *A Matter of Survival: Women's Right to Employment in India and Bangladesh* in Martha Nussbaum and Jonathan Glover (eds.), *supra* n. 29 at 37-60.

34. See N. Gandhi and N. Shah, *THE ISSUES AT STAKE: THEORY AND PRACTICE IN THE CONTEMPORARY WOMEN'S MOVEMENT IN INDIA* (1991).

35. Ss. 125-127. Until recently the maximum amount payable was Rs 500. Amendments to the CODE OF CRIMINAL PROCEDURE 1973 in 2000 have removed the ceiling of the maximum amount.

36. *Daniel Latifi and Another v Union of India*, AIR 2001 SC 3958.

denied any problem with the Supreme Court interpreting the Holy Quran in *Shah Bano* and declared itself bound by the earlier interpretations.

This is all very well if we are in agreement with the interpretation of the Supreme Court and in this instance feminists can only breathe a sigh of relief that the Supreme Court has felt compelled to recognize divorced women's entitlement to a reasonable standard of living. Despite recognizing the dire necessity of adequate maintenance for a divorced woman the Supreme Court still did not articulate what might constitute "adequate" provision for a divorced woman. It also cannot ensure effective execution of maintenance orders and of course there was no occasion to consider whether adequate provision for the divorced wife would take into account the needs of children she may be responsible for.

So too in Hindu law jurisprudence despite legislative provisions maintenance is hard to obtain and generally does not amount to much.³⁷ In this study a survey of 93 reported cases on maintenance for the period between 1982 to 1987 showed that majority of women received up to Rs 250 per month. Many women had to support their children as well and no separate sum was awarded for the children.

Thus an Indian woman who does not have the support of a husband can expect to live on the benevolence of her father or other family members, but let her not pretend that she has a right to dignity or even subsistence maintenance. Surely this is not an acceptable state of affairs and it is incumbent upon legal feminists to expose how it is justified and explore what may be done to change it.

Legal feminists are not at the forefront of this debate about RPLs and the discourse of religious and minority identities is set by the religious and political leaders. Though the possibility of recasting this debate seems very remote, there is no option but to try. Feminists must abandon their reticence in articulating what might constitute a just family law for all women. Whether Indian laws as represented in RPLs remain frozen in the past or keep in step with a rapidly changing society will depend on how the issues are conceptualised. It is futile-to-go-around-in-circles-about religious sanctity of these laws or their importance in constituting minority identities. The real issue for us is to ask what a gender just family would look like.

37. See for details Neeru Sehgal, *Economic Independence for Women: The Foundation for Eradicating Sex-Based Discrimination*, Ph.D. Thesis, Faculty of Law, University of Delhi, 1991, chap. 7.

V. A JUST FAMILY LAW INCORPORATING ECONOMIC INDEPENDENCE FOR WOMEN

A just family law for women in this area would at least recognize the social reality of separation whether by divorce, desertion or death. It would recognize women as the primary care givers and recognize the economic dependence of the primary care giver and the need for adequate financial support. In short, a just family law would ensure economic independence of women.³⁸

Thus a just family law would not only provide for adequate maintenance and inheritance rights for women but should also recognize their right to an equal share of matrimonial property. Family law has a limited scope in that it does not create the conditions of employment but it does impact on the possibilities of engaging in such work. And it does have the exclusive role to play in reconceptualising women's care giving work as economically valuable. Economic independence has a direct bearing on women's exit options from unsatisfactory relationships, including their perceived suitability to be the custodial parent.

Two interrelated objections to this proposal are that pursuing economic independence by itself will not change the life circumstances of women. Secondly, family law by itself is an inadequate means of bringing about economic independence. The demand for economic independence for women generates immense hostility and common objections are that economic independence is a middle class urban feminists' issue, that in a poor country like India it is an irrelevant issue for the majority of women as a right to financial assistance is unlikely to be a real safeguard. A family law that accepts the possibility of separation (through divorce) undermines the social fabric as it encourages individualism over concern for family. So too a demand for property rights for all women may not be appropriate. The objections come from other equally committed feminists as well.³⁹

This is a serious issue and raises a fundamental question of responsibility - by demanding economic independence for all women do the undeniably elite opinion makers have any right to 'interfere' in the lives of

38. See for a detailed version of this argument my *Human Rights: Imperatives of Theoretical Change*, 40 JILJ 6-37 (1998).

39. For example, Nandita Haksar says that the demand of property rights for women in the tribal societies of North-East India, when imposed by urban feminists actually disadvantages these women. Nandita Haksar, *Human Rights Lawyering: A Feminist Perspective in Amita Dhanda and Archana Parashar* (eds.), *supra* n. 31 at 89-116.

poorer or rural women and how can they ensure that the so called just family law will empower rather than disadvantage these women? All I can say in response to such a comment is that for similarly placed men, no one, absolutely no one, makes an argument that they should be denied economic self sufficiency.

Women perform wage and unpaid work. Martha Chen has eloquently argued that gainful employment outside the home, as a wage earner affects the self image and perceived value of women. In addition to providing economic independence it serves as a means of escape from male control over female labour. It often helps increase women's bargaining power within the household and enhances their perceived value both within the household and in society more broadly.⁴⁰ Bina Agarwal has also convincingly demonstrated that most rural women show a keen interest in the issues of ownership of land and laws of inheritance.⁴¹ Okin explores the idea that the situation of poor women in poor countries is not qualitatively different from that of most women in rich countries, but rather 'similar but worse'. She uses the concept of differential exit potentials within relationships.⁴² She explains that in the affluent western countries the distribution of power within the family is linked to the differential exit factor. The typical asymmetric dependency of wives on husbands affects their potential for satisfactory exit. So too 'when circumstances of severe poverty combine with a lack of paid employment opportunities for women, increasing women's dependency on men, men's power within the family is likely to be greatly enhanced - in many cases legitimized by highly patriarchal cultural norms.'⁴³ The exit options theory exposes the injustice of a situation in which the assumption that women are responsible for housework and child care, the disadvantaged position of women in wage work and their vulnerability to male violence all come together to give women lesser bargaining power when their interests conflict with those of men. It should therefore, be the goal of a just family law to provide realistic exit options to women.

40. Martha Chen, *supra* n. 33 at 54.

41. Bina Agarwal, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA, 56-57 and 421-466 (1996)

42. She uses Albert Hirschman's theory of the effects of differential exit potentials on power within relationships. See Susan Okin, *Inequalities Between the Sexes in Different Cultural Contexts* in Martha Nussbaum and Jonathan Glover (eds.), *supra* n. 29 at 274-297.

43. *Id.* at 287-288. She cites Partha Dasgupta, AN INQUIRY INTO WELL-BEING AND DISTRIBUTION (1993) and Amartya Sen, *Gender and Cooperative Conflicts* in Irene Tinker (ed.), *PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT* (1990).

I acknowledge that women are disadvantaged by a complex interaction of economic, social and political power structures and economic independence by itself will not change all other factors. Nor will legal change by itself create economic well being. But as Bina Agarwal has said it is not just an increase in women's command over economic resources but also the process by which such increase occurs that has a critical bearing on gender relations.⁴⁴ Law has a specific significance because it sets the normative standards. It is of crucial importance that normatively law upholds the standard of gender equality because then it provides the values for the transformation of other societal arrangements. The present gender hierarchies will not be dismantled by law reform only and the empowerment of women would require a whole complex of changes. But here I am addressing the role of legal thinkers. They can not take shelter behind the argument that law by itself is too insignificant a mechanism of social transformation. Law as one institution among many should uphold the ideal and in that way can be a catalyst for other institutions to transform themselves.

44. Bina Agarwal, *supra* n. 41 at 44 argues that in South Asia women's economic needs have primarily been discussed in the context of employment opportunities but it is crucial to recognise that access to land is one of the most critical factors in empowerment of rural women. She has demonstrated the stability of private land ownership in most of South Asia and how women are excluded from the ownership of this resource.

POLYGYNY AS A VIOLATION OF WOMEN'S RIGHT TO EQUALITY IN MARRIAGE: AN HISTORICAL, COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS OVERVIEW

Susan Deller Ross*

Over thousands of years, many religious doctrines and laws in societies around the world have allowed men to practice polygyny – that is, to have several wives at the same time. Polygyny deeply subordinates women within marriage and by that mechanism guarantees their subordination within society at large. Yet many scholars and feminists remain silent about its impact. Indeed, some even condone it.¹ Why? It appears they do not want to challenge other religions and cultures, and believe religion and culture trump women's international human rights. They are wrong, as shown below. They also ignore history's lessons.

I. POLYGYNY IN HISTORY

While polygyny has been deeply rooted in human society, so too is the movement over time to eradicate it. The men interpreting religious doctrine or making secular law have gradually banned it for most people. The Jewish religion originally permitted it, but banned it over a thousand years ago.² The ancient Romans criminalized bigamy.³ Christianity from the beginning seems to have condemned it and as it expanded its geo-

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graphic reach over the first 1000 years succeeded in ending polygyny in regions where it was practiced as people there converted to Christianity.⁴ When various sects attempted to institute polygyny, these early Christians quickly moved to suppress it.⁵ And even the Muslim permission for polygyny represented Mohammed's effort to end the practice of a husband taking an unlimited number of wives; hence he permitted only four and cautioned further "but if you fear that you cannot be equitable, then only one."⁶

In recent history, the United States successfully enforced its laws criminalizing polygyny against Mormon men in the Church of Jesus Christ of Latter-Day Saints, bringing a rapid halt to the Church's endorsement of the practice in less than forty years (1852-1890).⁷ The Russian Empire laws had allowed Muslims to practice polygyny, but it was successfully banned through decrees and laws issued in 1917, 1919, and 1926.⁸ Similarly, China outlawed both polygyny and concubinage in its 1950 and 1980 Marriage Laws and Vietnam did so in 1960.⁹ India banned polygyny for Hindus in 1955;¹⁰ Uganda and Kenya followed suit in their separate Hindu marriage laws.¹¹

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1. See, e.g., Martha C. Nussbaum, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH*, 229-230 (2000), (stating that polygyny in the abstract is "not oppressive to women"). But see Susan Moller Okin, *Is Multiculturalism Bad for Women?* in Joshua Cohen et al. (eds.), *IS MULTICULTURALISM BAD FOR WOMEN?* 14 (1999), (arguing that polygyny is oppressive and quoting a polygynist husband's justification that one wife is "trouble" but with several, "they are forced to be polite and well behaved[.] [I]f they misbehave, you threaten that you'll take another wife").
2. Paula E. Hyman, *A Feminist Perspective on Jewish Fundamentalism in Courtney W. Howland* (ed.), *RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN* 275 (1999).
3. Henry D. Krause et al., *FAMILY LAW CASES, COMMENT AND QUESTIONS* 46 (1998) (citing Beryl Rayson (ed.), *MARRIAGE, DIVORCE, AND CHILDREN IN ANCIENT ROME* (1991)).

4. Tertullian (155-220 A.D.), a Roman lawyer who converted to Christianity in Carthage and became a priest and prolific ecclesiastical author, condemned polygamy. Rev. S. Thelwall (trans.), *TERTULLIAN, TO HIS WIFE*, Book I, Chap. II, available at <http://www.newadvent.org/fathers/04/04.htm>. St. Augustine of Hippo (354-430 A.D.), in Reply to Faustus, Book XXII, section 47, available at <http://www.newadvent.org/fathers/14/0622.htm>, explained that polygamy was once the custom but was now a crime.
5. In 1534, the Anabaptists in Germany started preaching and practicing polygamy, but were stopped a year later by Catholic armies. John D. Roth, *The Mennonites' Dirty Little Secret*, CHRISTIANITY TODAY, OCTOBER 7, 1996.
6. John L. Esposito, *WOMEN IN MUSLIM FAMILY LAW* 135-36 (2001) (citing and quoting Quran (4:3)).
7. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding conviction of Mormon polygynist husband and rejecting his religious freedom defense); *Davis v. Beason*, 133 U.S. 333 (1890).
8. W.E. Butler, *Russian Law* 395-96 (1999); John N. Hazard, *LAW AND SOCIAL CHANGE IN THE U.S.S.R.* 247 (1953).
9. David C. Buxbaum (ed.), *CHINESE FAMILY LAW AND SOCIAL CHANGE* 451 (1978); *Women of China - Special Series*, New Trends in Chinese Marriage and the Family 123 (1987); *CEDAW Country Report, Vietnam*, U.N. Doc. CEDAW/C/5/Add.25 (Oct. 4, 1984).
10. Kirti Singh, *Obstacles to Women's Rights in India*, in Rebecca J. Cook (ed.), *HUMAN RIGHTS OF WOMEN* 380 (1994) (Hindu Marriage Act 1955).
11. See, e.g., *Hindu Marriage and Divorce Act* 1961, Cap. 214, §7(1) (prohibited for Hindus), VI LAWS OF UGANDA (rev. ed. 1964).

Two majority Muslim countries have also outlawed polygyny — Turkey in 1923 and Tunisia in 1956, as have the Ismaili Khojas of East Africa.¹² In fact, Tunisia found sources in Shari'a to justify its approach. Mohammed allowed polygamy only if the husband could treat all wives equally, and Tunisia concluded that was not possible for any man.¹³ Finally, Australia¹⁴ and some African countries have also criminalized polygyny for all within the country, whether in customary, Muslim, or statutory marriages. Burundi, Côte d'Ivoire, and Madagascar are in this category.¹⁵

II. COMPARATIVE POLYGyny LAW: MOST COUNTRIES BAN; A FEW PERMIT

Although polygyny is banned as the crime of bigamy for all in the Americas, Europe, the countries of the former Soviet Union, China, Vietnam and Nepal,¹⁶ and a few African countries, the national laws of

12. Esposito, *supra* note 6, at 52 (TUNISIAN LAW OF PERSONAL STATUS, Art. 18); *Id.* at 101 (Turkey, Ismaili Khojas).

13. *Id.* at 101.

14. *CEDAW Country Reports, Australia*, U.N. Doc. CEDAW/C/5/Add.40 (Oct. 30, 1986) (reporting traditional Aboriginal polygamous marriages not recognized under Australian law); U.N. Doc. CEDAW/C/AU/L/2 (Aug. 12, 1992) (reporting Muslims in the external territories of Australia could marry polygamously before July 1, 1992, but "the current family law regime in these territories will be replaced by Australian family law, bringing the law of marriage and divorce for all residents of the Territories, including Muslims, into line with legislation applying on the Australian mainland"); CEDAW Committee, *Concluding Observations: Burundi*, U.N. Doc. A/56/38, paras. 32-67 at para. 35 (Feb. 2, 2001), available at [http://www.unhcr.org/refugees/doc.nsf/\(Symbol\)/A.56.38.para.32-67.En?OpenDocument](http://www.unhcr.org/refugees/doc.nsf/(Symbol)/A.56.38.para.32-67.En?OpenDocument) (1993 law amended Code of the Person and the Family to abolish polygamy); The Center for Reproductive Law and Policy, *WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: FRANCOPHONE AFRICA* 124 (1999) [hereinafter *FRANCOPHONE AFRICA*] (Côte d'Ivoire) (Act No. 64-375 on marriage of Oct. 7, 1964, Official Journal No. 59 (Oct. 7, 1964), modified by Act. No. 83-800 of Aug. 2, 1983, prohibited polygamy; Penal Code, Art. 390, provides six months to three year penalty); *CEDAW Country Reports, Madagascar*, U.N. Doc. CEDAW/C/5/Add.65 (June 21, 1990) (1980 Order No. 62-089, art. 7, prohibits polygamy); CEDAW/C/5/Add.65/Rev.1 (April 17, 1991) (six month to three year penalty under Article 340 of Criminal Code for polygamy).

16. See, e.g., Suzana Bubic, *Family Law in Bosnia and Herzegovina*, in Andrew Bainham (ed.), 1996 THE INTERNATIONAL SURVEY OF FAMILY LAW 51, 52 (1998) [hereinafter *SURVEY*]; Anna Staneva, *Basic Issues in Bulgarian Family Law*, in Andrew Bainham (ed.), 1994 *SURVEY* 87, 88 (1996); Michael Palmer, *Caring for Young and Old: Developments in the Family Law of the People's Republic of China, 1996-1998*, in Andrew Bainham (ed.), 2000 *SURVEY* 95, 97 (2000); Jiri F. Haderka, *A Half-Hearted Family Law Reform of 1998*, in Andrew Bainham (ed.), 2000 *SURVEY* 119, 122 (2000) (Czech Republic); Prof. Dr. Susanne Storm and Prof. Dr. Hans Viggo Godsk Pederson, *Denmark*, in Prof. Dr. W. Pintens (ed.), 1 INTERNATIONAL ENCYCLOPEDIA OF LAWS: FAMILY AND SUCCESSION LAW 64 (Supp. 4, May 1998) [hereinafter *ENCYCLOPEDIA*]; M. Savolainen, *Finland*, in 2 ENCYCLOPEDIA 55 (Supp. 3 Dec. 1997); Prof. Dr. Dieter

a number of countries still permit it for the majority (or sometimes, the minority — e.g. India and the Philippines)¹⁷ of their male population. They typically do so by enacting marriage laws that vary depending on a person's religion or ethnic community as designated by birth.¹⁸ Women born into one religion or community may be subjected to polygyny. Women born into another may not.

