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CONTENTS

Editorial

ARTICLES

- Constructing A Platform of Memory: Towards
A Sociology of Indian Law Reviews ... *Upendra Baxi* 1
- Affirmative Action in Selected Countries ... *Harish C. Jain* 21
- Spotlight on Criminal Justice Administration
in India ... *B.B. Pande* 53
- WTO Dispute Settlement Mechanisms:
A Fresh Look ... *A.K. Koul* 67

NOTES AND COMMENTS

- Fertility Revolution and Changing Concept of
Family and Identity ... *Ved Kumari* 103
- Intellectual Property Protection for Plant
Innovation: A Journey from UPOV
to TRIPS ... *Suman Gupta* 122
- Right of Reproduction of Composers of
Music and Producers of Sound Recordings:
Infringement by Home Tapers ... *Alka Chawla* 135
- DNA Technology and Legal Issues in India ... *Mahavir Singh Kalon* 149
- The Biosafety Protocol: International
Transfer of LMOs ... *Piyush K. Sharma* 164
- Clipping the Wings of *Talag*: A Case of
Judicial Reform ... *Barsha Mishra and*
S.J. Hussain 180
- The Need For Redefining Competition Law
In India ... *Neera Bharihoke* 187

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The Internet Domain Name System: Interface with Trademarks, Disputes and their Resolution	...	Ravinder Singh	199
The International Criminal Court and Universal Jurisdiction	...	Anju Rani	218
Electricity Act 2003: A Critical Analysis	...	Gaurav Tomar and Kamaldeep Dayal	227
Arbitration Rules: A Comparative View	...	Harjyot Singh Bhalala	242
US Action in Iraq and the Rule of Law: Practice v. <i>Opinio Juris</i>	...	Poonam Chojar	251
The Price of Education: Prohibition of Capitation Fees	...	Mohit Gogia	262
BOOK REVIEWS			
The Hindu Succession Act, 1956 by S.A. Kader	...	Poonam Pradhan Saxena	274
Drug Control by P.K. Dutta	...	Anju Vati Tikoo	277
Law of Arbitration and Conciliation: Practice and Procedure by S.K. Chawla	...	V.K. Ahuja	280
International Law by Gurdip Singh	...	V.K. Ahuja	282
Bhaumik on the Railways Act, 1989 by H.K. Saharay	...	Lathika Srivastava	284
Contents of Delhi Law Review (Volumes 1-24)	...		287

Editorial

It gives me pleasure to present before the reader the Silver Jubilee edition of the *Delhi Law Review*. The *Review* started publication in 1972, and in the years since then has been one of the premier law journals published in the country. The *Review* has seen contributions from academics, both within and outside the country, researchers, lawyers and law students. It has been our endeavour to maintain high standards of scholarship and I am sure the *Review* will reach new heights in the years to come.

Legal education in India is presently undergoing a period of rapid change. Changes in the law and legal institutions, both within India and internationally, have demanded that legal education keep pace with these developments. The Faculty of Law, at the University of Delhi has been an early pioneer in legal innovation and continues to be in the front ranks of legal education in India. The *Review* serves as a platform to critically analyse and comment on changes taking place in the legal environment and legal education. Indeed, the emphasis on critical analysis and legal writing, which are emerging as important areas in legal education, only get strengthened by colleagues and students alike contributing to the *Review*. I am hopeful that in the years to come, the *Review* will attract contributions from the best and the brightest in the legal field.

I am thankful to all the contributors of this issue of the *Review*. I am indeed grateful to the Editor, Dr. Kamala Sankaran, and the other members of the Editorial Committee, Mr. B.T. Kaul and Dr. B.K. Raina, for their effort in producing this issue of the *Delhi Law Review*. I am also happy to note that from this year the *Review* would also be available on the Internet making for easier access and wider readership. I thank the Editors and the students who have made this possible. I also thank the printers, Ms. Shivam Offset Press for the fine job of printing this issue. We welcome suggestions for the improvement of the *Review*.

21 June, 2004

Surendra Prasad
Dean and Head
Faculty of Law
University of Delhi

Constructing A Platform of Memory: Towards A Sociology of Indian Law Reviews

Upendra Baxi*

I. SOME DISQUIETING QUESTIONS

The Silver Jubilee of the *Delhi Law Review* is a landmark event in the history of contemporary legal education and research in India. The editors of the *Review*, especially Dr. Kamla Sankaran, have done me great honour by their gracious invitation to contribute. Their request has placed a somewhat onerous burden as well because I felt that it was not quite right to yield to the temptation of offering as contribution a slice of my writing in progress. On the other hand, a wholly new offering for such an occasion did not compellingly emerge! I have resolved the tension by addressing here *faute de mieux* the tradition of law school based journals/ law reviews in India.

The task is made already difficult by the word 'tradition'. In fact, it may equally be said that one is rather speaking of its 'lack'. Speaking either way – tradition or lack of it – does not make much sense outside the wider literary traditions of law, by which I mean the well-established ways of writing academic textbooks and professional law books, digests, and commentaries. All this raises many questions. *First*, of course, is the very problem of nomenclature: what is an apt expression here – 'law reviews', law journals, or campus based academic traditions of legal writing? *Second*, how may we characterise the overall Indian literary traditions of law during the long colonial history and the short but tumultuous postcolonial times? *Third*, what may be said to constitute, within this tradition, the relation between law school-based reviews/ journals and the proliferation of lawyerly materials? *Fourth*, in terms of character and content, what does after all, the 'law review' corpus contribute to Indian legal development? Put starkly, is their existence worthwhile and if so, for whom? *Fifth*, how may we relate the situation of Indian 'law reviews' to South/ postcolonial knowledge production? Unfortunately, for the present purpose, this listing remains

* Professor of Law, University of Warwick, UK. Formerly, Vice-Chancellor and Professor of Law, Faculty of Law, University of Delhi, Delhi – 110007.

illustrative, not exhaustive; and I may here address only some of these complex issues.

In any event, friendly interrogations are necessary both as enabling us to revisit the recent past of Indian legal education and scholarship and as providing signposts for the future. But the undertaking is fraught with difficulties as well. My nearly quarter century long association with renovating Indian legal education and research further complicates tasks of judgement, and with it the management of one's inevitable predilections and biases. Further, no empirical studies yet exist against which one may readily expose oneself to a kind of reality check.

I write this as an act of hope. My hope is to provoke a quotient of self-reflexive Indian legal education and research in first two decades of the 21st century C.E. The first five decades of the last century sustained remarkable articulation of series of anxieties concerning the role of legal education and research; the best and the brightest of Indian academics in the previous half century knew that a lot needed to be done to redeem legal education but remained insecure, and differed a great deal, concerning the best way ahead. There was a robust resistance to any recipe reform. In comparison the pioneers of the new wave legal education working through a profusion of national law schools and new multiplex campus systems managed by a combination of indigenous and expatriate capitalists display remarkable self-confidence. They know *what* is to be done, *why* so, and in which precise *modes*; and further they know that their vision is unerringly *right*. Understandably, of late there has been no anxious discourse concerning nature and future of Indian legal education and research that so thoroughly agonised their precursors.

Already, unfortunately, the writing on the wall remains frightful; the unritical embrace of the unconstitutional political economy of a globalising political India makes past concerns objects in a Jurassic Park! I hope what I have to say here is received in more constructive affection by the emergent community of Indian legal academics than warranted by the amused, and at times frightened, courtesy extended to half extinct Dinosaurs!

II. THE POLITICS OF NAMING

The politics of naming presents a story yet awaiting its full raconteur. My primary focus here is with the distinct practices of naming some periodic publications as *reviews* and others as *journals*. But a wider aspect needs acknowledgement at the threshold: the politics of naming University postgraduate law departments, informally or otherwise, as *law schools*. Only careful historical research can determine the origins, spread, and the

politics underlying this change. In the interim, however, some preliminary understanding remains necessary.

We all know, *first*, that not just Indian legal education but the entire system of University education institutionalises separation between imparting undergraduate and postgraduate education, symbolised by the distinction between respectively 'colleges' and 'departments'. *Second*, the extant, even primordial, legal structures allow a differentiation of management between colleges and university departments; the statutory establishment of a Law Faculty, and within it a Department of Law, have eventually signified different pathways for the reform of Indian legal education. Universities having a large number of affiliated law colleges and rather meagrely staffed Departments understandably nurture the preponderant voice of college Principals in matters such as enrolment, curricular planning, pedagogy, and evaluation. *Third*, we also know that such reform proceeded apace in the single Law Faculty departments vested with responsibility for both undergraduate and postgraduate studies; national universities such as Allahgarh, Benaras, and Delhi, and state universities such as Chandigarh and Jammu, remained in the forefront of innovation. *Fourth*, at least in one instance - namely Benaras, a law college was transformed into a single department Faculty. *Fifth*, however, we do not precisely know the histories of this separation/amalgamation. *Sixth*, the notion that Universities may have a cluster of departments named as 'school' probably first emerged with the Delhi School of Economics, inspired by the London School of Economics and the novel emergence of Jawaharlal Nehru University. Structure entailed the invention of a wholly postgraduate university comprising only 'schools' and 'centres'. Neither model seems to have contributed much to the emergence of the idea of a 'law school'. *Seventh*, since 1980s with the inception of the National Law School of India University at Bangalore, and eventual proliferation of kindred brand equity ventures, we enter a signal, if not unique era, of single Faculty University, an idea that has since proliferated in diverse fateful ways.

Even though we lack archival research plotting the graph of this transformation, Americanisation of Indian legal education since 1960s leads to collective self-presentation of University departments imparting both graduate and postgraduate legal education as 'law schools'. However, we ought to note that this transformation begins as a circumstance of voluntary reception of a progressive trend of benefiting from Anglo-American legal education with the heroic efforts of Dean R. U. Singh at Lucknow Law School (the unsung hero of modern Indian legal education) who fostered such future leaders as Professor G. S. Sharma, Anandjee, P. K. Tripathi, A. T. Markose, R. U. Tiwari, S. K. Agarwal, and Shiv Dayal.

His impact on his peers (notably Hafiz-ur-Rahman at Aligarh, Dean Ramaswamy at Delhi, and younger faculty elsewhere) was considerable. But for Professor R. U. Singh's imaginative and indefatigable labours (he even sequestered his lifetime earnings to enable some of these eminent colleagues to study overseas, especially in the United States), the eventual Ford Foundation philanthropy that revitalised Indian legal education would never have arrived at any meaningful 'take-off' stage!

This inaugural debt remains yet to be fully acknowledged and now it is unlikely to ever occur, given the stalling of any creative response by his protégées (some now deceased) of my insistent request that they at least assemble a belated biographical memoir for the lamented R. U. Singh. I may here only say this much in passing: any history of Indian legal education reform that fails to honour the memory of its indigenous founders (and this history includes Professor G.N. Joshi at Benaras, Principal Pandit of the Indian Law Society Institute Law College at Pune and at one moment Dr. B. R. Ambedkar as the Principal of Government Law College, Bombay) remains insolently inaccurate indeed! I hope that this Essay will finally stir some of the younger academics at Delhi, and elsewhere, to redress the manifold and nefarious default of their precursors.

Reverting to the politics of naming, an important contrast is furnished by the fact that Law Colleges have *magazines* whereas Law Schools may paradigmatically only produce journals/reviews. The *lowly* college magazine is not considered a scholarly production; yet, it historically furnishes a significant outlet for local literary energies. As far as I know, there exists no study of the tradition of college magazines. It is unlikely also that any law library in India holds the entire collection of law magazines. Unlike journal and reviews, law college magazines are thought to furnish a genre of perishable writing.

The label 'law review' has distinctive Anglo-American origins, while the term, 'law journal' is an appellation with many countries of origin. A random title sample reveals an equal distribution of both the appellations. Delhi, Cochin, Chandigarh, Jammu, Nagpur, among others, present themselves as law reviews; Jaipur, Jodhpur, Kerala, among others, name their faculty publications as journals. The two national level academic publications also interestingly use the same appellation: *The Journal of the Indian Law Institute* and *The Journal of the Indian Society of International Law*. The only interesting variation was provided by *The Indian Yearbook of International Law*, inaugurated by Professor Charles Alexandrowicz, and nurtured by Professor T. S. Rama Rao; interestingly the Indian Law Institute based its annual publication not as yearbook but as the 'survey' of

Indian law. Obviously, the model of the *British Yearbook of International Law* influenced Alexandrowicz whereas the Indian Law Institute title was derived, I suspect, from the American genre of 'surveys'. Does this naming choice exert any gravitational weight in scholarship thus nurtured?

Is all this a mere linguistic accident or indicative of diverse institutional histories? Contingency does play a role. Professor Gyan Swaroop Sharma may have been as a Yale scholar influenced by his *alma mater* in terming the Jaipur, and later in a foundational moment the Indian Law Institute publication, as a *Journal*. So may have been Dean Tripathi (Delhi) loyal to his Columbia Law School tradition. This does not quite explain why Dean Anandjee (Benaras) betrayed his Yale association in naming his school publication as a 'Review'. This, of course, needs to be fully grasped as an aspect of competition, once upon a time, for leadership of Indian legal education between these two stalwarts. Not to be left behind in this was Dean Markose (Cochin) who owed loyalties similar to Dean Tripathi, although his scholarship was stamped more with English rather than American tradition. Dean Paras Diwan at Chandigarh and Professor S.S. Saraf at Jammu were not as was fiercely loyal to their overseas lineages in naming.

Beyond the contingency of scholarly association perhaps remain other histories signifying practices of the politics of naming. I do not know, for example, how distinguished American academics serving as Ford Foundation consultants influenced the practices of naming. It is also puzzling that the design of most law journals/reviews came to be American law school oriented when we recall the Anglophile legal aesthetic of many senior law teachers for whom *The Modern Law Review* signified the epitome of legal scholarship. And *place names*, American style, substituted the thematic motifs, the most poignant indicator of this being the transformation of Delhi University's annual publication entitled *Yavhar Nirvya* into starkly *Delhi Law Review*. Was this choice an aspect of rush for modernisation of Indian legal education and research that forbade even titular invocations of metaphors of classical Hindu jurisprudence?

III. FEATURES

The history of naming practices, yet to be written, also constructs narratives of juristic transplants. It is clear that while names of literary traditions can be mimed, their histories may not be transplanted. Not being a student of historiography of American Law Reviews is a handicap; but I still suggest an appropriate measure of comparison of Indian Law Reviews should invite attention to the formative era of American Law Reviews.

Prescinding this it is clear that the aspiration levels of the pioneers of modern legal education were high indeed; their aim was nothing short of social reproduction of the paradigm of American legal scholarship on the Indian soil encapsulated in the formula: '*No law review, no law school!*' The British model dispensed with the requirement of a law school journal as a *sine qua non* for providing legal education; this seems to have been summarily rejected by the pioneers of Indian 'modern' legal education.

The distinctive pedagogic extension of 'case method' of teaching law in leading Indian Law Schools entailed the necessary component of faculty and student writing. However, the captains of modern legal education also realised the virtue of hurrying slowly. The practices of this virtue meant that university based departments, which offered undergraduate as well as postgraduate degrees in law, were thought capable of ushering revolutionary curricular and pedagogic transformation within historically given institutional hierarchical governance. The dislocation between innovation and structure is a vast problem in itself, one that needs to be addressed in any serious future work on the 'modernisation' of Indian legal education and research. I here concern myself with this overall problematic primarily in relation to distinctive features of institutional literary productions, to which I now briefly turn.

A. Personnel

Academic institutions everywhere stand infected/ inflected by differentials in the quantity and quality of teaching staff and relations of hierarchy that constitute power and authority. The Indian law reviews/ journals understandably carry their distinctive milieu birthmarks.

A stark fact concerning the historic moment of 'modernisation' of Indian legal education in the last half of the 20th century C.E. is that fully fledged law faculties with tenured staff emerged slowly and unevenly. 'Tenure' is a term of art in American legal education where the privilege of full time teaching positions (or as we say in India, 'confirmed'—as against probationary appointments) is based on peer group evaluation of actual literary contributions and pedagogic excellence as well as determinations concerning potential. Professional politics intrudes but almost never to a point of rendering irrelevant considerations of academic / research contribution and potential. The situation in India is different where statutory selection committees of the University allow only a marginal peer group elevation through outside experts. In any event, very few Indian law schools can match the faculty size of even a modest American law school.

Most University law departments (outside national universities and the fortunate few state university law schools), including the self-styled national law school universities, remain meagrely staffed, especially at senior levels. And across all situational variables, the distribution of tenured chairs in law remains scarce. Most prestigious law schools enjoyed only one and unusually two tenured chairs. Neither Begaras nor Delhi, the engines of 'modernisation' of Indian legal education, had at the foundational moment more than two professors! As late as seventies, I happened to be the fourth professor appointed to Delhi University and that point of time perhaps the only non-Delhi based academic thus invited to a Chair! In this context, duties of memory require us to recall the promising figure of Professor Khawja Ali Darja, whose premature demise deprived the Delhi Law School of inestimable prospect of future leadership. At Delhi, the situation has since quantitatively changed; on a rough count, we have now about 25 professors! This result has been assured by the operation of merit promotion scheme that rewards primarily long years of teaching over demonstrable archive of quality publication; few will contest, upon wise introspection, the fact this quantitative expansion relates inversely to qualitative contribution to Indian legal literary production.

The Delhi Law School has also suffered a great deal of *casualisation of academic labour*, which adversely affects law reviews/ journals as well the overall academic milieu. I refer here to the phenomenon of *ad hoc* recruitment. The Delhi Law Faculty enjoys an unenviable reputation in this regard from its inception until today, where at any given time, the *ad hoc* faculty remains disproportionately far too numerous, with such appointments renewed from semester to semester and year-to-year. The reasons for these are many; in particular, a rather generous study leave provision for tenured teachers necessitates *ad hoc* recruitment of uncertain duration; so do the delays in convening statutory selection committees for full time positions. Further, the process of obtaining the concurrence by the University as well the University Grants Commission for creation of new faculty positions remains cumbersome. I wrestled with this intransigent problem myself, perhaps with modest success, in my own tenure as the Dean of the School and the Vice Chancellor of the University. This is a different story, which I may not pursue here. But this peculiar formation administrators amnicentesis to motivational structures for research and writing. Worse still, it creates and sustains a milieu of rather pernicious, often vicious, forms of intra-Faculty politics of dependency and patronage. This warrants further analysis; in this Essay I take all this as furnishing an inarticulate major premise for the state of art.

B. Hierarchy

The ways in which institutional hierarchies are structured remain important, though not decisive, for campus based literary traditions. With notable exceptions, senior law teachers and heads/ deans/ principals do not always favour *primus inter pares* academic cultures, where leadership roles tend to be defined not in terms of *power* but *influence*. When academic hierarchy stands constructed further on the lines of status, somewhat disassociated from active incumbent investment in literary production, growth of literary traditions also suffers.

Outside some state universities where Headship of law departments continues until the superannuation of the incumbent, most central (national) universities adopt the patterns of renewable three years tenure of Headship, which also coincides with Deanship. So over whelming are the institutional commitments of these offices that these beings may aspire to make literary contributions by a heroic struggle to find the twenty- fifth hour of the day! The notable exceptions only serve to prove the rule. It must be acknowledged that participatory decision making process where committees decide routine but important matters such as teaching allocation, examination responsibilities, library management encourages, at least in terms of time management, more senior level participation in legal writing.

However, the overall ethos of administrative cultures remains decisive. Quite often, the institutional Head/Dean/Principal imagine themselves in the figure signifying an almost Austinian sovereign! More often a 'he', rather than 'she', he determines the composition of the editorial committee, and the choice of the working editor. This composition remains the ineluctable privilege of the Dean or the Head of the department (as the case may be.) The Dean / Head also stands designated as the editor-in-chief, perhaps for good enough administrative reasons. This signifies 'good' times when the institutional leader is academically proactive and lean and mean time when he/she remains rather lazy! Since regular publication of review/ journal is not a prize item for practices of intra-faculty politics, most literary publications blossom only in good times. For this reason alone, the silver jubilee of the *Delhi Law Review* remains worthy of celebration!

Hierarchy also determines the role of student editorship; as far as I know, no Indian law review/ journal stands edited wholly by students, a major departure from American law school 'vision'. By the indicator of wholly student edited and managed law reviews in India, none may be said to exist in India.

The lack of wholly student managed and run law reviews is understandable because we, overall, lack a full time student body not distracted by other more compellingly relevant (including the scheduled rewards in Indian urban middle class male dowry markets) career pursuits. But this does not explain why quality full time undergraduate students and full time postgraduate students, including doctoral scholars, have yet not been fully involved in the editorial enterprise. I am not saying that student editorship presents an 'unqualified human good' (to borrow a description that E.P. Thompson evoked to describe the 'Rule of Law'), having witnessed personally Hans Kelsen's anguish at the *rejection* of his article critiquing in turn Julius Stone's critique of the Basic Norm, by the student editors of the *California Law Review*, eventually published by their peer group in the *Stanford Law Journal*. Of course, the editorial decision here was simply outrageous! Having said this, I must still add that throughout my literary career in India I have missed the push and the prod of young editorial minds asking me to do even better!

C. Authorship Variables

Other features of campus based literary productions direct attention to authorship and content variables, which in turn are at least partly related to the ways in which frequency of literary publication constitutes the basis of career advancement. For weal or woe, Indian law schools have, overall, rejected the 'publish or perish syndrome'. The habits of regular writing/ publication remain conspicuous by their absence. Only a small percentage of Indian legal academics may claim, in a lifetime of active teaching career, more than three page summation of books and papers; some senior academics, even Professors, in leading Indian law schools even as of now, present woefully slender publication record. This state of affairs, lamentable in itself and presenting a wider problematic, is relevant here as a causal factor partly explaining the retarded development of law journals/ reviews in India.

Concerning the dimensions of authorship, many issues await analysis. Yet, the following features are, I believe, likely to be validated by further research. *First*, compared with the formative years, the contribution by American scholars has dwindled, almost to point zero. The early phase of Ford Foundation funding (especially Delhi and Benaras) brought itinerant law Professors, some of them of great distinction, to the Indian Law Schools; the Ford Foundation retreat also signified the end of such creative peregrination. The Fulbright program, still in operation, does not bring such visitors too often. The sites of visitation seem to have now shifted to

National Law Schools. Overall, the lack of American collegial interest in publishing in Indian journals is thus understandable if only as symptomatic of Foundation unaided low intensity concern with Indian legal development.

Second, contributions by law professors remain minuscule, compared with contributions made by teachers at middle levels and young scholars. This seems to hold true also in relation women authorship. *Third*, and related, it is my impression that, overall, male colleagues dominate in terms of literary contribution, despite the otherwise happy social fact, certainly for Delhi Law School but also otherwise widespread, of gender parity in recruitment and forms of further career advancement.

Fourth, student authorship remains puzzlingly slender, given the thriving enrolments for Master's and doctoral programs. The system of shorter articles and student notes still remains rather uncommon. One reason for this of course is that the only form of legal writing, if it may be so-called, that the undergraduate law students practice occurs by way of answers to law examinations! Despite insistent urgings, most notably in the massive Report of the University Grants Commission Curriculum Development Centre (which I was privileged to lead), undergraduate tradition of student writing has yet to emerge, the only happy but still transient exception now provided by some national law schools.

