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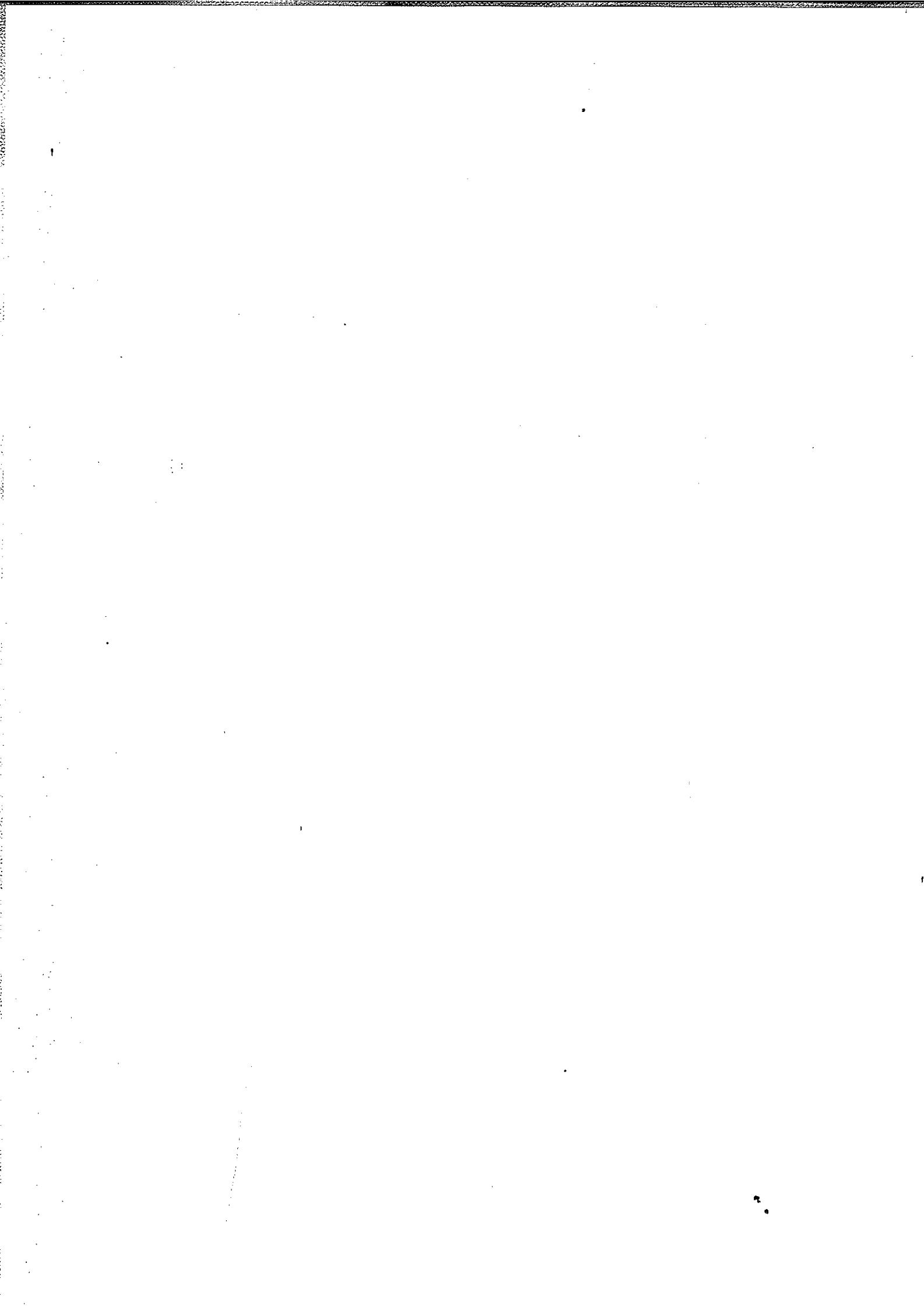
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RIGHTS OF VICTIMS OF CRIME – NEED FOR A FRESH LOOK*

*Dr. Justice A. S. Anand***

I Introduction

IN A general sense, every crime has at least three components – The criminal or offender, the crime and the victim of crime.

The growing menace of intimidation or allurement of the victims or witnesses during the trial at the instance of the accused or other vested interests brings to fore the question: Do the victims of crime have any rights in the prevailing criminal justice delivery system? The law's response to the 'rights' of the victims of crime has been inadequate and more often than not "merely a lip service".

The history of crime is as old as of mankind itself, but in the primitive period "a tooth for a tooth, an eye for an eye and a life for a life", was the essence of criminal justice. As the civilization developed, new ideas regarding an individuals rights and his corresponding duty to his fellow human beings took shape. The crime was no longer considered an offence against an individual only, but a revolt against the norms of an organized society and an attack on the civilization itself. Soon the state took upon itself, the right to identify and punish the offenders.

Definition of victim

The term victim is lacking descriptive precision. It implies more than the mere existence of an injured party, in that innocence or blamelessness is suggested as well as a moral claim to a compassionate response from others. The term victim is defined in Oxford English Dictionary as:

"victim is a person who is put to death or subjected to misfortune by another; one who suffers severely in body or property through cruel or oppressive treatment; one who is destined to suffer under some oppressive or destructive agency; one who perishes or suffers in health etc., from some enterprise or pursuit voluntarily undertaken."

As per Collins English Dictionary

* This paper was delivered on April 30, 2005 as Kelkar Memorial Lecture, at the Faculty of Law, University of Delhi, Delhi -110 007.

** Chairperson, National Human Rights Commission; former Chief Justice, Supreme Court of India.

identify and apprehend the offender, subject him to a fair trial and if found guilty, to punish him. The right to a fair trial is, thus, a constitutional imperative. Substantive penal laws prescribe punishment, whenever there is an invasion of this right of the citizens. Thus, in the prevailing criminal justice system, whenever a crime is reported, it is the State, which gets the crime investigated by its agency, moves the Court for trial of the offender and prosecutes him in the Court of law.

Neither at the stage of the framing of a charge nor at the time of passing of an order of discharge, are the views of the victim ascertained, let alone considered. He is not to be consulted during the trial. Even after the case ends up in a conviction, it is the State, which defends the judgment of the trial court in appeal, if any, filed against the conviction and sentence.