Uganda, Iran, and India provide examples of such systems in Africa, the Middle East, and Asia. In Uganda, customary law permits a man who marries under traditional norms to take another wife whenever he wishes and without limit. He does not have to give existing wives any notice of a new marriage to another wife, nor does such a marriage entitle an existing wife to a divorce. Most wives have no access to the statutory monogamous marriage law, because that law gives men a veto over monogamy.¹⁹ Islamic law permits Muslim men to marry up to four wives

Schwab *et al.*, *Germany*, 2 ENCYCLOPEDIA 49 (Supp. 12, Apr. 2001); Martha Doczi, *Family Law in Hungary*, in Andrew Bainham (ed.), 1995 *SURVEY* 197, 198 (1997); David Thor Bjorgjansson, *General Principles and Recent Developments in Icelandic Family Law*, in Andrew Bainham (ed.), 1995 *SURVEY* 215, 217 (1997); Janis Vebers, *Latvia*, in Andrew Bainham (ed.), 1997 *SURVEY* 207, 213 (1999); Prof. Dr. Jose Antonio Marquez Gonzalez, *Mexico*, 2 ENCYCLOPEDIA 45 (Supp. 13, July 2001); Prof. Dr. Gregor van der Burgh, *Netherlands*, 3 ENCYCLOPEDIA 50 (Supp. 18, Feb. 2002); *CEDAW Country Report, Nepal*, U.N. Doc. CEDAW/C/NP/L1 (Nov. 23, 1998); Ion Filipescu, *Family Law Developments in Romania*, in Andrew Bainham (ed.), 1996 *SURVEY* 363, 364 (1998); Prof. Miroslava Gec-Korosec and Vesna Klavec, *Slovenia*, 3 ENCYCLOPEDIA 77 (Supp. 8, Feb. 1999); Prof. Dr. Gabriel Garcia Cantero and Prof. Dr. Joaquin Rams Albesa, *Spain*, 3 ENCYCLOPEDIA 95 (Supp. 11, Aug. 1999); Oliver Guillod, *A New Divorce Law for the New Millennium*, in 2000 *SURVEY* 357, 358 (2000) (Switzerland); Irina V. Zhilinkova, *The Marriage Relationship in Ukraine*, in Andrew Bainham (ed.), 1994 *SURVEY* 469, 469 (1996).

17. Rebecca J. Cook (ed.), *HUMAN RIGHTS OF WOMEN* 380 (1994) (India: permitted for Muslims); Naomi Neft & Anne D. Levine, *WHERE WOMEN STAND: AN INTERNATIONAL REPORT ON THE STATUS OF WOMEN IN 140 COUNTRIES* 380-83 (1997-1998) (Philippines: permitted for Muslims). It is likewise permitted for minority Muslim communities in Singapore and Sri Lanka. See *infra* n. 18.

18. See, e.g., *CEDAW Country Report, Bangladesh*, U.N. Doc. CEDAW/C/5/ADD.34 (Apr. 11, 1986) (permitted for Muslims and Hindus); *CEDAW Country Report, Singapore*, U.N. Doc. CEDAW/C/SGP/L1 (Jan. 18, 2000) (permitted for Muslims); *CEDAW Country Report, Sri Lanka*, U.N. Doc. CEDAW/C/13/ADD.18 (Jan. 24, 1989) (permitted for Muslims); *Marriage Act 1904*, Cap. 211, § 43, VI LAWS OF UGANDA (rev. ed. 1964) (prohibited in civil marriages); *Hindu Marriage and Divorce Act 1961*, Cap. 214, § 7(1), VI LAWS OF UGANDA (rev. ed. 1964) (prohibited for Hindus); *MARRIAGE AND DIVORCE OF MOHAMEDANS Act 1906*, Cap. 213, § 2, VI LAWS OF UGANDA (rev. ed. 1964) (permitted for Muslims); *CUSTOMARY MARRIAGES (REGISTRATION) Decree 16/1973*, § 3(2) (Ug.) (permitted for customary marriages).
19. Country reports to the CEDAW Committee sometimes state that the couple may choose to be monogamous or polygynous. But since both must agree, if the wife wants monogamy and the husband polygyny, the husband prevails.

with the same right of veto over monogamy. In contrast, men who marry under the civil law or who are Hindu, Buddhist, a Jain or a Sikh, are barred from marrying another wife while still married to the first under criminal penalty of bigamy with five years' imprisonment. At least fifteen other African countries permit men to marry several wives²⁰ in systems that are often similar to Uganda's, with its separate codes for Muslim, Hindu, customary, and civil marriages.²¹ Only men who enter into a civil or Hindu marriage are subject to the bigamy criminal penalty in such countries.

In Iran, a man can have four permanent wives and if he is a Shi'a Muslim, as are most Iranians, as many temporary wives as he likes; Shi'a Muslims living in many other countries receive the same legal permission.²² A temporary marriage can be as short in duration as one hour or as long as ninety-nine years; it is a contract in which the woman agrees to have sex with the man in exchange for a predetermined sum to be paid to her.²³ The children of temporary marriages are legally recognized as legitimate but the temporary husband is not financially obligated to them or his temporary wife except for the original fixed sum.²⁴ At least nine other Middle Eastern countries permit polygyny,²⁵ although Sunni Muslims

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(the majority of the world's Muslim population) may not marry temporary wives.

In India, the laws applying to Hindu, Christian, and Parsi men prohibit polygyny through a bigamy penalty of seven years imprisonment. The law permits Muslim men to marry up to four wives by exempting them from bigamy prosecutions.²⁶ In the Indian state of Goa, however, the situation is paradoxically reversed, with Muslim men covered by the bigamy law and Hindu men exempted.²⁷ At least nine other countries in Asia permit polygyny for Muslims, and in the case of Bangladesh and Pakistan, both Hindus and Muslims.²⁸ Among these nine, Thailand (majority Buddhist; minority Muslim) does not recognize polygynous marriages as a matter of law, but polygyny is not a criminal offence either.²⁹

III. THE MISSING VOICES: WOMEN

The religious doctrines and laws that permit polygyny are the work of men. Women had no role in forming them. In ancient times when most of the relevant religious doctrines were first formed, women were totally excluded from participation. The same was true when societies began

20. The Center for Reproductive Law and Policy, *WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGLOPHONE AFRICA 167* (1997) (Ethiopia, Ghana, Kenya, Nigeria, South Africa, Tanzania, and Zimbabwe); *FANCOPHONE AFRICA*, *supra* n. 15 at 191 (Benin, Burkina Faso, Cameroon, Chad, Mali, and Senegal); *CEDAW Country Report, Malawi*, U.N. Doc. CEDAW/C/5/Add.58 (Aug. 15, 1988); *CEDAW Country Report, Namibia*, U.N. Doc. CEDAW/C/NAM/1 (Feb. 10, 1997). See *supra* n. 18.
21. See *supra* n. 18.
22. Parvin Darabi, *Issues Affecting Moslem Women in Iran*, in Kelly D. Askin and Dorean M. Koenig (eds.), *3 Women and International Human Rights 423* (2001) [hereinafter Darabi]. Shi'a Muslims also live in other countries such as Bangladesh, Iraq, India, Indonesia, and Pakistan. See e.g., Government of India, *TOWARDS EQUALITY: REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN INDIA 138-39* (1974).
23. Darabi, *supra* n. 22 at 429 (citing Art. 1075 of the Iran Civil Code).
24. *Id.* at 423.
25. *CEDAW Country Report, Algeria*, U.N. Doc. CEDAW/C/DZA/1 (Sept. 1, 1998); Anne H. Heindel, *Issues Affecting Middle Eastern Muslim Women: Self-Determination and Development in Turkey, Egypt, Iran, Iraq, and Saudi Arabia*, in Kelly D. Askin and Dorean M. Koenig (eds.), *3 Women and International Human Rights 523-424* (2001) [Egpt] [hereinafter Heindel]; *CEDAW Country Report, Iraq*, U.N. Doc. CEDAW/C/IRQ/2-3 (Oct. 19, 1998); *CEDAW Country Report, Israel*, U.N. Doc. CEDAW/C/ISR/1-2 (Apr. 8, 1997) (Section 176 of the Penal Law (1977) makes bigamy a crime punishable by 5 years imprisonment, but section 179 exempts individuals who are not Jewish, and section 180 exempts Jewish men "whose second marriage was permitted by a rabbinical court's judgment that underwent the specific Halachic procedure to make it religiously valid"); *CEDAW Country Report, Jordan*, U.N. Doc. CEDAW/C/JOR/2 (Oct. 26, 1999); *CEDAW Country Report, Libyan Arab Jamahiriyah*, U.N. Doc. CEDAW/C/LBY/2 (Mar. 15, 1999); *CEDAW Country Reports, Morocco*, U.N. Doc.

26. *CEDAW/C/MOR/1* (Nov. 3, 1994), U.N. Doc. CEDAW/C/MOR/2 (Feb. 29, 2000); Heindel, *supra* at 533 (Saudi Arabia); *CEDAW Country Report, Yemen*, U.N. Doc. CEDAW/C/YEM/3 (Nov. 19, 1992).
27. There is no statutory law covering the Indian Muslim male's right to marry four wives. That is part of the religious law. S. 494 of Indian Penal Code 1860 exempts Muslim men having four wives from the offence of bigamy.
28. Flavia Agnes, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 147* (1999).
29. *Afghanistan*, in Robin Morgan, (ed.), *SISTERHOOD IS GLOBAL 38* (1996) [hereinafter *SISTERHOOD*]; *CEDAW Country Reports, Bangladesh*, U.N. Doc. CEDAW/C/BSI/ADD.34 (Apr. 11, 1986), U.N. Doc. CEDAW/C/BGD/3-4 (Apr. 1, 1997); *CEDAW Country Report, Indonesia*, U.N. Doc. CEDAW/C/IDN/2-3 (Feb. 12, 1997); *CEDAW Concluding Observations, Maldives*, U.N. Doc. CEDAW/A/56/38, paras. 114-146 at para. 121 (Feb. 2, 2001), available at http://www.unhct.org/hts/doc.nsf/Symbol/Country_Report_Philippines, U.N. Doc. CEDAW/C/PHI/4 (July 25, 1996); *CEDAW Country Report, Singapore*, U.N. Doc. CEDAW/C/SGP/1 (Jan. 18, 2000); *CEDAW Country Report, Sri Lanka*, U.N. Doc. CEDAW/C/SRI/ADD.18 (Jan. 24, 1989); *CEDAW Country Report, Thailand*, U.N. Doc. CEDAW/C/5/Add.51 (June 12, 1987). Muslims constitute the majority in most of these countries, but the minority in the Philippines, Singapore and Sri Lanka.
29. In Thailand, a polygynous husband may only be prosecuted for perjury before the marriage registration officer. In 1997, the Thai CEDAW report noted that the country intended to record men's marital status on their computerized identity cards and to require officials to check each man's marital status before registering his marriage. *CEDAW Country Report, Thailand*, U.N. Doc. CEDAW/C/THA/2-3 (Apr. 7, 1997).

to write and publish court decisions or codify statutes. Until law schools began permitting women to attend, in the late 19th and early 20th century, there were no women lawyers anywhere in the world.

In general, not until the 20th century did women anywhere earn the right to vote and thereby the ability to influence law-making. The barriers to women's direct participation in the legislative process, however, remain high even today at the beginning of the 21st century. In most countries women constitute a negligible percentage of legislative bodies compared to their percentage of the human family; and this fact is especially true in the countries whose legislative bodies continue to support polygyny. The starting point for this discussion of women's voice is accordingly the observation that the laws now in place permitting polygyny have little to no democratic legitimacy among women.

Since the mid-19th century, however, women around the globe began fighting for legal and political change starting with both the right to vote and the status of women in the family. Women in many countries in the developing world, such as Indonesia, Pakistan and Vietnam, began fighting polygyny in various ways and sometimes achieved modest successes.³⁰ In the late 20th century, more and more women graduated from African, Middle Eastern, and Asian law schools and began writing scholarly analyses of the subject, participating in women's movements to reform or ban polygyny, and working for government institutions in positions that allowed them to influence the debate. An important development came from the new women anthropologists who, in a departure from past approaches, were interested in hearing the views of women living in polygynous communities.

These various advances have yielded some compelling evidence of how women in polygynous societies actually feel about it. In 1995, two women anthropologists decided the topic was worth exploring, noting the fact that "relatively little research has been done to specifically address women's attitudes toward polygyny."³¹ Tanzanian women interviewed forty-three Kaguru women from a small rural community in the country's

Morogoro region. About twenty-two per cent of women in that region were currently in polygynous marriages;³² the percentage of men was of course much lower. Among the forty-three interviewees, thirteen were currently or had previously been in polygynous marriages, leaving thirty without personal experience but with the ability to examine the institution up close from within their small village. The interviewers asked those women who were or had been in such marriages if "they were happy when their husbands married another wife." They asked the other women "how they would feel if their husbands were to marry another wife." The women had overwhelmingly negative reactions to the institution and both groups felt the same way about it. None saw any benefits in having a co-wife. Two representative comments:

"I don't like it. If it happens I can't avoid it, but I hate to have a co-wife. (R12, age 45)"

"I don't want a co-wife. I don't want my children to be married to co-wives. I hated this even before I got married. Unfortunately, I was involved in this one way or the other to have a co-wife. . . . It wasn't my will. . . . (R8, age 36)"

The interviewees gave many reasons for their negative attitudes:

"I wouldn't be happy [with a co-wife] because life would change. You know, if a husband has two wives or more then there will be no balance in love and in most cases the elder wife is the one disadvantaged. (R25)"

"[When my husband married another wife] I was not happy. . . . you are not confident about your completeness as a woman. The thought erodes your love for him. (R14)"

"... Sometimes the husband scorns you. The other wife scorns you, and the husband sides with her and sees you as nothing. You must get angry! (R43, age 60)"

Many women complained about the economic deprivation polygyny creates for them and their children.

"... [E]ven the budget will be higher; how are you going to progress? . . . You don't progress. Do you think it is just paying bridewealth only! . . . The needs will increase. . . . You could buy one kilogram of meat and suffice, now you have to send for

30. See, e.g., *Afghanistan*, in *SISTERHOOD*, *supra* n. 28 at 40; *Algeria*, in *SISTERHOOD*, *supra* n. 28 at 47; *Ghana*, in *SISTERHOOD*, *supra* n. 28 at 256; *India*, in *SISTERHOOD*, *supra* n. 28 at 303; *Indonesia*, in *SISTERHOOD*, *supra* n. 28 at 317; *Nepal*, in *SISTERHOOD*, *supra* n. 28 at 462; *Pakistan*, in *SISTERHOOD*, *supra* n. 28 at 529; *Miriam Habib, Pakistan: Women - A Fractured Profile*, in *SISTERHOOD*, *supra* n. 28 at 531; *Sudan*, in *SISTERHOOD*, *supra* n. 28 at 649; *Vietnam*, in *SISTERHOOD*, *supra* n. 28 at 726.

31. Dominique Meekers & Naida Franklin, *Women's Perceptions of Polygyny Among the Kaguru of Tanzania*, in 34 *ETHNOLOGY* 315-27 (1995).

32. *Id.*

half a kilogram. . . . I who came first have a family, the half kilogram what will it suffice? (R35)"

"When I got my sixth child my husband tasted a better love from outside, this made him to concentrate with an outside woman, they had [three children]. . . . At this long period, I had a lot of problems of taking care of the family. If my children were sick I had to take care myself, for everything. I was mother and father. (R8)"³³

Other evidence of women's attitudes toward polygyny comes from Uganda. During the early 1990s, the government solicited the input of its citizens in the course of developing what became the 1995 Constitution. The Ministry of Women in Development, in cooperation with other governmental entities and with women's non-governmental organizations (NGOs), held a series of seminars with women throughout the country to determine what they would like in the new Constitution.³⁴ The Ministry reported:

A majority of the women who participated in the constitutional seminars recommended that a man should have one wife, and a husband one wife. . . . Women noted that there is a lot of suffering in polygynous homes because the man cannot love his wives equally and usually he does not have enough to provide sufficient support to his wives and numerous children. This leaves a heavy burden on women. . . .

When people cite cultural relativism as a reason for refusing to take action against polygyny, they fail to realize that their view of the culture in question flows from current laws shaped almost entirely by men and the views of religious and governmental leaders who are almost always men. Asking women what they think will refute the idea that in a given culture every person thinks alike. As the voices above document so well, many women contest the status quo. They abhor polygyny precisely because it harms their children and them so deeply in both the emotional and material spheres.

IV. INTERNATIONAL HUMAN RIGHTS LAW PROHIBITS POLYGYNY

International law clearly establishes that polygyny violates women's most fundamental rights and freedoms. From the beginning of the inter-

national human rights system, international law required equality before the law and in marriage. Yet many countries have failed to take effective action against polygyny, citing freedom of religion and culture as reasons for inaction.

A. Women's Right to Equality Within Marriage

The founding of the United Nations in 1945 and its subsequently-enacted human rights system have brought ever-increasing attention to the need to eradicate all forms of discrimination against women. The opening clauses of the United Nations Charter show a "determination . . . to reaffirm faith in . . . the equal rights of men and women. . . ." and Article 55 declares that the UN will "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . sex . . . or religion."³⁵ Both reflect central awareness of the reality of women's lives, profoundly different from these aspirational goals, thus necessitating concrete action to change that reality. In Article 56, UN members pledge to take both "joint" action with the UN and "separate" action to achieve their Article 55 purposes.