Fifth, the more active faculty authors find the law school reviews too episodic to meet their literary production urges and aspirations. They routinely contribute more to the Journals of the Indian Law Institute, and the Indian Society of International Law. They also adorn mastheads, of editorial boards of many Indian scholarly journals, possessed of editorial advisory powers of rejection, or stylistic/ content reformulations, which they would rarely invoke for their own literary contributions! My observation here is based on my experience of editing, even if for a short while, *The Journal of the Indian Law Institute*. Even so, the episodic refereed publication, a *rara avis* for Indian scholarly writing, seems to have had some benign consequences for literary production of Indian law reviews.

Sixth, in terms of social origins and communities of fate and belonging, it remains sadly true that the Indian law reviews have failed even aspirationally to catalyse literary contributions from the scheduled castes and tribes students and teachers, despite the fact affirmative action programmes and policies entail their substantial presence in Indian law schools. In particular, the voices of *dalit* women protesting violence of Indian law and order are *not* at all reflected in Indian law reviews/journals. Does this symbolise forms of institutionalised racism and patriarchy in Indian law schools, despite some notable reform and innovation?

D. Content Variables

The dimension of content obviously warrants careful analysis. It is my impression that the *Delhi Law Review*, and kindred publications, remains heavily engaged with the following areas: public law, international law, commercial law, and family law. This while reflexive of dominant Faculty pursuits leaves out major areas from engagement such as criminal law, labour law, and legal theory/ history/ jurisprudence. I suggest future explorations based on refined pursuits of techniques of content analysis, as these alone may help unravel area biases in faculty writing and raise pertinent issues concerning this not-so-benign institutionally fostered neglect. However, I complicate this picture somewhat further in Section IV.

Aside from patterns of concentration and neglect, we ought to note changes in content quality. It is my overall impression, as a connoisseur of Indian law reviews/ journals that these have made, as well as registered, some important contributions. The law reviews have excelled at innovating doctrinal analysis of judicial decisions. Critical, if not extended book reviews, constitute another noteworthy instance. Cosmopolitan citation styles have also further developed. Equally, perhaps *more* importantly, these productions have remained hospitable to the pleas for non-doctrinal research and encouraged empirically informed research contributions. I suspect that future content analysis will more than amply validate these observations.

E. Resources

The questions of organisation and resources also need to be empirically fully grasped. Most campus based law reviews remain annual publications; not always published on time; combined issues for two or more years also occur. The frequency and irregularity of publication stand easily explained; the available funds from the University Budget for departmental publications are meagre and remain steady over time despite the rising costs of publication. Because of the high costs that the heavily subsidised University presses entail, the law journals/ reviews hunt for the least expensive commercial publisher. The print run is small; institutional subscription by other law school libraries is insignificant; the legal professionals do not subscribe; the market for subscriptions and back issues remains poorly organised; so do listings, if any, for complimentary distribution in ways that promote further circulation at least among the vast and ever growing alumni. At best, and from year to year, some income is derived from commercial advertisements. No reputed law publisher is inclined to take over the responsibilities of publication and marketing law school reviews because of the foregoing

features: the situation is happily different for other Indian social science disciplines.

Given all this, it is unsurprising that the journals/ reviews remain wholly non-viable and that perhaps no more than a dozen annual University law reviews exist. Worse still, very few law school libraries (let alone the libraries of the Supreme Court of India, and those of the High Courts) possess a full set of these publications. I know from my own experience what an uphill task it is for an individual scholar to have in one's personal collection a full set of these publications; as late as 2004 I find myself a beggling even my own Delhi Law Faculty colleagues to keep me up-to-date! There is no reason why some aspects of the resource situation may not be ameliorated by collective institutional effort. Given the current phase of digitalisation of Indian campuses, and the law schools, the way ahead seems to lie in faculty E-journal format.

IV. ORIGINALITY VERSUS MIMESIS

We remain deprived, even orphaned, of narratives of evolution of Indian legal education and research after more than five decades of the Indian Independence, and the Golden Jubilee of Indian constitutionalism, within which the nascent tradition of law reviews may well be understood. This unfortunate circumstance deprives us of any historic base of understanding of continuity and change in legal education and research. One important question arises at the threshold: what marks the difference between colonial and postcolonial Indian legal education and research? This is too large a question to be handled here but I may at least say that traditions of literary production, including of course the law reviews, provide a mirror.

The wider tradition of legal writing continues to flourish in the colonial mode. The unending revisions and re-editions of professional books and treatises remain based on a peculiar conception that suggests that legal professionals need legal *information*, not *knowledge*. Accordingly, professional treatises provide a prolix tour guide to statutory changes and leading judicial decisions, the latter ossified into forms of quick, always ready at hand, summaries of what the judges may be said to have decided. This genre dreads more nuanced and complex academic commentary on judicial (and legislative) developments and blithely ignores any reference to national and campus based law reviews. The eminent corpus of professional law books (Mulla on contracts, Ratanlal and Dhirajlal on penal code, Muntir on evidence, Shah di company law, Mulla on Hindu law, and others on an ever growing listing) provides an astounding example of the colonial imagery

of law in which doctrinal scholarship remains summative rather than critical.

The gifted corpus of Durga Das Basu that fostered approaches to knowledges of comparative constitutional law, and the eminent treatise of H. M. Seervai on Indian constitutional law, of course signal some extraordinary departures from this model. These are truly learned works. They also refer to scholarly writings emanating from the United States, United Kingdom, Canada, and Australia, which at one time, before the Internet explosion, were not available to many students and teachers. However, they completely exclude any reference to Indian scholars and law journals. The only scholarship they recognise and cite remains deeply Anglophile. Even Indian legal academics that participate in the tradition of revising/ re-editing 'canonical' works meekly obey deeply entrenched commercial traditions. Professor N.R.M. Menon, otherwise singularly dedicated to innovation of Indian legal education, brought very little scholarly writing to professional notice in an otherwise important reworking of editions of professional treatise on the penal code (co-authored with Justice D.A. Desai). The Butterworths rendition of Indian *Halsbury* necessarily continues the mode of colonial professional publication, despite the fact that some eminent Indian scholars have contributed to its composition. One hopes that the globalising legal tradition represented by the Butterworths Lexis-Nexis does not perpetuate cannibalistic inadvertence to literary formation of even innovative Indian legal scholarship.

We may not, however, ignore signs of hope. Academic treatises in some fields remain exemplary in referring to Indian writing: I refer here to treatises on constitutional and administrative law and jurisprudence produced notably by Professors A. T. Markose, M. P. Jain, S. P. Saha, M. C. J. Kagzi, S. N. Jain, M.P. Singh, and I. P. Massey. In other domains, for example, the texts produced by Professors Paras Diwan, Tahir Mohammad, and B. Sivaramayya also significantly break the colonial mould.

This having been fully acknowledged, it needs stating that most Indian textbooks, and Indian scholarship generally, remain insufficiently (to put this rather mildly) South comparative. Try a search for references to South Asian, African, and Latin American literature in these scholarly productions (as well as Indian law reviews) and you would draw a total blank! In a sharp contrast, other forms of South Scholarship (especially Malaysian and Singapore and southern African legal literary traditions) remain suffused with Indian literary referential components. Only a few Indian scholars have produced textbooks or treatises in foreign law (I can only recall Dean Ramwamsami's great work on the American Constitution's commerce clause,

Professor M. P. Jain's work on Malaysian administrative law and if I may expand the reference to Indo-German comparative studies to Professor M. P. Singh's work on German administrative law). Even pending further content analysis as concerns the wider literary tradition, one may safely say that it remains distinctly colonial, tethered to the imperial metropolis, and mimetic at its very core.

At the same time, we may ignore at considerable historiographic peril, elements of originality defining some emerging aspects of postcolonial scholarship emergent in Indian law reviews, within and outside Indian campuses. Academic writing in the *Journal of the Indian Law Institute*, the *Indian Journal of International Law*, the *Annual Survey of Indian Law*, and the sundry Indian law school journals/ reviews have actually contributed to several paths of de-colonising Indian legal development. I may not review here in any rich detail this complex contribution: at best I may randomly silhouette some important profiles.

First, the attempts at judicial archaeology constitute/construct markers of a new Indian juristic literary tradition. Critical celebration of judicial biographies remains a distinctive feature of campus based and off-campus Indian law reviews. The latter, in the pages of *The Journal of the Indian Law Institute*, has celebrated the judicial and juridical lifetimes of some eminent Indian Justices such as Justice Gajendragadkar and Subba Rao, which in some ways influenced my labours in producing, as my very first contribution at Delhi Law School, a book of writings and judgements of Justice K.K. Mathew entitled *Justice Mathew on Equality, Democracy, and Liberty*. Equally important is the Special Issue of *The Aligarh University Law Review* on Justice Mahmood, recalling his contributions to the making of the Indian law. This is probably the only law review based celebration of Indian justices under the colonial circumstance.

Second, the profoundly pertinent mediations by Professor Gyan Swaroop Sharma in the pages of the *Jaipur Law Journal* created ferment for contemplation of a distinctive Indian jurisprudence. Gyan also sought to institutionalise this imagery by a plea for a National Law School for India; this inaugural contribution deserves to be at least cherished by the new wave national law schools entrepreneurs.

Third, the *Jaipur Law Journal*, more than any of its counterparts, contributed to the further development of a distinctive Indian jurisprudence through the contributions of Professor G. S. Dhyani and the unsurpassable comparative contract law scholarship of Professor I.C. Saxena.

Fourth, the rather remarkable contributions in the *Benarus Law Review* concerning labour law and jurisprudence (by Dean Anandjee and his

specialist colleagues), preventive detention jurisprudence (notably by Professor Jariewala), judicial process (R. K. Mishra), mark a sociologically oriented legal analysis. Further, this *Review* hosted an inaugural jurimetric exploration of the Indian Supreme Court by George Godbois, Jr., which inspired a doctoral dissertation by Professor Vijay Kumar Gupta (which I was privileged to 'supervise'), since monographically published.

Fifth, the Indian law reviews have offered remarkable nourishment, by way of critical, often insightful, of public law scholarship: this stands signified by contents of several leading law journals/ reviews (notably by Professors P. K. Tripathi, M.P. Jain, S. P. Sathe, D.N. Saral, D.K. Singh, M. C. J. Kagzi, M.P. Singh, P. N. Singh, B. Errabi, among others).

Sixth, no less remarkable remain the equally remarkable contributions to the development of 'family law' scholarship by stalwarts such as Paras Diwan, B. Sivaramayya, and Tahir Mahmood, and younger scholars like Dr. Poonam Pradhan Saxena and to explorations of juvenile justice (notably through the active scholarly pen of Professor Ved Kumari).

Seventh, the ongoing dialogue, in the pages of the *Delhi Law Review* concerning social action litigation and the place of human rights in Indian state and societal development stands marked, if I may say so in all modesty, by my much internationally cited contribution to Delhi Law Review entitled '*Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India*' and subsequent contributions by Professors P.N. Singh, M.P. Singh, and B.B. Pande.

Eighth, (and without being exhaustive) one needs to acknowledge diverse valued contributions: to public international law (notably by Professor J. N. Saxena), international trade law (Professor A.K. Koul), and intellectual property rights (Professors S.K. Verma and Ashwini Kumar Bansal).

Future content analysis of law review/ journal contributions to the life of law in India will need refinement across many lines. We need to develop impact indicators in several ways that at the threshold raise several simple-looking questions. How often do Indian scholars contributing to legal literature in India, and overseas, cite contributions from campus based law reviews/ journals? What is the citational index of such references in professional treatises and academic texts produced by campus-based scholars and researchers? How often, and in which decisive contexts, do appellate justices invoke contributions made through these productions in comparison with their contributions to the wider tradition of legal writing? How may we assess the impact of campus based, and related traditions of writing on both the development of adjudicatory and legislative policy-making in

India? What kinds of relation (of hegemony or reciprocity) mark contributions by scholars of Indian origin (now fortunately an expanding genre) and the Euroamerican 'natives'? Many similar questions may be raised.

The impact of campus-based (and wider literary tradition) on adjudicatory policymaking is best accessed by a juridical/judicial citation index, providing a full measure of its utility and value. Indian academics may take some pride in episodic judicial acknowledgement, though far less profusely available when compared with American Supreme Court footnote references to law review literature. However, if we were to measure deference by later Indian scholars to their predecessors a more despairing situation emerges. No Indian scholar has yet produced a range of references to Indian literary production even remotely comparable to the recent exemplary work by Werner F. Menski's recent *Hindu Law and Tradition* (2003). This work constitutes a monumental reproach to cannibalising tendencies of much contemporary Indian legal traditions of writing.

In this context, the contributions by expatriate scholars (I use this term as signifying non-resident Indians as well as to persons of Indian origin) needs also to be situated in relation to the Indian literary tradition. Expatriate scholarly contributions devoted to Indian legal tradition and development have grown steadily, in the American law reviews, in the past two decades. I may here mention by way of example contributions by Professor Ved Nanda among the senior scholars and among the younger colleagues: Archana Parashar (though located in Australia), Praba Kottiswaran, Vijayshri Sripathi, Jayanth R. Krishnan, Anita Ramaswamy, Vikram Raghavan, and Iqbal Ishar. Fortunately, this remains an illustrative listing because any further listing must also include some brilliant doctoral / postdoctoral scholars working in American Law Schools. Further, at least one expatriate scholar served time in a leadership position at the National Law School of India University, Bangalore; and one Indian scholar has led, for now more than a quarter century, the International Center for Law in Development, New York. All this signifies indeed a promising development. While most of expatriate writings remain wholly advertent, even deferential, to Indian legal literature, contemporary Indian law review writing rarely cognises their literary contributions.

Even as the expatriate contributions have increased, the overall interest in Indian legal development and corresponding literary contribution by Euroamerican 'native' scholars has steadily declined. India-oriented legal scholarship has suffered a serious decline owing to a number of factors, which need to be fully explored, a task that I cannot address here. But an

initial checklist of factors will at least include the following: the already referred-to decline in Ford Foundation auspices for legal education reform, the low rate of scholarly and institutional return for legal academics pursuing 'exotic' comparative law research, the diversion of resources to studying institutionalisation of the 'rule of law' in People's Republic of China and the so-called 'post-socialist' and 'transitional' societies, the fluctuating profile of legal education and reform in overseas development aid North allocations, the complexity of Indian legal development since the Independence, and the rise of Indian legal scholarship, both doctrinal and empirical.

One needs also recall the ways in contemporary globalisation has provided some new diversions: some American law scholars known for their contribution to Indian legal studies have begun acting as 'consultants' (even as 'lobbyists') to transnational corporations, not so much for their erstwhile specialisation in Indian law but for the network of global capital, and other, contacts they usefully bring to the service of global capital. Thus, for example, both the Union Carbide Corporation and Enron retained as consultants some noted American law professors with India background (their identities must remain undisclosed for reasons of collegial courtesy and reasons of privileged communication.)

Further, given the spurt of globalisation related policy research concerning 'good governance', 'diversity, and 'access to justice' programmes, many American colleagues (among others) with extensive India background lead or take part in missions under the auspices of the World Bank, the Asian Development Bank, the UNDP, the USAID and like agencies. One may then witness, in the near future, some still 'New Law and Development' type policy analysis emerging as contribution to the campus and off-campus based Indian, and overseas, law reviews.

One must remain wary though of ignoring individual biographies. The emergence and development of concern with the law-ways of the non-European Other invites labours of cultural anthropology studying transformations in the dominant/hegemonic Euroamerican juristic cultures, a theme for another day! In the present context, it may indeed be worthwhile to seek such understanding in relation to a Duncan Derrett or a Marc Galanter.

As concerns the latter, the question surely arises: How may we understand Galanter's past and ongoing luminous contributions to Indian law and jurisprudence? How may we essay an understanding and explanation of his more abiding interest, compared with the episodic excitement of his peers? Specialisation in South development brought rewards primarily

within the Cold War formations of knowledges designated as 'area studies', outside which the system of academic honour and rewards remains competitively insular. What, after all, enabled Marc Galanter to successfully break (and with what future benign impact) through this American institutional mould? Further, how may we understand the social fact (in the Durkheimian sense) that he has been so remarkably able to nurture, with eminent success, a whole new generation of expatriate scholarship and also to furnish sites of comparative learning for generations of Indian students, and scholars, in their itinerant United States locations? He has encouraged serious minded empirical engagement with both state and non-state forms of Indian law in the United States against some heavy odds. He remains the only American scholar to continue to contribute, for now over four decades to critical understanding of Indian legal development — his first publications on India were in 1960 and 1961, and his initial exposure to Indian law was as a (Fulbright) student at Delhi Law School, then under the deanship of L.R. Sivasubramaniam. I suggest that a future volume of the *Delhi Law Review* addresses the full range of his contributions, and their impact on teaching and research in India, and that in doing so raise the further crucial question: In what ways may this engagement with India can be said to have cross-fertilised the American intercultural understanding of transformative role of law in society?

The wider question above also invites parallel labours as well in relation to the extraordinary contribution of Duncan Derrett, further enriched by Werner Menski and the insightful contributions of Dieter Conrad. Apart from furnishing 'symbolic capital' (to evoke Pierre Bourdieu's fecund phrase) respectively to the School of Oriental and African Studies at London and South Asia Institute at the University of Heidelberg, what impact did their work may be said to have on the United Kingdom and German scholarly landscape?

Comparative legal studies, in their various traditions, have primarily traced the impact of dominant Euroamerican law and jurisprudence on the colonial and still *de-colonising* societies, they have not yet even formed the question of *refracted impact*. Is it conceivable that domination traditions may remain entirely unaffected by the culture of the dominated peoples? Does no learning/unlearning occur among epistemic communities of the North by 'contact' with the global South? Aside from notable exceptions of Charles Alexandrowicz who traced the constitutive impact in the making of modern international law the 'gains of learning' (I here use this Hindu law metaphor with a benign intent) arising from South (here, both Asian and African) traditions and knowledge-ways, and of American comparative law oriented scholarship (enlivened by contributions of anthropology and political

science exemplified by Professors Bernard Cohn and Lloyd and Susanne Rudolph), one notes ruefully that the figure of 'contact' remains itself excessively Euroamerican-centric. 'Post contact' societies seem to be endowed with a permanent essence; they signify overwhelmingly only those affected by past imperial and now post-imperial globalising hegemones. An authentic postcolonial law review scholarship may only emerge in the future by the posing of the issue of reverse impact. One hopes against hope that the 'new wave' patterns of the Indian legal education and research may address this task adequately.

V. RELATIONSHIP WITH WIDER LITERARY TRADITION

I have already highlighted in the foregoing the rather difficult relation between professional treatises and episodic law review offerings. Clearly, the aspiration of the founders of Indian law reviews stands fully betrayed, were we to read this as signifying a more creative traffic of ideas between practitioners and professors. On yet another register of cross-cultural learning, there emerges a dire disparity. Leading South law journals, and judicial opinions, especially in Southern African jurisdictions, testify to a rich recourse to Indian law journal materials. The same observation holds true for some interesting developments in Latin American scholarship, which take seriously aspects of social action litigation and public law theory. In contrast, within-India legal literary production remains, overall, insolently insular.

More than five decades of the growth of insularity of campus-based legal scholarship remains refracted as well on other literary production sites, most notably the enviably viable (from the standpoint at least of the long suffering editorial communities of law school reviews) *Journal of the Indian Law Institute* and *The Annual Survey of Indian Law*. During my association with the Indian Law Institute, as its Honorary Research Director (1985-1988), in the course of a project concerning content analysis of the *Journal* (unfortunately unpublished), I was astounded by the relative referential paucity to campus based law review production. The same, more or less, remains true of scholarly contributors to the Journal Section of the *All India Reporter*, *Supreme Court Cases*, and allied law report journal contents. The situation is unfortunately *no* better in the new wave 'leadership' now allegedly offered by national law schools type literary productions.

All this is indeed deeply troublesome. The wealth of citations to Anglo-American law reviews and journals aggravated by voluminous silence to South legal literary production suggests a profound failure on our part to

de-colonise Indian legal education and research. And insofar as this furnishes a 'model' for the contemporary Commonwealth legal education and research, the insufficient pace and rate of de-colonised Indian scenario poses a moment of contemporary danger.

VI. A CONCLUSIONARY WORD

This elegiac, still far from a funerary, note should serve also as the conclusion of this admittedly curious contribution.

On a more upbeat note, I hope that these scattered observations may contribute to the much needed critical self-reflexivity even on the part of the already heavily globalisation satiated and sedated legal academia, constituted by the newly flourishing entrepreneurial communities of arch-'globalisers' of Indian legal education.

May I also express a larger hope that students of contemporary historiography of South literary productions may find this nascent exploration somewhat worthwhile?

Affirmative Action in Selected Countries⁺

Harish C. Jain^{*}

Globalisation and increasing competition pose important challenges to policy makers and organisations. One such challenge is the extent to which equality of opportunity is afforded to all members of the increasingly diverse labour force in the global economy.

This article examines: (a) the experiences of countries where equal employment and employment equity/affirmative action policies have been designed to assist the majority population such as in South Africa and Malaysia; (b) selected country experiences with quotas/reservations, legislated goals and timetables and positive action policies and programmes. For example, India and Malaysia have affirmative action (AA) programmes that are constitutionally sanctioned; the United States has Presidential Executive Orders requiring AA for federal contractors and sub-contractors with mandated goals and timetables; Canada and South Africa have legislated equal opportunity and employment equity/affirmative action (EE/AA) policies with goals and timetables; Britain has a policy of voluntary AA programmes and Northern Ireland in U.K. has legislated goals and timetables and AA programmes for Catholic minorities; and (c) lessons to be drawn from the success/failure of these policies in the six countries, and a analysis of whether or not such policies can be a source of competitive advantage in the global economy.

I. AFFIRMATIVE ACTION, EMPLOYMENT EQUITY AND WORKFORCE DIVERSITY¹

The terms AA, EE, and *workforce diversity* are often used interchangeably. However, they are conceptually different. In the North American context, AA originated in the United States as a response to segregation

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^{*} Professor Emeritus, MGD School of Business, McMaster University, Canada. E-mail: jainhar@mcmaster.ca

¹ This section is adapted in part from Harish C. Jain, Peter J. Sloane and Frank M. Horowitz, *EMPLOYMENT EQUITY AND AFFIRMATIVE ACTION: AN INTERNATIONAL COMPARISON* (2003).

and the disadvantage of Blacks in employment, education and other areas of life. Some have described AA as "hiring by numbers" due to its focus on increasing the representation of designated groups through targeted hiring, and to some extent training and promotion. AA compliance does not emphasise changing organisational policies, practices, and climate so that designated groups could become equal partners with other workers and share with other employees promotion and rewards for their performance.² The term EE was coined by Judge Rosalie Silberman Abella, appointed chair of a Royal Commission on Equality in Employment in 1984 by the Canadian federal government. Judge Abella set a course different from AA and sought to avoid the controversy and stigma attached to it. EE is designed not only to improve numerical representation of designated groups through hiring, but also to provide the supportive organisational culture for the retention, promotion, and training of the designated groups.

Thus, EE is a much more comprehensive strategy that stresses both quantitative and qualitative measures. Accordingly, the emphasis is not only on improving numerical representation but also on providing equality of opportunity through fair staffing procedures and a supportive organisational climate.³

In this article, I examine EE/AA with the perspective described above. Both refer to selective proactive policies and programs by government and non-governmental institutions to redress work-related inequalities that exist within countries along racial, ethnic, gender, caste, disability, and other lines. Diversity management, on the other hand, is a voluntary corporate response and an extension, not substitution, of proactive policies to ensure fair treatment of all employees.