Broadly speaking, there are two systems of dispensation of criminal justice presently — Adversarial and Inquisitorial. The system followed in India is the adversarial system of common law inherited from the British rulers. In this system, the accused is presumed to be innocent and the burden of proving his guilt beyond reasonable doubt lies on the prosecution. The accused also enjoys the “right of silence” and he cannot be compelled to answer the queries. In the adversarial system, the truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. The judge acts as a referee and decides whether the prosecution has been able to prove the guilt of an accused beyond a reasonable doubt. The system, *per-se*, appears to be fair and justified, but viewed from the perspective of the victim, it is heavily loaded in favour of the accused and is insensitive to the rights of the victims or their plight because generally the judge, in his anxiety to maintain his position of neutrality, fails to take initiative to find out the truth.

The presumption of innocence gives rise to various constitutional and legal rights insofar as an offender is concerned, such as, his right not to be arrested except in accordance with the law; right to be produced before the Magistrate within 24 hours of his arrest; right to know the grounds of his arrest; right to be represented by a counsel; right to legal aid in certain cases; right to bail; right to public trial; right to test the evidence by cross-examining; right to be heard on the question of sentence; immunity from compulsory testimony and so on and so forth. Thus, we find that the rights of an accused have been well-safeguarded in the scheme of criminal justice delivery system but in all those laws, there is hardly any reference to the “rights” of the victims of crime. After setting the criminal justice mechanism in motion, the victim is reduced to the status of being merely an “informant” — ignoring that he is a major stakeholder in the scheme of justice delivery system since he has suffered at the hands of the offender. There are some “illusory” rights available to the victims of crime, but even those are grossly inadequate. The victim of crime has hardly any role to

play in the whole proceedings except that he may, if alive, be examined by the prosecution as a witness. It is strange that in spite of the fact that a victim of crime, who suffers at the hands of the accused and moves the State through the police or the courts to seek justice is given the impression that after having lodged the report or the complaint, he is a "Mr. Nobody". The victim of crime is, thus, a mute witness to the whole drama. If alive, he may appear as a witness and there again the provisions of the Evidence Act, 1862 of relevancy of facts not withstanding, he is subjected to continual questioning, with the court almost silently watching. The law, today, fails to address the needs of the victims to be treated with dignity, to protection from intimidation, inside or outside the court room. Expressing concern particularly about the treatment of victims of sexual offences in the courts during their cross-examination, in *State of Punjab v. Gurmit Singh & Ors.*², the Supreme Court observed:

There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence."

Though the Supreme Court in *Delhi Domestic Working Women's Forum v. Union of India*³ indicated some broad parameters particularly for assisting

2. (1998) 2 SCC 384.
3. (1995) 1 SCC 14.

the victims of rape, like their right to legal representation at the police station as well as during the trials, the legislative and the executive response is grossly inadequate.

An indifference to the rights of the victims of crime is fast eroding the faith of the society in general and the victim of crime in particular in the criminal justice system and this has already given rise to the incidents of crime and lawlessness, in the form of terrorism, raising their ugly head to settle private and political scores over the adversary with a barrel of gun.

Right to bail, is regarded as a right of an accused with no corresponding right available to the victim or his heirs to oppose the grant of bail. It is left to the State only to oppose or not to oppose the grant of bail. Indeed, Sec. 439(2), Criminal Procedure Code, 1973 as interpreted by the Courts, recognizes the right of the complainant or any "aggrieved" party to move the High Court or the Court of Sessions for cancellation of bail granted to an accused person⁴ but that is at a subsequent stage. Of course, thanks to the judiciary, no case can be compounded without the participation of the complainant under Sec. 320, Cr. P.C. nor a closure report be accepted by the Court without hearing the informant.⁵ The Supreme Court even set aside the order of the trial court, allowing the prayer of the state for withdrawing prosecution on a plea of the father of the policeman killed by the forest brigand *Veerappan*.⁶ An appeal against an order of acquittal can be preferred by the complainant, but only with the prior leave of the High Court. The right to file a Special Leave Petition under Art. 136 of the Constitution was granted to a near relative of a victim, who was not a party to the proceedings, to challenge an order of acquittal passed by the High Court⁷ — but that again was a response of the judiciary to the plight of a victim of crime.

Under the Criminal Procedure Code, 1973, a victim of crime has a very limited right of revision and that too under exceptional circumstances. An accused has the statutory right to be heard on the question of quantum of sentence after conviction is recorded, but unfortunately a victim of the crime is not so heard. Even where he engages a counsel, during the trial of a case, instituted on a police challan or at the hearing of an appeal, his counsel is treated only as a "counsel by sufferance" and may or may not be heard by the court depending upon the attitude of the State counsel. He can at the best assist the public prosecutor but that also in case the public prosecutor really wants to be assisted

4. *Puran v. Rambhas* (2001) 6 SCC 338; *R. Rathiram v. State* (2000) 2 SCC 391.
5. *Union Public Service Commission v. S. Pappiah* (1997) 7 SCC 614.
6. *Abdul Karim v. State of Karnataka* (2000) 8 SCC 710.
7. *P.S.R. Sathyanantham v. Arunachalam* 3 SCC 141(1980).

by him. Thus, it is seen that a victim of crime in this country has hardly any guaranteed rights except may be of getting some assistance by way of payment of compensation, but even here the statutory provisions^{7A} are grossly inadequate. These provisions suffer from inherent limitations and are invoked grudgingly, sparingly and often inconsistently by the courts despite the apex Court exhorting criminal courts to take recourse to the provisions, since "this power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system". The Supreme Court, observed:⁸

"Sec. 357 (2) is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to the crimes. It is indeed a step forward in our criminal justice system."