From the beginning, women activists focused on the goal of ending polygyny and women's subjugation within marriage. The UN Commission on the Status of Women, meeting for the first time in 1947, agreed to work for "freedom of choice, dignity of the wife, monogamy, and equal right to dissolution of marriage."³⁶ That goal was subsequently reflected in the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948 [hereinafter UDHR].³⁷ Article 16(1) proclaimed that "[m]en and women of full age . . . have the right to marry and . . . are entitled to equal rights as to marriage, during marriage and at its dissolution."

An Indian woman lawyer, Hansa Mehta, and Eleanor Roosevelt worked together to insure that the UDHR would contain women's Article 16 right to equality in marriage. Roosevelt served as Chair of the newly formed United-Nations-Human Rights Commission while it drafted the UDHR. Each headed one of the three working groups; no other women served on the Commission. At the time, Mehta was also advising the Indian government (again, as one of only two women) on the rights

33. *Id.*

34. Ministry of Women in Development, RECOMMENDATIONS MADE BY THE WOMEN OF UGANDA TO THE CONSTITUTIONAL COMMISSION 12-20 (1991).

35. CHARTER OF THE UNITED NATIONS, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

36. Leslie J. Harris & Lee E. Teitelbaum, FAMILY LAW 271-79 (2000).

37. UDHR, G.A. res. 217A (II), U.N. Doc. A/810 at 71 (1948).

provisions of what became its 1949 Constitution.³⁸ There, she "batl[e]d] purdah, child marriage, polygamy, [and] unequal inheritance laws, . . . striving to set these ancient customs on a course of extinction."³⁹ Eleanor Roosevelt also fought for women's right to equality in marriage. Indeed, she suggested adding to the right to marry, "the specification that men and women have equal rights when a marriage is dissolved."⁴⁰

The UDHR focus on equal rights within marriage was further buttressed by the grand language of the Preamble and other articles. The Preamble spoke specifically of the United Nations' commitment to the "dignity and worth of the human person and in the equal rights of men and women." The very first article built on this core concept, and here again Hansa Mehta played a major role. Her efforts insured that Article 1 of the Declaration, which recognizes that all are born "free and equal in dignity and rights," be cast in inclusive terms. The first draft gave this right only to "men." At her insistence, the final version gave this right to "all human beings." Further commitments to women's rights to equality were reflected in Article 2 (all are entitled to the rights in the Declaration without "distinction" based on "sex"), and Article 7 ("[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law; [a]ll are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination").

The UDHR commitment to equality for women with particular reference to marriage was carried forth and amplified in two international human rights treaties. The International Covenant on Civil and Political Rights [hereinafter ICCPR] was forceful on the point.⁴¹ Article 23(4) required that ratifying states "shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." The specific requirement that states "ensure" a particular right appears only in this article and in two other articles specifically dealing with women's rights. Article 2(1) requires states to ensure to all the rights in the ICCPR, without sex (and other) distinctions. Article 2(3) obligates states to ensure that persons whose ICCPR rights have been violated have an effective remedy. And Article

38. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 90 (2001).

39. *Id.*

40. *Id.* at 93.

41. ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

3 requires states "to ensure the equal right of men and women to the enjoyment of all civil rights set forth in the present Covenant." The ICCPR also expanded on the Declaration's requirements about marriage. Now they covered "equal rights and responsibilities," rather than simply "equal rights."

The Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW] expanded yet again by listing the various areas of the law where married women commonly did not have equality with their husbands.⁴² It requires states to "eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on a basis of equality of men and women . . . [t]he same right[s]":

- to enter into marriage;
- choose a spouse freely;
- during and at dissolution of marriage;
- as parents vis-à-vis their children;
- to decide on the number and spacing of their children;
- as guardians or adoptive parents;
- in personal matters, including choice of family name, profession, and occupation; and
- with regard to owning, acquiring, managing, administering, enjoying or disposing of property.

Not only does CEDAW require that men and women have the same rights. It also requires that men and women have the same responsibilities:

- during marriage and at dissolution;
- as parents; and
- as guardians, trustees, or adoptive parents.

Thus, the UDHR, ICCPR and CEDAW make an exceptionally strong commitment to equality within marriage. But few scholars and commentators have paid much attention to the right to equality in marriage (with some notable exceptions).⁴³

42. CEDAW, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/

46, entered into force Sept. 3, 1981.

43. See, e.g., Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 Va. J. of Int'l. Law 643-709 (1990).

Although polygyny violates many different human rights of women, it violates their right to equality in marriage in the most egregious way possible. To understand that violation in depth, it is necessary to consider the common legal "rights and responsibilities" states attach to marriage in their legal systems. They include child support, child custody, spousal maintenance, spousal property ownership and control, spousal and child inheritance, spousal obligations to care for their children and each other, divorce, matrimonial property rights, spousal sexual fidelity, and sexual intercourse.

In a polygynous system, equality of rights and responsibilities as to these subjects is literally impossible. If a man has four wives, each wife has only one-fourth of a husband. Accordingly, he will be responsible to spend only one-fourth of his resources on the children he has with each of his wives, whether during marriage or at its dissolution. Each wife, in contrast, will have all of her resources available to care for the children. The same would be true for spousal care and maintenance. This math explains why the women quoted above complain so bitterly of the dearth of economic resources for themselves and their children when their husband marries another wife. With scarce resources the norm in the underdeveloped world, polygyny necessarily impoverishes the wives and their children. The wives have fewer rights than their husbands, and the husbands fewer responsibilities than their wives.

The women who were quoted also complained of their husbands' inattention to the children. Here too it is impossible for the husband to share equal responsibility with their wives for the personal attention to, emotional care for, and parental guidance of, those children. Just as each wife has a quarter of a husband, each of that wife's children has a quarter of a father. Or as one polygynous wife complained, "I was mother and father."

The countries that permit polygyny also have many marriage and divorce rules explicitly based on unequal shares or rights. For example, the inheritance rules that are designed to protect the economic well-being of surviving family members are usually built on an unequal share. Islamic law requires that any surviving female always receive one-half the share of the similarly situated male.⁴⁴ For widows and widowers who have children, the widow receives one-eighth and the widower one quarter.⁴⁵ Using this base, if a husband has four wives each will each inherit one quarter, of one-eighth, or one thirty-second share. Conversely, each

44. Espino, *supra* n. 6 at 38.
45. *Id.* at 39-40.

widower will inherit one quarter from each wife or one full share. Customary laws commonly go even further, and give the widow only the right to be cared for by her children, while the widower assumes control and ownership of all property she had.⁴⁶

As to the right to the opportunity for legal sexual intercourse,⁴⁷ wives will necessarily have fewer rights than their husbands. If a hypothetical husband rotates his nights evenly among his four wives, and has intercourse every night, each wife will have intercourse once every four days, while he does so every day. These countries also provide very different rules for marital fidelity for husbands and wives. Husbands in customary or Shi'a marriages are legally permitted to have extra-marital sex with single women or "temporary" wives because the new woman in their lives may turn into the new (permanent) wife. Wives, however, are subject to criminal prosecution or worse (murder) for the same act, because they are seen as the property of men. Similarly, men have the right to divorce their wives for a single non-marital sexual act with another man, while the women have no such right to divorce an unfaithful husband, again because his extramarital partner may become his new wife. This further dilutes each wife's right to legally-permitted sexual intercourse.

Both the UN Human Rights Committee [hereinafter HRC] and the Committee to Eliminate Discrimination Against Women [hereinafter CEDAW Committee], the bodies that monitor compliance with the ICCPR and CEDAW, have asserted in their general comments and recommendations that polygyny violates women's rights. The HRC recommends that polygyny "should be definitely abolished wherever it continues to exist" because it violates women's dignity and constitutes inadmissible discrimination.⁴⁸ The CEDAW Committee declares that prohibition is necessary because polygyny causes "such serious emotional and financial consequences" for the wives and children.⁴⁹ And of course it deprives women

46. For example, Tanzania's Local Customary Law (Declaration) (No. 4) Order, 1963, Schedule 2, Rules of inheritance, G.N. 436, provides in Rule 27 that "The widow has no share of the inheritance; if the deceased left relatives of his clan, her share is to be cared for by her children just as she cared for them."

47. This right is secured through such legal concepts as the suit for loss of consortium and divorce for failure to have intercourse. The responsibility to refrain from non-marital sex is enforced through criminal adultery law and divorce for adultery.

48. HRC, General Comment 28, Equality of rights between men and women (article 3), at para. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

49. CEDAW Committee, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), at para. 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 90 (1994).

of their Article 16 right to equality with men in marriage, as well as their Article 5 right to be free from customary practices premised on women's inferiority.⁵⁰

In sum, nothing could be more clear than the fact that the legal institution of polygynous marriage deprives women of their well-defined, and widely ratified, right to equality in marriage as to both rights and responsibilities.

B. *The Right to Religious Freedom*

Within the context of Islam, the most common claim is that the right to freedom of religion trumps the right to equality within marriage. There is virtually no support for this in international human rights law, but it is intuitively attractive and persuasive to many.

The ICCPR does recognize, in Article 18(1), the right to religious freedom, including the freedom "to manifest [one's] religion or belief in worship, observance, practice and teaching." If observance or practice were construed to include the right to be governed by religious rules on marriage and divorce, the argument might carry some weight. The evidence is to the contrary. The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief lists many religious practices which are protected forms of religious freedom, but nowhere mentions the freedom to be governed by religious law.⁵¹ In general, it protects the freedom to worship or assemble and to maintain places for doing so, have charitable and humanitarian institutions, use religious articles and materials, write about religion and teach it in suitable places, solicit funds, train and appoint leaders, observe days of rest and religious holidays and ceremonies, and to communicate with others about their religion.

But even if one were to concede that freedom of religion included the right of the state and Muslim religious leaders to impose Islamic law on all women born to Muslim parents, the religious freedom argument would still carry no weight. For the ICCPR right to religious freedom also preserves, through Article 18(3), the state's right to enact laws to limit those religious freedoms if such laws are "necessary" to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others."⁵² Given the fact that polygyny so clearly violates women's funda-

mental right to equality in marriage, that ground alone empowers states to limit religious freedom. The emotional and financial burdens polygyny creates for women and children also justify limiting laws to protect and enhance their safety and health.

One African Supreme Court (Mauritius) has already construed its own Constitution's religious freedom guarantee (virtually identical to that in ICCPR Article 18), in conjunction with the ICCPR requirement that women have equal rights in marriage, to deny the local Muslim community the right to personal religious law governing marriage, divorce, and inheritance. Mauritius law prohibits polygyny. Muslims sought the right to be governed by Shiri'a law instead. The Supreme Court rejected their claim in *Bhewa v. Government of Mauritius*, [1991] LRC (Const) 298 (1990). The Court reasoned that the Islamic plaintiffs had

... an insufficient understanding of the duality of religion and state in a secular system. The secular state is not anti-religious but recognises freedom of religion in the sphere that belongs to it. As between the state and religion each has its own sphere, the former, that of law-making for the public good and the latter that of religious teaching, observance and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion is the state religion but also the holy book of that religion is the supreme law.

Accordingly, it dismissed the plaintiffs' claim that the freedom to observe and practice their religion required the Mauritius government to enact a law imposing Islamic rules concerning marriage. The Court further observed that even if religious freedom were so construed, the Mauritius Constitution's exceptions to religious freedom (the same as those in ICCPR Article 18(3)) nevertheless permitted the country to prohibit polygamy. Indeed, international law required Mauritius to do so. For Mauritius had ratified the ICCPR, and Article 23(4) obligates Mauritius to ensure "the maintenance of monogamy . . . and . . . the largest measure of non discrimination against women, whether as wives or daughters."⁵²

⁵⁰ *Id.*

⁵¹ GA Res. 36/55, 36 U.N. GAOR Supp. (No. 15) at 171, art. 6, U.N. Doc. A/36/684 (1981).

⁵² The Court cited Article 23(4) requiring equality in marriage, 2(1) requiring all ICCPR rights without sex distinction, 2(2) and 3 requiring legislation and effective remedies

The Court's conclusion that prohibiting polygamy does not violate freedom of religion parallels the reasoning of the United States Supreme Court a century earlier, when it ruled that a Mormon's right to religious freedom did not include the right to an exemption from the general federal criminal statute prohibiting polygyny. In *Reynolds v. United States*, 98 U.S. 145 (1879), it characterized the convicted man's argument as

introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious beliefs? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

In a series of subsequent cases, the Court adhered to this position and upheld all federal statutes designed to bring an end to the practice of polygyny by Mormons. Strong enforcement of these statutes was eventually effective and Utah entered the United States on the condition that its Constitution prohibit polygyny. Meanwhile, the Church reinterpreted its doctrine to prohibit polygyny.

The U.S. Court's decisions have been favorably cited by other nation's courts. For example, the Bombay High Court in India twice upheld local statutes prohibiting Hindu polygyny, enacted before the national law

to give effect to all ICCPR rights, 24 requiring that minors be protected without sex discrimination against any child, and 26 requiring that all persons be equal before the law and entitled to equal protection without sex discrimination. [1991] LRC (Const) 298 (1990). The plaintiffs conceded that Mauritius' Criminal Laws, which included the 1838 Penal Code Ordinance Art. 257 banning bigamy, remained within the state's power although one plaintiff admitted he preferred that Shari'a criminal law be imposed on all Muslims in addition to Shari'a personal law.

prohibited it. In each case, it cited the U.S. Supreme Court's belief/practice distinction and holdings in support of its decision.⁵³

An additional support to the position that international human rights law does not allow religion to trump equality can be found in CEDAW's structure. It contains no exception for religious or customary law. Indeed, its Article 2(e) and 2(f) enforcement provisions require laws to eliminate discrimination against women by "any person, organization or enterprise," and legislation to "modify or abolish existing laws, . . . customs, and practices which constitute discrimination against women." It is undoubtedly for this reason that so many Islamic states have ratified CEDAW with reservations as to both the Article 16 requirements for equality in marriage and Article 2's enforcement requirements.

C. *The Right to Enjoy One's Culture*

By similar reasoning, the right to enjoy a minority culture does not trump women's equality rights either. We have already seen CEDAW's requirements concerning discriminatory laws, customs and practices. A similar provision in Article 5 requires states to adopt measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

Article 27 of the ICCPR does guarantee some cultural rights of minorities within a state. Of course, if the cultural practices are those of the majority, the article is simply inapplicable. But for any cultural minority, the language seems to favor them. It requires that minorities be given "the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." This provision does not exist in isolation, however. In addition to women's right to equality in marriage under Article 23(4), Article 2 guarantees that any right in the Convention must be recognized "without distinction of any kind, such as . . . sex . . ." Similarly, Article 3 requires that states ensure "the equal right of men and women to the enjoyment of all civil and political rights set forth in the Convention." And Article 26 guarantees the right to equality before, and the equal protection of, the law without "discrimination on any ground such as . . . sex . . ."

53. *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84; *Srinivasa v. Saraswati*, Annual AIR 1952 Mad. 193.

The HRC therefore states that these cultural rights "do not authorize any State, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law."⁵⁴ It requires states to "discharge their responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women."⁵⁵ There can be no real argument that international human rights law allows cultural groups to continue their discrimination against women.

V. CONCLUSION

As we have seen, women's right to equality within marriage has strong historic roots in the new international human rights regime that arose from the ravages of World War II. Close examination of the right to religious freedom and cultural identity reveal no exemption allowing religions and cultures to discriminate against women. Polygyny subjugates women in the most complete way possible, depriving them of that core right to dignity guaranteed to every human being and rendering them powerless vis-à-vis their husbands. It is time for post-colonial feminists and scholars to drop the veil of cultural relativism and open their eyes to the extreme harm created by laws that allow husbands to condemn their wives to polygynous marriages.

PLANT VARIETY PROTECTION AND FARMERS' RIGHTS: TOWARDS A BROADER UNDERSTANDING

*Philippe Cullet and Radhika Kolluru**

I. INTRODUCTION

The protection of plant varieties by means of intellectual property rights has been a subject of increasing importance in the aftermath of the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).¹ Plant variety protection in TRIPs is premised on the need to provide incentives to private sector actors to engage in plant breeding. The ultimate rationale for plant variety protection is the enhancement of food security through the provision of new improved varieties and improved availability of seeds through private sector channels.

The introduction of plant variety protection in India has significant implications since seed has traditionally been supplied overwhelmingly by farmers themselves and by the public sector, with the private sector playing a marginal role until recently in most crops. From a legal perspective, the protection of plant varieties remains an issue which is far from settled even though the Protection of Plant Varieties and Farmers' Rights Act was adopted in 2001 in compliance with TRIPs obligations. This is due to a number of reasons: Firstly, plant variety protection is an issue which goes beyond giving incentives to the private sector. In fact, while the TRIPs agreement is the direct trigger for the introduction of plant variety protection, it is not the only relevant treaty. The Biodiversity Convention and the International Treaty on Plant Genetic Resources for Food and Agriculture (PGRF A Treaty) are also of major importance.²

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1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, 15 Apr. 1994, 33 INTERNATIONAL LEGAL MATERIALS 1197 (1994) [hereafter TRIPs Agreement].
2.