AA/EE programs are legislatively driven, whereas diversity management is strictly voluntary and is a strategic corporate response to the growth of diversity in the workforce and is motivated by business objectives. Diversity management can complement, but not replace, EE/AA.⁴

2. Carol Agoos and Catherine Burr, *Employment Equity: Affirmative Action and Managing Diversity: Assessing the Differences* need volume number INTERNATIONAL JOURNAL OF MANPOWER 30 (1996).
3. Harish C. Jain, *Foreword* in Adele Thomas and David Robertshaw, *ACHIEVING EMPLOYMENT EQUITY: A GUIDE TO EFFECTIVE STRATEGIES*, DEVELOPING THE FUTURE OF ORGANIZATIONS (1999).
4. Harish C. Jain and Anil Verma, *Introduction: Workforce Diversity and Competitive Strategies: Human Resource Policies and Practices in the 1990s* INTERNATIONAL JOURNAL OF MANPOWER 5-13 (1996).

II. SELECTED COUNTRY POLICY RESPONSES TO EMPLOYMENT EQUITY/ AFFIRMATIVE ACTION PROGRAMMES

I have selected several countries to illustrate policy responses to discrimination in employment in the public and private sectors at the macro and micro levels respectively. These are: India, Malaysia, Canada, United States, South Africa, and Britain including Northern Ireland. Employment Equity/Affirmative Action (EE/AA) policies of these countries will be examined in some detail.

In Malaysia and South Africa, AA policies deal with the majority communities. In Malaysia, such policies deal with the *Bumiputras* ("sons of the soil") who comprise approximately 66 percent of the estimated 23.3 million population, Chinese 25.3 percent and Indians 7.4 percent of the population.⁵ In South Africa, EE policies in the form of constitutional guarantees of equality of opportunity and employment equity legislation and other policies deal with women (both White and Black) who are 52 percent of the total population and with Blacks who are more than 88 percent of the country's population including men and women who comprise Blacks (76.7 percent), coloureds (8.9 percent), Asians (2.6 percent), and others.⁶ In India, the government's task is one of addressing inequalities for women consisting of 48 percent of the population and a significant number of minorities such as scheduled castes (SCs), scheduled tribes (STs).⁷ Both groups constitute 21 percent or more than 200 million of the 864 million population as of 1991.⁸ In Canada and the United States, EE target groups include racial minorities, women, aboriginal people and persons with disabilities. In both countries, close to 45 percent of the workforce consists of women; racial minorities constitute about 25 percent in the

5. Treasury, *Economic Report 2000*.
6. STATISTICS SOUTH AFRICA 2001
7. SCs comprise 135 million persons and STs consist of 66 million persons, as of 1991. STs are made up of some 400 communities varying greatly in size, physical characteristics, linguistic and religious usages, as well as traditional modes of livelihood. They do not however, have a distinctive racial, religious or even linguistic identity that marks them off from the non-tribal communities. They remain relatively backward and live in isolation in remote communities. Unlike the tribals (STs), SCs are found in every part of the country and have been closely involved in the life of their respective communities. They speak the language of the region they inhabit. In the past, they occupied the lowest position in the economic hierarchy and have been engaged in manual and menial occupations. The Constitution of India has abolished the practice of untouchability, but they continue to suffer from many disadvantages (Beteille 1993).
8. Harish C. Jain and C.S.V. Ratnam, *Affirmative Action in Employment for the Scheduled Castes and the Scheduled Tribes in India* 15 INTERNATIONAL JOURNAL OF MANPOWER 6-25 (1994).

United States and 10.3 percent of the labour force in Canada. In Britain, racial minorities form 6.5 percent of the population but their visibility is increased by their concentration in large metropolitan areas.⁹ Women make up 43 percent of those at work. In Northern Ireland, ethnicity and religion are closely inter-twined. For instance, a person's community of origin greatly affects their marriage partner, residential area, school to be attended by their children, choice of employers, etc.¹⁰ The Catholic minority is sizeable and growing relative to the Protestant majority. (58 percent Protestants versus 42 percent Catholics). AA is the key mechanism, according to the former Fair Employment Commission (FEC) and now the Equality Commission, to affect the working environments inside companies.

A. The Indian Experience

When India became independent in 1947, the nationalist leadership was committed to removing job and other barriers faced by the two groups. They wrote into the Constitution provisions prohibiting discrimination on grounds of religion, race, caste, sex, descent, place of birth or residence: the Constitution came into effect in 1950. The purpose was to eliminate discrimination against the untouchables - Scheduled Castes (SCs) and to facilitate spatial and social mobility for tribal people - Scheduled Tribes (STs).¹¹

Members of the SCs and STs are predominantly in the unorganised, informal sector, and thus largely unprotected by employment standards and other labour legislation. A substantial majority is dependent on agriculture but do not own land, which leads to very low wages and bonded labour.¹²

Both SCs and STs were given seats in the parliament and in the state legislative assemblies in proportion to their population. Quotas or reserva-

9. B. Parekh, *REPORT ON THE FUTURE OF MULTI-ETHNIC BRITAIN* (2000).

10. R.J. Cormack and R.D. Osborne, *DISCRIMINATION AND PUBLIC POLICY IN NORTHERN IRELAND* (1991).

11. According to Sowell, "India is not only the world's largest multi-ethnic society but also one of the most socially fragmented, with powerful religious, caste, regional and ethnic differences cross-cutting the society. There are an estimated 180 languages in India and more than 500 dialects." T. Sowell, *PREFERENTIAL POLITICS: AN INTERNATIONAL PERSPECTIVE* (1990). In India, preferential policies for minorities are state or local, while preferential policies for less fortunate minorities such as untouchables and tribal groups are national, supplemented by local programs.

12. A. Kaur, *India in Jane Hodges-Aberhard and Carl Raskin* (eds.), *AFFIRMATIVE ACTION IN THE EMPLOYMENT OF ETHNIC MINORITIES AND PERSONS WITH DISABILITIES* (1997).

tions provisions were also made for employment in government and public sector jobs (i.e., public enterprises), in the national and state governments, as well as for admissions into schools, colleges, medical and engineering schools.¹³ Thus, the Indian experience is one in which AA is defined quite rigidly in terms of reservations and quotas. The rationale for Constitutional safeguards and AA programmes for women and the socially and economically depressed classes - both men and women - lies in the obnoxious practice of untouchability in respect of SCs and exploitative slavery in respect of both the SCs and STs.

Due to repeated criticisms¹⁴ of government policies by the Commission for Scheduled Castes and Scheduled Tribes (set up in 1978 in the Ministry of Home Affairs) the Constitution was amended in 1992.¹⁵ This provided statutory powers to the Commission to investigate and monitor all matters relating to AA measures provided for the SCs and STs. It became mandatory for the federal and state governments to consult the Commission on AA measures. The Commission was also vested with powers of a civil court examining a suit.¹⁶

In 1990, the Indian Government announced that there would be additional quotas or reservations for "other backward classes" (OBCs).¹⁷ The OBCs are socially and educationally backward classes of citizens and the government adopted a quota of 27 percent for the OBCs on top of the 22 percent provided for the scheduled castes (SCs) and the tribals (STs). Thus, in all, 49 percent of government jobs and admissions into colleges, medical and engineering schools were put aside for approximately three-

13. *CONSTITUTION OF INDIA*, Arts. 15, 16, 46 and 335.

14. The representation for SCs and STs was well below the quotas: 5 percent in Class I jobs against a quota of 15 percent for SCs and 1.04 percent versus a quota of 7.5 percent for STs.

15. The Commission for Scheduled Castes and Scheduled Tribes is now a constitutional authority.

16. A. Kaur, *supra* n. 12. As a result, several measures were adopted, such as: (1) the establishment of the National Scheduled Castes and Scheduled Tribes Finance and Development Corporation—a non-profit company—to assist in employment generation for SCs and STs; (2) aid to voluntary organizations for SCs such as technical training; (3) national overseas scholarships and transportation grants for higher studies abroad; (4) post-secondary school scholarships for SC and ST students including payment of all tuition and compulsory fees as well as maintenance allowance; (5) book banks for SC and ST students; and (6) hostels for girls and boys from SCs, as well as (7) coaching schemes offered through pre-examination recruitment training centres to improve SC representation in various services in the federal and state government and in public sector enterprises.

17. Mandatory Constitutional provisions of reservation of seats in the Parliament and the State Legislatures apply only to the SCs and STs, and not to the OBCs.

quarters of the population.¹⁸ In its decision of November 16, 1992, the Supreme Court upheld the government's order (by a majority of 6 to 3) to provide job quotas for the OBCs. The Court decided that reservations for all three groups (SCs, STs and OBCs) should not ordinarily exceed 50 percent. As well, candidates selected for reserved positions must meet certain conditions of eligibility to satisfy the requirement of efficiency in administration. The judgement exempted from reservations appointments to certain positions, for example, defence personnel, research scientists, medical scientists, university professors, etc.¹⁹

The achievements of AA in India are significant, particularly with regard to securing proportionate representation in professional and managerial positions (yet this is confined to the public sector).²⁰ There is a small and growing middle class of untouchables and tribals.²¹ Although AA programs were originally intended to last for ten years from 1950, they have been extended repeatedly over the years. Only a small proportion of the SC and ST population are qualified for better jobs in government and public enterprises. As per the 1981 census, only 2 percent of SCs and STs graduated from high school and 0.25 percent were university graduates. Thus, providing access to human resource endowments and entitlements like education, training, relevant skills, etc. should precede or proceed in parallel with the quota system.²²

AA in India has survived and strengthened because of popular and political support; more than one out of every five seats in the parliament are represented and filled by SC and ST candidates as guaranteed by the Constitution. Similar reservations exist with respect to state legislatures,

18. Harish C. Jain and C.S.V. Rammam, *supra* n. 8.

19. *Indra Sawhney v. Union of India* AIR 1992 SC 477.

20. Harish C. Jain and C.S.V. Rammam, *supra* n. 8.

21. Currently, of the 365 districts in India, 60 to 70 are headed up by district officers who are members of SCs and STs; some of them are also vice-chancellors at universities, doctors, airline pilots, and lawyers. In addition, there are SC teachers in a fairly large number of village schools and they play an important role in changing attitudes towards SCs. See A. Betelle, *India: Equal Opportunities for All and Special Opportunities for Some*, in Weiner (ed.), *DEVELOPMENT AND DEMOCRACY* (1993). AA has been successful in large part in altering the image that other people have of SCs and STs.

22. In the past, it has often been pointed out that jobs reserved for the STs and SCs could not be filled for want of qualified candidates. This is partly a direct result of governments not giving effect to the Constitutional directive for universal elementary education. Hence, job reservations, according to Betelle has been an easy way out for governments; it is a cheap mechanism, implemented at low cost. All that it requires is that places are set aside in the public service. See Betelle *supra* n. 21. Betelle goes on to point out that an effective job reservations program would have required much more active intervention by both the government and other agencies in society.

(and even in local government bodies). Continued political pressure from the elected representative belonging to these communities, who account for 22.5 percent of Parliamentarians and legislators, helps keep governments and public enterprise managers on their toes.²³ Despite these provisions, the progress has been slow on account of a low economic growth rate in the 1950-1990 period. Resources available for the expansion in education and other social services have remained scarce.

It has become increasingly apparent that the beneficiaries from the disadvantaged communities are likely to be the better-off and not the worst-off members of the communities to which they belong and in whose name quotas are made. The Supreme Court of India, in its 1992 decision noted earlier, was concerned about the flow of benefits to what is called "creamy layers" among the disadvantaged and that no really effective way has been found for diverting the benefits of reservation from the better-off to the worst-off members of backward communities.²⁴

Reservations policies have also exacerbated inefficiency to some extent and the attitude that government employment is a right. There is no incentive for better performance. The entire initiative has been left to the government. The private sector has had no obligations to offer job opportunities to SCs and STs.²⁵

B. Experience in Malaysia

The post-independent government in Malaysia was formed by a coalition of three ethnic groups: the Chinese, the Indians, and the Malays. Following independence in 1957, an accord was forged among the three ethnic groups: Citizenship for the Chinese and Indians in return for the Malays receiving preferential treatment under the constitution.²⁶ However, following the riots after the 1969 elections it was felt that the ethnic Malay community was economically disadvantaged and that this situation was not conducive to national stability and unity.²⁷ A new economic policy (NEP)

23. Harish C. Jain and C.S.V. Rammam, *supra* n. 8.

24. A. Betelle, *supra* n. 21. In India, a vast majority of the population is concentrated in villages. Job reservations divert attention from the masses who are so poor even to be seeking jobs in their names. Hence job reservations can only attend to the problems of middle class SCs and STs.

25. *Ibid.*

26. M. Puthucherry, *Malaysia: Safeguarding the Malays and the Interests of Other Communities*, in Weiner (ed.) *supra* n. 21.

27. According to Sowell *supra* n. 11, "an escalation of preferential policies of Malays occurred after the race riots of May 1969, in which Malays unleashed mob violence against the Chinese. The Malay government promulgated its 'New Economic Policy,' designed to achieve what it called 'racial balance.'"

resulted in a fundamental restructuring of the Malaysian economy in order to correct economic imbalances. Several strategies were employed to increase the employment and earned income of *Bumiputras* (native Malay). Quotas were introduced in various areas such as admission to university and equity ownership. Quotas, however, were used extensively in the public sector where *Bumiputras*, especially those with educational qualifications, found ready employment. Appointments in the Civil Service were made at a ratio of four Malays to one non-Malay.²⁸ While there was some resentment on the part of non-Malays, the Chinese leadership within the governing alliance was willing to go along. In fact, there was a political bargain struck between the Malays and the Chinese elite. The deal was that the Chinese could make money while the Malays could run an administration that pursued pro-growth policies.²⁹

Substantial changes were made to the Constitution. The special position of Malays was guaranteed; these provisions could not be removed even by normal two-thirds majority required for other constitutional amendments. Thus, future governments could not amend this section of the Constitution even if they had a two-thirds majority. In addition, amendments to the sedition laws were passed to make it illegal to question these rights in Parliament or outside.

In the post-NEP period, the government decided to continue the quota program.³⁰ According to Puthucherry,³¹ the combination of economic

28. According to Puthucherry *supra* n. 26, the NEP aimed at assisting Malays and other *Bumiputras* to move from agricultural occupations to the more lucrative urban occupations where opportunities for socio-economic advancement were much greater. Affirmative action programs were introduced to education, employment and in the corporate sector where wealth was measured in terms of equity ownership. In education, ethnic quotas were introduced for admission to local universities. In the private sector, statistical targets were set for "economic restructuring." It was envisaged that within a twenty year period, the proportion of Malay ownership of share capital would increase from less than 2 percent in 1969 to about 30 percent by 1990. In addition, laws were passed making it compulsory for firms over a certain size to employ a certain number of Malays at all levels of the hierarchy. Companies wishing to expand their operations were also required to set aside a proportion of their new capital for Malay ownership. The price of shares offered to Malays was lower than the market value, thus giving opportunity to those who were allocated these shares to make quick returns. The emphasis of the NEP was on equality of results, that is, in ensuring that the distribution of income, wealth and occupations is in proportion to the population of each group. Emphasis was placed on getting the right ethnic "mix" in employment at all levels and in both public and private sectors.

29. I. Emsley, *Malaysia, Affirmative Action: The Malaysian Experience* (Oxford, 1992).

30. M. Mahathir, *Speech at Parliament* New Straits Times, June 18, 1991.

31. Puthucherry, *supra* n. 26.

growth and special benefits produced a Malay middle class. The NEP came to be increasingly identified with restructuring of society in order to reduce inter-ethnic disparities, especially between ethnic Malay and ethnic Chinese Malaysians.³²

The NEP has been associated with the economic development policy in three Outline Perspective Plans- OPP-1 for 1971 to 1990; OPP-2 for 1991-2000 and OPP-3 for 2001-2010 and the new National Vision Policy³³ is linked to OPP-3. As Jomo suggests, development policy associated with the Second OPP and then by National Vision Policy (NVP) linked to OPP-3 is still thought to be primarily influenced by the NEP's restructuring of society.³⁴ The NVP supports the objective of previous plans in 1970s and 1980s to place 30 percent of the country's wealth in the hands of Malays - the *bumiputras*. In March 2001, following clashes between Indians and Malays, the government for the first time set a 3 percent target of Indian equity ownership. The government is predicting an average economic growth rate of 7.5 percent per annum so that affirmative action policies for the *Bumiputras* and Indian population will not be at the expense of Chinese interests.

Results of the Policies

In 1969, Malays had only 2 percent of equity in firms, and few Malays were in management. Arrangements were made to expand Malay equity capital, so that by 1990 it reached about 18 percent and 20 percent in 2000.³⁵ Private individual ownership rather than trust agencies ownership has risen from less than a third to over 90 percent, though much of this NEP achievement has been subject to dispute. Until the early 1990s, the economy of Malaysia grew at between 6 and 7 percent per year. In private sector employment, the Malays exceeded the fifty percent target set in the first Outline Prospective Plan (OPP-1) reaching 61.8 percent by 1990 in the professional and technical categories. The Malays also improved their representation from 22.4 percent in 1970 to 31.3 percent in 1990 in the administrative and managerial occupational groups, even though their tar-

32. K. Sundaram Jomo, *Malaysia's New Economic Policy and National Unity*, Paper prepared for the United Nations Research Institute for Social Development Conference on Racism and Public Policy, September, Durban, South Africa (2001). See also Hebert, Murray, and S. Jayasankaran, *Affirmative Action Policies Enacted After Riots 30 Years Ago Still Play a Vital Role in Forecasting Racial Harmony*, IAK EASTERN ECONOMIC REVIEW May 20, 1999.

33. Announced by Prime Minister Mahathir in April 2001.

34. K. Sundaram Jomo, *supra* n. 32.

35. *Ibid.*

geted representation level was 49.3 percent. This lower representation attainment level reflects low Malay representation at the managerial and supervisory levels in the manufacturing and service sectors.³⁶

The most significant change over the years has been the reduction in the incidence of poverty from 74 percent of Malays in 1970 to an overall figure of 6 percent in 1994 and the Malay share of national wealth went up from 1.5 percent in 1969 to 19.4 percent in 1998. The national economy had an economic growth rate of 7 percent a year for most of that period and hence the Malay's advance did not come at the expense of other races.³⁷ Thus, the distribution of income, wealth and occupations among individuals has achieved a more balanced ethnic mix. In particular, the affirmative action programs have contributed to the establishment of a Malay business community. Through various strategies including the setting up of public enterprises to employ and train Malays and the use of administrative regulations to encourage Malay employment in private sector companies, a more ethnically balanced urban community has come about. Malays now occupy positions that were monopolized by non-Malays in the past. Enrolment in institutions of higher learning increased to such an extent that by 1980, 75 percent of the students in local institutions of higher learning were Malay.³⁸

The high rates of economic growth, as indicated above, resulted in a general increase in the level of income for all ethnic groups and this has been the most important factor contributing to the success of the affirmative action programs.

Some negative consequences of AA have been that a) it has been difficult for the civil service to maintain its image as impartial and politically neutral when it is constantly making political decisions based on ethnic considerations rather than on the objective criteria of need and merit, according to Puthucherry³⁹; b) AA can result in the perpetuation and even strengthening of ethnic cleavages; c) AA programs also tend to result in conflicts within the preferential groups themselves since the benefits of AA programs accrue disproportionately to better off than to poorer sections of the groups; this is especially the case between the dominant Malay group and the other indigenous sub-groups that together make up the *Bumiputera* category such as Sarawak and Sabah groups; and

36. J. Hodges-Aberhard and C. Raskin, *AFFIRMATIVE ACTION IN THE EMPLOYMENT OF ETHNIC MINORITIES AND PERSONS WITH DISABILITIES* (1997).

37. Murray Hebert and S. Jayasankaran, *supra* n. 32.

38. M. Puthucherry, *supra* n. 26.

39. *Ibid.*

d) some critics have argued that once AA is introduced, it becomes permanently entrenched in the political system, serving the interests of a small minority.

C. Experience in the United States

In the United States, initially the country had to address the problem of a disadvantaged minority rather than a majority or large plurality. According to Farley,⁴⁰ the United States was essentially a Black-White country until 1960. Today, USA is becoming a multi-cultural country having people from numerous nationalities and racial and ethnic backgrounds. This is because of slowing birth rates of Blacks (and Whites) and increasing immigration from Asian and Latin American countries; there were almost 13 million landed immigrants during the 1980s and early 1990s.⁴¹ Farley suggests that the Spanish-origin population will numerically pass the Black population within 10 years, due to their rapidly growing population relative to Blacks.⁴² In fact, Farley's prediction has already come true. According to the 2000 Census figures, Hispanics have already overtaken Blacks; there were 35,305,818 Hispanics (or 12.5 percent Hispanics out of the total population of 281,421,906), relative to 34,658,190 Blacks or 12.3 percent Blacks in the same year. This demographic diversity is to be found throughout the United States⁴³, and not just in big cities, and has been confirmed by the 2000 Census.⁴⁴

According to Farley⁴⁵, 90 percent of Blacks lived in poverty at the beginning of World War II and while relative gains have occurred in the median income of Blacks in the 1990s, the Black-White earnings gap is likely to continue.

The Civil Rights Act 1964, Title VII, applies specifically to employment: other sections or titles of the Act apply to voting rights, education and accommodations etc. Title VII prohibits discrimination on the basis of race, colour, religion, sex or national origin in every aspect of employment,

40. R. Farley, *Demographic, Economic and Social Trends in a Multicultural America* in James S. Jackson (ed.) *New Directions: AFRICAN AMERICANS IN A DIVERSIFYING NATION* (2000).

41. *Ibid.* See also James S. Jackson, *Introduction and Overview* in *NEW DIRECTIONS: AFRICAN AMERICANS IN A DIVERSIFYING NATION* (2000).

42. R. Farley, *supra* n. 40.

43. *Ibid.*

44. See www.census.usatoday.com. See also Haya El Nasser and Paul Overberg, *Index Chart Growth in Diversity: Despite 23 percent Jump, Segregation is Still Going On*, *Researchers Say* USA Today 3A, 10A, March 15, 2001.

45. R. Farley, *supra* n. 40.

The Equal Opportunity Employment Commission (EEOC) was established to administer the Act. The Act applies to employers, employment agencies, and labour organisations. The Act was amended in 1972 and its coverage extended to include public and private employers with 15 or more employees.

The term affirmative action first appeared in American law, in the Civil Rights Act 1964, Title VII. All employers of 100 or more employees are required to submit employment statistics reporting employment by race and other protected categories in broad job classifications each year. Although not specifically required under Title VII, affirmative action may be required as part of a conciliated or court settlement among employers and the federal enforcement agencies. According to Leonard,⁴⁶ more than 1,700 class action suits were filed under this legislation. These suits have been among the most powerful prods to increasing minority and female employment because they affected the most people, resulted in large awards, and generated most publicity.

The Civil Rights Act 1991 covers more prohibited grounds such as age, disability and extends the coverage of the Act to the United States Senate and political appointees of the President and staff members of the elected officials at the state level. The House of Representatives employees are covered by a House Resolution adopted in 1988.⁴⁷ In 1965, the then President Lyndon Johnson issued an executive order requiring affirmative action in employment and promotion of all federal contractors, even if they had never discriminated.