In the scheme of the Code of Criminal Procedure 1973, and the Evidence Act, 1862, if there are gaps or faults in the investigation, the benefit generally goes to the accused. This is because the right of an accused, under the criminal justice system, takes precedence over the right of the victim. However, it must be remembered that a victim of crime has a stake in the result of the trial of the offender. It humiliates and frustrates a victim of crime when the offender goes unpunished or is let off with a relatively minor punishment, as the present system pays no attention to his injured feelings. Imposition of appropriate punishment on the criminal or the offender is the response of the courts to the society's cry for justice. Dealing with the object of sentencing, in *Bheru Singh v. State of Rajasthan*⁹, wherein the appellant had murdered his wife and five children, the Supreme Court observed:

"The object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after

considering all those factors and taking on overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

II International Conventions

The United Nations General Assembly at its Plenary Session on November 29, 1985, adopted a declaration of 'Basic Principles of Justice for Victims of Crime and Abuse of Power'. This declaration is in a way the magna carta of the rights of victims globally and contributes an important recognition of the needs to care for victims of crime. The declaration has made certain suggestions for dealing with the problems of victims of crime including victims of abuse of power. For example:

- (a) Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to promote redress, as provided for by national legislation, for the harm that they have suffered.
- (b) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
- (c) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.
- (d) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected without prejudice to the accused and consistent with the relevant national criminal justice system.
- (e) Providing proper assistance to victims throughout the legal process.

7A The Code of Criminal Procedure, Sec. 357 (3) (1973).

8 *Hari Singh v. Sukhbir Singh* 4 SCC 551 (1988).

9 1994 (2) SCC 467.

(1) Taking measures to minimize inconvenience to victims, protect their privacy where necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

The European Convention on "Compensation of Victims of Violent Crimes" also contains many of the rights recognized in the U.N. Declaration of 1985.

Need of the Hour

It is high time that rights of the victim of crime are recognized in this country – it may in the longer run even help in checking the rise in the crime rate and also bring credibility to the criminal justice system.

In its 154th Report, the Law Commission of India also recommended incorporation of a provision for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the Courts. The recommendation, however, has not so far been acted by the Government.

Award of fair and reasonable compensation to the victim of crime may not act only as a balm on his wound but may also deter, to whatever little extent, the criminal from committing the crime. But there is no such statute in this country, which takes care of it. Under clause 12, of the U.N. Declaration of 1985, the onus is on the State to "endeavour to provide financial compensation to both victims who have suffered bodily injury or impairment or physical or mental health as a result of serious crimes as well as the family of those who have died as a result of victimization".

When sovereign functions are purportedly done by bosses and minions of Government and the citizens are damned, sovereign immunity is often invoked. When a soldier shoots at a citizen without any justification or a police officer tortures an innocent citizen in his custody, no democracy, which honours human rights, can vaccinate the Republic against liability for criminal or wrongful conduct. In such cases, sovereign immunization negates the Rule of Law and discriminates unjustly in favour of the sovereign. The Supreme Court in *Nilabati Behera v. State of Orissa*¹⁰ held that the concept of sovereign immunity is not applicable in cases of violation of the right to life and liberty guaranteed by Art. 21 of the Constitution. The Court observed:

"The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Art. 32 by this Court or under Art. 226

¹⁰ (1993) 2 SCC 746.

by the High Courts, for established infringement of the indefeasible right guaranteed under Art. 21 of the Constitution, is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Arts. 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

The court relied upon the following passage from the First Hamlyn Lecture by Lord Denning titled "Freedom under the Law":

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do, and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the mining of coal, so also the procedures of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery by declarations, injunctions and actions for negligence..... This is not the task for Parliament..... the courts must do this. Of all the great tasks that lie ahead, this is the greatest. Properly exercised, the new powers of the executive lead to the Welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country."

The court held that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. It cautioned that the old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. It felt that the Courts shelve the obligations to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations and observed:

“..... The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law – through appropriate proceedings. Of course, relief in exercise of the power under Arts. 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with *Rudul Sha v. State of Bihar* granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Arts. 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole.”

The enforceable right to compensation was further developed in *D.K. Basu v. State of West Bengal*¹¹ wherein it was observed that the “award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages.....” and that “the relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them.....”

Emotional assistance or charity has its own limitations. A permanent mode of compensation has to be worked out. It may be worth considering as to whether the State, which fails to protect the life and property of the citizen, should not be made to pay compensation to the victim of crime, of course, reserving the right of the State to reimbursement from the guilty. Setting up of a fund for payment of compensation to victims of crime as is in vogue in Canada, Australia, New

¹¹ (1997) 1 SCC 416.

Zealand, United Kingdom, under the control of a Board, for awarding compensation to victims of crime would constitute a positive and a welcome step to assure the victims of crime that “We care”. (State of Tamil Nadu has already created a Victim Assistance Fund.)

III Conclusion

A beginning can be made by bringing about a model legislation based on the U.N. Declaration of 1985 and by setting up a fund for payment of compensation to the victims of crime under an independent Board for awarding compensation to the victims of crime. The State which creates the fund should be entitled to reimbursement from the offender or the guilty party in the same manner as a decree holder, the manner of reimbursement, in cash or kind, being left to the State to be decided on the facts of each case and the capacity of the individual. It may be treated as a charge on the estate of the offender or the guilty party. It is necessary that due compensation is paid to the victim of crime to assure him that the society cares and feels for him. He needs justice and the society is obliged to give him justice and not merely lip service. Therefore, a beginning is imperative. Victims of crime, today, feel left out, ignored and are crying for attention and justice. It is time that their loud cries are heard as tomorrow may be too late. There is an urgent need, thus, to take a fresh look and recognize the rights of the victims of crime in the criminal justice delivery system.

CELEBRATING PROFESSOR M. P. JAIN

Upendra Baxi*

THE RECENT sad demise of Professor M.P. Jain brings literally to a close the era of the founders of modern Indian legal education and research¹. He contributed immensely and enduringly to the life of law in contemporary India. He shaped, and sustained, the cultures of institutional innovation at the Benaras Hindu University Law School and the Delhi Law School and also eminently serviced the formative moment of the Indian Law Institute. A true scholar, Professor Jain continued to contribute robustly to developments in the public law domain till the very last working day of his life. In this truly exemplary genre of encyclopaedic exegetical scholarship, he also exemplifies nobly the authentic meaning of his first name: *Mahavir*.