54. HRC, General Comment 28, Equality of rights between men and women (article 3), at para. 32, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

55. *Id.*

Secondly, while plant variety protection is directly related to innovation in the field of agriculture, it must also be understood in the broader context which includes conservation of biological resources. Thirdly, plant variety protection is opposed to the idea that agricultural management should be based on the sharing of knowledge and resources. This may be criticised from a conceptual and practical point of view. However, in the context of the widespread ratification of TRIPs and the increasingly tenuous nature of farmers' hold over their resources and knowledge, it is necessary to go beyond criticism and understand the additional requirements of the current international legal system with respect to the needs of farmers and more broadly of food security for all individuals.

This article first looks at some of the reasons for the introduction of plant variety protection and examines in particular the links with food security and the reasons for introducing plant variety protection measures. The second section surveys the property rights forms that have been proposed at the international level to provide plant variety protection and examines the existing legal regime in India with regard to plant variety protection. The third section argues that India needs to do more than it has done until now to implement a plant variety protection regime which truly fosters food security, provides traditional knowledge holders with secure property rights and rethinks farmers' rights in a broader context which takes into account the imperatives of food security and agro-biodiversity conservation alongside the already implemented focus on commercialisation.

II. PLANT VARIETY PROTECTION AND FOOD SECURITY

Plant variety protection is intrinsically linked to food security. In fact, it can only be justified if it enhances food security. This section briefly explores the notion of food security before turning to the specific issue of plant variety protection.

A. Food Security

Food security can be understood at different levels, from the household to the international level.³ It is commonly held that at present there

are sufficient food supplies at the international level,⁴ and in the Indian context at the national level as well.⁵ However, studies indicate that with increases in population, and diminishing land availability, international and national food security will be a major concern in coming years.⁶ To achieve food security at the national level states require sufficient resources to either produce or import enough food to feed the whole population and an efficient distribution system to ensure everyone access. Ensuring food security at the household level implies that people must either have sufficient income to purchase food or the capacity to feed themselves directly by cultivating their own food.

Food security is directly linked to agro-biodiversity which is essential to promote resilience in farming. Reduction in diversity (through practices such as monoculture) increases vulnerability to natural forces, to pest/weed attack and other plant diseases.⁷ Therefore, agro-biodiversity is of primary importance for small-holder and/or subsistence farmers as it ensures both income-generation and household food security. Agro-biodiversity also provides ecosystem services on farms, such as pollination, fertility and nutrient enhancement, and insect and diseases management and water retention and thus makes for more productive farming, decreasing the number of external inputs required.⁸ Additionally, agro-biodiversity provides the raw material (or the genetic pool) for all crop-related biotechnology research and development. Diversity also has nutritional and social importance, where different varieties may contain different nutrients and health benefits or may be of differing cultural worth.

Small-holder and traditional farmers have customarily practiced farm-

2. See respectively Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 31 INTERNATIONAL LEGAL MATERIALS 818 (1992) [hereafter BIODIVERSITY CONVENTION] and International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 Nov. 2001 [hereafter PGRFA TREATY].

3. According to Paragraph 1 of the Plan of Action of the World Food Summit, Rome, 13-17 Nov. 1996, food security exists 'when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.'

4. See, e.g., Carl F. Jordan, *Genetic Engineering, the Farm Crisis and World Hunger* 52 Bioscience 523, 526 (2002) and Jose Falck-Zepeda et al., BIOTECHNOLOGY AND SUSTAINABLE LIVELIHOODS - FINDINGS AND RECOMMENDATIONS OF AN INTERNATIONAL CONSULTATION (ISNAR, Briefing Paper No. 54, September 2002).

5. See, e.g., INDIAN ECONOMIC SURVEY 2001-2002 (2002).

6. See, e.g., FAO, THE STATE OF FOOD INSECURITY IN THE WORLD 2002 (2002).

7. See for instance, M.S. Swaminathan, *Ethics and Equity in the Use and Collection of Plant Genetic Resources: Some Issues and Approaches in International Plant Genetic Resources Institute, ETHICS AND EQUITY IN CONSERVATION AND USE OF GENETIC RESOURCES FOR SUSTAINABLE FOOD SECURITY* 7 (1997).

8. Lori Ann Thrupp, *Linking Agricultural Biodiversity and Food Security: the Valuable Role of Agrobiodiversity for Sustainable Agriculture* 16 INTERNATIONAL AFFAIRS 265, 268 (2000).

ing techniques which conserve and enhance agro-biodiversity. In order to maximise productivity and minimise risk they have made certain selections whereby they have preserved old varieties, invented new varieties and adapted existing varieties to suit their local environment, thereby enriching agro-biodiversity.⁹ As a result, the promotion of such farming is relevant, not just for household food security, but also for guaranteeing food security at national and international levels as well. It is essential, therefore, that farmers retain control over plant varieties so that they may continue to innovate, improve and adapt varieties to suit changing needs and conditions.¹⁰ Additionally, since food security and access to food is also linked to adequate income, promotion of small-holder and labour-intensive farming is essential in developing countries like India, where a large percentage of people earn their livelihood from agricultural labour.

National policy plays a vital role in countering food insecurity. The principles emanating from the human right to food form an important basis for such a policy.¹¹ One of the State's obligations with respect to the human right to adequate food is that it must proactively engage in activities to strengthen people's access to and utilization of resources and means to ensure their livelihood and food security.¹² This includes measures such as land reform, ensuring physical and economic access to credit, natural resources, new technologies, rural infrastructure, irrigation, and provision of explicit farmers rights through legislation. Rigorous monitoring and planning by the State is required to ensure that cash crops do not replace food crops at the cost of food security.¹³ The State must also regulate private sector activities to ensure that they do not impinge on the resources of people who do not have access to sufficient food (which includes ensuring that private sector firms do not intrude on farmers

9. See J. Esquinas-Alcazar, *The Realisation of Farmer's Rights in M.S. Swaminathan (ed.), AGRO-BIODIVERSITY AND FARMERS' RIGHTS* 2 (1996).
10. See, e.g., Objectives 3.1 and 3.4(d) of the Plan of Action *supra* n. 3.
11. The human right to adequate food has found expression in various international documents. See, e.g., Art. 11 of the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, New York, 16 Dec. 1966, reprinted in 6 INTERNATIONAL LEGAL MATERIALS 360 (1967).
12. Paragraph 15, Committee on Economic, Social and Cultural Rights, General Comment No. 12 - The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5 (1999). [Hereafter General Comment on Article 11]
13. Often as consequence of fall in commodity prices brought about by wide spread industrialised farming and agricultural subsidies in the north, small farmers in developing countries are forced to abandon cultivation of food crops and switch to cash crops, in order to eke out a reasonable living. See, e.g., Marcel Mazoyer & Laurence Roudart, *L'asphyxie des economies paysannes du Sud* 523 MonDR. DIPLOMATIQUE 19 (Oct. 1997).

rights) and that their activities sufficiently promote agro-biodiversity.¹⁴ The State must also ensure that there is sufficient R&D in the area of under-utilised crops of high nutritional value.¹⁵

B. Law and Policy Rationale for Plant Variety Protection

At the outset, it must be mentioned that plant variety protection can have a narrow and broad meaning. The narrow view only considers plant variety protection from the point of view of commercial breeders and the needs of the biotechnology industry. The broader view acknowledges that there are different actors in plant variety management who deserve protection and who perform different functions, ranging from innovation (new seeds) to agro-biodiversity management.

India has had a number of reasons for introducing a plant variety protection regime. The most immediate trigger for the Plant Variety Act 2001 are the obligations undertaken in the WTO context, specifically under Article 27.3.b of the TRIPs Agreement. Article 27.3.b of TRIPs imposes on all countries the introduction of some form of intellectual property protection for plant varieties. However, it does not impose the introduction of patents and therefore leaves member states free to devise their own legal framework in this regard (*sui generis* option). While WTO membership imposed a specific deadline on India for the introduction of plant variety protection, other factors are also at play. India, has, for instance, been subjected several times to the appropriation of local knowledge through patents in foreign countries (also referred to as biopiracy) in the past few years. While the introduction of intellectual property rights in the field of genetic engineering may not provide a direct counter to biopiracy, it raises the profile of traditional knowledge as an issue worthy of debate and protection. Beyond issues specifically linked to biopiracy, the development of an intellectual property rights regime related to plant varieties is generally reflective of broader trends towards the appropriation through private property rights of resources and knowledge previously deemed to be freely available to all individuals and nations. The trend towards privatisation of resources, knowledge and means of production has been tremendous in the past couple of decades. It finds expression in the field of agriculture with the progressive development of an international legal framework which favours private ownership of genetically

14. In fact failure by the State to regulate individuals or groups so as to prevent them from violating the right to food amounts to a violation of its obligations. (See Paragraph 19 of the General Comment on Article 11, *supra* n. 12).
15. Objective 3.4, Plan of Action, *supra* n. 3.

modified seeds over public access and sharing of knowledge. This has, for instance, been reflected at the national level with the increase in incentives given to the private sector seed industry.¹⁶

Plant variety protection can be justified by necessity, or in other words by WTO membership. Other substantive reasons also help justifying plant variety protection both from the perspective of commercial breeders, farmers and agro-biodiversity conservation. As far as commercial breeders are concerned, the rationale for the introduction of plant variety protection is that it will promote food security because genetic engineering offers humankind its only chance to significantly increase yields in coming decades in view of the shortage of arable land to produce more food for an expanding population. Interestingly, the enhancement of food security is also an argument which can be used to justify farmers' rights on farmers' varieties since protection of the latter's interests will also promote the long-term food security of the majority of the population in India. The other reasons for introducing plant variety protection include the role that farmers play in sustainably using biodiversity and specifically in developing, conserving and enhancing agricultural biodiversity.

Within this general framework, several possibilities are open to the government. It can choose to protect only commercial breeders with the introduction of patents and be fully in compliance with its TRIPs obligations. It may choose to introduce plant breeders' rights and thereby provide rights which include some exceptions in favour of other breeders and farmers. It may further choose to grant rights only to breeders but introduce a benefit-sharing scheme which, for instance, takes into account its obligations under the Biodiversity Convention. Finally, it can go beyond the preceding options and protect all relevant actors in the field of agricultural management, from farmers to local communities and panchayats to commercial breeders and state governments, an approach which takes into account not only TRIPs obligations but also all other relevant international treaties.

III. LEGAL FRAMEWORK FOR PLANT VARIETY PROTECTION AND MANAGEMENT

The legal framework for plant variety protection includes the different treaties that India has ratified in this field and the different legislative instruments adopted to implement international commitments.

16. New Seed Policy, 1988.

A. International Legal Framework

India has taken different kinds of commitments in the field of plant variety protection and management. These include a series of obligations concerning the conservation and sustainable use of biological resources as well as commitments concerning the protection of traditional knowledge and farmers' rights and a series of obligations in the field of intellectual property rights regarding the commercial use of plant varieties.

Firstly, India has ratified the Biodiversity Convention which provides the basic framework for the conservation and the use of biological resources. It affirms India's sovereignty over its biological resources but qualifies India's control with the introduction of the notion of 'common concern' which implies that the protection of biodiversity in India is of interest not only to this country but also to the international community at large. The Biodiversity Convention is noteworthy for recognising the need to conserve while also acknowledging the legitimacy of using biological resources which provide, for instance, every individual's basic food needs. The Convention also provides that governments must preserve traditional knowledge and foster its application.¹⁷ While this provision does not mandate the recognition of the rights of traditional knowledge holders, it provides at least the lineaments of a policy framework in this regard. The Convention also regulates access to biological resources and the sharing of benefits arising from their use. It attempts to provide a framework which respects donor countries' sovereign rights over their biological and genetic resources while facilitating access by users. Access must therefore be provided on 'mutually agreed terms' and is subject to the 'prior informed consent' of the country of origin.¹⁸ Further, the Convention provides that donor countries of micro-organisms, plants or animals used commercially have the right to obtain a fair share of the benefits derived from use. Finally, the Convention constitutes one of the few treaties which offer a specific statement on the relationship between the management of biological resources and intellectual property rights. Article 16 clearly indicates that intellectual property rights are not to undermine the working of the Convention.

Secondly, India has also ratified the PGRFA Treaty. This treaty adopts to a large extent the philosophy of the Biodiversity Convention and provides for the three interrelated goals of conservation, sustainable use

17. Art. 8j, BIODIVERSITY CONVENTION, *supra* n. 2.

18. Art. 15, BIODIVERSITY CONVENTION, *supra* n. 2.

and benefit sharing.¹⁹ The overall aims of the Treaty are the promotion of sustainable agriculture and food security. The Treaty is significant for radically altering the legal status of plant genetic resources in international law. While the previous instrument – the 1983 International Undertaking²⁰ – promoted the sharing of plant genetic resources, the new Treaty affirms states' sovereign rights over their PGRFA and condones the introduction of intellectual property rights. One of the main contributions of the PGRFA Treaty to the international legal framework is its focus on the situation of farmers, their contribution to the conservation of agrobiodiversity, the rights they have over their physical assets – for instance, seeds – and to a much lesser extent the question of traditional knowledge. More specifically, the PGRFA Treaty gives recognition to farmers' contribution to conserving and enhancing plant genetic resources for food and agriculture. It further gives broad guidelines to states concerning the scope of the rights to be protected under this heading but overall devolves the responsibility for realizing farmers' rights to member states. This includes the protection of traditional knowledge, farmers' entitlement to a part of benefit-sharing arrangements and the right to participate in decision-making regarding the management of plant genetic resources. However, the treaty is silent with regard to farmers' rights over their landraces. In fact, the 'recognition' of farmers' contribution to plant genetic resource conservation and enhancement does not include any property rights. In this context, the only rights that are recognized are the residual rights to save, use, exchange and sell farm-saved seeds. The overall significance of the PGRFA Treaty lies in the fact that it is the first treaty providing a legal framework which not only recognizes the need for conservation and sustainable use of plant genetic resources for food and agriculture but also delineates a regime for access and benefit sharing, and in this process provides direct and indirect links to intellectual property right instruments.

Thirdly, India was a founding member of the WTO and in this capacity must implement the TRIPs Agreement. TRIPs generally provides minimum levels of intellectual property rights protection in all member states. This has brought about a substantial burden of adjustment in the patents field because the Patents Act 1970 differed in significant respects from what was required under TRIPs. Among the many changes that India has had to bring in, the introduction of plant variety protection called for by article 27.3.b of TRIPs has given rise to significant debate because of the

choice it offers between adopting patents or a *sui generis* system. This choice has often been interpreted as implying that all countries either have to introduce patents or plant breeders' rights (PBRs). PBRs are intellectual property rights closely related to patents which were first defined in the UPOV Convention.²¹ These rights grant commercial breeders exclusive rights over their inventions but include more exceptions than patents, and in particular can include exceptions in favour of other breeders' research and in favour of farmers. While PBRs constitute one alternative to patents, the *sui generis* option is not limited to PBRs and can be construed in a number of different ways, thereby allowing countries to devise a plant variety protection regime which fits their specific needs and situation while taking their other obligations into account. The inclusion of the *sui generis* option is therefore of great significance within TRIPs because it allows member states to explore alternatives to patents beyond what Articles 7 and 8 allow.²²

Overall, the international legal framework in the field of plant variety protection and management is characterised by its lack of cohesion. While on the one hand, the Biodiversity Convention and the PGRFA Treaty attempt to provide answers to the relationship between intellectual property rights and environmental management, the TRIPs Agreement addresses intellectual property rights issues without taking into account concerns regarding environmental conservation or the management of traditional knowledge. Given that there is no international institution to ensure that different negotiations produce compatible treaties, the cohesion of different international obligations with each other must be mostly judged at the level of their implementation.²³ This is why close scrutiny of implementation legislations is imperative to ensure that all international obligations are given similar importance, with the exception of fundamental rights which by constitutional mandate ought to be given more prominence than the rest.

21. International Convention for the Protection of New Varieties of Plants, Paris, 2 Dec. 1961, as Revised at Geneva on 10 Nov. 1972, 23 Oct. 1978 and 19 Mar. 1991 (UPOV Doc. 221(E), 1996) [hereafter UPOV CONVENTION].

22. Arts. 7 and 8 provide the broader framework within which the TRIPs Agreement must be understood and implemented and may constitute the legal basis for exceptions in favour of developing countries.

23. The Convention on the Law of Treaties, Vienna, 23 May 1969, 8 INTERNATIONAL LEGAL MATERIALS 679 (1969) provides the basic framework for interpreting treaties, and includes provisions concerning the interpretation of different treaties addressing similar issues. It provides, for instance, that states must implement all their international obligations in good faith.

19. Art. 1 of the PGRFA Treaty, *supra* n. 2.

20. International Undertaking on Plant Genetic Resources, Res. 8/83, Report of the Conference of FAO, 22nd Sess., Rome, 5-23 Nov. 1983, Doc. C83/REP.

B. Domestic Legal Framework

Significant progress has been made in recent years towards setting up a legal regime for the management of plant genetic resources. The main legislative instrument is the Protection of Plant Varieties and Farmers' Rights Act 2001 which constitutes the government's response to its obligations under Article 27.3.b of the TRIPS Agreement. The Act focuses on the establishment of plant breeders' rights and farmers' rights. The regime for plant breeders' rights largely follows the model provided by UPOV and the criteria for registration are the same as those found in UPOV, namely novelty, distinctness, uniformity and stability. The Act incorporates elements from the 1978 version of UPOV and includes some elements from the more stringent 1991 version, such as the possibility to register essentially derived varieties.