D. Experience in Canada

Canada's population and workforce are becoming increasingly pluralistic. Forty-two percent of Canadians reported origins other than French or British, while 16 per cent of Canadians were foreign born.⁴⁸ The 1996 Census information regarding racial minorities or visible minorities (VMs), as they are called in official statistics in Canada, indicated that VMs made up 11.2 percent of the Canadian population. The VMs are a growing proportion of the population in Canada's principal cities. For instance, they made up 32 percent of the population of Toronto, 31 percent in Vancouver,

as well as 16 percent in Calgary, 14 percent in Edmonton, 12 percent in Ottawa/Hull, and 11 percent in Winnipeg.⁴⁹ Table 1 shows the representation of racial minorities in the Canadian workforce from 1981 to 1996. Their proportion had more than doubled from 4.9 percent to 10.3 percent.

Table 1
Percentage of Workforce Representation of Women and Racial
Minorities in Canada: 1981-1996

	1981	1986	1991	1996
Females	42.1	44.0	45.9	46.4
Visible minorities	4.9	6.3	9.1	10.3

Source: Census Statistics Canada

a. Policy Responses in Canada

In the early 1980s, governments in Canada began to investigate the need for policy initiatives in the area of improving the economic status of minorities who faced discrimination in the labour market. The best known of these investigations, commissioned by the federal government known as the Abella Commission Report,⁵⁰ found that significant obstacles confronted the four designated groups and recommended early action to head-off potential social conflict that may result from inaction. In the same year, the all-party Parliamentary Committee Report known as the Daudlin Commission Report, *Equality Now!*⁵¹ reported similar findings on the status of visible minorities. The Edmonds Task Force⁵² examined barriers to advancement of women in the federal public service.

The Canadian responses to improving the status of designated groups such as women and ethnic minorities can be divided into four groups. One category of response is in the form of prohibiting discrimination on enumerated grounds. All the provinces and territories including the federal government, for instance, have human rights legislation prohibiting dis-

46. J. Leonard, *What Promises are Worth: The Impact of Affirmative Action Goals*, 148 *ANNALS OF HUMAN RESOURCES* 20 (1985).

47. Wayne F. Cascio, *MANAGING HUMAN RESOURCES: PRODUCTIVITY, QUALITY OF WORK LIFE, PROFITS* (1998).

48. Heritage Canada, *ANNUAL REPORT 1994-1995 ON THE OPERATION OF THE CANADIAN METI-CULTURALISM ACT* (1996).

49. Harish C. Jain, Parbudyal Singh, and Carol Agoos, *Recruitment, Selection and Promotion of Visible Minority and Aboriginal Officers in Selected Canadian Police Services* 43 *CANADIAN PUBLIC ADMINISTRATION* 46 (2000).

50. R. S. Abella, *EQUALITY IN EMPLOYMENT: A ROYAL COMMISSION REPORT* (1984).

51. R. Daudlin, *EQUALITY NOW! REPORT OF THE SPECIAL COMMITTEE ON VISIBLE MINORITIES IN CANADA*, Society (1984).

52. J. Edmonds, *BENEATH THE VENERB* Volumes 1-4 (1990).

criminatorily treatment on several grounds including gender, race, ethnic origin, religion, and age. Courts have been willing to read in certain grounds of discrimination, even when the legislatures in certain jurisdictions had chosen not to include these grounds into their respective laws. For instance, sexual orientation in the case of the Alberta and the federal human rights statutes was read into the two statutes by the Supreme Court of Canada. The Constitution Act 1982, contains the Canadian Charter of Rights and Freedoms. Section 15(2) of the Charter guarantees certain rights and freedoms without precluding employment equity programs. This section applies to all government agencies across Canada (e.g. federal, provincial, territorial and municipal).

The second category of responses has been to enact specific legislation aimed at implementing employment equity programs. This has taken the form of federal Employment Equity Act (EEA) 1986, revised and amended in October 1995 and strengthened to include federal government agencies for the first time. The 1986 EEA covered employers in mainly three industrial sectors: banking, transportation, and communications. It covered about 343 private sector employers and federal crown corporations with a total of 576,965 employees.⁵³

The third category has been to use administrative policy (as opposed to legislation) to require implementation of employment equity programs. The best example here is the Federal Contractors Program (1986) which requires organisations with 100 or more employees bidding on federal government contracts of \$200,000 or more to undertake employment equity programs. This program covers 845 contractors with a workforce of 1.1 million.⁵⁴ Contractors are required to remove barriers faced by the four designated groups in selection, hiring, promoting and training; mount proactive positive measures; and come up with specific goals and timetables.

The fourth category of response has been the collective agreement provisions under the industrial relations legislation. Approximately half the collective agreements in Canada included anti-discrimination clauses that prohibit discrimination on the basis of the several prohibited grounds or merely incorporate the human rights legislation of the relevant government. These prohibited grounds cover hiring, promotion, job assignment, com-

53. H.C. Jain, *Employment Equity in Canada* HUMAN RESOURCE MANAGEMENT IN CANADA 45-50 (1995).

54. Judi Longfield, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act* REPORT OF THE STANDING COMMITTEE ON HUMAN RESOURCES DEVELOPMENT AND THE STATUS OF PERSONS WITH DISABILITIES (2002).

penation and other areas where discrimination may occur.⁵⁵ About one-third of collective agreements also contained specific clauses for the protection of older and disabled workers and prohibit sexual harassment. Some agreements also contain clauses on relatively new grounds such as AIDS, drug use, electronic surveillance of workers etc.⁵⁶

b. Employment Equity

EE is permitted by the Constitution Act 1982 as well as the federal EEA enacted first in 1986 and revised extensively in 1995.

The Canadian Charter of Rights and Freedoms is a part of the Constitution Act 1982. The Charter's provisions apply to all government agencies across Canada including federal, provincial and municipal. In addition, the Charter provisions have a direct impact on human rights legislation through the equality provision,⁵⁷ Section 15, as noted above.

Section 15 (1) states: Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex or mental or physical disability.

(2) Subsection (1) does not preclude any law, program, or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

In addition, the federal government has had the Contractors Program since 1986 which applies to large and medium sized provincially regulated employers who supply goods and services to federal government departments and agencies. Both the EE Act and the Contractors Program cover four groups: women, aboriginals, persons with disability and visible (racial) minorities.

The EEA applies to employers in the private sector, as noted above and to federal government departments with 100 or more employees. The legislation requires these employers to file an annual report with Human

55. Anthony Giles and Akiyah Starkman, *The Collective Agreement in Morley Gunderson, Allen Ponak and Daphne Taras* (eds.) UNION-MANAGEMENT RELATIONS IN CANADA 306 (2001).

56. A. Giles and A. Starkman, *supra* n. 55 at 307.

57. D. McPhillips, *Employment Legislation in Canada* in Morely Gunderson *et al* (eds.) *supra* n. 55 at 227.

Resources Development Canada (HRDC). Employers are required to provide annual information on the representation of the four designated groups by occupational groups and salary range, as well as hires, promotions and terminations. The public sector employers were required to provide similar information to the Treasury Board of Canada beginning 1996.⁵⁸

Under the 1995 Act, in addition to this statistical information, employers are also required (as of October 1997) to include in their annual reports: 1) a description of the measures taken to implement EE and the results achieved; 2) and the consultations between the employer and its employee representatives concerning EE implementation.

Failure to comply with the filing requirements can result in an administrative penalty for three specific reporting violations (for private sector employers only): (a) failure to file an annual report; (b) failure to include the required information; and (c) knowingly filing a report containing false or misleading information. The amount of monetary penalty is \$10,000 for a single violation and \$50,000 for repeated and continued violations. All records used in the compilation of the annual reports must be retained by the employer for two years following the submission of the report. The annual reports are made publicly available and also given to the Canadian Human Rights Commission (CHRC).⁵⁹

The CHRC was given the authority to conduct on-site compliance reviews (i.e. audits) to verify and ensure employer compliance as of October 24, 1997. The Act also provided for the final enforcement, where necessary by an EE Tribunal. The Tribunal was empowered to hear disputes and issue orders enforceable by courts.

The 1995 Act prescribed four factors to be taken into account in setting goals by an employer.⁶⁰

These were:

- (1) the degree of under-representation of each designated group in each occupational category;
- (2) availability of qualified persons in designated groups within the employer's workplace and the Canadian workforce;
- (3) the anticipated growth or reduction of the employer's workforce during the period of numerical goals; and

58. H. C. Jain, *supra* n. 53.

59. *Ibid.*

60. *Ibid.*

- (4) the anticipated turnover within the employer's workforce in respect of which the numerical goals apply.

c. Evaluation of the Results

In the private sector firms covered by the EEA since 1986, overall, the representation of members of VM groups went up almost 2.5 times in the fifteen years, 1987 to 2001, from 4.9percent to 11.7percent. However, their representation remained below the forecasted 14 percent labour market availability rate expected in the 2001 Census.⁶¹ VMs remained concentrated in some occupational groups and under-represented in others, including senior management.⁶²

The CHRC reported that while there had been progress for some designated groups, "movement towards an equitable federal workplace continues at a snail's pace."⁶³ Visible minorities in the public sector "are simply not making acceptable gains."

As noted earlier, the EEA did not apply to the public service (that is, federal government departments and agencies) until 1996. Hence the data is available since 1997. As of March 31, 2002, the representation of VMs in the federal public service was 6.8percent, way below the labour market availability even in 1996 let alone 2001.

E. Experience in Britain and Northern Ireland

Ethnic minority population has been growing continuously since the late 1940s, reaching 1 million in the late 1960s, 3 million by 1991 and more than 3.8 million of the population of Great Britain in 1999.⁶⁴ In the spring of 2000, 2.4 million people of working age belonged to ethnic minorities in Great Britain.⁶⁵

Women are concentrated in lower skilled and lower paid jobs with less access to vocational training and education. In addition, large numbers of them work part-time and this is closely associated with their family responsibilities.⁶⁶

61. Canadian Human Rights Commission, ANNUAL REPORT 41 (2002).

62. Employment Equity Act, ANNUAL REPORT 65-66 (2002).

63. Canadian Human Rights Commission, ANNUAL REPORT 86 (1999 - 2000).

64. D. Owen, B. Reza, A. Green, M. Maguire and J. Pitcher, *Patterns of Labour Market Participation in Ethnic Minority Groups* Labour Market Trends 505-510 (2000).

65. B. Twomey, *Labour Market Participation of Ethnic Groups* Labour Market Trends 29-42 (2000).

66. EOC website, p. 1, available at www.eoc.org.uk.

In Britain, equal employment opportunity legislation was initially introduced during the 1970s and has been gradually expanded to include more groups and to cover more aspects of employment. There is separate legislation covering sex, race, and disability⁶⁷ and separate geographical arrangements with separate enforcement agencies in Britain and in Northern Ireland. In Northern Ireland,⁶⁸ religion has been the main reason for the Fair Employment legislation.

In Britain, the Equal Opportunities Commission (EOC) and the Commission for Racial Equality (CRE) are the enforcement agencies for the Sex Discrimination Act and the Race Relations Act respectively. They have the power to request information from employers and other organisations, to undertake 'formal investigations' and to issue 'non-discrimination notices.' Both agencies have the authority to issue 'Codes of Practice.' While adherence to such codes is voluntary on the part of employers, such non-compliance may be taken into account in legal proceedings. The government, however, plans to merge the EOC and the CRE and have one single all embracing equality commission, as in Northern Ireland, with a wider range of coverage including religion and age.

Although there is no general provision for affirmative action (AA) in the above mentioned legislation, AA is permissible in recruitment and training where there have been fewer or no members of one race or sex in particular work in the previous twelve months.

67. THE RACE RELATIONS ACT 1976 makes it unlawful to discriminate on grounds of colour, race, nationality including citizenship or ethnic or national origin in employment, training and related matters. The Sex Discrimination Act 1975, as amended makes it unlawful to discriminate on grounds of sex and marriage when recruiting, training, promoting, dismissing or retiring staff. See H. C. Jain and A. Bowmaker-Falconer, EMPLOYMENT EQUITY/ AFFIRMATIVE ACTION CODES OF PRACTICE AND BEST PRACTICES IN USA, BRITAIN, CANADA AND OTHER SELECTED COUNTRIES (1998).

68. In Northern Ireland, legislation bans discrimination in employment on grounds of religious belief or political opinion. All public authorities and private sector employers with more than ten employees are required to register with the Fair Employment Commission - now the Equality Commission - and submit annual reports to the Commission on the religious composition of their workforces. Failure to do so is a criminal offence that is punishable by a fine and in some cases by economic sanctions, such as loss of government grants and contracts. The Commission has power to direct an employer to take Affirmative Action, such as the encouragement of job applicants from an underrepresented group. It can also set goals and timetables in cases where fair participation by both Protestant and Catholic communities in employment is not being secured. The Fair Employment Tribunal adjudicates on individual complaints of discrimination. It can award unlimited compensation to victims of discrimination and may order remedial action by an employer. It also has powers to fine an employer and provide details of the Commission's directions to the employer to high court in order for an employer to obey its orders. See HMSO, NORTHERN IRELAND (1995).

In Northern Ireland the legislation covering racial discrimination was enacted recently (1997) to be administered by the Commission for Racial Equality. Religion, not covered by legislation in Britain, has the most extensive legislative coverage in Northern Ireland with provisions for both AA and contract compliance. Although legislation prohibiting discrimination on the basis of religion has existed in Northern Ireland since the partition of Ireland in 1920,⁶⁹ it was not until the enactment of Fair Employment Act 1976 that employment discrimination on the basis of religion and political opinion in both public and private employment was outlawed.

For racial and ethnic minorities there was no legislative protection until 1997, as noted above, when the (NI) Race Relations Order (RRO) was enacted. Unlike Britain, it was perfectly lawful to deny someone a job in Northern Ireland because of his or her colour and ethnic background.

In Northern Ireland, the census has never included a question on ethnicity and therefore no definite figures are available. The best estimates, according to the Multi-Cultural Resource Centre, is that between 1.5 to 2 percent of Northern Ireland's population is made up of Blacks and minority ethnic communities.⁷⁰

The enactment of the RRO was mostly due to the impetus from the non-governmental voluntary and community sectors and the criticism of the British Government by the United Nations Committee on the Elimination of All Forms of Racial Discrimination 1993 for not providing protection from racial discrimination in Northern Ireland. As Rogers⁷¹ observes, there were Black and minority ethnic communities in Northern Ireland, some second and even third generation. Some of their members undoubtedly suffered racial discrimination and harassment. It took more than 21 years before this legislation was extended from Britain to Northern Ireland.

Racial grounds in the RRO are defined as colour, race, nationality, or ethnic or national origins. The legislation covers employment, the provision of goods, facilities and services, housing and education. It outlaws direct and indirect discrimination and victimisation. In relation to employment, it covers recruitment, promotion, training, harassment and access to benefits.

In April 1998 the Belfast Agreement was signed by the Irish and British Governments and ratified by a majority of people in Northern Ireland. Political power was devolved from the British Parliament to Northern

69. S. Rogers, EMPLOYMENT EQUITY: THE VIEW FROM NORTHERN IRELAND (2000) (unpublished manuscript at the Fifth International Metropolis Conference, Vancouver).

70. *Ibid.*

Ireland. The equality dimension of this Agreement was translated into legislation in the form of Northern Ireland Act 1998. The Act provided for the establishment of a new Commission called the Equality Commission. The Commission assumed the functions of the existing equality agencies in Northern Ireland: the Commission for Racial Equality, the Equal Opportunities Commission and the Fair Employment Commission as well as the Northern Ireland Disability Council.⁷¹ The new Equality Commission opened its doors to the public in October 1999. As of now, the various agencies are operating independently within the new Commission and the Equality Commission is faced with the challenge of coming up with a structure to deliver services to a diverse range of constituencies within its mandate.

The RRO empowers the Equality Commission to assist, financially or otherwise, individual complainants. This is unique since legal aid is not available for cases before the Northern Ireland industrial tribunals relating to employment. No provision is provided for class actions.⁷² The legislation does provide the power to conduct a formal investigation into practices within sectors or specific industries. However, judicial decisions in Britain have limited the effectiveness of this tool thus far. Both the CRE and Equality Commission have recommended that the government must make legislative amendments to ensure that formal investigations are more effective. Apart from enforcement, the Equality Commission has decided to focus on capacity building within the Black and minority ethnic sector itself.

In Northern Ireland, the public sector continues to be a major employer providing work for 34 percent of those in employment. The workforce at present (2000) is around 420,000.⁷³ The female participation in the workforce has gone up from 45 to 47 percent in the last decade. (There is no detailed data of the breakdown of workforce on grounds of ethnicity as yet).

a. *Fair Employment and Treatment Order*

Due to its ineffectiveness the first FEA was strengthened in 1989 and 1998 under the Fair Employment and Treatment Order. The Fair Employment Act 1989 was replaced by the Fair Employment and Treatment (Northern Ireland) Order 1998 (enacted in December 1998). However, the

71. *Ibid.*

72. *Ibid.*

73. WOMEN AND MEN IN BRITAIN available at <http://www.eoc.org.uk>.

terms of the Order are essentially the same as those of the earlier Act, with minor realigning to transfer the role of the FEC to the Fair Employment Directorate within the new Equality Commission, as noted earlier.

All private sector employers in Northern Ireland with more than ten employees are required to register with the FEC, while public sector employers are automatically registered with the Commission. In 1999, there were almost 3,994 private sector employers and 132 public sector employers registered with the new Equality Commission⁷⁴ representing more than 70 percent of the total Northern Ireland workforce.

Fair employment legislation placed obligations on employers such as the requirement to review employment practices and mandatory monitoring of their workforces. These features have been absent from any other anti-discrimination legislation in Britain. The FEA 1989 provided for: (a) a compulsory registration of employers of more than ten workers with the Fair Employment Commission (FEC); (b) annual monitoring of workforces and of applicants for employment; and (c) review every three years of recruitment, training and promotion practices to determine whether an affirmative action program needs to be set up to reach the goal of fair participation of both Catholics and Protestants in accordance with FEC's Code of Practice. Penalties under the Act include criminal penalties, economic sanctions and exclusion from tendering for government contracts and denial of any government grants.⁷⁵

The FEC and now the Equality Commission (EC) has the power to conduct investigations to determine whether individual employers have complied with the requirements of the legislation. The Commission can also obtain a written undertaking from the employer to commit itself to undertaking affirmative actions including goals and timetables to correct under-representation of a religious group. It may apply to a tribunal to enforce the undertakings. According to the latest report of the EC, only 4 of the 4100 employers required to make a return were prosecuted for failure to submit within the specified time period.⁷⁶ According to the EC, the Catholic share of the monitored workforce in 1999 was 39.9 percent compared to a Catholic share of those 42 percent of those available to work. The Catholic share of the male monitored workforce, according to EC has increased from 32 percent in 1990 to 36.9 percent in 1999. Among

74. Canadian Human Rights Commission, ANNUAL REPORT 32 (1999-2000).

75. P.J. Sloan and D. Mackay, *A Employment Equity and Minority Legislation in the UK after Two Decades: A Review* INTERNATIONAL JOURNAL OF MANAGEMENT 18 (1997).

76. Canadian Human Rights Commission, ANNUAL REPORT 32 (1999-2000).

the female workforce, Catholics increased from 38.5 percent in 1990 to 42.5 percent in 1999. Since 1990, the Catholic proportion had increased in every occupational group.⁷⁷ Even though the monitoring by the EC revealed a continuation of the improvement in the Catholic participation in the labour market, the gap in employment contributed significantly to the continuing differentials in the experience of unemployment between Catholics and Protestants. Among the long-term unemployed, two-thirds were Catholic.⁷⁸ There is, however, clear evidence that the FEA has had a significant impact on reducing inequalities in the workplace in Northern Ireland.⁷⁹

b. Conclusions and Implications

Thus, the Northern Ireland Orders relating to race relations are passive, weak law thus far since there is no provision of monitoring and without goals and timetables as in the case of the FEA in NI. The British RRA will include a positive duty on public employers to promote equality of opportunity and monitoring by the CRE. However, unlike the FEA, there are no such requirements in the case RRO in Northern Ireland. The positive action provisions in both the RRA and of the RROs are weak, as noted earlier; in addition, there is no contract compliance under these laws.

Northern Ireland has its own Sex Discrimination Order 1976, and Equal Opportunities Commission, but legislation covering racial discrimination was enacted recently. Religion, not covered by legislation in Britain, has the most extensive legislative coverage in Northern Ireland with provisions for both AA and contract compliance. Although legislation prohibiting discrimination on the basis of religion has existed in Northern Ireland since the partition of Ireland in 1920, it was not until the enactment of the Fair Employment Act 1976 that employment discrimination on the basis of religion and political opinion in both public and private employment was outlawed.

The FEC's enforcement powers are substantially greater than those of the EOC and CRE in Britain. However, according to CRE, there has been increasing acceptance of ethnic monitoring in the 1990s. Hence, the CRE (in 1993) made several proposals to the government. These included compulsory monitoring of ethnic origins of those in employment, contract compliance, powers for local authorities, and class action suits in industrial tribunals.

An important development since 1973 has been the role of European community legislation that takes precedence over United Kingdom law and has brought about changes in the Britain legislation, especially relating to women. Britain became a member of the European Economic Community (EEC) in 1973 and thus subject to the EEC law.

The amended RRA was enacted in November 2000. The amended legislation extends the outlawing of discrimination to all public authorities and central government as well as it places a statutory duty on these bodies to promote racial equality and eliminate institutional racism.⁸⁰ Auditing and inspection of public bodies is also mandated under the new Act. CRE expects to make a real, measurable impact on racial equality across Great Britain.⁸¹ For instance, the duty will apply to the way a public authority carries out its various functions, including employment of staff. The duty on public authorities include: a) the monitoring of staff by ethnicity; b) the assessment of the impact on racial equality of proposed policies and consultation on them; c) the monitoring of the impact on racial equality of policies and practices.

The CRE has the authority, under the new Act, to issue codes of practice containing practical examples of how different types of public authorities can comply with their general and specific duties. Hence, there will be codes for central (federal) government departments, local authorities, educational bodies, police authorities and the NHS, as well as a general code for all other authorities.

c. An Assessment of the Race Relations Act in Britain

The RRA in Britain has had a positive effect, "has helped to curb the worst kinds of discrimination in employment" and "also had invaluable impact on the general climate of opinion."⁸²

The weaknesses of the RRA include a) failure to deal with institutional racism and organizational culture; b) the concern with colour racism rather than cultural racism; c) more concerned with ensuring equality of treatment rather than dealing with difference and diversity; d) does not prohibit religious discrimination; e) concerned with negative duties, that is avoidance of discrimination rather than promoting diversity.⁸³ According to the report, *The Future of Multi-Ethnic Britain*, sponsored by the Runnymede

77. Canadian Human Rights Commission, *supra* n. 76 at 28.

78. *Ibid.*

79. S. Rogers, *supra* n. 69.

80. Commission for Racial Equality, ANNUAL REPORT 5-9 (2000).

81. *Id.* at 6.

82. B. Parekh, REPORT ON THE FUTURE OF MULTI-ETHNIC BRITAIN 264 (2000).

83. *Id.* at 265.