'M.P.' (as he used to be hailed with warm fondness, and he did not chafe at my calling him by his first name) inspired *affection*, but never a sense of awe, usually associated with and distinctively Indian law school modes of wielding often tyrannical academic institutional power and authority; in this, it must be said, Mahavir differed from many of his luminous contemporaries. As a teacher, researcher, and author, Mahavir remained accessible to all; he wrote clearly and cogently. He did not believe that simplicity in writing betrayed the complexity of the field. He made the law bare in all its august yet technical, turgid, and prosaic detail. If there was ever the whisper of romance, excitement, and extravagance of adventure in legislative or judicial texts, Mahavir ensured a rather smooth, and flattened, passage of all this in a linear doctrinal narrative. I suspect he did so with a sense of fidelity to the virtues of legalism; M.P. believed that law has an autonomous life of its own, with histories that may not

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1 When Professor Lotika Sarkar brought this sad news to me, we recalled, in a longish telephone conversation, many a moment of our decades long association with him at the University of Delhi. We recalled with fondness his capacity to laugh away life's adversities; the robust patience with which he handled the demeaning practices of institutional politics by some of his equally eminent contemporaries; and his jovial yet often gruff collegiality. We also recalled his presence and participation, long after his retirement, at many public lectures and events. M. P. Jain in this respect always encouraged his erstwhile colleagues. We also mourned together the fact our deferral a year ago of a promised visit to him at his Darjaganj home (in old Delhi, unlike many of his contemporaries and successors he never moved to more 'fancy' New Delhi locations!) I still recall fondly my visits to his home when dear Kunti, his 'long suffering spouse' (as I called her!) was alive and later when M.P. continued to work amidst utter desolation (also for long years after the murder of his cousin, and a very dear friend, Professor S.N. Jain.)

be reduced to the social, economic, and the political, and that the stories concerning the development of the law must be so told as to foster a public ethic of rule following, especially among those who make and interpret rules.

For him then the pursuit of the doctrinal development of the law was not a hapsarian fault but rather a badge of scholarly honour. Mahavir pursued rather a homegrown pragmatic understanding of Indian law, in its manifold development. This contrasted radically with some of his contemporaries (in particular, Dean Anandjee and Professor R.S. Murthy, and partially even Gyan Swaroop Sharma) who strove to emulate the difficult diction of the Yale mentors—Myers McDougall and Harold Laswell. Instead, Mahavir strove to exemplify the resilient best in the common law scholarship resisting forms of understandings of the law as *one* among *many* policy sciences. He had the better of his contemporaries, thus consolidating a rival source and stream of the ways in which the life of the colonial and postcolonial law may be narrativised. M.P. never wavered in his choice of indwelling the worlds of blackletter law legal doctrine. A robust pragmatist, Mahavir believed that doctrinal criticism held the best promise there was for ameliorating legislative and adjudicatory waywardness.

M.P. also affirmed the importance of understanding the craft of legal history. His many editions of *The Indian Legal History* command the highest citation index; no Indian legal scholar, in my knowledge, has achieved or since rivalled this honour. But he primarily conceived the legal historian's craft as a rather relentless pursuit of the dull detail of the development of legal institutions and doctrines. This, he wrote concerning the *retail* not the *wholesale* imposition of forms and practices of colonial legality. This imposition, in his view, came in bits and pieces. M.P. doubted grand designs and equally grand narratives and would have agreed with the extraordinary assertion of John Robert Seeley, writing in 1883, that the British 'seem... to have conquered and peopled half of the world in a fit of absence of mind?' While certainly he would have, at many points,

2 Quoted in Robert J. C. Young, *Postcolonialism: An Historical Introduction* (2001; Oxford: Blackwell). Seeley draws our attention not to any 'absent-mindedness' but rather of 'the absence of mind.' Colonialism as an unfolding Eurocentric psychopathology thus offers a fresh perspective for postcolonial studies!

Professor Werner Menski recognizes the principal contribution of M.P. Jain when he writes that while he emphasized the 'importance of English law in India,' Jain also provided 'evidence that many of the early laws were either gradually rendered defunct or gradually abolished.' Jain would have agreed with Menski that the 'notion that India is a common law jurisdiction implies a political statement about the historic impact of British colonial rule, rather than an accurate description of the present legal system'; see Werner G. Menski, *Hindu Law: Beyond Tradition and Modernity* 212, fn. 13 (2004; Delhi, Oxford University Press).

3 Upendra Baxi, 'The Colonial Inheritance', in *Comparative Legal Studies: Traditions and Transitions* 46-75(2003) Cambridge, Cambridge University Press; Pierre Legrand and Rodrick Munday (Eds.)

agreed with my description of colonial 'predatory legality', M. P. would not have shared my anxious narratives of a hegemonic imperial design.

For the moment, it remains important for me to affectionately recall Mahavir's distinctive conceptions of legal history. For a long time, he maintained that legal history - writing ought to devote as far as it can to the detailed presentation of the dynamic of its institutions and processes. Power, ideology, and struggle were, he acknowledged, crucial categories but their importance for the legal historian lay only in the measure of their impact on the design and process of legal institutions. And very often, Mahavir was able to demonstrate the pertinence of chance and contingency, contrasted with any overall design for domination pursued a coherent ideological mastery.

Even so, I recall asking him why the early work of Ranajit Guha⁴ (in contrast to the later Guha, the founder of subaltern studies), or the work on agrarian history, for example by David Washbrook⁵ and Elizabeth Whitcombe⁶, should not matter, even decisively, for his vision of practice of legal history. His candid and honest immediate response, as far as I may now recall, was that a legal historian was not always competent to perform the tasks apt for historians of ideas and of political economy. He thus chose to bear unique disciplinary burdens. However, even when we agreed to disagree, his openness to alternate modes of doing legal history⁷ did register somewhat in the final edition of his book on Indian legal history.

Yet, Mahavir resolutely chose to ignore the genre of Marxian and subaltern historiography. Sadly enough, thus, Mahavir had no use, and actually resisted, anti-imperial class struggle oriented narratives of Indian legal history. Nor did he, in his many revised editions of his germinal work, quite choose to grapple with the new feminist⁸ and eco-history readings⁹ of the colonial and post-colonial moment. He remained cast in earlier histories of mentalities thus, after all,

4 Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (1963, Paris and The Hague: Mouton)

5 For example, see, Washbrook, 'Law, State, and Agrarian Society in Colonial India', *Modern Asian Studies* 15 no. 3 (1981: 649-721).