The second main aim of the Act is the introduction of farmers' rights. At this level, substantial changes were proposed by the Joint Parliamentary Committee to which the Bill was referred after its introduction in Parliament.²⁴ While the original version of the Bill introduced in Parliament only contained a short provision on farmers' rights, the Committee decided to add a whole new chapter on farmers' rights. As adopted, the Act seeks to put farmers' rights on a par with breeders' rights. It provides, for instance, that farmers can, like commercial breeders, apply to have a variety registered.²⁵ Generally speaking, the Act envisages that farmers should be treated like commercial breeders and should receive the same kind of protection for the varieties they develop.

The Act also provides two avenues for benefit sharing.²⁶ The first scheme allows individuals or organizations to submit claims concerning the contribution they have made to the development of a protected variety. The final decision is taken by the Authority established under the Act which determines the amount taking into account the importance of the contribution in the overall development of the variety and its commercial potential. The second benefit-sharing avenue allows an individual or organization to file a claim on behalf of a village or local community. The claim relates to the contribution that the village or community has made to the evolution of a variety.

24. See Joint Committee on the Protection of Plant Varieties and Farmers' Rights Bill, 1999, REPORT OF THE JOINT COMMITTEE (August 2000).

25. S. 16.1.d, PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT 2001 [hereafter PLANT VARIETY ACT].

26. Ss. 26 and 41, PLANT VARIETY ACT.

The Biological Diversity Act 2002 (Biodiversity Act) addresses some questions which are relevant for biodiversity management in general and plant variety management specifically. The main focus of the Act is on the question of access to resources.²⁷ Its response to current challenges is to assert the country's sovereign rights over natural resources. It therefore proposes to put stringent limits on access to biological resources or related knowledge for all foreigners. The Act's insistence on sovereign rights reflects current attempts by various countries to assert control over the resources or knowledge they control. While the Act focuses on preserving India's interests vis-à-vis other states in rather strong terms, its main impact within the country will be to concentrate power in the hands of the government. Indeed, Indian citizens and legal persons must give prior intimation of their intention to obtain biological resources to the state biodiversity boards.²⁸ The Act is even more stringent in terms of intellectual property rights since it requires that all inventors obtain the consent of the National Biodiversity Authority before applying for such rights.²⁹ The impact of this clause is, however, likely to be limited since patent applications are covered by a separate clause.³⁰ Further, the Authority has no extra-territorial authority.

Overall, the Biodiversity Act implicitly takes the position that India cannot do more than regulate access by foreigners to its knowledge base. It does, however, attempt to discipline the intellectual property rights system in some respects. As noted, it requires inventors who want to apply for intellectual property rights to seek the Authority's permission. It also authorizes the Authority to allocate a monopoly right to more than one actor. Further the Authority is also entitled to oppose the grant of intellectual property rights outside India.³¹ The Act also seeks to address the question of the rights of holders of local knowledge by setting up a system of benefit sharing. The benefit sharing scheme is innovative insofar as it provides that the Authority can decide to grant joint ownership of a monopoly intellectual right to both the inventor and the Authority or the actual contributors if they can be identified.³² However, the sharing of

27. The only substantive chapter of the Biological Diversity Act 2002 – Chapter II – is entitled Regulation of Access to Biological Diversity.

28. S. 7, BIOLOGICAL DIVERSITY ACT.

29. S. 6, BIOLOGICAL DIVERSITY ACT.

30. Permission of the National Biodiversity Authority must be obtained before the sealing of the patent but can be obtained after the acceptance of the patent by the patent authority. See S. 6.1, BIOLOGICAL DIVERSITY ACT.

31. S. 18.4, BIOLOGICAL DIVERSITY ACT.

32. S. 21.2.a, BIOLOGICAL DIVERSITY ACT.

intellectual property rights is only one of the avenues that the Authority can choose by way of discharging of its obligation to determine benefit sharing. It is also in the Authority's power to allocate rights solely to itself or a contributor such as a farmer contributor. Other forms of benefit sharing include technology transfers, benefit claimers becoming associated with research and development or the location of production, research and development units in areas where this will facilitate better living standards to the benefit claimers.

Finally, plant variety protection is also influenced by the patent legislation. While the Patents Act as adopted in 1970 dealt with patents in general and was not specifically related to biological resources, it addressed a number of issues that are of relevance in the context of PGR management. It rejected, for instance, the patentability of all methods of agriculture and was generally much more restrictive than similar laws in western countries. TRIPs has imposed significant alterations to this Act. The Patents (Amendment) Act 2002 has generally modified the Act to allow compliance with TRIPs.³³ The Amendment Act brings the duration of the rights to a uniform 20-year period and also substantially modifies the sections concerning the working of the patents by, for instance, doing away with licences of rights. The provision which seeks to oblige patentees to manufacture their inventions in India was also struck out because of the TRIPs requirement that imports should not be treated differently from products locally produced.³⁴ With regard to environmental protection, the Amendment Act includes some of the TRIPs exceptions related to environment and health. It also addresses the question of biopiracy by imposing the disclosure of the source and geographical origin of biological material used in a patented invention. Further, non-disclosure of the geographical origin or the anticipation of the invention in local or indigenous knowledge constitutes grounds for opposing or revoking a patent.

IV. PLANT VARIETY PROTECTION FOR FOOD SECURITY

As noted above, there are a number of different actors involved in plant-variety management, all with the ultimate aim of enhancing food security. Existing conditions indicate that while a significant segment of the overall population has easy access to sufficient food, there remain crores of people whose basic food needs are not met. In an economy where employment remains mostly in the agricultural sector, it is therefore of primary importance to make sure that the legal regime which is being

set up favours access to food for the majority of poor people and fosters farmers' control over their land, crops and knowledge. This section argues that the current legal regime does not go far enough towards empowering farmers. Further, on the basis of the new PGRTA Treaty it argues that a broader conception of farmers' rights should be adopted with a view to foster farmers' hold over their knowledge and with a view to comprehensively implement all international obligations in this field.

1. Assessment of the current legal regime

The legal framework put in place until now can be looked at from two completely different angles. On the one hand, the Indian Plant Variety Act is among the most progressive plant variety protection legislations adopted by a developing country in furtherance of its TRIPs obligations. The apparent will to provide equal rights to commercial breeders and farmers is far-sighted insofar as it indicates a clear understanding that the forces shaping globalisation require the assignment of property rights to all concerned actors in the different fields where appropriation is taking place. In particular, it is noteworthy for providing a clear acknowledgment that farmers' rights can be conceived as intellectual property rights, in exactly the same way as other products of human creativity. On the other hand, it appears quite likely that the chapter on farmers' rights will not be implemented. Firstly, farmers' rights were introduced as an afterthought to the first draft which contained only rudimentary farmers' rights. The Act provides only one set of criteria for registration – which are the criteria taken from the UPOV Convention for the protection of commercial breeders' varieties – and as a result, it will be extremely difficult for farmers to register their varieties even though they are entitled to it. Secondly, the decision of the Government to formally join UPOV will at least put pressure on the Plant Variety Authority to favour commercial breeders over farmers and at worst may lead to the Authority either formally or informally not implementing the provisions of the Act concerning farmers' rights. As a result, though this Act theoretically recognises farmers' rights, a lot remains to be done for farmers' rights to become a reality in the form of intellectual property rights. The protection of traditional knowledge is also taken up in the Biodiversity Act which focuses on the appropriation of Indian traditional knowledge by foreigners but does not empower holders of traditional knowledge with rights to stop unwanted appropriation within the country. Another shortcoming of the Plant Variety Act is that, though TRIPs compliant insofar as it provides for a *sui generis* option within the narrow confines of Article 27.3. b of TRIPs, it only deals with plant variety management from the point of view

33. See PATENTS (AMENDMENT) ACT 2002.

34. Art. 27, TRIPs Agreement, *supra* n. 1.

of their commercialisation and fails to take into account the fact that commercial activities cannot be separated, either legally or in practice, from the conservation of agricultural biodiversity, the rights of farmers* and that of the state.

Apart from the specific problem concerning farmers' rights, the current legal framework is fraught with inconsistencies which are linked to the different origins of the Acts. Each of the three legislative instruments examined above have been individual responses to specific international obligations which have been addressed by different ministries and departments according to the main focus of the concerned treaty. The result is a legal framework which lacks a sense of unity and purpose and instead comprises a collection of defensive responses to international commitments, rather than a cohesive strategy to address internal problems. Consequently, there are, for instance, a number of overlaps between the benefit-sharing regimes proposed in the Biodiversity Act and the Plant Variety Act while the Patents Act does not even acknowledge the issue of benefit-sharing despite the fact that benefit-sharing is on the whole a direct consequence of the introduction of intellectual property rights in the agricultural field.

2. *The need for a broader conception of farmers' rights*

The preceding section indicates that there are some general and some specific problems in the adopted legal regime for plant variety management and protection. A number of these problems are of a technical nature and relate, for instance, to the lack of coordination between the different acts. One more substantive issue is the question of farmers' rights or the rights of farmers over their traditional knowledge. The need to find a more comprehensive answer to this issue has been made more pressing with the ratification by India of the new PGRFA Treaty. This importance of this treaty is linked to the fact that it directly links biodiversity conservation, biodiversity use and farmers' rights and to the fact that it constitutes a direct response to the introduction of intellectual property rights-in-agriculture-through-patents and plant breeders' rights.

The existence of different treaties separately addressing plant variety management and protection makes their joint implementation an onerous task for member states. This process must, however, be undertaken because this is exactly what international law requires, and because this constitutes one important avenue to foster food security at all levels within the country. As a result of international obligations in this field and with a view to foster food security, a comprehensive plant variety protection

regime should include the following elements: the protection of commercially relevant knowledge; the conservation and management of biological resources and plant genetic resources; the protection through property rights of traditional knowledge; and the recognition that plant variety management and protection is intrinsically linked to the fundamental human right to food. In other words, a legal regime concerning plant varieties should not stop at what is commercially useful today but should incorporate, for instance, human rights considerations linked to food security.

Given that the emphasis at the international level has generally been on defining and strengthening the rights of exclusively commercially minded actors through patents and plant breeders' rights, the definition of a broader regime need not add much to existing and well-developed rights. It should rather focus on farmers' rights and the mainstreaming of biodiversity management and traditional knowledge protection. Starting with international legal obligations, the necessity to redraft farmers' rights to make them effective has been made more pressing following the ratification of the PGRFA Treaty. While the TRIPS agreement makes no mention of the necessity to protect farmers' rights, the PGRFA Treaty – while not defining farmers' rights at the international level – specifically puts the onus on member states to make farmers' rights a reality.³⁵ A few of the substantive elements that make up farmers' rights are indicated in the Treaty. These include, the protection of traditional knowledge, equitable benefit sharing, and the right to participate in decisions concerning the management of plant genetic resources. In other words, the Treaty steers countries towards recognising the need for giving farmers control over their knowledge for reasons of justice as well as to foster sustainable use and conservation of plant genetic resources. However, it leaves member states free to decide on the most appropriate framework for the same. There are a number of other elements in the PGRFA Treaty which point the direction for further work in this area, both in domestic and international law. The access and benefit-sharing regime instituted under the PGRFA Treaty is, for instance, much more developed and comprehensive than the one under the Biodiversity Convention. The PGRFA Treaty also indirectly highlights that it is difficult to distinguish biological resources, genetic resources and related knowledge. Indeed, the definition of genetic resources under the Treaty includes reproductive and vegetative propagating material that contains functional units of heredity.³⁶ More

35. Art. 9.2, PGRFA Treaty, *supra* n. 2.

36. Art. 2, PGRFA Treaty, *supra* n. 2.

broadly, the Treaty links plant genetic resource conservation, intellectual property rights, sustainable agriculture and food security.

Some indications of the possible shape of a comprehensive farmers' rights regime at the domestic level can be given. Firstly, farmers' rights should be conceived as a positive mechanism giving traditional knowledge holders property rights and therefore full control over their knowledge. This involves allowing farmers to commercialise their own knowledge. In this sense, farmers' rights are based on the recognition that all economic actors should have commercial rights over their knowledge, and not only one specific category of inventors. A further justification for the introduction of farmers' rights is the role that property rights play in fostering the sustainable use and the conservation of resources due to the intrinsic link between the knowledge and the resource and the requirement of ownership of both to foster their conservation. In this sense, farmers' rights are perfectly suited to play a multiple role in granting full property rights to farmers which allow commercialisation if desired, in contributing to agro-biodiversity conservation, and simultaneously fostering food security at the local level. Overall, farmers' rights should be conceived from the point of view of farmers and in accordance with their view of sustainability and commercial use. If this is not achieved, there is a significant danger that farmers' rights will be used only as a way to force poor farmers to maintain agro-biodiversity for the global good of humankind with minimal personal rewards.³⁷

Secondly, in the context of the multiple goals of farmers' rights, other actors involved in agro-biodiversity management should also have duties towards the promotion of food security, agro-biodiversity conservation and sustainable use. While farmers directly benefit from agro-biodiversity conservation, the global community also benefits in direct and indirect ways. This calls for the sharing of conservation obligations on an equitable basis between all actors benefiting from the exploitation of agro-biodiversity. This burden should not only be spread amongst farmers and local firms marketing seeds, foodstuffs and other crops but also at the international level, given that outside-firms, individuals, and eventually, the international community benefit from these conservation activities.

Thirdly, the question of the introduction of farmers' rights includes important issues concerning the holders of the rights. Intellectual property

37. Cf. FAO Commission on Plant Genetic Resources. Revision of the International Undertaking. Analysis of Some Technical, Economic and Legal Aspects for Consideration in Stage II: Access to Plant Genetic Resources, and Farmers' Rights. Doc. CPGR-6/95/8 Supp.

rights such as patents are often conceived as purely individual rights even though in practice, they can easily be shared among several individuals or entities. Intellectual property rights can less easily 'legde' themselves to shared management in the case of an unidentifiable number of rights holders. Farmers' rights present specific problems in this field. In some instances, specific individuals may make individual contributions to the development of a new or improved plant variety. In this situation, the model provided by individual rights can be applied in the case of farmers' rights. This case is, however, likely to be at most infrequent given that novelty is very often the product of direct or indirect collaboration between different individuals and/or communities. As a result, farmers' rights are likely to be of a communal nature. The usual intellectual property rights model is not well suited to the recognition of common property rights over knowledge because it generally seeks to individualise contributions to the development of science and technology. As a result, it will be necessary to develop new tools to take into account the special nature of knowledge pertaining to plant genetic resources. Even in cases where contributions by specific individuals can be identified, it may not be equitable to assign rights to specific individuals because the subject matter of farmers' rights is closely linked to food security which is of direct interest to each and every individual in the local community and beyond. One way to solve the problem of allocation in countries like India which have institutions of local democratic governance is to determine that panchayats or their equivalent elsewhere should be the centre/entity for locating the ownership of farmers' rights. With appropriate safeguards to ensure that panchayats do not replicate economic inequalities between members of a local community, they can constitute an appropriate institutional framework for ensuring that everyone benefits from any existing entitlements. The rationale for not following the usual individual allocation model is that knowledge pertaining to plant genetic resources is directly related to the fulfilment of basic food needs for all individuals, landowners, farmers, manual labour and non-farming individuals in a given community. Farmers' rights seek to give control to individual and local communities over their knowledge and resources. This does not imply that the rights conferred must be to the exclusion of any other similar right elsewhere. In terms of the possible commercialisation of the product, this indicates that instead of a monopoly right, all rights holders are entitled to separately manufacture and commercialise their own products without infringing anyone's right.

Fourthly, the question arises of the uses to which farmers' rights can be put. From a broad perspective, these can be summarised under 'defen-

sive' and 'positive' functions. The former will be there to help farmers fight the appropriation of their resources and knowledge with legal tools. Today, the whole of 'traditional knowledge' is deemed to be in the public domain because it cannot be assigned through patents or plant breeders' rights. Farmers' rights constitute a first step towards re-establishing a fair playing field in which all actors have claims over their knowledge. Farmers' rights will also constitute the basis for claims of benefit-sharing as recognised at the national and international levels. The positive function of farmers' rights is the most innovative and important in the long run. In a world where all resources and knowledge are being assigned, it is imperative for reasons of equity and food security that farmers and farming communities acquire control sanctioned by the law as this constitutes one of the few ways in which incentives for agro-biodiversity conservation and innovation at the local level can be maintained. The commercial use of the protected knowledge may serve as an added bonus which traditional knowledge holders may or may not use.

V. CONCLUSION

The introduction of diverse forms of intellectual property rights in the agricultural field is on the whole completely novel in India and mainly linked to the necessity to comply with India's existing international obligations and to the general trend towards the privatisation of knowledge in recent decades. This new system is in complete contradiction with the previous system of agricultural management which privileged the sharing of resources and knowledge concerning plant varieties by all actors from local farmers to those at the international level. In this context, while individual property rights over state-of-the-art inventions are being strengthened in large part in response to WTO related obligations, the development of strong and effective farmers' rights is of increasing importance. This should allow them to defend their interests against fraudulent appropriation and to allow them to benefit from their own knowledge in a legal and commercial sense if they so wish. Farmers' rights should, however, not be conceived strictly along the lines of existing intellectual property rights such as patents and plant breeders' rights. In fact, while the commercialisation of food crops may be important to all actors engaged in agricultural management, it is by far not the only relevant consideration. Much broader issues such as the conservation and sustainable use of agro-biodiversity and food security for each and every individual are as important and probably much more central than commercial considerations in a field which directly concerns the fulfilment of basic food needs. In this sense, the introduction of farmers' rights fulfils a number of

significant functions both from a socio-economic and socio-ecological point of view:

- Farmers' rights contribute to making the legal system fairer by providing property rights to all relevant actors in plant variety management;
- Farmers' rights contribute to the recognition of the contribution of farmers to food security, to conservation and sustainable agro-biodiversity management and to innovation in agricultural management; and finally
- Farmers' rights will make an enormous contribution to food security by fostering control, not only over resources and land but also over knowledge for the dozens of crores of people who are directly engaged in small-scale agricultural management.