Trust, the positive duty, noted earlier, in the amendments to the RRA, do not extend to private employers.⁸⁴ A recent survey of the ethnic minorities in the one hundred largest corporations in Europe found that, except in Britain, few minorities reach the top; none of the responding companies had an ethnic minority as a Chief Executive Officer (CEO) and almost all had a dismal representation of racial minorities in the board rooms within European countries.⁸⁵ The report cites a survey conducted by the Runnymede Trust in Britain in 2000 and found that ethnic minorities constituted only 1 percent of senior managers.⁸⁶

F. Experience in South Africa

The Employment Equity Act (EEA) was enacted by the Parliament in 1998. It aims to redress the ghettoization of the Blacks (including coloureds and Indian) women and persons with disabilities (called the designated groups) in the workplace. The objective of the EEA is to achieve equality in the workplaces by elimination of unfair discrimination and promotion of "equal opportunity" through the implementation of positive and pro-active measures (termed as affirmative action measures) to advance the designated groups. The EEA requires employers with either 50 or more employees or certain specified turnover (in monetary terms) to undertake affirmative action measures with a view to ensure that the designated groups have equitable representation in all occupational categories and levels in an employer's workforce consistent with their availability in the external labour market.

a. Rationale for EEA

Historically, the labour market was a distorted one, with inequality in access to education, skills, managerial and professional work, based on race and ethnicity. Racial discrimination was created in labour legislation, for example in job reservation clauses that restricted access to skilled jobs (preserving them for White employees), in the Mines and Works Act 1904 and Industrial Conciliation Act 1956. These provisions were repealed in 1980 and significant labour law reforms have occurred in the last five

84. *Ibid.*

85. Rana Foroohar, Stefan Theil, Samia Marais, Tara Pepper, Heike Weidckind, Barbire Nadeau, and Emma Daly, *Race in the Boardroom: A Newsweek Survey of Corporate Europe Finds Plenty of Confusion about the Continent's Changing Identity. Just as New Laws are about to Require More Clarity*, NEWSWEEK 28-32 February 18, 2002.

86. Rana Foroohar *et al.*, *supra* n. 85.

years. However, the apartheid labour market has left most employees inadequately trained and economically dis-empowered. South Africa's peaceful transition through its 1994 national election and constitutional measures has given hope that the Constitutional democracy will provide equal protection and opportunity to all citizens regardless of colour, gender, religion, political opinion or sexual orientation.

The legacy of workplace discrimination against Blacks, the majority population, is systematically being eroded, albeit slowly. According to one survey of 161 large firms in South Africa (employing 560, 000 workers), in the year 2000, 80 percent of managers were Black, 5 percent each were coloured and Indian; thus, 80 percent of all managers were White. Of these managers, 79 percent were male and 21 percent female. In 1998, the percentages of Blacks, coloureds, and Indian were 6, 4 and 4 respectively

87. The legislative armoury against unfair discrimination is now quite formidable. For example, Chapter 2 of the new EEA prohibits unfair discrimination against designated employees. These include Black people, women and employees with disabilities. Legislative prohibitions against unfair discrimination are also intrinsic to South Africa's Constitution (1996). Chapter 2 (the Bill of Rights) contains an equality clause, and like the EEA specifies a number of grounds which constitute unfair discrimination. Additionally, Sch. 7 of the Labour Relations Act 1995 considers unfair discrimination either directly or indirectly as a residual unfair labour practice. Grounds include race, gender, ethnic origin, sexual orientation, religion, disability, conscience, belief, language and culture. Labour laws have been at the forefront of the post-apartheid government's determination to remove unfair discrimination. A new law, THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 1999, seeks to prohibit discrimination in both civil society and in employment practices. The draft CONSTITUTION adopted by the Constitutional Assembly on May 8, 1996 was approved by the Constitutional Court in November of 1996. Section 9(2) of the Bill of Rights in the Constitution states in part: "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

Similarly, S. 2(2) of Sch. 7 of the Labour Relations Act 1995 stipulates that "an employer is not prevented from adopting or implementing employment policies and practices that are designated to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."

More explicitly, section of the EEA sets out the purpose of the Act to achieve equity in the workplace.

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels of the workforce.

88. BREAKWATER MONITOR REPORT (2000) available at <http://www.labour.gov.za>.

with 86percent White managers, and 84percent male and 16percent female.⁸⁹

According to the Commission on Gender Equality (CGE) women constituted the major segment of the SA population but accounted for only a third of the labour force. They were mainly concentrated in service, retail and manufacturing sectors. Across all sectors, women were mainly to be found occupying jobs associated with stereotyped domestic roles; thus gender equality within the workplace, according to the CGE was undermined by job segregation and perceived roles associated with gender group.⁹⁰

The Department of Labour (1999) states that Whites had a 104 percent wage premium over Africans; men earned approximately 43 percent higher wages than similarly qualified women in similar industrial sectors and occupations.⁹¹

Another indication is the representation of women and Africans in the senior public sector positions. According to the 1995 Household Survey, men accounted for 78 percent and women for only 22 percent of all legislative, senior officials and management positions in the workforce. Of the 78 percent that were men, 46 percent were White, 23 percent Black, 6 percent Asian, and 3 percent Coloured. Of the 22 percent that were women, 12 percent were White, 8 percent were Black, 1 percent Asian and 1 percent coloured.⁹²

Eighty seven per cent of management in the Public Service (Director and above) in 1998 were men, and only 13 percent women.⁹³ Over half

89. *Ibid.*

90. Commission for Gender Equality, SURVEY OF EMPLOYERS REGARDING: AA POLICIES AND PRACTICES: GENDER IN THE PRIVATE SECTOR (1999). More than a quarter of African males and 60 percent of African females in the formal sector were in the elementary occupations such as cleaning, garbage collection and agricultural labour. Similarly 41 percent of coloured women were in these elementary occupations while 40 percent of Indian women were in clerical occupations. About 18 percent of African women and 19 percent of coloured women were in managerial or professional jobs while 11 percent of African men, 14 percent of Coloured men and 37 percent of Indian men were in managerial professional jobs. See B.J. Erasmus and E. Sadler, *Issues Affecting Women in the South African Workplace: A Comparative Analysis of Findings* SOUTH AFRICAN JOURNAL OF LABOUR RELATIONS 4-19 (1999).

91. Adele Thomas, A PIANO OF DISCORD: REASONS FOR JOB MONITORING AMONG BLACK MANAGERS (2000) (unpublished paper, on file with the University of Witwatersrand, Johannesburg).

92. Lize Booysen, *Towards More Feminine Business Leadership for the 21st Century: A Literature Review and a Study of the Potential Implication for South Africa* SOUTH AFRICAN JOURNAL OF LABOUR RELATIONS 39 (1999).

93. STATISTICS SOUTH AFRICA 41 (1998).

the men who were public sector managers were White.⁹⁴

Women comprised only 1.3 percent (49) of the 3773 directors of the 657 companies listed on the Johannesburg Stock Exchange.⁹⁵ Only 14 women were listed as either executive directors, chairwomen or managing directors, and less than 1 percent board members were women.⁹⁶

b. Employer Obligations Under the EEA

The EEA requires employers in consultation with unions and employees to:

- conduct a review of employment policies and practices to identify the specific job barriers faced by the designated group members and attempt to remove them;
- conduct a workforce survey and analysis to identify the under-representation of members of the designated groups relative to their availability in the external workforce;
- develop an employment equity plan with numerical goals and timetables, monitoring and evaluation procedures; report on remuneration and benefits in each occupational category and level;⁹⁷ and

94. Lize Booysen, *supra* n. 92.

95. There is also a concentration of managerial control through a system of interlocking directorates where the same person(s) serve on the boards of several corporations. This social closure has limited the upward mobility of Black managers and women. However, South Africa's re-entry into the international business community has forced an awareness about its relative competitiveness in the manufacturing and service sectors. Recently, statutory and governmental tender requirements have been towards employment equity and diversity at all levels. Several Black directors have been appointed to boards of directors. Although less than 15 percent of South Africa's company directors are Black or women, this is likely to change significantly by the year 2005.

96. G. Naidoo *Empowerment of Women in the Corporate World* 15 PEOPLE DYNAMICS (1997).

97. The EEA does not set quotas, but rather enables individual employers to develop their own plans. Criteria regarding enhanced representativity include national and regional demographic information and special skills supply/availability. S. 27(1) of the EEA requires designated employers to submit a statement of remuneration and benefits received in each occupational category and level to the Employment Conditions Commission established by S.59 of the BASIC CONDITIONS OF EMPLOYMENT ACT 1998. S.27(2) requires that where disproportionate income differentials are reflected in the statement, a designated employer must take measures to progressively reduce such differentials. S. 27(3) indicates that these measures may include: (a) collective bargaining; (b) compliance with sectoral pay determinations made by the Minister of Labour in terms of S. 51 of the BASIC CONDITIONS OF EMPLOYMENT ACT; (c) applying norms and benchmarks set by the Employment Conditions Commission; and (d) relevant measures

develop measures an employer will undertake to progressively reduce any disproportional differentials in pay as well as an employment equity plan.

Whenever unfair discrimination is alleged in terms of the EEA, a reverse onus of proof is on the employer to establish that the practice is fair. As part of a required employment equity plan, all employers with 50 or more employees are required to review all their employment and human resources practices to remove any provisions or practices which may have a discriminatory effect. This includes recruitment and selection, and remuneration. It is in these two areas, as well as in the provision of substantive benefits and conditions of employment, where discrimination is most likely.

The EEA requires that employers give due consideration to 'suitably qualified person' in their recruitment of designated groups. Such a person may have either formal qualifications, prior learning, relevant experience, or capacity to acquire-within a reasonable time-the ability to do the job.

Capacity to acquire the ability to do the job will require training and support. Currently few Black men and women are qualified to fill semi-skilled, skilled and professional jobs, due to apartheid practiced by the previous White regime. The EEA along with the Skills Development Act 1998 requires employers to provide training to designated groups.

The EEA encourages employers to provide improved internal grievance procedures against discriminatory behaviour and harassment. Labour inspectors have the enforcement powers. Those disputes that cannot be resolved through internal procedures will be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and ultimately the Labour court.⁹⁸

c. State of Compliance with the Employment Equity Act by Employers

The Commission for Employment Equity (CEE) recently released its first annual report covering the period 1999-2001.⁹⁹ The Commission's

in the SKILLS DEVELOPMENT ACT 1998. The Employment Conditions Commission is required to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials. The Commission is not allowed to disclose information pertaining to individual employees or employers.

98. Bob Hepple, *Equality Laws and Economic Efficiency* (INDUSTRIAL LAW JOURNAL 18 (1997)).

99. Department of Labour, COMMISSION FOR EMPLOYMENT EQUITY REPORT, 1999-2001 (2001).

report for 2001 is based on 8250 employers with 3,336,784 employees and shows mixed results:

On the plus side, it indicates that employers, in general, are taking their responsibility seriously for eroding the effects of the apartheid labour market which had left most Black workers inadequately trained and disempowered. For instance, the EEC report indicates that Black (African, coloureds, and Indians) workers improved their labour market position from the 1998 baseline survey¹⁰⁰ to 2001 as Professionals, Technicians and Associate Professionals from 25 to 38 percent in 1998 to 55 and 48 percent in 2001 respectively. The Professionals' position also compares favorably to Statistics South Africa's Household Survey data for 1999.

Blacks lost ground from 1998 as legislators, senior officials and managers when their representation in these occupational categories was 28 percent to 26 percent in 2001; this is even more pronounced compared to their representation of 45 percent in the Household Survey of 1999. They are primarily concentrated in elementary occupations (98percent in 2001), plant and machine operators (94percent in 2001), skilled agricultural and fishery workers (86percent in 2001) and service and sales workers (72percent in 2001).¹⁰¹

Women (Black and White) hold a minority of positions, that is 22 percent, as legislators, senior officials and managers; of the 22 percent, White women hold 15 percent, Indian women 1 percent, African women 3 percent, and Coloured women 2 percent in this category.¹⁰² Women (both White and Black) currently hold only 13percent of all top management and 21 percent of all senior management positions in SA. However, (not shown in the table) African women hold only 1.2percent of all top management positions.¹⁰³ Women represent 38 percent of total employment, and are clearly under-represented in all management occupational levels.¹⁰⁴

Black employees consisted of 31 percent of all levels of management. Therefore, an overwhelming majority of managers across all levels of management were White. Employees with disabilities represented only 1 percent of all management level. The CCGE Survey (1999) found that employers cited the several problems in integrating women in their workforce: (a) resistance by male employees (across the organisations);

100. Conducted by Jain and Bowmaker-Falconer in 1998 for the SA Department of Labour.

101. *Supra* n. 99 at 30.

102. *Ibid.*

103. *Ibid.* at 19.

104. *Ibid.* at 19 and 24.

spectrum); (b) stereotyped perceptions, and (c) poor skills among female employees.¹⁰⁵

However, employers adopted the following criteria for recruitment and promotion

(a) psychometric testing including subjective and culturally biased testing; and

(b) emphasis on skills, formal qualifications and experience.¹⁰⁶

A paradox thus seems to exist, as noted by the CGE¹⁰⁷: one the hand companies are citing poor skills level amount females to be the main barrier. On the other hand, they continue to include it as a criterion for recruitment and promotion. Thus, this means that male employees would be the most likely job incumbents relative to women.

An evaluation of the compliance with the EEA must take into consideration: a) the economic and financial factors relevant to the sector in which the employer operates; b) present and anticipated economic and financial circumstances of the employer; (c) progress in implementing EE by other employers; and d) reasonable efforts made by the employer to implement EE.¹⁰⁸ In fact, some of these factors regarding employer's economic and financial circumstances and plans are outlined in the Canadian (federal) EEA.

d. Conclusion

Although progress has been made in enhancing racial and gender representation in the workplace, this is an incremental process which has to be supported by coherent human resource development priorities through the implementation of the Skills Development legislation and changes in the organisational culture. This is vital at both public policy and organisational levels. An increasing earnings gap has an adverse impact on mainly Black people. This situation continues, despite the increasing diversity and multi-racial character of a growing middle class. The biggest priority must be human resource development and education in skills and competencies needed in a society in transition.

105. Commission for Gender Equality, *SURVEY OF EMPLOYERS REGARDING AA POLICIES AND PRACTICES: GENDER IN THE PRIVATE SECTOR* (1999)

106. *Ibid.*

107. *Ibid.*

108. M. Samson, *Training for Transformation Agenda 6-17* (1999).

This reality has been recognized by the government and the Black Economic Empowerment Commission. The Commission has made important recommendations to the government to 'kick-start' the economy and enhance economic growth through state-driven measures to ensure Black participation in the mainstream economy. Proposed measures include a national integrated human resource development strategy, legislated de-racialisation of business ownership in the private sector, setting of national targets that include land distribution and ownership, and equity participation in economic sectors. The Commission further recommends targets for senior and executive management in private sector firms of more than 50 employees to be Black. The Commission's proposals, which have been accepted by the government in principle, are a significant policy basis for improving access to capital and skills and economic empowerment for the majority of South Africans. These overall measures, along with the progress in implementing employment equity, will greatly improve the chances of majority Blacks to have their just share in the South African economy.

III. OVERALL CONCLUSIONS AND IMPLICATIONS

It is obvious that countries with mandatory AA programs such as India, Malaysia, and the Northern Ireland part of UK, as well as those with Contract Compliance programs such as the United States, have made significant progress in improving the employment and earnings of the designated groups, although they still have a long way to go.

EE/AA policy measures stimulate positive changes in the workforces of affected employers. In particular, such public policy measures:

- help broaden the focus of the affected employers to designated groups in the selected countries;
- require employers to collect both stock and flow data on the designated groups in several countries such as Canada, USA, and South Africa;
- encourage many employers to devise new and innovative measures to attract, retain and motivate designated group workers by adopting pro-active hiring, training, promotion and compensation policies;
- persuade many employers to relate their human resource management plans to corporate plans by revamping the human resource function, and in many cases, developing human resource information systems to benefit both designated and other workers; and

sensitive employers to the changing demographics in their respective societies, thereby helping managers develop policies to cope with these developments.

There are powerful forces at work to reduce disparities in the labour market opportunities of ethnic minorities and women. We have deliberately chosen six countries which are diverse both in terms of culture and economic development to show that responses to this challenge vary according to the circumstances of each country but usually involve a degree of legal intervention. While there may be widespread agreement in the need for reform, the precise mechanisms for achieving this are the subject of much debate and controversy. Nowhere is this more clearly seen than in the case of affirmative action and to some extent employment equity programs that may be perceived to have detrimental effects on individual members of non-discriminated against groups.

Malaysia and South Africa are distinctive in so far as protection is offered to the ethnic and racial majority as opposed to minority groups. In India the problem arises from the caste system. In the UK a distinction is made between Northern Ireland and Britain. In the former religion which is aligned with political leanings is a major issue, while this is largely absent in the rest of the UK. In England the problem of racial discrimination is influenced by the fact that racial minorities are largely concentrated in large urban areas. In each of the developing countries there may be problems of illiteracy and in the UK and elsewhere of language which reduce the productivity potential in employment of certain members of these groups and make it more difficult to detect whether differences in employability and pay are caused by discrimination. In the USA racial minorities include a diverse array of groups including Blacks, Hispanics and Mexicans, with non-Whites making up 25 percent of the population. What is clear from USA, Canada as well as the UK experience is that the outcomes differ not only between the minorities and majority groups, but also across minority groups with some achieving better labour market performance than others. In the USA and Canada there are a wide range of measures including affirmative action and employment equity plans respectively for federal contractors and protection against age and other prohibited grounds of discrimination. Much of this legislation has been influential elsewhere as in the case of affirmative action in Northern Ireland.

Spotlight on Criminal Justice Administration in India⁺

*B. B. Pande**

Criminal Justice Administration (CJA) has always been a fascinating theme. Even during our childhood days we spent innumerable hours playing criminal-police, lock-in-lockout and punishing the culprit games, which caught our imagination because they evoked infantile anxieties, fears and joys. But then, there was much greater unanimity in our desire to enact the policeman and our zeal to impart punishment to the wrongdoer. One more thing that was distinct about those 'games' was that, though they were games but we all took them seriously. In the six decades of my journey from childhood to adulthood and beyond, the CJA is still with us, perhaps even more, but the lines of demarcation between police and criminal have become distinctly blurred and the unanimity about punishment to the culprit has more or less disappeared. Now, for most of us the CJA is a real thing (not a game), but more and more of us seem to have mastered the art of 'playing' with it and in the process the real has turned into a 'grand farce'. Presently, I propose to turn the spotlight on certain key areas of CJA, which are described by some to be in a 'state of crisis'. This is with a view to better understanding the nature and extent of the 'crisis' and forging possible measures for its resolution.

1. THE ERODING NORMATIVE RAISON D'ETRE OF CRIMINAL LAW AND DEVIANCE:

Criminal law can be defined 'normatively' as something good or desirable, because it functions to prevent or resolve social conflicts between the law-abiders and the law-breakers. It is such conceptualisation of criminal law that is taught in law classes and academics and also believed as a gospel truth by a large bulk of the consumers of criminal law, who unequivocally accept the consensus based criminalisation myth. In contrast to this much better known view, criminal law can also be perceived,

⁺ Kunnarappa-Reckless Award Lecture delivered at the 27th All India Criminology Conference of the Indian Society of Criminology organised by the Lucknow University, Lucknow, October 10-12, 2003.

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

'neutrally', as a set of 'power resource', which is neither good nor bad.

Such a neutral criminal law can be deployed for tilting the power balance more for enhancing conflicts rather than reducing them. The 'normative' or "neutral" conceptualisation can be equally applied to deviance as well. Thus, deviance may be bad or worth shunning to many, but there are others who perceive it merely as a form of behaviour that can have both negative as well as positive connotations. From a sociologist's point of view there is nothing unusual for the different sections of society to perceive law and deviance diversely. Such diversity as a matter of fact is well analysed by the sociologists in terms of the four distinct combinations of relationship between law and deviance which are described in social science parlance as follows (i) *functionalism*, where both criminal law and deviance are normatively defined, (ii) *instrumentalism*, where criminal law is neutrally defined but deviance is normatively defined, (iii) *interactivism*, where criminal law is normatively defined and deviance is neutrally defined, and (iv) *structuralism*, where both criminal law and deviance are neutrally defined.

In the domain of politics normativity may not always be a virtue, because norms are often used for maintaining domination and conjuring hegemony. But for a Mohandas Karamchand Gandhi, a true *satyagrahi* must learn to respect the norm and be ready to face punishment if he breaks it. But today many politicians would prefer to avoid the Gandhian tenet of fidelity to the norms; for them the norm is not more important than the cause. Norms can be respected so long they yields political benefits. The main reason for the growing disrespect for the norm amongst politicians is that it shuts-out almost completely the possibilities of an alternative and a politically convenient action. Also norm by its very nature is rigid and more or less inflexible that eliminates the possibilities of politics of propagating new causes. The *Babri Masjid Demolition case*¹ is a classical example of growing tension between the norm that criminalises the act of defiling any place worship (Section 295, Indian Penal Code 1860, enacted over 140 years ago) and the cause of building another place of worship. The case also marks the growing tension between the unchangability of the norm and the mutability of the cause.

But unlike the sociological and political view points, the norm is the very heart and soul of law. Norm in the legal domain not only declares in advance the kinds of behaviour that are proscribed but also keeps under check whimsical and arbitrary views that have a tendency of gaining

1. *M. Ismail Faruqui v. Union of India* AIR 1995 SC 605.

credibility because of political influence, mostly of the extra-legal kind. A recent Prakash Jha film: *Gangval*, is an excellent example of this tendency and its increasing appeal. The film based on the Bhagalpur blinding episode in the late seventies shows how in the face of all-round failure of the CJA and the growing menace of crime, the people express a strong support for arbitrary and illegal actions on the part of the police. For the community the cause of fighting criminals becomes more important than the norms of fair trial, human dignity etc. The more worrying aspect of *Gangval* jurisprudence is its likely impact on the normativity. This is particularly important at this juncture when the print as well as visual media is evoking much greater interest in crime themes. The recent introduction, in the TV channels of programmes such as "Jurrin", "F.I.R." and "Most-Wanted" have succeeded in turning the crime theme into an item of entertainment, but without caring for the normative boundaries. These programmes can either lead to undue glorification of crime or of the repressive control apparatus. Both of which are equally detrimental to the normative cause.

It is nobody's argument that the out-dated and irrational norms can never be questioned or subjected to reform or change. But for achieving that objective one need not go to the extent of eroding the very sanctity of the norm itself. Because that extreme step should be resorted to only under revolutionary situations, which ought to come in the lives of a nation only rarely.

II. SILENT AND OPEN SUBVERSION OF THE RULE OF LAW

Just as subversion of the norm primarily relates to the consumers or the subjects of the CJA, the issues relating to subversion of Rule of law primarily relates to the agencies of the CJA such as the police, the prosecution, the courts, the prisons, the correctional services and the criminal lawyers. Since these agencies are creations of the law, their power and functions are strictly subject to the relevant laws alone. It is assumed that the various agencies function in accordance with the rule of law, either singly or in combination.