6 *Agrarian Conditions in Northern India: the United Provinces under British Rule, 1860-1900* 9v. J) (1972; Berkeley, University of California)

7 In particular at least to Lloyd and Susanne Rudolph's superb *Modernity of Tradition* (1967; Chicago, University of Chicago Press)

8 Nor does M. P. Jain have much use for the classic study by Vasudha Dhagamwar entitled *Law, Power, and Justice* (1974, Bombay, N. M. Tripathi; revised and reprinted by the same title by New Delhi, Sage.) I do not here mention the subsequent feminist readings of the colonial and postcolonial law, save to mention Rajeswari Sunder Rajan, *Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (2003) Durham, Duke University Press)

9 Here I desist from citations but may instance the many—splendoured corpus of Ram Guha and Madhav Gadgil.

privileging himself as a gifted raconteur of the globalizing capitalist law. Even so, he foresaw the organic connexion between global capitalism and state sponsored racism. Indeed, he went so far as, among other matters, things, to devote a whole precious chapter concerning the constitution of racial discrimination in the high colonial British Indian state and law. His still remains the most adequate account, on my reading, that explains why the jury system failed to institutionalise itself in postcolonial India. Overall, what he finally offers remains worthy of patient and scrupulous reading, even by those of entirely opposed ideological or methodological persuasions.

Mahavir's contributions to Indian public law development (alongside with S. N. Jain) remain cast, overall, in the legalist (in the very best sense of that discursive term) mould. The range and depth of his analytic coverage remain as impressive as the labours of Durga Das Basu and H. M. Seervai, whose corpus has been rightly compared with Blackstone and Chancellor Kent. Mahavir's corpus, I believe, deserves the same order of praise, with even a happy caveat that he has innovated, and put to work, even richer uses the tradition of comparative constitutional studies. Unlike them, Mahavir wears his comparative learning lightly. Enormously conversant, and fluent, with the Euroamerican development in constitutional and administrative law and jurisprudence, his preponderant interest lay in essaying a deeper understanding of the practical ways in which these may be related to the courage, craft, and contention of Indian decisional law and jurisprudence. He admires measured judicial activism but remains quick to critique (what he thinks to be) its excesses. Likewise, he looks, with considerable disfavour, at the legislative activism, especially manifest in profuse constitutional amendments. Above all, M. P. values the rule of law as the single most critical resource for any serious-minded pursuit of the Indian constitutional vision because of the discipline its enacts against the expedient populism of power. Mahavir also believed that legal academics ought also remain disciplined by the virtues that it proselytises for political and policy actors, including Justices: put another way, he insisted that search of an ideal policy ought never to neglect the disciplinary sway of legal doctrine.

Many generations of students and colleagues held M. P. Jain in great affection and owe a considerable debt to him as a mentor¹⁰. So still do his students and colleagues at the Faculty of Law, University of Malaysia, as well as the Bar and the Bench in Kuala Lumpur. His treatise on Malaysian administrative law continues to be studied, and cited, thus also marking a contribution not usually associated with expatriate lifeworlds of Indian scholarship. Many a Third World

10 And although not as often cited in the Indian judicial decisions, his texts have, on all available evidence, nurtured many an unacknowledged forensic legal career at the Indian Supreme Court.

student and scholar associates the habits, or rather (as Pierre Bourdieu names this in anthropological contexts) the *habitus* of the study of public law with the M.P. Jain scholarly tradition. For the same reason, it remains important for us all to recall with him the values of doctrinal scholarship, which for him remained also a vehicle of social critique and Indian reconstruction.

The 'Jain' scholarly virtues need now a fuller re-visitation in these halcyon days of contemporary Indian globalization—a moment in which past frameworks of judicially imposed restraints on executive and legislative power seem irritatingly irrelevant to the task of making India 'safe' for the community of foreign investors. The 'Jain' virtues now reaffirm the potential of legalism (an ethic of following rules) itself as a Global South constitutional, juristic and judicial resource. 'M.P.' lived truly a rich, learning and learned, republican life as a Member of Parliament of Commonwealth of Learning. Even as we may now miss his presence amidst us, those privileged to know him will never miss his authentic voice.

NEW COMPETITION REGIME OF INDIA: AN APPRAISAL

S. K. Verma*

I Introduction

IT IS a common knowledge that for the last two decades, some of the dominant economic themes have been the process of globalisation¹, liberalization and the progressive integration of world economy. Under globalisation, countries rely more on market forces, in which the questions of ensuring competition and efficient functioning of markets assume critical importance as the number of new entrants in the market increases. These entrants may be instrumental in giving rise to greater potential for competition in markets regardless of their geographical location/scope, yet have the potential to play havoc on the national economies by their anti-competitive policies/practices. It is notable that as the number, size and scope of activities of these enterprises increases, to remain competitive at the micro-level, they adopt global strategies, including forging strategic alliances, and their commercial practices, at times result into anti-competitive practices to the detriment of economic development of a country and prejudicially affect consumer interests. Such practices tend to undermine the benefits of liberalization and thus need to be checked.

There is also a close connection between trade and competition. Vigorous competition is vital to innovation, strong and effective markets, and consumer interest and productivity growth in the economy. Trade laws, which regulate trade policies, and competition laws, which regulate competition policies, have the common objective, namely, to achieve economic efficiency, by improving the business environment for more efficient resource allocation. In order to achieve the objective of maximum economic efficiency, the liberal trade policy must be complemented through a sound competition policy by preventing anti-competitive business practices and unnecessary government intervention. Further, competition law or policy is an essential complement to investment liberalization as well. A sound competition policy and law can contribute to

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¹ The term 'globalisation' is primarily associated with the western model of market economy. It is premised on the removal of national barriers to trade and investment. It is associated with contemporary phenomenon of privatisation, de-regulation, the expanded provision of incentives for entrepreneurial behaviour, structural adjustment programs and related pressures on developing countries to open-up their markets for international financial institutions and developed countries. See S. K. Verma, Globalization, Marketization and Constitutional Mandate, 42 JIL 395 (2000).

securing an attractive environment for foreign investment, particularly foreign direct investment by providing stable and transparent legal framework and signaling a commitment to market institutions and mechanisms. The competition law should be capable of providing safeguards against possible abuses of market power by foreign investors. Thus, there is a need for an appropriate competition law to protect fair competition and to control, if not eliminate, anti-competition practices in the trade and market. A good competition policy², along with a sound competition law, should help in fostering competition, economic efficiency, consumer welfare and freedom of trade, which should equip the governments in meeting the challenges of globalization by increasing competition in local and national markets.