Conversely, the development of farmers' rights provides an opportunity to re-examine patents and plant breeders' rights. This should contribute to make these more 'traditional' intellectual property rights more relevant to the field of agriculture by, for instance, imposing new conditions on rights holders concerning both traditional knowledge and biodiversity conservation.

RESOURCES AND FOLKLORE: INDIAN APPROACH TO LEGAL OBLIGATIONS

Suman Gupta*

The economic, scientific and commercial values of traditional knowledge, traditional knowledge associated with genetic and bio-resources, and folklore have attracted widespread attention. Globalisation, new technology, and increased international trade have raised new intellectual property issues. Biotechnological revolution has made it possible for the pharmaceutical industry to take keen interest in genetic resources and traditional methods of medical care. Similarly, folklore traditions are also being exploited by various ways. These new issues have raised the question for efficient and effective protection of traditional knowledge and rights and interests of traditional knowledge holders. The World Intellectual Property Organization (WIPO) has done significant work to facilitate discussion on these new intellectual property issues regarding genetic resources, traditional knowledge and folklore. As the problem has complex legal and ethical as well as economic and social dimensions, the WIPO has established the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, to provide a forum for the Member states to discuss these issues. The Intergovernmental Committee was established in September 2000. In its two meetings, held so far, more than 100 States, 50 non-governmental organizations, numbers of other intergovernmental organizations along with the persons from the local communities have participated to discuss the issues concerned. At its first Session, the Committee tried to give equal weight in the discussions to each of the three elements i.e. Genetic Resources, Traditional Knowledge, and Folklore. The Committee discussed the determination of legal standards and practical measures to facilitate activities in these three fields.

I. PROTECTION OF GENETIC RESOURCES

Issues concerning Genetic Resources and related traditional knowledge

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1. Henry Olsson, THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE WIP/O/GIC/UK/CNRA/VI/12 (2002)

and their relationship with intellectual property rights were in fact first mentioned in the Convention on Biological Diversity² (CBD), which was adopted on 5th June 1992. The objectives of the CBD are conservation of biological diversity, the sustainable using of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.³

To fulfil these objectives, it is necessary that Member States obtain advanced technological means and measures to conserve biological diversity. The development, exploitation and commercialisation of these advanced technological means in the field of biotechnology rely on available genetic resources. The protection of intellectual property is very important in the development and exploitation of advanced technologies. Thus the CBD involves intellectual property issues in relation to access to genetic resources, bio-technical inventions and traditional knowledge. The main principles established by CBD provide that the Member States have the sovereign right to exploit their own resources pursuant to their own environmental policies⁴; that access to genetic resource shall be subject to "Prior Informed Consent" of the providing party⁵; that the benefits arising from the commercial and other utilization of genetic resources should be shared in a fair and equitable way⁶ and that access to genetic resources and sharing benefits, both shall be upon mutually agreed terms, named as Contractual Agreements.⁷ The Intergovernmental Committee of WIPO at its First Session adopted five Work Programs on its agenda for the solution of problems relating to Genetic Resources. They are as follows:

2. United Nations CONVENTION ON BIOLOGICAL DIVERSITY (CBD) signed at Rio de Janeiro, on 5th June 1992 and came into force on 29th December 1993. India ratified it in February 1994.
3. Art. 3.
4. Art. 3
5. Art-15-(5)
6. Art. 15(7). Through its 42 Articles, the CBD recognizes national sovereignty over biological resources, calls for taking general measures for conservation and sustainable use, identification and monitoring of components of biological diversity, *in-situ* and *ex-situ* conservation, sustainable use of components of biological diversity, incentive measures, research and training, public education and awareness, impact assessment and minimizing adverse impacts, access to genetic resources on mutually agreed terms and with 'prior informed consent' of the country providing the resources. It also provides for transfer of technology including biotechnology on fair and most favourable terms from developed to developing countries.

A. *Prior Informed Consent*

The issue of 'Prior Informed Consent' in relation to Genetic Resources and Related Traditional Knowledge has been highlighted in the CBD. The first task of the Intergovernmental Committee which is concerned with the development of appropriate provisions or guidelines for National Patent Laws to ensure consistency between the granting of patents and measures which the States have taken to control access to genetic resources deal with the issue of prior informed consent.⁸ Thus, Prior Informed Consent is a condition for the granting of patents on the basis of genetic resources. This task has not so far been dealt in detail in the Intergovernmental Committee.

B. *Patentability of Biotechnology Inventions*

The second task of Intergovernmental Committee concerns the Development of Legal Standards (in the form of Guidelines) relating to the availability and scope of patent protection to structures and compositions derived from, or isolated from, naturally occurring living organisms and also to early stage biotechnology inventions.⁹ No active work has been undertaken on this issue until now.

C. *Benefit-Sharing*

The third issue concerns benefit-sharing from the use of genetic resources. The task of Intergovernmental Committee is to develop practical and low cost mechanisms to implement benefit-sharing arrangements under multilateral system for access to genetic resources and such benefit-sharing. In this task also, the work has not progressed much.

D. *Guide Contractual Practices*

This is a practice-oriented task where sufficient progress has been made. Guide Contractual Practices relates to development of Guidelines and Model Intellectual Property Clauses for access to genetic resources and benefit sharing. The Committee gave support for the construction of WIPO database containing information in this respect and to disseminate a questionnaire to gather information to be put into the database. The Committee believed that it would be of great practical value.

E. *Management of Genetic Resources*

The fifth task of the Committee is to take measures to improve the management of genetic resources for effective conservation. This task did not receive much support and has not been pursued till now.

II. PROTECTION OF TRADITIONAL KNOWLEDGE

Exploitation of traditional knowledge has increased in industrial activity. Patents have been granted for inventions, which were actually not new as they reflected only previously known traditional knowledge. Local and tribal communities over generations have bred races of several food, medicinal and cash crops. The landraces bred by farming communities are the foundation material of modern plant breeding and global food security. There would be no plant breeders working on experimental farms if it were not for the prior knowledge gained from these rural and tribal communities. Thus, these people own the bio-resources in their region since it is they who maintain them and possess the knowledge of their properties and use. This traditional knowledge automatically confers on them certain rights including the right to share the benefits. This new problem asks for better protection for traditional knowledge.

A. *Need and Importance of giving a Proper Definition to Traditional Knowledge*

While dealing with the intellectual protection to traditional knowledge, it is very important to define as precisely as possible, what the term traditional knowledge means. The definition of traditional knowledge has different meanings when used for different purposes, such as sociological, historical or legal purposes. The concept of traditional knowledge may refer to "indigenous knowledge, traditional medicine, or knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."¹⁰ The CBD uses the term traditional knowledge as "a term used to describe a body of knowledge built by a group of people through generations living in close contact with nature." The WIPO uses the term traditional knowledge to refer to tradition based literary, artistic or scientific works; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information, etc.

8. International Bureau of WIPO, INDUSTRIAL PROPERTY PROTECTION OF BIOTECHNOLOGICAL INVENTIONS BIOT/CE/11/ and BIOT/CE/1V/2.

9. International Bureau of WIPO, WIPO AND INTERNATIONAL COOPERATION IN RELATION TO PATENTS WIPO/PS/KL/86/1.

10. Song Jianhua, INTELLECTUAL PROPERTY AND GLOBAL ISSUES: IP PROTECTION FOR TRADITIONAL KNOWLEDGE, ACCESS TO GENETIC RESOURCES AND FOLKLORE, WIPO/IP/DEL/02/2 (2002).

This highly diverse and dynamic nature of traditional knowledge makes it impossible to develop a single and exclusive definition of the term. The Intergovernmental Committee, at its Third Session, discussed a document on "operational definition of traditional knowledge." No conclusion was, however reached. It has been left to the Secretariat to prepare a document on the various elements, which could make up a working definition in the next session of the committee. The Committee has also decided, with consensus of members, to make efforts to delineate the scope of subject matter for the purpose of having a definition of traditional knowledge. This is necessary for assessing the availability and scope of intellectual property protection for traditional knowledge within the scope of subject matter covered by definition, and also identifying any elements of this subject matter that require additional protection.

One more reason for giving a relatively precise and exact definition and scope of the subject matter is for drafting domestic legislation and international negotiations. A definition is also necessary to differentiate it from folklore because the protection of expressions of folklore is a separate topic. In addition, the approach of some countries to protect expressions of folklore usually has some relationship with or has been incorporated in copyright law. Thus the task of the Committee is focused on these three areas - genetic resources, traditional knowledge and expression of folklore. Therefore, it is better to exclude elements related to folklore while drafting the definition of traditional knowledge for purpose of domestic legislation and further negotiations.

B. Means for Protection of Traditional Knowledge

The protection of traditional knowledge received growing attention following the adoption of the CBD in 1992. The CBD seeks to encourage access to the world's genetic resources, traditional knowledge and folklore resources provided they are utilized with the informed consent of the holder of the resources and any benefits derived from the access are shared in equitable manner. However, divergences exist as to whether intellectual property rights should be applied and if applied what should be the rationale and modalities of protection; and should protection be through the establishment of a new or *sui generis* form of protection. Another alternative is the *misappropriation option*, i.e. to establish a mechanism to prevent third parties from unduly appropriating traditional knowledge. The protection of traditional knowledge concerns two distinct elements: passive protection and active protection.

Passive Protection - Integration of Traditional Knowledge into Searchable Prior Art: It requires ensuring that patents are not granted for inventions based on previously known traditional knowledge. In various cases patents have been granted for the inventions which were not new but only a slight improvement on previously known traditional knowledge. Thus, it has become important to take measures to integrate such documentation into searchable prior art for the purpose of patent examination. The Intergovernmental Committee has initiated number of activities for this purpose.¹¹

Thus, traditional knowledge may be used as *prior art* in course of patent examination. The purpose is to prevent applications involving traditional knowledge from being granted patents. These measures will protect the interests and economic benefits of traditional knowledge holders, who could be individuals, families, communities, or even countries. We know that traditional knowledge has been developed by communities and distributed by oral means, and in addition there is almost no record of its documentation, so *Patent Examiners* are not able to Search and Use the related traditional knowledge to evaluate patent applications that are generated from traditional knowledge. This makes it important that the problem of documentation of traditional knowledge should be solved first.

Active Protection of Traditional Knowledge: It means the development of a *sui generis* protection system for such knowledge. The passive protection of traditional knowledge ensures that patents are not granted for those inventions that are based on previously known traditional knowledge. However, active protection ensures that traditional knowledge enjoys some kind of Intellectual Property Protection. Active Protection can be made in two ways:

1. Application of Existing Intellectual Property Standards to provide Protection for Expressions of Traditional Knowledge: It is

11. Activity 1: Preparation of an Inventory of Traditional Knowledge related Periodicals, Gazettes, Newsletters, etc. For this inventory, number of suggestions have been made such as integration of this inventory in the Minimum Documentation List of the PCT (Patent Cooperation Treaty). Inventory has to be taken into account by the International Patent Classification Task Force on the Classification of Traditional Knowledge; inventory should be uploaded on the WIPO Website.
- Activity 2: Secretariat should prepare an Intellectual Property Tool Kit to facilitate the understanding of the intellectual property implications of the documentation of Traditional Knowledge.
- Activity 3: Preparation of an Inventory of existing Databases on Disclosed Traditional Knowledge.

important to assess to what extent existing intellectual property system could provide protection to expressions of traditional knowledge. Such protection can be provided through the application of systems for the protection of trademarks, geographical indications, patents, copyright and related rights, trade secrets and industrial designs.¹²

2. Development of New Intellectual Property Standards for the Protection of Traditional Knowledge: It is necessary that new intellectual property tools must be developed and designed to provide additional protection to traditional knowledge, because protection by the existing standards is not complete. The existing intellectual property system does not properly protect traditional knowledge because of its particular characteristics, such as its transmission from generation to generation in constantly changing environment and furthermore the objective of existing system is the protection of private rights. As the intellectual property system is itself in a progressive stage the development of new tools may not be impossible. The WIPO Convention has taken a broad concept of intellectual property. It provides that: "[I]ntellectual property shall include existing intellectual property rights and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields". This concept provides a strong base for developing new intellectual property standards for the protection of traditional knowledge.

The Intergovernmental Committee at its Third Session explored the possible structure of a *sui generis* system for the protection of traditional knowledge. It found that certain elements need further study and more discussions. Some of these elements are: The policy objective of the

12. Trademarks: Traditional knowledge holders can have their knowledge protected through registering Collective and Certification Trademarks to establish signs under which goods manufactured in accordance with particular traditional methods or standards are sold.
- Geographical Indications: Holders can also use geographical indications to protect their traditional products.
- Patents: Patents could protect traditional knowledge, inventions or innovations based on traditional knowledge by filing collective patent applications through associations of traditional knowledge holders.
- Copyright and Related Rights: Traditional knowledge holders can protect their "moral rights" under copyright and compilations of traditional knowledge documentation through the concept of original and non-original database protection.
- Trade Secret: Traditional knowledge may also be protected by means of trade secret and law of unfair competition.

protection; the subject matter for protection; the criteria according to which such subject matter should be protected; the ownership of the rights; the rights to be granted; the means for acquisition of the rights; the administration of the rights; and the term of protection and expiry of the rights.

Thus, protection of traditional knowledge could be setup in two different tracks, the folklore track and biodiversity track. The folklore track will emphasize the cultural contexts in which traditional knowledge operates while the biodiversity track will concentrate on biodiversity associated traditional knowledge. There is also a need to explore the interaction between *sui generis* system and existing intellectual property protection system.

III. PROTECTION OF EXPRESSIONS OF FOLKLORE

Folklore is cultural heritage of a nation that is still developing in its contemporary forms. It has specific importance for developing countries, as it is a base of their cultural identity and means of self-expression within their own communities as well as in their relation with the world. So, folklore is a living, functional tradition rather than a souvenir of the past. The notion of folklore covers a number of artistic expressions in the form of songs, music, dance and handicrafts developed by the communities or individuals over the centuries in changing phenomenon.¹³

A. Need and the History of the Protection of Folklore

The developing technology, particularly in the fields of sound, audio visual recording, broadcasting, cinematography and cable television has lead to exploitation of this cultural heritage. Expressions of folklore are not only commercialised without any respect for the cultural or economic interests of the communities in which they originate, but are also distorted for marketing them. The Neighbouring Rights cannot fully provide protection against the improper use of folklore, since they cannot prevent the copying of expressions of folklore that are not performed, broadcast or contained in phonograms. Furthermore, the limited duration of the protection of neighbouring rights does not fit folklore as the limited duration of copyright does not fit it. The protection of expressions of folklore by means of copyright law was undertaken in the Diplomatic Conference of Stockholm (1967) for the Revision of the Berne Convention. Article 15(4)

13. Ana Maria Pacon, 'THE PROTECTION OF TRADITIONAL KNOWLEDGE IN PERU', WIPOLIP/DEL/02/4 (2002).

of the Stockholm (1967) and Paris (1971) Acts of Berne Convention says that:

(a) in the case of unpublished works where the identity of author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for the legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union that make such designation under the terms of this provision shall notify the Director General (of WIPO) by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.¹⁴

After this, in 1978, at the meeting of WIPO's Governing Body it was felt that very few countries had formulated legal norms to protect folklore. The International Bureau of WIPO then prepared a first draft of *sui generis* Model Provisions for an intellectual-property-type national protection of folklore against certain unauthorized uses and against distortion. This draft was submitted in Daker in 1979 to WIPO's Permanent Committee on Copyright and Neighbouring Rights. This Committee recommended that a joint WIPO/UNESCO Working Group should be convened and should deal not only with domestic but also with international aspects of the legal protection of folklore creations. WIPO and UNESCO convened Working Group in 1980 at Geneva to study the Draft Model Provisions as well as international measures for the protection of folklore. This working group recommended that the Secretariats of WIPO and UNESCO should prepare a revised draft taking into consideration all the interventions made in Working Group. The Secretariats prepared the revised draft and submitted it in the Second Meeting of Working Group at Paris in 1981. The outcome of this meeting was submitted in 1982 to a Committee of Government Experts, convened by WIPO and UNESCO at Geneva. The Committee adopted what is now called, "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" referred as "Model Provisions".¹⁵

14. WIPO, INTELLECTUAL PROPERTY READING MATERIAL, Publication No.476 (E) 179-80 (1995).

15. *Ibid.*

The issue of the protection of the folklore is now also on the agenda of the Intergovernmental Committee. The Committee proposed three activities in this context: (i) Updating of the model provisions; (ii) Improving of the protection of handicrafts and other tangible expressions of folklore and (iii) Revival of the efforts to establish an international protection system. The secretariat prepared a detailed Report on the National Experiences with the Legal Protection of Folklore and proposed four activities (i) Increased legal-technical assistance to countries for a better protection of folklore; (ii) Updating of the Model Provisions; (iii) International protection of expressions of folklore in the form of a *sui generis*-system and (iv) Studying the relationship between customary laws and protocols in the folklore field and the formal intellectual property system.