But the reality of CJA is hardly in conformity with the theoretical assumptions that the agencies of criminal justice ought to and do function in strict compliance with rule of law. The non-compliance can range between mere violations to inadvertent or advertant subversions. The term subversion of rule of law relates to those violations that have the tendency of turning the CJA into a farce. Furthermore, depending upon the motive of the subverter, a subversion may be described as a silent subversion or

open subversion. Silent subversions are a part of the routine and may occur mainly on account of paucity of resources or lack of manpower and inadequate training and skills. The instances of subversion of procedural and evidentiary rules is more rampant and better known, but the instances of silent subversion of substantive law is not unknown either. The infamous *Best Bakery* Case judgement (Sessions Case No. 248 of 2002 titled as *State v. Rajubhai Dhanirbhai Baria and others*) of the Sessions Judge of the Fast Track Court No. 1, Vadodara Shri H.U. Mahida, could not have done better in exposing the of the CJA in a more telling manner thus:

[W]henver communal riot takes place, the police investigation in the riot related offences turns out to be lame as compared to other investigations. The real culprits escape from the scene of the offence on arrival of the police. The innocent passerby and others watching the sight curiously remain under impression that they would not be harmed since they are innocent. However, from amongst such people and from the surrounding population the police selectively picks certain persons of their choice. During the course of investigation if anybody turns out to be oversmart or raises his voice, such persons are definitely slammed inside as accused. (para 49 Sessions Case No. 248/02).

In the same vein the judgement goes on to read:

[J]ust as bogus accused are roped in the offence, bogus witnesses are also roped and involved and similarly bogus panchas are created. Since the accused are bogus, the depositions made by the true witnesses also turn out to be meaningless against the bogus accused. (Para 50).

The Judge has rendered great service by letting out the inner realities of investigation and testimonial processes, but he little realised that he himself was becoming a party to subversion of rule of law when he decided to conveniently keep out of the mess. As later pointed out by the National Human Rights Commission in its petition before the Supreme Court in these words: "That the failure of the trial court, after making the observations referred to above, to order further investigations before concluding the trial has put the credibility of the justice delivery system under serious challenge. In this context, the petitioner submits that a criminal trial is not a mere formality. When an offence is committed and the court is seized of the case either through complaint or police report, it becomes the duty of the court to ascertain the truth and render justice. Failure to do so results in miscarriage of justice" (Ground I of the Petition: emphasis

supplied). It is hoped that the Supreme Court's intervention may set right the miscarriage in the *Best Bakery* Case or the other post Godhra riot cases, but the sad fact of subversion of Rule of Law in many other cases before the various criminal justice agencies still remains unaddressed.

We all know how the consumers of the CJA, particularly those who are poor and resourceless are made to run from pillar to post for getting their F.I.R.'s registered, securing a fair and impartial investigation, ensuring that witnesses are permitted to make a true and fearless deposition and the courts make acquittals, convictions and sentencing strictly in terms of the laws. Take for instance the problem of hostile witness that constituted the basis for the 21 acquittals in *Best Bakery* case. The practice of witnesses turning hostile is not something unknown to the CJA in India. The fact that witness will turn hostile, is often well-known to the investigating agencies and welcomed by the prosecution and even the judiciary. Many lawyers are known and sought after for their special abilities to break the witnesses. Therefore, the malaise of witnesses turning hostile is largely a creation of the system itself, that uses this as a technique for diverting the resourceful accused out of the system. In the *Best Bakery* case itself, did the functionaries of the CJA not know that undue pressures were being exerted for quite some time on the key witnesses? Yet why no one cared to exercise the rule of law power before the actual event of "Miscarriage of justice"? As a matter of fact the State of Gujarat and its functionaries never displayed any interest in enforcing the rule of law, at all: F.I.R.s were designedly not registered, in a large number of cases, as indicated in the *Best Bakery* judgement also, for over a month no investigatory steps were initiated, even the Fast Track Court judge enacted a farcical trial by acquitting all the 21 accused after a bare 4 months and 7 days trial (the trial commenced on February 20, 2003 and the judgement was delivered on June 27, 2003 - as per NHRC Petition). From all this it appeared that the State of Gujarat was in no mood to enforce the rule of law and did not mind its open subversion in the name of the will of the majority. This is clearly borne out by the defiant attitude of the Chief Minister who by following a unusual course preferred a Petition before the President of India, seeking an enquiry into all the earlier riot cases. Meaning in a way: We admit the subversion of Rule of Law in Gujarat, but that had been happening for a long time in many other states as well. Even the institutions meant to protect the interest of minorities and women meekly fell in line with the State's views. It goes to the credit of the NHRC that it responded to the open subversion by preferring a well argued Petition before the Supreme Court under Article 136 of the law. Now after the admission of the Petition and the Supreme Court's tough talking with the CJA function-

aries of the State the message has gone home that subversion of rule of law shall not be tolerated any more this time.

Even after the sad experience in Gujarat it may still be legitimate for the defenders of the CJA and many such other rule respecting functionaries to argue that there is no real crisis, but only certain digression on account of a few deviant officials. It may be further argued that such limited instances of subversion can be effectively checked by the powers of judicial and administrative review. After all the large number of cases before the Supreme Court and High Courts that keep on giving mild or strong directions to the officials to comply with the rules are indication that the system is working fairly well. But the growing incidents of State lawlessness, increasing nexus between criminal-politicians and officials and the spreading tentacles of corruption at high places does not let us believe that everything would be all right in the very near future. We do get an uneasy feeling of damage to the institutions may have gone beyond repair.

The stakes involved in the intentional and even inadvertent subversion of Rule of Law are too high to be ignored and too pressing to be postponed any longer. Thus, unless some concrete steps are taken to ensure better compliance with the Rule of Law at all the levels; we shall continue to be haunted by the ghost of the rule-respecting police officers who are already locked-up in a life and death battle in more than just a few sectors. The poignancy of the situation is best exemplified in the character of an upright and young police officer in the recently released Bollywood film *Shool* (The Thorn), whose cries for upholding the rule of law were neither heeded by his fellow officers nor by the top brass of the police. Ultimately the law-abiding and rule-oriented officer takes to the path of lawlessness for the sake of elimination of the political don and in the end destroys the very principle for which he stood and suffered throughout.

III. DENIAL OF JUSTICE BY DELAY

Delay in CJA has already become too well known to shock us any more. Perhaps that is why the Supreme Court in *Ramchandra Rao v. State of Karnataka*² declined to lay a strict limit to the period for a criminal trial. But delay from the perspective of the parties caught in the criminal justice drama such as the accused (his family members, relatives and friends), the victim (his family members, relatives and friends) and the community (whose day to day anxieties and fears are closely linked to the incident) is different and a vital element for upholding the credibility of the CJA in their

2. (2002) 4 SCC 578.

eyes. The following two incidents unfolded a new meaning of delay for me:³

Father who could not afford even a few days' delay

The Lok Adalat in Tihar Prison in the month of December, 2000 had a difficult undertrial prisoner who was alleged to have committed theft of a cycle. He told the Magistrate that he had not committed the offence but was willing to confess to the crime because it will earn him early release from the prison. The Magistrate advised him that confession and conviction would entail a criminal record, therefore in his own interest he should wait for his trial in a regular court, with fair chances of acquittal. The undertrial persisted and said a regular trial takes few months and even more: "I cannot afford to wait because my ailing son may die by then".

Complainant more interested in bringing an end to the case

In the course of Compounding of Cases Project at Tis Hazari Courts our legal service volunteers came across a case in which the complainant was more keen to bring the case to an end than the accused. This was because the ten year old case had already had several hearings and each time the complainant had to appear in the court along with the case property, a scooter. He would not only loose one day wages, but would also be required to carry the junk scooter in a cycle rickshaw. After counselling and persuasion the accused agreed to oblige the complainant by confessing to the crime, and the case came to an end after conviction and set-off for the period already undergone.

The dynamics of delay in criminal cases is complex and thoroughly under researched. A recent study has analysed delay in the trial of minor offences at the District Court level in Delhi.⁴ The study had identified delay in terms of six stages, namely, from filing of chargesheet to framing of charges, prosecution evidence, statement of the accused, defence evidence, arguments and judgement. The study made an offence-wise analysis of delay as follows:

- For Accident cases the average time taken in disposal of cases resulting in conviction was 1893 days and for cases resulting in

3. These are based on the Tihar Jail Project conducted by the Legal Aid Clinic, Faculty Law, University of Delhi.

4. Amita Puri, *Delay in Trial of Minor I.P.C. Offences at the Tis Hazari Courts*, Unpublished LL.M. Thesis 2002.

acquittals the average disposal time was 3150 days. In these cases the maximum average delay of 1828.8 days was caused at the Prosecution evidence stage, followed by 418.2 days in the filing of chargesheet to framing of the charge stage.

For Hurt, Assault and Intimidation cases the average time taken for conviction cases was 1849 days, while for acquittal cases it was 2380 days. In such cases, the average time taken for prosecution evidence was 1485.95 days, followed by average time taken for framing of charges as 801.5 days.

For Theft cases the average time taken for disposal of cases leading to conviction was 1962.2 days and for cases leading to acquittal it was 2561.2 days. In such cases the average time taken for prosecution evidence was 1516 days, while average time taken for framing charges after chargesheeting was 763.63 days. The average time taken for defence evidence in these cases was 4.45 days (for Accidental) zero days (for Hurt etc.) and 22.5 days (for Theft). Thus, the greatest contributor to delay in trials were witnesses, followed by the presiding officers who delay the framing of charges.

Why did the framers of the Constitution and the drafters of the Code of Criminal Procedure not consider it worthwhile to recognise the right of the accused, the victim and the community to get speedy justice, particularly when the movers of the Criminal Procedure Bill in 1970 had underscored speedy disposal as one of the three basic considerations, is difficult to understand much less appreciate.

Even if delay to a certain extent is treated to be an inherent aspect of the formal system of justice, how does the system stand to gain from it? A closer study of the dynamics of delay reveals that it provides a *carrie blanche* to inefficient investigators, manipulating lawyers and vacillating judges, whose only interest is to keep the cause lingering. Why and for how long the CJA would keep on sympathising with the inefficient, manipulator and the vacillating? Why should we not take a cue from the USA that confers right to speedy trial under the Constitution or the UK where such a right is well recognised statutorily?

IV. THE CONVENIENT CRIMINALS AND INCONVENIENT CRIMINALS

Though the CJA refuses to acknowledge any class distinction between criminals, but in reality the system operates diversely for the criminals of different socio-economic strata. In the words of Alan Norrie:

This social dividing up of the potential criminal population takes as to Foucault's (1979) account of the prison in modern society,

and the dual role that it plays there. Those who are located at the 'bottom end' of the social structure, with least to gain from 'playing the game', are precisely those whom the prison system ends up containing. They cannot be deterred but they can be removed from circulation for a period of time. The prison thereby acts as a cordon sanitaire, between the relatively law abiding and the rest. While containing the one group, it acts as a symbol to the other of the dangers of crossing the line between criminality and respectability.⁵

The aforesaid criminal can be termed as 'convenient-criminals', who constitute the large bulk of criminal population involved in petty crimes. Richard Quinney described their crimes as 'crimes of resistance',⁶ while Marxist criminologists describe them as *lumpenproletariat* criminals. Our CJA too is mainly pre-occupied in dealing with such criminals, whether at the stage of arrest, bail, remand, pre-trial prisonisation, trials, sentencing and post-conviction prisonisation.

In contrast to the above described 'convenient criminals', we have a small yet distinguished class of 'inconvenient criminals' who have been described as 'Privileged Class Deviants' 'Crimes of the Powerful' 'Offences Beyond the Reach of Law'.⁷ To this category of 'inconvenient criminals', the addition of terrorists of all hues has been a significant development. A feature that outrightly distinguishes this category from the earlier category is their unnatural and unwanted presence within the CJA, not only because they wield disproportionate political and social power but because the system is hardly in a position to deal with them. The discomfort faced by the judicial authorities in handling the cases of terrorists in Punjab and in the J&K is a case on the point. In the same vein one can explain the continued elusion of the forest Mafias Veerappan (who may as well be described as Saint Veerappan because of his abilities to remain beyond the reach of law on account of his *Maya*), who can be titled as inconvenient criminal *par excellence*.

The underlying idea in emphasising these two categories is not to suggest the obvious, but to draw attention towards the need for rationalisation

5. Alan Norrie, *Crime, Reason and History* 202 (1993).

6. Richard Quinney, *Class, State and Crime: On Theory and Practice of Criminal Justice* (1977).

7. B.B. Pande, *The Nature and Dimensions of Privileged Class Deviance* in K.S. Shukla (ed.), *The Other Side of Development* (1987).

8. Lee and Visano, *Official Deviance in the Legal System* in H. Laurence Ross (ed.) *LAW AND DEVIANCE* (1981).

9. Sixth U.N. Congress (1980).

of the criminalisation process, that appears to have outlived its utility. Those involved in CJA planning know it better that criminal justice cannot be divorced from the socio-economic context. It is well known that our CJA lacks infra-structural resources and skilled manpower. Therefore, if we decided to deploy the CJA resources to effectively deal with the inconvenient criminals, about which apparently most of us are in agreement, than the CJA has to shift away from the convenient criminals. The need to set these priorities is all the more incumbent for us. Even the developed societies of the West have kept on altering their priorities, that is the reason for their undertaking the decriminalisation and re-criminalisation exercise periodically.¹⁰

I am aware that quite a few of us are trained in not making a distinction between 'petty crimes' and 'serious crimes'. To many petty criminality is the nursery for serious crimes. But it is time that we understand that for taking inconvenient criminals seriously we have to shed our stereotypes and think differently.

V. CRIMINAL JUSTICE REFORM WITHOUT HOPE

In the first phase of comprehensive CJA reforms in the country in the early 70's the basic approach was: *first*, to update the criminal law and procedure and bring it in line with the modern systems; *second*, to evolve a more humane model of CJA by infusing the due process elements; *third*, to make CJA responsive to the needs of specified weaker section such as children, women and lower caste groups, and *fourth*, to suggest new and alternative forms of punishments. The new Code of Criminal Procedure 1973 did have specific provisions for incorporating some of these objectives like right to pre-sentence hearing under Sections 235 (2) and 248(2), speedy disposal by fixing a period of investigation of 60 days and 90 days under Section 167, emphasis on reformative and non-traditional sentences under Sections 360, 361 etc. In the same vein the Indian Penal Code (Amendment) Bill 1972 and the Bill of 1978 were introduced to re-write the substantive Criminal Law Code. One thing distinct about the reform process of 70's was they were backed-up by thorough researches by the Law Commission of India, which brought out the exhaustive 41st and 42nd Reports. Furthermore, these reports and proposed amendments in the Bill were elaborately discussed at the level of the society and in the Parliamentary Committees. It is unfortunate that the IPC Bills lapsed and the events in the 80's and 90's made the law reform itself crisis ridden. By the end of the 90's crime and criminal justice reform no more remained to be an issue

10. THE EUROPEAN DECRIMINALIZATION COMMITTEE REPORT (1981).

of intellectual enquiry, it had passed into the domains of politics. Crime was increasingly seen not only as a threat to law and order but to the national integrity and ideal of nationality itself. No doubt terrorism and transnational economic criminality posed a grave challenge and some serious steps were urgently needed; but seeing all crimes in the same frame and cutting off crime inquiries from intellectual roots led to serious distortions in the understanding of the crime phenomenon and the official policies in respect to it. The constitution of the Justice Malimath Committee on Reforms of (the) Criminal Justice System in November 2000 and its over-wide six point terms of reference epitomises this classic distortion. Points 1 and 2 in the terms of reference are more like an admission of the fact that either there existed no CJA in India before 2000 or it had totally lost its utility for the society, that is why there is a need "To examine the fundamental principles of criminal jurisprudence ... to re-write the Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act".

The Malimath Committee submitted its Report (MCR) in April 2003. Perhaps more on the expected lines than the earlier constituted CRWC that only succeeded in making certain recommendation that did not carry, forward the dream of building a "totally new social order". The two volume, six parts and twenty three chapter Report has made 158 recommendations touching upon almost all the aspects of the CJA. More important than the specific recommendations are the basic premise of the reform process itself which according to the MCR are as follows:

- (i) *violence and organised crimes have become the order of the day. As chances of conviction are remote crime has become a profitable business. Life has become unsafe and people live in constant fear* (para 1.3; emphasis supplied).
- (ii) The system is heavily loaded in favour of the accused and is insensitive to victim's plight and rights (para 2.2).
- (iii) The Adversarial system lacks dynamism because it has no lofty ideal to inspire. It has *not been entrusted with a positive duty to discover the truth as in the Inquisitorial system...* the system appears, to be skewed in favour of the accused. It is therefore necessary to strengthen the Adversarial system (para 2.15; emphasis supplied).
- (iv) Peace and law and order situation depend to a large extent on the efficacy of Criminal Justice System. There is therefore an imperative need to provide a fair *procedure that does not allow easy escape for the guilty* (para 5.16; emphasis supplied).
- (v) There are three standards of proof: "A preponderance", "clear and convincing" and "beyond reasonable doubt" ... "The middle course,

in our opinion" makes a proper balance between the rights of the accused on one hand and public interest and rights of the victim on the other (paras 5.30 and 31).

The afore-quoted five paragraphs may be a very narrow sample of the Committee's broad-based recommendations, but it may suffice to give a fair indication of their perception of the social context and the guiding philosophy. Two scholarly comments, one from a former Judge of the Supreme Court Justice K.T. Thomas that "the recommendations have some silver coins" and the other from Professor Upendra Baxi that the MCR has performed a "classic exercise in seduction",¹¹ underscore the "some appeal for everyone" quality of the MCR. It is proposed here to critically analyse only five key concerns of the MCR as follows:

A. Reforms under the Shadow of International and National Terrorism and Organised Crimes

The whole nation should share the Committee's concern about the harmful consequences of acts of terrorism that strike at the very roots of civilised social existence. No honest citizen would disagree with the Committee's views that strong and firm measures should be adopted for dealing with such crimes and other equally harmful variety described as Federal Crimes. But the real problem is that the Committee appears to have carried the serious crime scare too far by identifying violent and organised crime as the common crime or by suggesting "crime has become a profitable business". The fact is that bulk of crimes are still of the traditional nature, which need to be understood and clearly differentiated from terrorism and organised crimes. In any case for dealing with crimes of terrorists and organised nature more significant would be swift and scientific measures of detection, prevention and investigation rather than lowering the standard of proof, shifting the burden and stringent punishment.

B. Underexplored Reclassification Initiative

The Committee did touch the vital theme of "Reclassification of Offences" in chapter 15. As proposed, the Committee feels "As done in some countries crimes may be classified into four codes, namely (1) The Social Welfare Offence Code, (2) The Correctional Offence Code, (3) The Criminal Offences Code and (4) The Economic and Other Offences Code" (MCR para 15.6.11). Furthermore in Recommendations 108 to 113 there is a proposal to increase summary procedure offences, petty offences,

non-arrestable offences, reducing the number of non-bailable offences, increasing the category of compoundable offences etc. But it is unfortunate that the Committee nowhere spells out the rationale for the various reclassification strategies. It is not clear why the Committee proposed to undertake this massive exercise. For example the suggestion that the classification of offences as cognisable and non-cognisable categories ought to be done away with (MCR para 15.3.1), is likely to bring more offences within the CIA fold, thereby, in a way, negating the proposal of four fold classification of offences. Similar recommendation for making all offences cognisable was made by the Padmanabiah Committee on Police Reform (2000), for conferring more powers on the Police. But at the same the Law Commission Paper on Powers of Arrest (2002), have suggested increasing the number of non-cognisable offences to give more powers to the judiciary.

While agreeing with the MCR plea of reclassification one had expected that reclassification should have constituted the core of the reform work. But unfortunately this happens to be the least worked-out and elaborated part of the MCR. The reason for such a treatment are not difficult to imagine.

C. Little Scope for Disagreement with Committee's Proposals for the Victims

Perhaps the least controversial aspect of the MCR is its concern for the victims. Victims have traditionally remained the most ignored sections of the CIA. Therefore, the proposal to ensure victims right to more effectively participate in the trial and the right to be compensated adequately are more than justified. But in the context of a society like ours can our thinking about the victim be complete without talking about the victims of abuse of power? This is because most vital and gross victimisation often takes place at the hands of the law enforcement officials such as the Police, the Courts and the correctional institutions. The Supreme Court's initiatives in the area of compensatory justice to victims mainly related to victimisation at the hands of correctional officials (*Rudul Shah v. State of Bihar*),¹² investigatory officials (*Nilabati Behara v. State of Orissa*)¹³ and *D.K. Basu v. State of West Bengal*,¹⁴ The Committee seems to have overemphasised the non-State victimisation, which certainly shifts the focus away from the accused, but no attention is paid to the accountability of the power abusing officials.

12. AIR 1983 SC 1086.

13. (1993) 2 SCC 746.

14. AIR 1997 SC 610.

11. Upendra Baxi, THE (MALIKATHI) COMMITTEE AN REFORMS OF CRIMINAL JUSTICE SYSTEM: PROMISES, POLITICS AND IMPLICATIONS FOR HUMAN RIGHTS (2003).

D. Half-heard Search for Punishment Alternatives

The Committee gives ample evidence that it is alive to the needs of reform in the area of punishment alternatives and sentencing strategies. Chapter 14 of the MCR is devoted to: Offences, Sentences, Sentencing and Compounding. In respect of new forms of punishment the Committee has not gone beyond the IPC Bill 1972. Neither the possibilities of new punishments such as 'curfew order', 'community rehabilitation order' 'attendance centre order' has been explored in the Indian Society context, nor reference has been made to *Restorative Justice* alternative. In many European systems *restorative justice* has already replaced traditional punishment for many non-serious categories of offences.

The most controversial view of the Committee is in respect of Capital Punishment. Para 14.7 is titled as: 'Alternative to Death Penalty', gives an impression that the Committee is taking an abolitionist stand and a reformist line. But its suggestion of imprisonment for life without commutation or remission, can hardly be justified on reformist grounds. The Committee seems to be aware about the need for sentencing guidelines (Para 14.4), but its recommendations fall short of seeking a comprehensive sentencing legislation. Sentencing disparities and formlessness have become too notorious and judicial discretion needs to be guided by Rule of Law, on the lines of the US Sentencing Act 1984 and the UK Sentencing Act 2000.

E. Who cares for "Truth"?

The Committee seems to be over-obsessed by the "truth" seeking quality of the Inquisitorial System (particularly the French system about which the members of the Committee have a few days first hand experience). None can contest the Committee's noble aspiration of making the CIA "truth based". But the Committee has not adequately spelled out the ways and means of going about this mission. Ordinarily our courts find it very difficult to arrive at a conclusion about 'proof' on the basis of relevant and admissible evidence, how is search of truth going to be any easier? Apart from inherent difficulties in search for truth, it is likely to be very time consuming too. It is almost ten years now that the Justice Liberhan Commission is trying to unearth the truth about Masid demolition, but still they seem to be nowhere near. Furthermore, a judge as a human being is likely to suffer from all possible human weaknesses too, like the *Best Bakery* case judge. It is not clear as to how the proposed mandatory obligation to search the truth is likely to transform the human beings?