It is incumbent on the governments to adopt a competition policy, which should preserve and promote competition by enforcing competition law against restrictive business and trade practices of national and multinational enterprises and by influencing the formulation and/or implementation of governmental (State) policies or measures affecting competition. A good competition policy would not only encompass the liberalized trade policy but would also prevent anti-competitive business practices and unnecessary government intervention. Competition law primarily deals with anti-competitive business agreements, abuse of the dominant market position by enterprises and regulation of mergers, amalgamations and acquisitions. However, both the competition policy and law, aim at promoting and fostering competition, economic efficiency, consumer welfare and freedom of trade and therefore, they are complementary to each other.

II Competition Policy Under the WTO Dispensation

Most of the WTO agreements, viz., the General Agreement on Tariffs and Trade (GATT), 1994, Trade-Related Intellectual Property Rights (TRIPS), General Agreement on Trade in Services (GATS) and Trade-Related Investment Measures (TRIMS), agreement on agriculture, the agreement on government procurement, which extends competition rules to purchases by government entities, and other agreements, aim to support fair competition. However, despite

² 'Competition Policy' is generally being defined as "those Government measures that directly affect the behaviour of enterprises and the structure of industry". See R.S.Khemani and Mark A. Dutz, "The Instruments of Competition Policy and their Relevance for Economic Policy", PSD Occasional Paper No. 26, World Bank, Washington DC (1996). Competition policy encompasses government policies like privatization, de-regulation, trade policy, industrial policy, consumer policy, regulations governing capital and competition law. Competition law, which is a specie of competition policy, deals with anti-competitive business agreements, abuse of dominant market position by enterprises and regulation of mergers, amalgamations and acquisitions.

this emphasis on fair competition, the WTO Agreement has the potential of anti-competitive practices because of level of trade liberalization, investment and international protection of intellectual property under TRIPS, but surprisingly it does not contain any separate law/agreement on the subject of competition. The attempts, mainly by the European Community, to have an agreement on competition policy under the WTO started in the right earnest at the Singapore Ministerial Conference of 1996 by putting it on the list of potential future issues for WTO trade negotiations and by establishing the (still existing) WTO Working Group on the Interaction between Trade and Competition Policy.³ The Group was to examine the relationship between trade and investment; and interaction between trade and competition policy, including anti-competitive practices. Since then, in the jargon of WTO negotiations, the topic of trade and competition policy has become known as one of the four so-called Singapore issues along with foreign investment, trade facilitation and transparency in government procurement.

At Doha Ministerial Conference of 2001, the members agreed that negotiations on WTO competition law would start after the following Ministerial Conference.⁴ At Cancun Ministerial Conference in September 2003, developing countries insisted negotiations on all the four Singapore issues and refused to negotiate on a single Singapore issue⁵, with the result that no agreement could be reached on the issue of competition policy and the Conference failed. From a legal point of view, the WTO Doha Declaration of 2001 remains the basis for

³ WTM/in (01)/DEC/1, 13 December 1996, No. 20 Ministerial Declaration of 13 December 1996.

⁴ http://www.wto.org/english/thewto_e/minist_e/min96_e/wto01dec_e.htm
Doha Ministerial Declaration of 20 November 2001, WTM/MIN(01)/DEC/1, 20 November 2001, No. 23-25, http://wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm.
The Declaration reads as follows:

(23) Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. (25) In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

⁵ Developing countries agreed to negotiations on the Singapore agenda provided that there would be future progress in the field of trade in goods and agricultural products in particular, see Josef Drexl, "International Competition Policy after Cancun: Placing a Singapore Issue on the WTO Development Agenda", *World Competition* 2 (2004, September).

future work as long as no other mandate gives new direction to multilateral trade negotiations. In the meantime, the only international agreed document on restrictive business practices remains the set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the UNCTAD in 1980⁶, which is very limited in its scope.⁷

III Competition Law in India

Since independence, India's foreign trade policy had been highly restrictive and it relied on import curbs except for highly essential commodities. Its industrial, foreign trade and investment policy was highly regulated and government controlled. The important foreign trade-related legislations, including those related to company law, competition, foreign exchange and financial services were reflective of a regulated economy. The philosophy behind this "tight jacket" approach was to protect domestic industry from foreign competition. This philosophy got an initial jolt in mid-1980s but a perceptible change became visible from early 1990s, particularly after India became a party to the WTO agreement.

After four decades of mixed economy and planned development, in 1991, the Government of India, in an attempt to integrate the Indian economy with the global economy, embarked on the process of liberalization of Indian economy by declaring a new economic policy (NEP), which provided market-oriented free economy as the model. The NEP marked a philosophical shift from the erstwhile pursuit of the command economy to the liberal economy by replacing the system of controls. It was devised to accelerate economic development and to keep pace with the international developments that had resulted through the coming into force of the WTO and other agreements under its umbrella. Being a member of the WTO and recognizing the important linkages between trade and economic growth, the Government of India took many steps to align its economy and national laws with the WTO mandate and enhance its thrust on globalisation.

In the pursuit of globalisation, India has responded by opening up its economy, removing controls and resorting to liberalization. It has adopted a number of policies to liberalize trade and capital flows combined with domestic privatisation and deregulation as well as enacted many new laws or has amended existing laws to make them WTO compliant. The new industrial policy adopted in 1991,

opened many areas to foreign investors. A liberalized foreign investment policy⁸ was complemented by the new trade policy. The natural corollary of these efforts was that the Indian market should be geared to face competition from within and outside the country. Like many countries in the world, India had enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act), and made it an integral part of the economic life of the country.⁹

As an off shoot of the Singapore Ministerial Declaration of 1996, and also finding the ambit of the MRTP Act inadequate for fostering competition in the market and eliminating the anti-competitive practices in national and international trade, the Government of India set up an Expert Group to study interaction between trade and competition. The Expert Group, which submitted its report in January 1999, recommended, among others, for the constitution of a regulatory agency to control and eliminate anti-competitive practices that may emerge during the implementation of different WTO agreements.¹⁰ It also suggested for a new Competition Law, which should be an effective instrument for engendering and protecting competition in the market.

In October 1999, the Government appointed a High Level Committee on Competition Policy and Law (the Raghavan Committee) to advise on the new competition law consonant with international developments and to suggest a legislative framework either in the form of a new law or by appropriate amendments to the existing MRTP Act. Acting on the report of the Committee (submitted in May 2000), and considering the suggestions of the trade and industry as well as the general public, the Government enacted the new Competition Act, 2002,¹¹ which has replaced the earlier Monopolies and Restrictive Trade Practices (MRTP) Act, 1969.