*B. Model Provisions for National Laws on the
Protection of Expressions of Folklore Against
Illicit Exploitation and Other
Prejudicial Actions*¹⁶

The basic principle in providing for legal protection is maintaining a proper balance between protection against abuses of expressions of folklore and the freedom and encouragement of their further development and dissemination as well as adaptation for creating original author's works inspired by folklore. This is because, a major part of expressions of folklore forms a living body of human culture which should not be restricted in its unfolding or influence on creativity by too rigid protections.

Definition and Subject Matter of Protection: Model Provisions do not provide any definition of folklore. However Section 2 defines the term "expressions of folklore". It provides that, "expressions of folklore are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community". The use of words "expressions" and "productions" rather than "works" is to underline the fact that the provisions are *sui generis* rather than of copyright, since "works" are the subject matter of copyright. Expressions of folklore are subdivided into four groups depending on the form of "expression", namely,

16. *Id.* at 180-87.

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|--|-------------|--|
| 1. Expression by words | "Verbal" | folk talks, folk poetry and riddles |
| 2. Expressions of musical sounds | "Musical" | folk songs and instrumental music |
| 3. Expressions by the human body | "by action" | folk dances, plays and artistic form of rituals |
| 4. Expressions incorporated in a material object | "tangible" | drawings, paintings, pottery, terracotta, wood-work, metal work etc. |

The first three groups need not be reduced to material form, i.e., words need not be written down, music need not exist in the form of musical notation and the bodily action need not exist in written choreographic notation. The fourth group called tangible expressions must be in a permanent material form, such as stone, wood, textile, gold, silver or any other metal etc.

Illicit exploitation and prejudicial actions: Section 1 of Model Provisions defines two main categories of acts against which expressions of folklore are protected. They are: Illicit exploitation and other prejudicial actions:

Illicit Exploitation: It means any utilization of expression of folklore if it is made both with gainful intent and outside its traditional or customary context without authorization by a competent authority or the community concerned. This definition means: any utilization, even with gainful intent, within the traditional or customary context is not subject to authorization; and any utilization, even by members of the community where the expression has been developed and maintained, outside that context and with gainful intent requires authorization. "Traditional Context" means using an expression of folklore in its proper artistic framework based on continuous usage by the community, for example, to use a ritual dance in its traditional context means to perform it in the actual framework of the respective rite. "Customary Context" refers to utilization of expressions of folklore in accordance with the practices of everyday life of the community, for example, usual ways of selling copies of tangible expressions of folklore by local craftsmen. A customary context develops and changes more rapidly than traditional context. Section 3 specifies various acts of utilization that requires authorization.

Other Prejudicial Actions: Section 5 of Model Provisions explains four distinct offences detrimental to interests to the use of expressions of folklore: (i) In all printed publications, and in connection with any commu-

nication to the public of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived. Non-compliance is subject to punishment under Section 6, (ii) Unauthorized utilization of an expression of folklore where authorization is required constitutes an offence; (iii) Deception of the public, by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case, is also punishable and (iv) Public utilization distorting the expression of folklore, in any direct or indirect manner, "prejudicial to the cultural interests of the community concerned" is an offence. The term "distorting" covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore published, reproduced, distributed, performed or otherwise communicated to the public by the accused. Section 6 is penal section that provides punishment.

Permitted Use: Model Provisions do not prevent indigenous communities from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. This is necessary because keeping alive a traditional popular art is closely linked with reproduction, recitation, or performance of traditional expressions in the originating community. The requirement for authorization to adapt, arrange, reproduce, recite or perform such creations can place a barrier in the way of the natural evolution of folklore and even they could not be enforced in societies in which folklore is a part of life. This is the reason that Modern Provisions allow, "any member of a community of the country to freely reproduce or perform expressions of the folklore of his own community in their traditional or customary context, irrespective of whether he does it with or without gainful intent and even if it is done by means of modern technology provided such technology has been accepted by the community as one of the means of the evolution of its living folklore" Section 4 sets out four special cases, in which there is no need to obtain authorization even if utilization has been made against payment and outside its traditional or customary context. They are: use or utilization for purposes of education; utilization made "by way of illustration" in any original work of an author, provided that such utilization is compatible with fair practice as it is understood in the country concerned; expressions of folklore borrowed for creating an original work of an author and "incidental utilization" which includes utilization in connection with reporting on current events and utilization of images where the expression of folklore is an object permanently located in a public place.

C. Enforcement of the Protection of Expressions of Folklore

Who Authorises Utilization of Expressions of Folklore: Model provisions refer to "competent authority" and "community concerned", and avoid the term "owner" of the expression. The reason is that in some countries, expressions of folklore are regarded as the national property, while in other countries, the sense of ownership of the traditional artistic heritage may be more developed in the communities themselves. Thus, in countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose off their folklore and are sufficiently organized to administer the utilization of folklore, such uses may be subject to authorization by the community itself. However, in countries, where the traditional artistic heritage of a community is considered as a part of cultural heritage of a nation/ or where the communities concerned are not organized to administer the use of their folklore themselves, "competent authorities" may give authorization (Section 9).

Process of Authorization: Section 10 provides that an authorization must be preceded by an application submitted to competent authority. The task of competent authority is to grant authorization for certain kinds of utilization, to receive applications for authorization of such utilizations, to fix and collect fees if required by law.

Use of Fee: Section 10 of Model Provisions deals with the purpose for which the collected fee must be used. The fee must be used for promoting or safeguarding the national culture and folklore. Certain percentage should go to the community concerned and rest should cover the costs of administration of the authorization system. Where fees are directly collected by the community the use of fee is also decided by the community. The State, if want to share revenue can either impose tax or share by other measures.

IV. THE INDIAN APPROACH

Biotechnology, which was confined to laboratory, has now entered into the market. Its raw material is genes, cells and living organisms like bacteria, plants and animals. The application of biotechnology in various economic sectors have made it a money-spinner, so corporate giants of the world seek control over it. The biotechnological revolution has taken place in the developed countries i.e. the developed world has the technological tools needed to convert genes to products and then to money. However, most of the world's bioresources are found in developing countries. Now, since bioresources constitute indispensable inputs for

biotechnology, and in order to overcome its limitations of raw material and to remain leaders of the commercial exploitation of genetic material the transnational corporations of the developed world have been making systematic efforts to corner the bioresources of developing countries. They have persuaded their governments to negotiate bilateral agreements and multilateral regimes. The use of bioresources is regulated through two treaties - The General Agreement on Tariffs and Trade (GATT) now revised as World Trade Organization (WTO) and the CBD.

The developed countries thus have advanced technology in the field of genetics and genetic engineering but have little or no germplasm; on the other hand developing countries are the repositories of the genetic wealth and indigenous knowledge about how to use this wealth. India is one of the germplasm-owning countries that also has a good indigenous technology. The combination of technology with germplasm, both its own, puts India in a position to take advantage in the field of biotechnology and emerge as a global leader. Furthermore, India's future prospects for development and its place in the world economy depends upon its ability to take advantage of biotechnological revolution. India is in advantageous position to do so, not only because it possesses the bulk of the world's bioresources, but also because of the immense potentialities of applying biotechnology in the field of agricultural and natural resources development.

The cases of turmeric, *basmati* and *neem* have shown that possession of all relevant information is extremely important in order to reclaim the bioresources that foreign multinationals try to usurp from us through patenting. Equally important is the prompt enactment of legislations on subjects covered under TRIPs Agreement and the CBD. This is because rights must be established before they can be exercised. The challenge to the patenting of *basmati* rice, for example, has gone by default because we have not taken legal action to claim *basmati* as a geographical designation. *Basmati* rice is associated with India and Pakistan as a product special to that region, similar to that of France with Champagne wine and Scotland with Scotch whisky. By selling *basmati* rice without an agreement with India and Pakistan, the Americans are violating the CBD, which grants countries the ownership rights over the germplasm found in their territories. The second violation is that of geographical indication, so there is a need to be vigilant on this score since we grow and market various special products that are associated with our regions like Darjeeling tea, *Afonso* and *Dasher* mangoes and *Shahi* *Leechi*. Thus, there are three areas of concern pertaining to intellectual property rights relevant to biological materials - protection of geographical indication, protection of

the germplasm and plant varieties, and the protection of biological diversity, indigenous knowledge and benefit sharing.

Protection of Geographical Indications: The protection based on geographical indications is to be found in Section 3 of TRIPs. Articles 22, 23 and 24 deal with the protection of goods that are geographically indicated. The intellectual property regime in GATT/WTO acknowledges the claim of a region over products that are associated in a special and specific way only with that region. Unless a geographical indication is protected in the country of its origin, there is no obligation under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) for other countries to extend reciprocal protection, whereas India would be required to extend protection to goods imported from other countries which provide for such protection. Furthermore, prevention of unauthorized persons from misusing geographical indication would not only protect consumers from deception but would also add to the economic prosperity of the producers of such goods and also promote goods bearing Indian geographical indications in the export market. A geographical indication is the name of a country, place or region which indicates that particular goods originating from such areas have some special characteristics which are only due to their origin in particular geographic location. These special characteristics may be due to natural factors (such as raw material, soil, climate, temperature, moisture) or the method of manufacture or other human factors. Geographical indication is regarded by the buyers as descriptive of the geographical location of origin of goods. The protection of geographical indication is necessary in commercial relations both at the national and international level because wrongful use of it can be misleading for purchasers of goods and is contrary to honest practices and the wrongdoer gains an unfair advantage over his competitors. In view of the above circumstances, it was considered necessary to have a comprehensive legislation for providing adequate protection for geographical indications and their registration, and therefore The Geographical Indications of Goods (Registration and Protection) Act 1999 was passed.¹⁷

The Protection of Plant Varieties and Farmers' Rights Act 2001: This legislation was necessitated by the commitments that India made in the Agreement on TRIPs when it ratified the Uruguay GATT Round in 1994. Article 27.3(b) of TRIPs which deals with the protection of the new plant

17. Geographical indications are protected through registration and through infringement proceedings by authorised users. Any person who wrongfully uses or falsely applies geographical indication or sells goods to which false geographical indication is applied can be fined up to Rs. 3 lakh and imprisonment for a term of 6 months to 3 years.

varieties offer three options: (i) protection granted by a patent; or (ii) an effective *sui generis* system; or (iii) by a combination of the two. India adopted a *sui generis* system rather than the precast UPOV model.¹⁸ The Act provides for the establishment of an effective system for protection of plant varieties, the right of farmers and plant breeders and the development of new varieties of plants. Protection of farmers' rights is necessary for the contribution they have made in conserving, improving and making available plant genetic resources for the development of new varieties. Protection of breeders' rights is necessary for accelerated agricultural development, to stimulate investments for research and development both in public and private sector and to facilitate the growth of seed industry to ensure the availability of high quality seed and planting material to the farmers. The Act provides for benefit sharing for the tribal, rural families or individual farmers or local communities if they establish any linkage of varieties developed by them to the new protected plant varieties registered by breeders.¹⁹

The Biological Diversity Act 2002: India is a party to the CBD, which has the main objective of conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of utilization of genetic resources. The role of indigenous knowledge in the realm of medicinal plants is more obvious than in crop varieties. Knowledge about the characteristics of a particular plant and its properties as a healthy substance gives medicinal plants their social and economic value. This knowledge of use has been acquired through hundreds of years of experience, trial and error and incremental refinement. The communities have developed the knowledge of the plants, animals, minerals

18. International Bureau of WIPO, PROTECTION OF EXPRESSIONS OF FOLKLORE GIC/UK/CNR/VI/12.

19. Thus, the use of farmer varieties to breed new varieties will have to be paid for. The Act constitutes a National Gene Fund, which shall be applied for payment by way of benefit sharing, compensation payable to communities, expenditure for supporting the conservation and sustainable use of genetic resources and for strengthening of *panchayat* in carrying conservation and sustainable use. The Act provides that any person who is neither a breeder nor a registered agent of the variety registered under this Act shall be infringer if either he uses, sells, exports, imports or produces such variety or give identical or deceptively similar denomination to any other variety to cause confusion in the mind of public. The penalty for infringement ranges from Rs. 50,000 to 5 lakh as well as jail term from 3 months to 2 years. Thus this *sui generis* legislation places farmers' rights at par with breeders rights and acknowledges and rewards the contribution of farmers to the development of land races and therefore to the development of new varieties. Plant breeders will first pay for the genetic material or germplasm or indigenous knowledge used by them for developing new varieties.

and other natural substances in several forms like *Ayurveda* and *Siddha* or the knowledge is still with the communities that live around forests or close to nature like tribal communities, island communities and others. The Biological Diversity Act 2002 has been enacted by Parliament to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith. The Act takes into account three principal areas. These are:

1. to establish ownership rights over biological resources found in the sovereign territory of India;
2. to formulate the guidelines and structure for prior informed consent according to which user party will seek the permission of authority for access to genetic resources and
3. the conditions for material and information transfer agreements have been laid down so that use of biological resources is just, equitable and sustainable.²⁰

V. CONCLUSION

The adequate intellectual property protection to traditional knowledge, genetic resources and folklore is very crucial for the promotion of society. The issue is new and complex, so it needs greater caution, attention and efforts. In order to foster all these three resources as an important source of creative expression, legal protection must be provided both at a national and international level, against their improper utilization or commercial exploitation. It is of paramount importance that protection should be provided beyond the frontiers of the countries of the origin, because international measures are indispensable means of extending the protec-

tion. Consequently, there is an urgent need of multilateral treaties based on national laws. The protection of folklore was on the agenda and in 1982 the WIPO/UNESCO Model Provisions on the Protection of Expressions of Folklore were adopted. The establishment of the Intergovernmental Committee by the WIPO provides an appropriate forum to discuss all these aspects in a constructive way. In this forum, it is not only the governments but also the NGOs, local communities and indigenous peoples that take part actively in the debate. The work of the Committee has already yielded some practical beneficial results, but it needs to pay greater attention to few basic elements such as documentation of traditional knowledge, recording ownership of traditional knowledge, indication to origin of genetic resources and folklore in documents relating to intellectual property rights. Furthermore, the possibility of developing existing intergovernmental cultural or other appropriate agreements to also cover reciprocal protection should be considered. In India, The Protection of Plant Varieties and Farmers Rights Act 2001 and The Biological Diversity Act 2002, both seek to ensure that indigenous communities are not denied their share of profits that accrue from the commercial exploitation of the genetic resources that they have conserved. These laws also do not grant intellectual property rights protection over products and processes derived from indigenous knowledge because of the rationale that knowledge that belongs to communities should not be privatised. Whatever laws may be there, implementation can only come when communities are knowledgeable and protect it themselves. No government can by itself protect this knowledge irrespective of how many institutional structures it might have. Therefore in addition to government support, community efforts and the participation of the NGOs of the region must come together.

20. The Act provides that any person who is not citizen of India, or who is a non-resident or any body-corporate that has non-Indian participation shall take prior approval of the National Biodiversity Authority for obtaining any biological resource occurring in India, or knowledge associated to it or for commercial utilization or for bio-survey. Furthermore the results of any research relating to any biological resources cannot be transferred to such persons and no person can apply for any intellectual property right without approval of the authority. Whoever contravenes or attempts to contravene or abets the above provisions shall be punishable with imprisonment for a term that may extend to five years and with fine up to Rs. 10 lakhs. The Act constitutes a National Biodiversity Fund, which shall be applied to benefit sharing, conservation and promotion of biological resources and development of areas from where such biological resources or knowledge has been accessed and socio-economic development of such areas in consultation with local bodies.

II

In 1997,¹ the Bar Council of India (the nodal agency charged with setting standards in legal education) made mandatory a list of 21 courses,² which the law schools must teach together with four other compulsory practical training courses at the LL.B. level. It will be enlightening to analyse each one of these courses to find out the focus of legal education as conceived by Bar Council of India. This paper analyses the four practical training courses prescribed in the LL.B. curricula, namely, Paper I: Moot Court, Pre-trial and Preparation and Participation in Trial Proceedings; Paper II: Drafting Pleading and Conveyancing; Paper III: Professional Ethics, Accountancy for Lawyers and Bar Bench Relations and Paper IV: Public Interest Lawyering, Legal Aid and Para-Legal Services.

The Bar Council provides that Paper-I will have three components of 30 marks each and the viva voce will be for ten marks. The first component is a minimum of three moot courts to be undertaken by each student consisting of written submissions and oral advocacy. Secondly, the students are required to attend two trials in the course of their LL.B. studies and to maintain a record of various steps observed during their attendance on different days in the court assignment. Thirdly, each student is required to observe two interviewing sessions of clients at the lawyer's office / legal aid office and to record the proceedings in a diary. Each student will further observe the preparation of documents and court papers by the advocates and the procedure for filing of the suit / petition.