WTO Dispute Settlement Mechanisms:

A Fresh Look

A.K. Koul*

I. INTRODUCTION

For global peace and prosperity, an open, rule based trading system, based on principles of non-discrimination, progressive liberalisation of tariffs, and rule of law could help support such peace and prosperity. Obviously once the international obligations and rights and duties of member states have been defined, the question of how those obligations, rights and duties are to be enforced especially in the arena of international trade, multilateral conventions and treaties remains. In the Havana Charter/ITO, the concept of balancing the rights and duties was incorporated by providing for compensatory adjustment in case a member has not obligated itself to the rights and duties which it had agreed upon while acceding to ITO. Once the ITO failed to come into existence, almost similar provisions were incorporated in Articles XXII and XXIII of GATT 1947. The management of disputes in the WTO is structured on the basis of the abovesaid Articles of GATT, and the rules and procedures as further elaborated and modified therein. Therefore, a brief survey of the jurisprudence of settlement of disputes as developed in GATT, upto the incorporation of an elaborate treaty of twenty seven articles and four appendices known as Understanding on Rules and Procedures Governing the Settlement of Disputes as part of the Governing the Settlement of Disputes that are a part of the WTO dispensation that has come into force on 1 January, 1995 is attempted.

II. DISPUTE SETTLEMENT IN GATT 1947

The GATT 1947 in the legal technical sense did not conceive of a specific procedure or provision for the settlement of disputes nor did it provide legal norms as to when a breach or breaches would amount to violation of a rule so as to give rise to a dispute. The GATT even was silent about the establishment of a tribunal for resolving actual disputes or to promulgate authoritative interpretations on questions of interpretation.¹ Yet

* Professor, Law Centre II and former Head & Dean, Faculty of Law, University of Delhi, Delhi-110007.

1. See Kenneth W. Dam, THE GATT AND INTERNATIONAL ECONOMIC ORGANISATION 352 (1977).

over the years the disputes with regard to breaches of substantive norms of GATT and its articles as well as the question of interpretations have been a recurring phenomena. Surprisingly enough, GATT has resolved many more disputes and evolved umpteen interpretations and interpretative techniques to make the GATT functional. To some extent, the Contracting Parties acting jointly under Articles XXXV.1 or under more specific provisions of GATT exercised the functions of a tribunal. As GATT 1947 is drafted on conventional terms, including a liberal use of prohibitory language, the remedy provisions are not drawn in terms of sanctions. The organising principle as a whole is a system of reciprocal rights and obligations to be maintained in balance. Professor John H. Jackson, however notes that there are nineteen clauses in the GATT which GATT Contracting Parties are obliged to consult in specific instances including the instances of customs valuation, and invocation of escape clause.² GATT Articles and Paragraphs are as follows:

11:5; VI:1; VII:1; VIII:2; IX:6; XII:4; XIII:4; XV:III:12; XVII:16; XVIII:21; XXVIII:22; XIX:2; XXII; XXIII; XXV:1; XXVII; XXVIII:1; XXVIII:4; XXXVII:2.

Also there are seven different provisions for compensatory withdrawal or suspension of concessions. 3 Article II:5; XI:4; XVIII:7; XXIII:21; XIX:3; XXIII; XXVII; XXVIII:3; XXVIII:4.

The GATT in Article X, to some extent provided a mechanism with due regard to the obligations of contracting parties *inter se* themselves by requiring the publication of laws, regulations, periodical decisions and administrative rulings of general application pertaining to the treatment of products for customs duties. Such instruments are to be published promptly in a manner so that the governments and traders are conversant with them. Similarly, agreements 'affecting the publication of trade policy' in force between the government or a governmental agency of one contracting party and another contracting party, were also to be published.³

By 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance further set out the commitments of contracting parties to notify such measures to the maximum extent possible notwithstanding whether those measures are consistent with the rights and obligations of the contracting parties under the GATT.

2. See John H. Jackson, *World Trade and the Law of GATT* 164 (1969).

3. See generally A.K. Koul, *Settlement of Disputes in International Trade*, IN.C.L.J. 46-68 (1966).

III. ARTICLE XXIII AND THE ROLE OF PANELS

Article XXII: 1, requires each contracting party to afford other contracting parties adequate opportunity for consultation with respect to any matter affecting the operation of GATT. Article XXII: 2 authorises the contracting parties acting jointly, at the request of a contracting party, to consult with other parties on matters which were not resolved through Article XXII: 1 consultations. Eventually the consultations became a basis for the generation of GATT's settlement procedures which was grounded in Article XXIII.

Under Article XXIII:1 a complainant must show that either (i) benefits accruing to him under the GATT are being nullified or impaired; or (ii) attainment of any objective of the GATT is being impeded. In addition, the complainant must further show that such nullification and impairment is a result of (a) breach of obligation by respondent contracting party; (b) the application of any measure by the respondent contracting party, whether it conflicts with the GATT or not; or (c) the existence of any other situation.

If no satisfactory adjustment is made between the complainant and the respondent contracting parties within a reasonable period of time or if the difficulties pertain to clause (c) of Article XXIII, then the complaining party is authorised to refer the matter to the Contracting Parties under Article XXIII:2 who are required to investigate the matter and make appropriate recommendations. In an appropriate case, Article XXIII:2 permitted the Contracting Parties to authorise the complaining party to suspend the application of tariff concessions or other GATT obligations to the party found to be acting inconsistent with its obligations under the GATT.

Over the years, especially in absence of specific procedures and formal settlement of disputes mechanism, the contracting parties laboured very hard and some semblance of formal dispute mechanism system was developed by evolving a system of panels for redressing grievances of the complaining contracting parties.⁴ Some semblance of formality was added to the settlement of disputes process in 1979 when the Tokyo Round adopted an Understanding on Notification, Consultation, Dispute Settlement

4. For an overview on the developments in the dispute settlement mechanisms in GATT, see John H. Jackson, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT*, 3rd ed. 327-371 (1995); Robert Hudec, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990); *EMERGING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993); Pierre Pescatore, *The GATT Disputes Settlement Mechanism*, 27 J. of World Trade 6-20 (1993).

and Surveillance which included an annex setting out an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement. This Description noted, in part, that:

Panels set up their own working procedure. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party having a substantial interest in the matter which is not directly party to the dispute, but which has expressed in the Council a desire to present his views. Written memoranda submitted to the panels have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the GATT, especially on historical or procedural aspects. The secretariat provides the secretarial and technical services for panels.⁵

The abovesaid provisions were further reaffirmed and elaborated by adding more detail including a requirement that, 'The Contracting Party to which such a recommendation i.e. to bring a challenged measure into conformity with GATT has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendations or ruling by the Contracting Parties.'⁶ Some minor steps were also taken in a Decision on Dispute Settlement Procedures on Nov. 30, 1964.⁷

The panel system of settlement of disputes has played a very vital role and by 1990, more than 140 cases were resolved by the use of panels under Article XXIII. The panel as already referred is an independent body of experts with 'three main tasks viz (a) to inquire into the facts of the case; (b) to assess all the relevant elements for a decision on the measures;

5. Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2); BISD 263/215, 217.

6. BISD 295/13, 15.

7. BISD 315/9.

and (c) to submit a proposal for such a decision.⁸ The reports of the panels do not have legal force. The panel reports go to the GATT 'Contracting Parties' where mediating and political aspects are reconsidered and the panel report if gets adopted, achieves legal force.

The Complaints under Article XXIII 1 (b) termed as non-violation complaints have raised questions of interpretation and non-violation complaints have been successful only if the infringement of tariff benefits have been proved.

A survey of cases of violation of Article XXVIII reveals that the panels adopted different and varying interpretations to the phrase 'nullification and impairment of benefits'. In early violation cases,⁹ some sort of injury to the contracting party was considered necessary before involving Article XXIII, however, in subsequent cases, the concepts such as *prima facie* or nullification and impairment was introduced.¹⁰ Nullification and impairment concepts have further been concretised in the form of 'adverse effect' and 'frustration of reasonable expectation' and these two concepts have not necessarily been applied in a cumulative way but are applied separately.¹¹

IV. DISPUTE SETTLEMENT IN GATT 1947 AND ITS REFINEMENTS

Having referred to the differing and varying interpretations of the phrase 'nullification of benefits', the dispute settlement in GATT 1947 was suffering from the inbuilt mechanism of not contemplating a formal dispute settlement body. Article XXIII, at best was formally 'Constituting Contracting Parties' as a dispute settlement authority but keeping in view the legal nature of GATT, any decision to modify, amend or interpret the GATT, required the consent of all the parties which *albeit*, was in conformity with Article 40 of the Vienna Convention on the Law of Treaties. This meant that in practice a losing party in a dispute not only could refuse to agree and 'block' the adoption of an adverse panel, it could even refuse to agree to the very establishment of a panel, thereby avoiding the embarrassment of an adopted report altogether.

8. See GATT, ANALYTICAL INDEX PREPARED BY E-U PETERMANN (1989) of Article XXIII. Also see, Armin Von Bogdandy, *The Non-Violation Procedure of Article XXIII:2, GATT: Its Operation and Rationale*, 29 *Journal of World Trade* (1995) at 95-111.

9. See cases referred in John H. Jackson, *supra* n. 2 at 181-187.

10. See the case of *U.S. Taxes on Petroleum and Certain Imported Substances*, 34th Suppl. BISD 136 (1998). Panel Report Adopted on June 17, 1987.

11. See Armin Von Bogdandy, *supra* n. 8 at 101.

Panel Reports which were adverse to the contracting parties were indeed blocked, however, in course of evolution of settlement of dispute mechanism from 1947 to 1992, the losing party eventually accepted the results of an adverse panel report in approximately 90 per cent of cases.¹² Still blocking was a problem and seemed in the 1980s to be occurring with increasing frequency.

This 'blocking' of the panel decisions to some extent was overcome by 'Montreal Rules' adopted by the Contracting Parties in April, 1989, Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April, 1989.¹³ The 'Montreal Rules' became the basis of negotiating the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes.

The 'Montreal Rules' were applied although on a trial basis from May 1, 1989 till the conclusion of Uruguay Round for the complaints brought under Article XXII or XXIII. The importance of the 'Montreal Rules' was in the fact that it placed time limits on consultations and provided for the automatic establishment of a panel. Once a process of consultation has started, the defending party was required to reply within 10 days and to agree to consultation in good faith in no less than 30 days. In case the agreement for consultation fails, the complaining party could directly request the 'Contracting Parties' for the establishment of a panel. If consultations failed to settle the dispute within 60 days of the request, the complaining party then could request for the establishment of a panel.¹⁴

'Montreal Rules' provided further that 'If the complaining party so requests, a decision to establish a panel or a working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an Item on the Council's regular agenda, unless at that meeting the Council decides otherwise. This indirectly meant that a Panel would be established without fail, at the second meeting of the GATT Council after the request was put on the agenda, unless the Council decides otherwise. For the Council to decide 'otherwise' under GATT's process of decision by consensus, however, all parties including the complaining party, would have to decide otherwise. This is being termed as a 'negative consensus' system, a system that required consensus not to establish a panel as against the system which required positive consensus to establish a panel.

These and some other principles were adopted on a permanent basis in WTO. The other principles of 'Montreal Rules' which found place in the

WTO settlement of disputes mechanism deal with the terms of reference of panels, the composition of panels, procedures for multiple complaints and third party participation, and time limits. Rules on sensitive topics of adoption of panels reports were also included.¹⁵

V. WTO, GATT 1994 AND THE SETTLEMENT OF DISPUTES

A. General

The settlement of disputes in any international organisations should be 'rule oriented' rather than 'power oriented' as the 'rule oriented system' brings stability and predictability and international trading system necessarily requires 'rule base' system that has been introduced in a big way in the WTO Dispute Settlement Understanding or DSU.¹⁶

The DSU contains 27 Articles totalling 143 paragraphs plus four appendices, and is perhaps the most significant achievement of the Uruguay Round negotiations, often being referred as a jewel in the crown of WTO. Unique in public international law, the DSU confers compulsory jurisdiction on the Dispute Settlement Body (DSB) for purposes of resolving disputes. The interpretative role of the WTO dispute settlement system is made explicit in Article 3(2) of the DSU which provides that the system serves to 'clarify the provisions of the WTO Agreements in accordance with the customary rules of interpretation of public international law'.

The DSB has been busy with cases since its inception as in the first two years of its existence more than 80 cases were filed and upto the end of year 2003, more than 300 cases were filed which implies that the international community has reposed trust and confidence in the DSB of the WTO. The profile of cases decided and filed shows how varying and conflicting political, economic and social factors of member countries are involved for settling the disputes which essentially may be trade oriented.

As provided in Article 3(2) of the DSU, the Appellate Body of the DSB in its various decisions has depended on the Vienna Convention on Law of Treaties especially its Article 31 as a rule of interpreting the DSU. Article 31 of the Vienna Convention on the Law of Treaties provides that, 'A treaty shall be interpreted in good faith in accordance with the ordinary

15. *Ibid.*

16. John H. Jackson, *The Crumbling Institutions of the Liberal Trading System*, 12 *Journal of World Trade L.* 93 at 98-101 (1978); *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 *J. of World Trade L.* 1 at 3-4 (1979); *The World Trading System* 111 (1998) Robert H. Hudec, *supra* n. 2.

12. Hudec, *ENFORCING INTERNATIONAL TRADE LAW*, *supra* n. 4 at 27.

13. BISD 365/61 hereafter referred as 'MONTREAL RULES'.

14. *Id.* at c 1 and c. 2.

meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.¹⁷ This approach presumably 'is based on the view that the text of a treaty must be presumed to be the authentic expression of the intention of the parties'¹⁷ which represents a break from the GATT 1947 panel practices where negotiating history played a prominent role in ascertaining intention.¹⁸ Under the Vienna Convention Rules, recourse to negotiating history, or preparatory work, can only be a supplementary means of interpretation to confirm a meaning already arrived at by the Article 31 (1) rules, or where an interpretation is in accordance with the rules leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.¹⁹

The Appellate Body has interpreted the WTO Agreements by reference to ordinary meaning of the words viewed in their context in the light of object and purpose of the treaty. Although it has identified objects and purposes as part of the interpretative process,²⁰ it has also said that if the terms of the treaty are given their ordinary meaning, in context, this should 'effectuate its objects and purposes.' Appellate Body notwithstanding the fundamental rule of Article 31 (1) of the Vienna Convention has drawn on other interpretative mechanism more specifically on 'effectiveness' which has been endorsed by the Appellate Body as 'fundamental tenet of treaty obligation.' Moreover, the Appellate Body in interpreting the language of a provision of one of the WTO Agreements can seek additional interpretative guidance as appropriate from the general principles of international law. In some cases, the Appellate Body has interpreted on case to case basis, implying that the meaning may change according to circumstances of the case. The practice of the Appellate Body shows that although, Vienna Convention rules on treaty obligations are the starting and guiding principles, yet the Vienna Convention does not provide single and self contained answers to all questions of interpretation of WTO Agreements.

B. DSU and its Applicability

The central provision pervading the settlement of disputes under the WTO is GATT Article XX and XXIII of 1947 incorporated *mutatis*

17. Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 115 (1984).

18. D.J. Kuiper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law*, 25 *Neth YIL* 227 (1994).

19. Art. 32, *VIENNA CONVENTION ON THE LAW OF TREATIES*.

20. See for example, *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997 (Jan 16, 1998) at para 165.

mutandis in GATT 1994. The jurisprudence evolved around Articles XX and XXIII of GATT 1947 has been described earlier. Suffice it to say that Article XIII of 1947 did not provide specific procedures for settling disputes concerning matters arising out of GATT, therefore, the DSU came into being only after the WTO Agreements came into force.²¹

Article I of the DSU sets out the coverage and applicability pursuant to its consultation and dispute settlement provisions concerning the 'covered Agreements' which are listed in Appendix 1: the Agreement Establishing the World Trade Organisation; the 13 individual multilateral agreements on trade in goods; GATS; TRIPS and the four plurilateral agreements. It encompasses measures affecting the operation of any covered agreement taken within its territory of a member, including measures taken by regional or local governments. It does not extend to other matters not falling within the four corners of GATT.²²

The rules of DSU with special modification have been applicable to other Agreements as listed in Appendix 2 to DSU such as:

Agreement	Rules and Procedures
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VIII of GATT 1994	19.3 through 19.5, Annex 11.2(f), 3, 9, 21
Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services	XXIII:3, XXIII:
Annex on Financial Services	4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

The above list of rules and procedures includes provisions where only a part of the provision may be relevant in this context.

21. GATT Focus No 107, May 1994 at 12.

22. See Canada—Agreement of the Foreign Investment Review Act, BISD 305/140 adopted on 7th Feb. 1984.

If there are disputes involving two or more covered agreements other than the DSU and in the event of a conflict in the special or additional rules and procedures contained in those agreements, Article 1.2 obligates the parties themselves to attempt to agree on the rules and procedures to apply. If they are unable to do so, within 20 days of the establishment of the panels, the Chairman of the DSB, in consultation with the parties, shall determine the rules of procedures, to be followed within 10 days of a request to do so by either party. The DSB Chairman should be guided by the principle that special or additional rules and procedures should be used where possible, with the DSU rules and procedures being used where necessary to avoid conflict.

In case there is no difference between the rules and procedures of the DSU and covered agreements, the rules of procedures of DSU apply together with the special or additional provisions of the covered agreements. However a special or additional provision should only be found to prevail over a provision of DSU in a situation where adherence to one provision will lead to a violation of other provisions in the case of a conflict. An interpreter must therefore, identify an inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement before concluding that latter prevails and that the provisions of DSU does not apply.²³

C. Dispute Settlement Mechanism

a. Dispute Settlement Body (DSB)

The DSU created three institutions to administer WTO dispute settlement mechanism. The first is the Dispute Settlement Body established under Article 2 of the DSU for the purpose of administering rules and procedures set out in the DSU subject to the exceptions as provided in the covered agreements. The DSB has power to establish panels, adopt panel reports and Appellate Body Reports, supervise the implementation of recommendations and rulings, and authorizes sanctions for failure to comply with dispute settlement decisions. The General Council of the WTO serves as the DSB but the DSB has its own chairman and follows separate procedures for those of the General Council.

The DSU has the power to establish Appellate Body to review panel rulings.²⁴ The Appellate Body is a standing institution composed of seven

persons appointed by the DSB for four year terms.²⁵ The members of the Appellate Body must be persons with demonstrated expertise in law and international trade who are not affiliated with any government. The Appellate Body membership must be 'broadly representative of membership in WTO.'²⁶

The Appellate Body hears cases in divisions of three, but each member is required to stay abreast of the dispute settlement activities of the WTO. The WTO system continues the panel system of GATT 1947. Panels are composed of three (exceptionally five) persons, well qualified governmental and/or nongovernmental individuals, selected from a roster of persons suggested by the WTO members. Panel members serve in their individual capacity and not as representatives of WTO members.²⁷

b. Dispute Settlement Procedures

General Provisions

Article 3 of the DSU set out the general provisions which provides mainly the objectives of the dispute settlement mechanism as enshrined in the DSU, which have been summarised as under:

1. adherence to the management principles applied under Articles XXII and XXIII of 1947 GATT as modified by the DSU;
2. DSU is meant for security and predictability of the multilateral trading system, to serve and preserve the rights and obligations of Members under the covered Agreements—recommendations of DSB should not add or diminish the rights and obligations of members of WTO;
3. promptness of settling situations where a Member considers that his benefits have been infringed, and to maintain proper balance between rights and obligations of the Members;
4. DSB's aim should be achieving a satisfactory settlement of the disputes keeping in mind the rights and obligations of members;
5. consultations and dispute settlement should be such which is consistent with the covered agreements and not to nullify or impair benefits of members nor the objectives of the agreements;

23. *Guatemala-Cement I*, Guatemala-Antidumping Investigation Regarding Portland Cement from Mexico, Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, para 64.

24. Art. IV.3, WTO Agreement.

25. DSU, Art. 17.

26. DSU, Art. 17.

27. DSU, Art. 8.

6. matters formally raised under consultation and dispute settlement shall be notified to DSB and the relevant Councils and Committees where any member may raise any point relating thereto;
7. solutions mutually agreed to a dispute is preferred—in absence of mutually agreed solutions, the first objective of dispute settlement mechanism is to secure withdrawal of the measures concerned if found to be inconsistent with the provisions of the covered Agreements. Compensation should be resorted to only if the immediate withdrawal of the measure is impracticable. The last resort is the possibility of suspending the application of concessions or obligations under the covered Agreements on a discriminatory basis *vis-à-vis* other member subject to authorisation by the DSB;
8. in cases where there is an infringement of the obligations assumed under a covered Agreement, it constitutes a case of nullification or impairment *prima facie* i.e. presumption, that rules have an adverse effect on the other Member in the covered Agreement and it is the responsibility of the other Member to rebut the charge;
9. DSU provisions are without prejudice to Members and any Member can have recourse to the authoritative interpretation of the covered Agreement through decision making under the WTO Agreement or a covered Agreement which is plurilateral Trade Agreement;
10. the dispute settlement mechanisms is not contentious and Members are supposed to act in good faith in resolving disputes. Complaints and counter complaints should not be linked.

The jurisprudence of the above 'General Provisions' as developed by the DSB of the DSU is discussed as below.

The concept of 'security and predictability' in Article 3.2 is the central object of the dispute settlement system of DSU to protect the security and predictability of the multilateral trading system and DSU provisions must be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it.²⁸ The WTO rules are reliable, comprehensible and enforceable, and are not so rigid or inflexible as to leave room for reasoned judgments in conformity with endless and ever changing ebb, of real facts in real cases in the real world.²⁹

28. U.S. 301, 310 of the Trade Act of 1974, Panel Report, WT/DS/52/R, adopted 27 January 2000, para 7-7.5.

29. *Japan, Alcoholic Beverages case*, Appellate Body Report, WT/DS8/AB/R, para 31.

With regard to nullification and impairment of benefits under Article 3.8, the Appellate Body on the contention that United States has never exported a single banana to EEC and therefore could not suffer any trade damage, was rejected and held that the two issues of nullification and impairment and the standing of United States are closely related. The United States is a producer of bananas and a potential export interest by the United States cannot be excluded; the other is that the internal market of United States could be affected by the EEC banana regime, and by its effects on world supplies and prices of banana.... They are relevant to the question whether the European Communities has rebutted the presumption of nullification and impairments.³⁰ In the case of Turkey-Textiles, the quantitative restrictions on imports of textiles and clothing from India were in violation of WTO law, India had not suffered any nullification or impairment of benefits within the meaning of Article 3.8 as imports from India had increased since Turkey imposed quantitative restrictions. The Panel rejected these arguments and Turkey had failed to rebut the presumption of nullification and impairment.³¹

c. Consultations

Normally, an international trade dispute settlement commences with consultation between the member nations of WTO under Article XXII of GATT 1947 and as already noted, the consultation mechanism was further strengthened and reaffirmed in the Tokyo Round. The DSU affirms the effectiveness of the consultation and provides that each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultations regarding any representation made by another Member concerning measures affecting the operation of the covered Multilateral Trade Agreements taken within the territory of the former. Such consultations occur regularly at the official level and can be raised at the Ministerial level as appropriate.³²

The request for consultations are to be notified to DSB and to the relevant Councils and Committees. The Council as already noted are Councils for Trade in Goods, for Trade in Services, and for TRIPS. The Committees are those which are concerned with different substantive areas of WTO Agreements, such as Committees on Antidumping, Technical Barriers to Trade, Subsidies and Countervailing Measures.

30. EC—Banana III, EC-Regime for the Importation, Sale and Distribution of Bananas, Appellate Body report WF/DS 27/AB/R: DSR 1997:11, para. 5.1.9.

31. Turkey-Textiles, Turkey Restrictions on Imports of Textiles and Clothing Products, Panel Report WT/DS34/R, adopted 19 Nov. 1999.