IV The Genesis of The Competition Act, 2002: The MRTP Act

The MRTP Act is still the extant competition law in India, as the Competition Act has not yet been fully implemented.¹² The genesis of the MRTP Act is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principles of State Policy in those Articles lay down, *inter alia*, that the State shall strive to promote the welfare of the people by securing and protecting as

⁸ India became a signatory to the Multilateral Investment Guarantee Agency (MIGA) in April 1992.

⁹ The Act was in furtherance of the fulfilment of the constitutional mandate under Arts 38 and 39 of the Constitution of India.

¹⁰ See S. Chakravarty, *New Indian Competition Law on the Anvil*, Rajiv Gandhi Institute for Contemporary Studies, RGICS Working Paper Series, No. 22, (2001) 33.

¹¹ Act No. 12 of 2002 (w.e.f. 14.01.2003). The Act became operative in part from 31.3.2003.

¹² The main provisions, Secs. 3 (Prohibition of anti-competitive agreements), 4 (Prohibition of abuse of dominant position), 5 & 6 (Regulation of combinations) are not in force as yet.

⁶ See UN Dec. TD/RBP/Conf/10, May 2, 1980, noted at 19 ILM 813 (1980).

⁷ See S. K. Verma, "International Regulation of Restrictive Trade Practices of Enterprises", 28 JIL 389 (1988).

effectively as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the state shall, in particular, direct its policy towards securing that the ownership and control of material resources of the community are so distributed as best to sub-serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The MRTTP Act was enacted in 1969 with the objectives of preventing concentration of economic power to the common detriment control of monopolies; prohibition of monopolistic trade practices; prohibition of restrictive trade practices;¹³ and prohibition of unfair trade practices.¹⁴

The MRTTP Act was designed to “ensure that the operation of economic system doesn’t result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices prejudicial to public interest.”¹⁵ The declared economic philosophy behind this Act was “Small is beautiful”. The MRTTP Act, however, was unable to adequately deal with anti-competitive practices like cartels, boycotts and refusal to deal, predatory pricing, bid rigging, abuse of dominance, etc. arising out of the implementation of WTO agreements. Although the MRTTP Commission and the Supreme Court have tried to fit these into the ambit of monopolistic trade practices (MTPs) and restrictive trade practices (RTPs), the different and varied interpretations have lead to conflicting policies and in some cases the offending parties have used these technical imperfections to escape indictments. Under the Act, there existed the MRTTP Commission with civil court powers, and amongst others to perform investigative functions. The Commission often faced the allegation of being bureaucratic and over-burdened with matters of improper distinction and division of work. The Commission also is said to have functioned in a manner not conducive to the dynamics of the growth of the economy. Moreover, the provisions related to unfair trade practices (UTPs), that were included in the MRTTP Act in 1984, look somewhat outside the scope of a competition enactment.¹⁶ Thus, the MRTTP Act has become obsolete in the light of international economic developments relating more particularly to competition

13 The MRTTP Act defines a restriction trade practice as a trade practice, which has, or may have the effect of preventing, destroy or restricting competition in any manner.

14 Under the new dispensation, the Unfair Trade Practices will now be dealt under the Consumer Protection Act, 1986, as amended in 2002 (Act No. 62 of 2002). The amended Act has become effective w.e.f. 15.3.2003.

15 The statement of objects clause of the MRTTP Act proclaims to this effect.

16 UTPs, under the India law, fall under the following categories: (i) misleading advertisements and false representation; (ii) bargain sale, bait and switch selling; (iii) offering of gifts or prizes with the intention of not providing them and conducting promotional contests; (iv) product safety standards; and (v) hoarding or destruction of goods. Making false or misleading representation of facts disparaging the goods, services or trade of another person is also a prohibited trade practice under the Indian law.

laws and the need was felt to shift the focus from curbing monopolies to promoting competition.

The MRTTP Act was based upon the behavioural and reformist doctrines. In terms of behavioural doctrine, the conduct of the enterprises and bodies, which indulge in trade practices in such a manner as to be detrimental to public interest, was examined with reference to whether the said practices constitute monopolistic, restrictive or unfair trade practices. In terms of reformist doctrine, the provisions of the Act provided that the MRTTP Commission, if on enquiry, comes to the conclusion that an enterprise has indulged in restrictive or unfair trade practices, it can order for the discontinuance of such practices and issue an order enjoining the erring party not to repeat those in future. The Commission could also accept an assurance from a delinquent enterprise regarding removal of prejudicial effects of such a practice. Thus, the veneer of the Act was essentially advisory or reformist in approach.

Major amendments were effected to the MRTTP Act in 1991, to make it pro-competitive. By these amendments, the thrust of the Act was shifted on curbing monopolistic, restrictive and unfair trade practices with a view to preserving competition in the economy and safeguarding the interest of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices. The Statement of Objects and Reasons for the 1991 amendment *inter alia* stated:

With the growing complexity of industrial structure and the need for achieving economies of scale for ensuring higher productivity and competitive advantage in the international market, the thrust of the industrial policy has shifted to controlling and regulating the monopolistic, restrictive and unfair trade practices rather than making it necessary for certain undertakings to obtain prior approval of the Central Government for expansion, establishment of new undertakings, merger, amalgamation, take-over and appointment of Directors.

By this amendment, size as a factor to discourage concentration of economic power, in a manner was given up. Provisions relating to concentration of economic power and pre-entry restrictions with regard to prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and take-overs of undertakings were deleted from the Act. The Act had an extra-territorial reach in respect of prohibited trade practices, a part of which was perpetrated within India.

Despite these amendments, the reformative philosophy of mere “censuring” a delinquent enterprise and direction to offset the loss caused by it to an aggrieved person was found, over a period of time, to be ineffective in combating irresistible

greed to reap unreasonable profits by resorting to and repeating the objectionable business practices by enterprises. The competition regime envisaged under it was out of tune with economic reforms initiated by the Government since 1991 and the Act was also out of tune with process of globalization, liberalization and privatization sweeping across the world, making it obsolescent, unworkable and even in some cases counter-productive. Thus, a situation had arisen in which there was no harmony between government policies and the law. Such a situation does not augur well for the economic reforms being undertaken by the government as their success hinges upon the implementation of policy and law in coherence.