Paper II apart from teaching the relevant provision of law, consists of 15 exercises in drafting and 15 exercises in pleadings to be taught through class instructions and simulation exercises. The pleadings shall cover civil, criminal and conveyancing fields. Each exercise shall carry three marks each. The remaining ten marks will be given in a viva voce examination which will test the understanding of legal practice in relation to drafting, pleading and conveyancing. Paper III is to be taught with the help of the prescribed materials and 50 selective opinions of the disciplin-

CLINICAL LEGAL EDUCATION: ISSUES OF JUSTICE⁺

*Ved Kumari**

I

It is important to begin by asking whether education should be limited to the development of personal capabilities and skills that enable a person to lead a better life and to earn a livelihood, and whether the wider social purpose of ensuring justice should be left to other agencies directly entrusted with this job? It is the basic premise of this paper that education can be and should be used to promote justice in society. It is believed that only such education is just which not only equips students with the skills required for the profession but which also leads to more just results, practices and attitudes of professionals and decision makers at different levels. For education to become justice education, it must meet three tests: (a) each course should be formulated to include issues of justice in society, (b) the methods of teaching should promote the basic values of equality and respect for difference, and (c) the education should equip the student with the theory and professional skills required in the given field of learning.

Translating this concept of justice education in the field of legal education means that it is not enough for a law school to impart knowledge and skills required by a lawyer in pursuing the profession, but that education should also sensitise the student to issues of access to justice faced by the deprived sections of society and the impact of law on such sections. Students graduating from law schools spread out to various fields of governance and justice enforcement processes. Law schools therefore have an important role to play and responsibility to discharge for promoting justice through education.

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1. LE (Cir. No. 4/1997).
2. Namely, Jurisprudence, Contract-I, Contract-II, Tort and Consumer Protection Laws, Family Law-I, Family Law-II, Law of Crimes; Criminal Procedure Code Juvenile Justice Act and Probation of Offenders Act, Constitutional Law, Property Law, Law of Evidence, Civil Procedure Code and Limitations Act, Legal Language/Legal Writing, Administrative Law, Company Law, Human Rights And International Law, Arbitration Counselling and Alternate Dispute Resolution Systems, Environmental Law, Labour Law, Interpretation of Statutes and Land Laws.

ary committee of the State Bar Councils and 10 judgments of the Supreme Court on the subject. Written examination in this paper will have 80 marks and the viva voce will carry 20 marks. The design and evaluation criteria of Paper IV has been left to the discretion of the law schools / colleges in consultation with the universities and State Bar Councils to be framed keeping in view the local conditions. It may be taught partly through class instructions including simulation exercises and partly through extension programs like Lok Adalat, legal aid, and legal literacy and para-legal training. The course should include lessons on negotiations and counselling, use of computers in legal work, legal research in support of public interest litigation, writing of case comments, editing of law journals and law office management. The Universities have been given a free hand to appropriately divide the marks in the paper for the different programmes evolved in the colleges under its control.

It is apparent from a perusal of these courses and the methodology prescribed for teaching that these are aimed at providing a large number of professional skills required by a lawyer relegating to the background the wider perspective and aim of ensuring that legal education should lead to just results also. If law in society is all about ensuring justice to all, legal education must ensure that the students develop a critical understanding of various disparities in society that result in denial of access to justice to variety of groups in society. Prof. Sathe asked the pertinent question, "Is legal education all about imparting skills of lawyering or does it also have to create a commitment to certain values?" He opined

A lawyer is not only a seller of services but he is a professional who renders services for maintaining the rule of law. He is supposed to be an officer of the court. He has to have commitment to certain values such as democracy, individual liberty, social and economic equality including gender equality and concern for the disadvantaged sections of society which will include the poor, women, the physically handicapped, children, the minorities and the dalits. Legal education has to create such a commitment.

The UGC Model Curriculum has reiterated the same saying " that legal education ought to be a device for Human Resource Development

3. S.P. Sathe, *Community Responsive Legal Education: Trends in South Asia*, Keynote Address in ROUNDTABLE DISCUSSION ON COMMUNITY RESPONSIVE LEGAL EDUCATION: TRENDS IN SOUTH ASIA, November 27-28, 2001 organised by the United States Educational Foundation in India in collaboration with Pune Law College.

in law with the object of attaining social justice and democratic development."

However, even from the perspective of teaching professional lawyering skills there remains much to be desired. For example, Paper I prescribes observation as the primary method for learning stages of a case as well as for interviewing and counselling the clients, preparation of documents and papers for filing of case. It has been long recognised that students should be made active participants in learning rather than confined to the role of passive learners. Learning by observation only promotes passivity on the part of students. In addition, there are other problems with the course also. First, it poses administrative difficulties in assigning adequate teachers for supervision and in the placement of students beyond the duration of the six-month course if they have to learn the stages of a case. Secondly, presence of students during client interviews may lead to violation of the principle of client confidentiality unless due care is taken to seek client's permission and to teach the importance of this principle to the students. Papers II and III make no efforts at including any social justice component and are to be taught through classroom based activities only. Paper IV has some scope for exposing and sensitising the students to the hard realities of poverty and illiteracy, but the course design has been left to the discretion of the law school. In case a law school does opt for integrating community-based legal activities together with the other topics prescribed for the course, the workload of such students would be much higher.

There is no denying the fact that law students do need training in the practical skills required by a lawyer. However, it is possible to reformulate these courses in a manner that will ensure that students not only acquire the professional skills needed by a lawyer but are also exposed and sensitised to issues of justice for the mass of India's population that suffers from the ills of poverty, illiteracy and lack of awareness.

III

The minimum that can be done in the current scheme of the practical training papers to introduce justice is to frame problems for moot courts on aspects relating to human rights, poverty, discrimination or displacement issues, students to observe cases involving the issues of social justice and violation of human rights and by including such issues in the instruments to be drafted by them.

4. University Grants Commission, UGC Model Curriculum Law 13 (2001).

Law students are expected to learn practical lawyering skills in two ways, namely, classroom courses for teaching such skills and legal aid clinics. For example, in the Law Faculty in Delhi University the course on Drafting, Conveyancing, Moot Courts and Professional Ethics has teaching of skills of legal writing, argumentation and issues of professional ethics as its primary goals. The Law Faculty also has its legal aid clinic and has run its legal aid programmes in the beggars' court, juvenile court and Thar Prison in addition to organising legal literacy camps in rural areas on a regular basis. It has been long recognised that legal aid clinics offer a large range of professional skills to students. "A variety of skills not otherwise available to the students in the traditional legal curriculum are provided by the law school clinic. These include interviewing and counselling, the association and management of human relations, fact gathering and sifting, fact consciousness and a sense of relevancy, legal research and writing, handling crises-situations and intelligent decision-making and above all an appreciation that law is only one method of solving problems and not always the best method."

This paper argues for mainstreaming of legal aid clinics and other similar programs by incorporating them in the L.L.B. curricula to ensure teaching of the practical skills of lawyering and generating awareness and sensitivity to the issues of access to justice by poor and deprived sections of society. Such inclusion will not only promote the Bar Council's agenda of teaching professional skills but will also ensure that more law schools undertake legal aid activities making law accessible to the poor and deprived. The legal aid clinics in law schools in India function as an adjunct social service activity rather than part of the main curriculum.⁶ Involvement of students in the legal aid clinics as part of their courses has many benefits. First, it will result in the training of students in the professional skills of lawyering, (as desired by the Bar Council) through introduction of the practical training courses. Second, inclusion of the social service activity in the main curriculum gives a clear message to the students that legal aid is integral to the profession and not something which the law schools and lawyers engage in at their discretion. This realisation and perspective is necessary to serve the long recognized need for legal aid of a large population of poor who go unrepresented in the absence of sufficient number of lawyers providing free legal aid. Third, it will ensure

5. Report of the Expert Committee on Legal Aid, *PROCESSUAL JUSTICE TO THE PEOPLE* 157 (1973).
6. Students participate in the Legal Aid Clinics in all law schools on a voluntary basis and their work in the clinic is not assessed for examination, as is the case in courses that are part of the main curricula.

legal aid work a place of priority in the law school planning and administration and hence the functioning of legal aid clinics will not remain a labour of love of a few teachers in the law school. Finally, it will generate awareness about and sensitise the upcoming generations of lawyers to the problems of poverty and access to justice. This exposure to the unjust and difficult situations people live in during their education will lead to more sensitive and just decisions and practices by them when they assume important offices of decision making as lawyers, judges, politicians or bureaucrats. Hence, it must be compulsory for each law school to evolve projects aimed to help various sections of society living in difficult circumstances and to involve law students in them as part of their curricula. Report of the Expert Committee on Legal Aid⁷ had pointed out some of the obvious benefits to the student, to the profession and to the cause of legal aid which a student legal aid clinic imparts as follows:

1. The nature of existing legal practice heavily inclined towards the rich business corporations and propertied individuals is bound to get a revision-orientation with the advent of legal aid. An expanding clientele drawn from the poor, the oppressed and the under privileged will generate new demands upon the legal profession including new skills, a value system favourable to the weaker sections and a sensitivity to injustice.
2. Given proper supervision, law students can give excellent legal aid and advice at much cheaper cost to remote villages in the country where official and professional agencies often fail to serve.
3. The legal aid clinic is an excellent medium to teach professional responsibility and a greater sense of public service. Faced with real challenging problems and conflicting value choices the student develops necessary perspective, a sense of relevancy and proportion and skills to articulate and apply rules of professional ethics in concrete situations.
4. The law school clinic is a visible and effective instrument for community education and a wide variety of far-reaching preventive legal services programmes.
5. An important by-product of inducting law students in legal aid is its potential contribution towards a better legal education, socially relevant and professionally valuable.

7. *Supra* n. 5.

IV

An academic course in contrast with a community-based project has a clearer course structure, defined hours of work, prescribed readings, definite workload and precise assessment criteria while a community-based project evolves with the work undertaken and the progress made. Hence it is important to identify the issues that need to be addressed before a legal aid clinic or other community-based project may be converted into an academic course. How should such a course be structured? Should it be compulsory or optional? In which year of law school should the course be offered? What should be the criteria for admission to such a course? What should be the student-teacher ratio? How should the workload of students and teachers be determined? What should be the teaching methods for such a course? Where / how should one locate / develop materials for such courses? How can such courses be continually improved? How should collaboration / supervision of students / professional from other disciplines / bodies be carried out when such collaboration is essential for the success of the project? How do we assess the performance of students? How does the law school ensure continuity of the project or handing over of the work of one batch of students to subsequent batches? Where could we locate the administrative and financial support required for such projects? This article presents some thoughts on some of these aspects with a view to generate discussion and further thinking on the matter.⁸

A. Conceptualising Legal Aid Activity as a Taught Course

The word legal aid has been used here as encompassing all kinds of legal aid activities in the community, including legal literacy and awareness, alternate dispute resolution, para-legal and legal aid work in judicial, quasi-judicial and administrative bodies and for the inmates of various state-run institutions.

A law school that already has a legal aid activity may begin by identifying the skills students are taught / learn by participating in that project. It may then consciously choose the skills requiring special attention and decide the methods for systematic imparting and evaluation of those skills. For example, in a typical legal aid clinic students are usually given some basic legal knowledge on the field of work of the clinic before they are sent to the community while the students learn on their own about

8. As mentioned earlier, the guidelines prescribed by the Bar Council are minimal and do not address all these questions in any details.

client interviewing and counselling, negotiation, legal research and drafting. (Empathy and awareness of the problems of the poor are prominent among many skills needed by students.) There is no structure to this learning nor any reflection and analyses on it. There is enough literature available on each one of these aspects that the students should be asked to read. The teacher should supplement this reading with role-plays and research and writing exercises. Armed with this skill the students would be able to handle the field situations better.

In case a law school is beginning afresh, it has to at the outset, as with any other course, be clear about the objectives of the course. Broadly speaking there will always be the twin objectives of teaching professional skills and serving the community. However, what needs to be identified are the particular skills the course aims to achieve and the kind of project that would be most suited to teach those skills. For example, if the school wants to focus on alternate dispute resolution, participation in lok adalats may be more suited to hone these skills than a legal literacy programme. On the other hand, a legal literacy programme may be chosen if the object is to teach legal research and writing and communication skills. Assisting the clients by drafting their documents for filing in courts or other official bodies gives opportunities to train students in drafting, pleadings and conveyancing.

It is of utmost importance to remember that all community projects leave an impact on the people whose lives they touch and the students should not be allowed to interact with community until they have shown sufficient sense of the responsibility and commitment towards the people with whom they would be interacting. Since the people whose life these projects touch are usually deprived it is the responsibility of the project directors to ensure that the students' learning projects should not result in greater disillusionment or harassment to the clients. Hence, each one of these activities in the field needs to be preceded by rigorous classroom training.

Having identified the skills and the project for those skills, the teacher needs to identify the reading material for those skills, choose the teaching method and identify or develop appropriate simulation exercises for practicing them in the classroom setting before allowing the students to interact with the live-clients. There are a good number of books, few

9. N.R.M. Menon (ed.) *CLINICAL LEGAL EDUCATION* (1998); B. Malik (ed.) *THE ART OF A LAWYER* (9th Ed. 1999).

Indian⁹ but mostly foreign,¹⁰ available on the subject to choose from on various aspects of trial, pre-trial, ADR and other skills required by a lawyer. Lecture and case-methods may be supplemented or substituted by brain storming, experiential, simulation, role plays, group discussion, games, pyramid, sub-groups, hypothetical problems, handouts.¹¹ Each one of these methods involves the students in active learning but choice of the appropriate method is crucial for success. For example, brainstorming is most appropriate for generating ideas and widening the canvas of thinking. Experiential learning stimulates learning either by making the students recall an actual experience from their lives or creating an everlasting experience in the class for generating empathy. Simulation exercises like moot courts are good for learning argumentation and communication skills, while role-plays may be used effectively for client interviewing and counselling and professional ethics. Group discussion results in the thrashing out of ideas and enables the students to work with others. Games bring in fun and sense of outshining the other while learning.¹² Pyramids start with the activity beginning with two participants and then including others through a snow balling effect. This activity may be more useful for learning fact gathering, relevancy of fact and active listening. Activities in sub-groups may provide opportunities for improving the skills of observation and critical peer evaluation. The students learn to apply the law in a given hypothetical situation. Handout or written materials supplied helps in retaining the important points of the subject.

Finally the teacher may need to determine the manner of evaluation of the students' skill and fieldwork. There are many options to choose from for evaluation of these skills. One may decide to evaluate them on the basis of their performance in simulation exercises after due practice

10. Steven Lubet, *MODERN TRIAL ADVOCACY ANALYSES AND PRACTICE* (1993); Roger Hydock, *TRIAL THEORIES TACTICS TECHNIQUES* (1991); Thomas A. Mauet, *MATERIALS IN TRIAL ADVOCACY PROBLEMS AND CASES* (1994); Thomas A. Mauet, *TRIAL TECHNIQUES* (1996); Thomas A. Mauet, *MATERIALS IN PRETRIAL LITIGATION PROBLEMS AND CASES* (1992); Thomas A. Mauet, *PRETRIAL* (1995); R. Lawrence Dessan, *PRETRIAL LITIGATION LAW, POLICY AND PRACTICE* (1991); Roger S. Hydock *et al*, *LAWYERING PRACTICE AND PLANNING* (1996) Anyone planning to procure these books may want to check up the latest editions of the same as these are revised regularly. Older editions work equally if the purpose is to learn the techniques and use them for developing one's own materials by reference to the local laws and cases applicable to one's jurisdiction.
11. See, M. Le Brun and R. Johnstone, *THE QUITE REVOLUTION IMPROVING STUDENT LEARNING IN LAW* (1994) See also, Simon Rice with Graeme Coss, *A GUIDE TO IMPLEMENTING CLINICAL TEACHING METHODS IN THE LAW SCHOOL CURRICULUM* (1996).
12. An interesting game developed by management professionals called Red Blue is quite popular to teach negotiation.

or they may be evaluated on the basis of their performance in a given field work activity. In the latter case, factors like initiative, participation, diligence, rapport with the client, confidence building, empathy, communication, time-management, etc. may be among the factors to be focused for evaluation rather than the outcome of their work. The best of efforts may not bear results while the least work may show best results. For example, if the students have been assigned to work for a Lok adalat, it should be irrelevant for the purpose of evaluation whether the client showed up for the Lok adalat or not as that may be influenced to a great extent on the client's own motivation rather than the nature of the effort put in by the student. Similarly, if the students are participating in the litigation process, they should not be judged on the outcome of the case but how they handled it. The outcome may be dependent on a variety of factors. Understanding of facts and their relevancy, knowledge of legal provisions and precedents, preparation of papers, delivery of arguments, summing up of the case, court manners and body language are more appropriate aspects to judge student's performance.

B. Preparing for Conducting such a Course Effectively

For a course of this kind to be developed satisfactorily and to run effectively, the teachers conducting such courses need training, administrative and peer support.

For effective evolution of these courses four aspects need to be taken care of.

1. training of teachers in newer skills;
2. evolution of criteria for determining the teacher-student ratio and workload;
3. evolution of supervision techniques and evaluation criteria; and
4. representation by students and professional responsibility.

Until now teaching in classrooms has been limited to teaching law to the LL.B. students. The full time teachers are assigned substantive law subjects and theoretical papers and the part-time teachers who are full-time lawyers are seen as better equipped to teach the procedural law courses. Neither sets of law teachers has been 'taught' these skills. Teachers learn some skills like legal research and writing, communication, argumentation by doing it in course of their research and teaching. Similarly the lawyers also learn their skills on the job. Both need to be first convinced that such skills can be 'taught' and then learn how to teach