32. Art. 4.

The request for consultations should specify the articles of the relevant WTO agreements under which consultations are sought. These normally would include Article 4 of the DSU, the corresponding provisions of other covered agreements which are listed in footnote 4 of the DSU, and Articles XXI or XXIII of GATT. Under footnote 4, the corresponding consultations are listed as under:

Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT, 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade Related Aspects of Intellectual Property Rights, Article 64.1 and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

The complaining party should give reasons for the request including identification of measures at issue and the identification of legal basis for the complaint. It is necessary that the request for consultations should be broad in scope as far as possible, both in identifying the measure and in indicating the legal basis for such complaint, as these will limit the scope of any eventual panel request and that in turn, will limit the scope of the terms of reference of the panel.³³ A measure that is not subject of consultations cannot be referred to a panel.³⁴ Panels, in turn, may evaluate a measure only under the provisions of the covered agreements specified in the terms of reference, which incorporated the request for a panel.³⁵

Besides that a Member has to satisfy himself that the action after consultation would be fruitful. The DSU in Article 4:3 sets dead lines for consultation procedures. A Member receiving the request for consultation must respond to the request within 10 days of its receipt, and must agree

33. United States-Denial of Most-favoured nation Treatment as to Non-rubber Footwear from Brazil, BISD 395/128 (adopted June, 1992) at 147-148.

34. United States—Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon, BISD 415/ 229, 430 Nov. 1992) (Adopted on 27 April, 1994).

35. Japan-Taxes on Alcoholic Beverages, WT/D58/R, WT/DS/10/R: Adopted on 1 Nov. 1996.

to enter with consultation within 30 days after receiving the receipt or within a time frame mutually agreed. If the receiving Member does not reply within 10 days, or if it fails to consult within 30 days or within a period otherwise agreed, the Member requesting consultation may proceed immediately to request the DSB to establish a panel. The complaining party may also request for the establishment of a panel during sixty days period provided both the parties jointly consider that the consultations has failed.

It is pertinent to mention that the request for consultations and its field of reference that may be referred to a panel is crucial as any failure to raise an issue or to advance a particular objection to the impugned measure has resulted in the respondent's successful objections to its consideration by the Panel. A scrutiny of cases decided by GATT 1947 Panel reveals that the nonidentification of measures as well as field of reference may prove fatal. In EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong:³⁶ Canada-Administration of Foreign Investment Review Act:³⁷ and the United States—Denial of Most Favoured Nations Treatment as to non-Rubber Footwear From Brazil:³⁸ the ill conceived references proved fatal.

Whenever, a Member of WTO other than the consulting Member thinks that the Member has substantial trade interests in consultations being held pursuant to Article XXII:1, Article XXII:1 of the GATS, or the corresponding provisions in other covered Multilateral Trade Agreements, such interested Member may notify the consulting Member.

Consultations essentially are bilateral, confidential and without the involvement of the DSB, the panel or the secretariate of the WTO. As the consultations are confidential and no official records of kept, a panel which may be constituted in the event that consultations have failed, does not know what was discussed during consultations. Therefore, there is nothing in the DSU that requires that a complainant cannot request a panel unless its case has been adequately explained in consultations. As a corollary to this, the Panel request will itself set out the scope of the requested consultations and the Panel must assume that all the points contained in the request were subject of consultations.

All parties in the dispute settlement must be 'fully forthcoming' and in the consultation process facts must be freely disclosed, as the demands of

36. GATT, BISD, 305/129 (1983).

37. GATT, BIDS 305/140 (1983).

38. GATT, BISD 395/128 (1991).

due process implicit in the DSU make full disclosure of facts during consultations important. For the claims that are made and that the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact finding.³⁹

d. Good Offices, Conciliation and Mediation

If the consultation fails, the Members of WTO may avail themselves of DSU's good offices, conciliation or mediation services. Article 5 of the DSU provides for the above services to be taken voluntarily by the Members if the Members to the dispute so agree and request for such services to any item of the dispute which can be terminated at any time; whenever good offices, conciliation or mediation are entered into within sixty days from the date of the request for consultation before requesting for a panel. Also, the complaining party may request a panel during the sixty days if the parties to the dispute jointly consider that good offices, conciliation and mediation has failed to settle the dispute. Further, the Director General of GATT may provide such services in an effort to assist members to resolve a dispute.

e. The Establishment of Panels

To resolve the dispute within sixty days if the consultation fails (if a Member to which a request for consultations is made agrees within 10 days to consult within 30 days, and does so, the complaining party may not ask for a panel until 60 days have elapsed from the date of original request, unless the parties agree that further consultations would not be productive) at the request of the complaining party, a meeting of the DSB shall be convened within 15 days provided at least 10 days advance notice of the meeting is given, a panel may be established by the DSB to hear the dispute. In cases of urgency including those which concern perishable goods, Members shall enter into consultations within 10 days of the request for consultations, and the complaining Member may request a panel 20 days after the request, if consultations have failed. The DSB is the sole judge of urgency of the matter.

The DSB may by consensus also decide not to establish a panel. The request for the establishment of a panel has to be made in writing and such

39. India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, AB-1997, WT/DS550/AB/R (19th Dec. 1997, Adopted 16 Jan. 1998, para 94).

request shall indicate whether consultations preceded the request for panel; identify the specific measures at issue; and also provide a brief summary of the legal nature of the complaint and the problems clearly. Special terms of reference are also possible as alternatives to the above method of reference provided the written request includes the special terms of reference.⁴⁰ The establishment of panel appears to be a matter of right with the complaining party.

The jurisprudence as evolved by the DSB on the interpretation of Article 6 is as follows:

- (i) It is important that a panel request is sufficiently precise for two reasons: first it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and second, it informs the defending party and the third parties of the legal basis of the complaint.⁴¹
- (ii) In *EC-Bananas*, the Appellate Body stated that the need for a 'legal interest could not be implied in the DSU or in any other provisions of the WTO Agreement and that Members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful'. We cannot read in DSU any requirement for an economic interest.⁴²
- (iii) The term 'measure' in Article XXIII:1 of GATT 1994 and Article 26.1 of the DSU as elsewhere in the WTO Agreement, refers only to policies and actions of governments, not those of private parties. But while the truth may not be open to question, there have been number of trade disputes in relation to which panels have been faced with making sometimes difficult judgements as to the extent to which what appears on their face to be private action may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.⁴³ The post GATT cases demonstrate the fact that an action taken by private parties does not rule out the possibility that it may be deemed to be a governmental if there is sufficient government involvement in it.

40. Article 6 of the DSU.

41. *EC-Bananas III*, AB-Report, WT/DS27/AB/R, DSR 1997: 11, para 142.

42. *Korea-Dairy*, AB-Report, WT/DS98/AB/R, para 7.13.

43. Panel Report on Japan-Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R adopted 22 April, 1998, para 10.52.

It is difficult to establish bright line rules in this regard, however, it needs to be examined on a case to case basis.⁴⁴

- (iv) To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified measure. The requirement of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the respondent party can reasonably be found to have received adequate notice of the scope of the clause of the complaining party. The two key elements, close relationship and notice are inter-related and only if a 'measure' is, subsidiary or closely related to a specifically identified measure' will notice be adequate.

- (v) 'measures' within the meaning of Article 6.2 of the DSU are not only measures of general application i.e., normative rules, but also can be the application of tariffs by customs authorities.⁴⁶

VI. TERMS OF REFERENCE OF PANELS

In order to avoid delays and also to clear the functioning of panels, the standard terms of reference are to be furnished within twenty days from its establishment and are, to examine, in the light of the relevant provisions in (name of the covered Agreement(s) (5) cited by the parties to the dispute), the matter referred to the DSB by (name of the party) in document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement/s. The DSB may authorise the chairman of in establishing a panel to draw up the terms of reference of the panel in consultation with the parties to the dispute and such terms shall be circulated to all members.⁴⁷

The terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the

44. *Ibid.*, paras 10.55-10.56.

45. Japan-Film Supra, para 10. 8.

46. EC-Custom classification of Certain Customs Equipment, Ab-Report DSR 1998: V para 65.

47. Art. 7. DSU.

precise claims at issue in the dispute.⁴⁸ The ellipses in Article 7 indicates two things. One, that document number given to the complainant's request for the establishment of a panel will appear in the term of reference. Second, as in the request of the complaining party will have referred to the particular agreements at issue and also, the relevant provisions of those agreements, the panel's jurisdiction will be limited by these references. The panel, therefore, may not go beyond them to consider whether the measures or actions complained of are inconsistent with other agreements or other provisions of the agreements cited.⁴⁹

The relationship between terms of reference and submissions, there is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be submitted in a complaining party's first written submission. It is the panel's terms of reference governed by Article 7 of the DSU, which sets out the claims of the complaining parties relating to the matter referred to DSB.⁵⁰ Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the working procedures in Appendix 3 unless the panels decides otherwise after consulting the parties to the dispute.' Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.⁵¹

VII. COMPOSITION OF PANELS

Article 8 of the DSU provides that panels normally are composed of three panelists or five provided the parties to the dispute agree for the same within ten days after the establishment of the panel by the DSB. Panelists generally are present or former members of non-party delegation to the

48. Appellate Body Report on Brazil-Dessicated Coconut case: WT/DS22/AB/R. DSR 1997:1 p. 21.

49. Japan—Takes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, and WTDS11/R (11 July 1996) Adopted as Modified by the Appellate Body 1 Nov., 1996, para 65.

50. EC—Bananas III, Panel Report as modified by Appellate Body Report, WT/DS27/AB/R. DSR 1997: 11 para 7.57.7.58.

51. India—Patents (US)—India-Patent Protection for Pharmaceutical and Agricultural Chemical Products-complaint by United States, Panel Report as Modified by Appellate Body Report, WT/DS50/AB/R, DSR 1998:1 paras 92-93.

WTO, or academics. They serve in their individual capacities, not as government representatives or organisations. Members are generally required to permit their officials to serve as panelists and are prohibited from giving them instructions or seeking to influence them with regard to matters before them. If a dispute involves a developing country, at least one panelist shall be from a developing country if the developing country so requests.

It is the secretariate which proposes nominations for the panels to the parties to dispute and the parties to the dispute are not expected to oppose nominations except for compelling reasons. If the parties do not agree within twenty days from the establishment of a panel, at the request of either party, the Director General of the WTO in consultation with the Chairman of DSB, and the Chairman of the relevant council or committee may form the panel by appointing the panelists whom he or she considers most appropriate in accordance with any relevant special or additional procedure of the covered multilateral agreement, after consulting with the parties to the dispute. Accordingly, the chairman of the DSB may inform the members of the composition of the panel thus formed not later than 10 days from the date the chairman receives such a request.

The secretariate has to maintain a roster of panelists both governmental and nongovernmental individuals possessing the qualifications of either having served on or presented a case to a panel, served as a representative of a WTO member, or of a contracting party to the GATT 1947 or as representative to a council or committee of any covered Multilateral Agreement or its predecessor Agreement, or in the secretariate taught or published on international trade law or policy, or served as a senior trade policy official of a Member. These panels members are to be selected with a view to ensuring the independence of the Members, a sufficiently diverse background and a wide spectrum of experience.

In cases of multiple complaints, where more than one Member requests the establishment of a panel related to the same matter, a single panel is established, taking into account the rights of all members concerned. Further, the single panel has to organise itself in such a manner as if separate panels would have examined the matter in dispute. Written submissions by each of the complainants in a multiple complaint has to be made available to other complainants.

The interests of third parties in a dispute has been recognised (Article 10 of the DSU) and any Member having a substantial interest in a dispute (referred to in DSU as a third party) and having notified the DSB of that interest, may be heard by a panel and may make written submissions to the

panel. Third parties receive the first written submissions of the parties to the first meeting of the panel, but no provision is made for them to receive the second or subsequent submissions. A panel's decision whether to grant 'enhanced' participatory rights to third parties is a matter that falls within the discretionary authority of the panel. Such discretionary authority is not unlimited and is circumscribed, for example, by the requirements of due process.⁵²

VIII. FUNCTIONS, PROCEDURES AND RESPONSIBILITY OF PANELS

The function of the panel is to assist the DSB in discharging its responsibilities under DSU and the WTO agreements (Article 11 of the DSU). A panel has to make an objective assessment of the matter, including the facts of the case and its conformity with the relevant covered agreements. It has also to make findings assisting the DSB in recommending or giving rulings. For that purpose the panels have to consult the parties to the dispute regularly and give them an adequate opportunity for achieving satisfactory solutions.

The duty to make an objective assessment of the facts is, *inter alia*, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with the objective assessment of the facts. 'Disregard' and 'distortion' and 'misrepresentation' of the evidence, in the signification in judicial and quasi-judicial processes, imply not simply an error of judgement in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or due process of law or natural justice.⁵³

The burden of proof normally falls on the party whether complaining or defending, who asserts the affirmative of a particular claim or defence. If a party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to other party, who will find unless it adduces sufficient evidence to rebut the presumption.⁵⁴

52. Appellate Body Report on US-1916 Act, WT/DS/36/AB/R, para 138-150.

53. EC—Hannongs, *supra* n. 20, Appellate Body Report, 132-133, 135 and 138.

54. US—Wool Shirts and Blouses, AB-Report, WT/DS3 3/AB/R.

Panels control the settlement of dispute process within the confines of the rules set out in DSB, establishing deadlines for written submissions establishing the schedule; (Article 12 read with Annex. 3 of the DSU). Normally all the information is submitted by the parties, panels are not confined to parties for the source of information they need. They can seek information and technical advice from any sources they deem appropriate. Panels have the right to consult experts to obtain their opinions and, with respect to scientific and technical matters, may request an advisory report from an expert review group.⁵⁵

The DSU rules provide time schedule for implementation of various stages in the panel process once it is established. Within one week the panel will consult with the parties and establish a time table for the proceedings.⁵⁶

(a) Receipt of first written submissions of the parties: 1. Complaining Party (plaintiff), 3-6 weeks; Party complained (defendant), 2-3 weeks; (b) Date, time and place of first substantive meeting with the parties: third party session, 1-2 weeks; (c) Receipt of written rebuttals of the parties, 2-3 weeks; (d) Date, time and place of second substantive meeting with the parties, 1-2 weeks; (f) Receipt of comments by the parties on the descriptive part of the report, 2 weeks; (g) Submission of the interim report, including the findings and conclusions to the parties, 2-4 weeks; (h) Details for party to request review of parts of report, 1 week; (i) Period of review by panel, including possible additional meeting with parties; (j) Submission of final report of parties to the dispute, 2 weeks; (k) Circulation of the final report to the members, 3 weeks.⁵⁷

The other provisions of panel procedures stress transparency and a legitimate approach for concluding the panel deliberations as well as expeditious disposal of the disputes brought before the panel. Specific provisions have been made to extend the more favourable and differential treatment to the LDCs which have been accorded to them by the lowered Multilateral Agreements in course of settling the disputes.⁵⁸

IX. ADOPTION OF PANEL REPORTS

The adoption of panel reports is quite different from the practice of adoption of panel reports as practised under GATT 1947. The adoption of

⁵⁵ Art. 13.2.

⁵⁶ Art. 12.3.

⁵⁷ Art. 12 read with Appendix 3 of DSU.

⁵⁸ Art. 12:11.

panel reports under GATT 1947 was faulty as the report had to be adopted by consensus and as such the panel reports were never accepted in their spirit and character and there were all possibilities of blocking the panel reports. On the other hand, the DSU has changed the procedure of adopting the panel reports significantly, first by providing for interim review of *provs* and *cons* of the dispute after the parties have submitted their submissions to the panel and second, the parties to the dispute may ask for review to the interim report or its parts.⁵⁹ This procedure ensures against erroneous findings of fact and law as well as opportunity for the losing party to get the last opportunity of rectifying the mistake before the panel arrives at its final decisions.

Once the report has been finalised by the panel, it is submitted to DSB, the Member are given twenty days before DSB adopts the report. The Members can raise objections within ten days to panel reports and the party to the dispute shall have full right to participate in the consideration and deliberation of the report by DSB. The DSB after the issuance of the panel report and within sixty days shall adopt the panel report at a meeting; if a meeting is not scheduled a meeting of the DSB should be held unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB by consensus decides not to adopt the report. If a party has notified its intentions to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.⁶⁰

X. APPELLATE REVIEW AND STANDING APPELLATE BODY

Under Article 17 of the DSU, the DSB has been empowered to establish standing Appellate Body with seven members, three of whom shall serve any one case and shall hear appeals from panel cases. The standing Appellate Body is composed of persons of recognised authority, who have demonstrated expertise in law, international trade and the subject matter of the covered Multilateral Agreements. These members are not to be affiliated with any governments. The tenure of the persons appointed to serve on the standing Appellate Body is four years with the possibility of re-appointment.

The standing Appellate Body is limited to considering issues of law covered in the panel report and legal interpretations developed by the panel. The Appellate Body proceedings are normally to be concluded

⁵⁹ Art. 15.

⁶⁰ Art. 16.

within sixty days and in any event not to exceed ninety days and the Appellate Body has to inform the DSB in writing of the reasons for extension of time. The report of the Appellate Body is subject to the same automatic adoption rule as regular panel reports by the DSB unless the DSB decides otherwise by consensus within thirty days of this circulation to the DSB.

The DSB provides strict rule of confidentiality and there is a prohibition of *ex parte* communications with the panel or the appellate Body with regard to matters for their consideration. Also any written submissions to the panel or Appellate Authority is treated most confidential, however, the members to the dispute have a right of access to the same. The Appellate Body may uphold, modify, or reverse the legal proceedings and conclusions of the panel.⁶¹

The Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within thirty days following its circulation to the Members. The decision of the Appellate Body or a panel that a measure is inconsistent with a covered Multilateral Trade Agreement, shall obligate the members to bring the measure into conformity with that Multilateral Agreement. The Appellate Body or panel can also recommend measures for bringing the measure in conformity with the rule or the Multilateral Trade Agreement.⁶²

Finally, the time frame for DSB decisions from the date of establishment of a panel by the DSB until the date the DSB considers the panel or the Appellate Body report, shall not exceed nine months where the panels report has not been appealed or twelve months where the report is appealed.

XI. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS AND RULINGS

Article 21 of the DSU provides an elaborate mechanism of surveillance of implementation of recommendations and rulings of panels and Appellate Body reports.

Once a panel finds a complaint is justified, its report categorically recommends that the offending Member should cease and desist from the violations of GATT rules by either withdrawing the offending measures or

suitably amend the measures to bring it in conformity to the GATT rules or covered Multilateral Agreements.

Accordingly, once the report is accepted, the DSB is empowered to monitor whether or not its recommendations have been implemented. The DSB is further empowered to keep vigil in respect of measures which a losing party has to take to remedy a violation of GATT or the covered Multilateral Agreement in pursuance of the recommendations of the panel within thirty days of the adoption of the panel or Appellate Body report. If a Member is not in a position to comply with the panel's recommendations immediately, a reasonable time may be granted to such Member by the DSB or a mutually agreed time frame within forty five days of the adoption of the recommendations and rulings by the DSB between the disputants. In such arbitration, arbitrators are supposed to implement the panel recommendations and rulings within a period of fifteen months.

In case of disagreement between the disputants of the existence or consistency with a covered Multilateral Agreement of the measures taken to comply with the recommendations and rulings, such disputes are to be resolved by referring them to the settlement dispute mechanisms of the covered Agreements.

The DSB is further empowered to keep under surveillance the implementation of the adopted recommendations or rulings. Any member has a right to raise the issue of implementation of the panel recommendations at the DSB. DSB shall keep on its agenda the implementation of the panel recommendations and rulings for a period of six months.

XII. COMPENSATION AND THE SUSPENSION OF CONCESSIONS

If the recommendations are not implemented, the winning party may be entitled to seek compensation or the authority to seek to suspend concessions previously made to that member. However, neither compensation nor the suspension of compensation or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered Multilateral Agreements.⁶³ Article 21.1 of the DSU provides that prompt compliance with recommendations or rulings of the DSB is essential in order to assure the effective resolution of disputes to the benefit of all members.

It is noteworthy that Article 22.3 of the DSU, catalogues the principles for suspending concessions and obligations after invoking the dispute

61. Art. 18.

62. Art. 19.

63. Art. 22.1.

settlement procedures as conceived in the DSU and briefly are as under:

- (a) suspension with respect to same sector in which the nullification or impairment or violation has occurred;
- (b) suspension with same sector is neither practicable nor effective, suspension in other sectors under the same agreement;
- (c) suspension with other sectors is not effective or practicable and the circumstances are serious enough, suspend concession or other obligations under another covered Multilateral Agreement;
- (d) for applying the above principles, sectoral trade and how far it can compensate, as well as broader economic elements related to the nullification or impairment and broader economic consequences of the suspension or other obligations. If the party requests authorisation to suspend concessions or other obligations pursuant to (a) and (b) set above, it shall state the reasons for the request which is sent to DSB. Such a request shall also be forwarded to the relevant council of the covered Multilateral Agreements. The level of suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment.⁶⁴

It is important to note that the DSB shall not authorise suspension of concession or obligations if a covered Agreement prohibits such suspension.⁶⁵

Although as noted earlier, the level of the suspension of concessions or other obligations authorised by DSB has to be equivalent to the level of nullification or impairment, yet the DSB can under certain circumstances and by way of a protest by a complaining party, refer the matter to arbitration. Such arbitration has to be carried out by the original panel, if members are available or by an arbitrator appointed by the Director General of WTO. Such arbitration has to be carried out by the original panel, if members are available or by an arbitrator appointed by the Director General of WTO. Such arbitration has to be completed within sixty days and concessions or other obligations negotiated earlier cannot be suspended during the course of the above arbitration.⁶⁶

The role of the arbitrator is limited as he cannot examine the nature of the concessions or other obligations to be suspended but is concerned only

to examine whether the level of nullification and impairment is equivalent to the level of injury incurred by the member. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered Multilateral Agreement. The arbitrator may further examine whether the principles required to suspend concession or other obligations (Article 22.3) have not been complied with and the decision of the arbitrator in this connection is final. All these decisions by the arbitrator shall be communicated to the DSB promptly and the DSB upon request by a party may grant authorisation to suspend concession or other obligations.⁶⁷

Finally DSU provides that the suspension of concessions or other obligations are by way of a temporary relief and are applicable till such time as the measure has been found to be inconsistent with a covered Multilateral Agreement has been removed, or the member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits or a mutually satisfactory solution is reached. It is incumbent on the DSB to continuously monitor the compliance of implementation of the adopted recommendations or rulings, including cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring the measure into conformity with the covered Agreements have not been implemented.⁶⁸

Further, the dispute settlement provisions of the covered Multilateral Agreements can be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a member. Whenever the DSB rules that a member does not observe the provisions of a covered Multilateral Agreement, it is incumbent on the member to observe the provisions by taking reasonable measures necessary for such observance.⁶⁹

XIII. NON-VIOLATION

As already explained in the beginning of this article complaints under Article XXIII: 1(b) termed as non-violation complaints have raised questions of interpretation and non-violation complaints have been successful only if the infringement of tariffs were proved. The DSU have incorporated the abovesaid non-violation principles and have provided that whenever the provisions of Article XXIII: 1(b) of GATT 1947 are applicable to

64. Art. 22.

65. Art. 22.4.

66. Art. 22.6.

67. Art. 22.6 and 22.7.

68. Art. 22.8.7.

69. Art. 22.9.