A perusal of the MRTP Act also shows that there was neither a definition nor even a mention of certain offending trade practices, which are restrictive in character. For example, abuse of dominance, cartels, collusion and price fixing, bid-rigging, boycotts and refusal to deal, and predatory pricing were not covered under the Act.¹⁷ To address these lacunae as well as to control and eliminate anti-competitive practices that may surface during the implementation of WTO agreements when the market would be open to international competition prompted the Government to draft a new legislation on the subject. The resulting Act viz, the Competition Act, 2002 contains many innovative provisions, which are expected to deter corporate entities, their boards and key executives from contravening the Act and disrespecting the orders of the Commission.

V Salient Features of the New Competition Regime

The Competition Act intends to provide, keeping in view the stage of economic development of the country, for the establishment of a Commission to prevent trade practices, having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers¹⁸ and to ensure freedom of trade to all the participants in markets in India, and for matters connected there with or incidental thereto. The Preamble of the Competition Act, 2002 reads:

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition

17 S. Chakravarty, *New Indian Competition Law on the Anvil*, Rajiv Gandhi Institute for contemporary studies, RGICs Working Paper Series no. 22 (2001) at 30. The MRTP Commission, however, over the years has attempted to fit these practices under different provisions of the Act through interpretation of the language of those provisions.

18 "Consumer" has been defined in Sec. 2(f) in identical terms as under the Consumer Protection Act, 1986, Sec. 2 (1)(d).

in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets...."

Thus, setting up a Competition Commission is the predominant intention under the Act, as stated at the outset. The Commission, known as the Competition Commission of India (CCI) has been entrusted with the task of implementation of the Act. The other main features of the Act are discussed as under:

A. The procedure for registration of agreements, containing restrictive clauses has been dropped.¹⁹ Hence, restrictive business agreements are altogether exempted from registration.

B. Anti-competitive Agreements

Any trade agreement (including Memorandum of Understanding or Arrangement, formal or informal) is void if it is in contravention of section 3, which provides that, "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India"²⁰

Four anti-competitive agreements, viz., agreements relating to price fixation, output restrictions, market allocation and bid rigging are *per se* presumed to have appreciable adverse effect on competition and are hence prohibited.²¹ These agreements are in the nature of horizontal agreements, which are entered into between enterprises that are at the same stage of production chain and in the same market, and have an appreciable adverse effect on competition and are generally prohibited *per se* in all the developed jurisdictions. Under the Act, however, an agreement entered into by way of joint venture, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services, has been kept outside the purview of this rule.

Other restrictive business agreements like exclusive supply/distribution dealing, refusal to deal, tie-in arrangement sales etc., are not prohibited *per se*²² but they are to be judged on the touch stone of "rule of reason" as against rule of *per se* anti-competitive, to ascertain their impact on competition and legal

19 The MRTP Act, 1969, Sec. 33 requires the registration of certain agreements relating to restrictive trade practices.

20 Clause (1) of Sec. 3. Other clauses of Sec. 3 have extra-territorial application, clause (3).

21 The Competition Act, 2002, Sec. 3(3).

22 Sec. 3(4), such an agreement is presumed to be anti-competitive if it causes or is likely to cause an appreciable adverse effect on competition in India.

sustainability.²³ The "rule of reason" test is required for establishing the illegality of an agreement and is generally applicable in the case of vertical agreements,²⁴ which are considered less harmful than the horizontal agreements.

Prohibition of abuse of dominant position

The concept of dominant undertaking prevailing in the MRTP Act has been discarded. Entity having dominant position is not *per se* bad or illegal, but abuse of such dominance is illegal. Under the Act, the acquisition of dominance by an enterprise is neither frowned upon nor it is legally assailable.²⁵ But the abuse of dominant position, affecting consumer interest is made actionable at law²⁶ and there are no escape routes unlike section 38(1) of the MRTP Act, 1969 which contained 11 safety valves including the frequently solicited balancing clause, i.e., that the advantages of restriction imposed outweigh the disadvantages flowing there from and thereby a gateway for quashing of Restrictive Trade Practice Enquiry no more subsists.

Dominance has been described under the Act as "a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour."²⁷ The Act, while prohibiting abuse of dominant position, does not provide any threshold for the same. But certain factors have been mentioned to ascertain the abuse of dominance in individual cases. However, for assessing whether an undertaking is dominant or not it is important to determine, as in the case of horizontal agreement, what is the "relevant market" — the product market or the geographic market. The Act defines the "relevant market" to mean the

23 The Supreme Court in *Tata Engineering & Locomotive Co. v. RRTA*, AIR 1977 SC 973, held that whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will *per se* be a restrictive trade practice. To determine this question three matters are to be considered. First: what facts peculiar to the business to which restraint is applied; second: what was the condition before or after the restraint is imposed; and third: what is its actual and probable effect. The spirit and substance of this principle is also reflected in Sec. 19(3) of the Act, which states that the Competition Commission while determining whether a restrictive agreement has an appreciable adverse effect on competition or not shall have regard to all or any of the following: viz., (a) entry barriers to new players; (b) driving away of existing players; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvement in production or supply of goods or services; (f) promotion of technical, scientific and economic development by means of production or supply of goods or services.

24 Vertical agreements are between enterprises at different levels of manufacturing, sale or distribution processes, such as between a manufacturer and a wholesaler.

25 Sec 4(2) reads: There shall be an abuse of dominant position... if an enterprise, (a) directly or indirectly, imposes unfair or discriminatory - (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service.

26 The Competition Act, 2002, Sec 4.

27 Explanation to Sec. 4 (2).

market "which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets".²⁸

Dominance is said to be abused when there is an appreciable adverse effect on competition due to the actions of a dominant undertaking. Appreciable adverse effect on competition occurs when an enterprise, directly or indirectly imposes unfair purchase or selling price, including predatory prices of goods or services; limits production, market or development to the prejudice of the consumers; indulges in action resulting in denial of market access; makes contracts with obligations which have no connection with the subject-matter; or uses dominance in one market to move into or protect other markets.²⁹

However, reasonable actions to protect one's commercial and legitimate interests, including aggressive competitive practices like vehement and large scale advertising incentives and offers on products are not regarded as abuse of dominance.

Regulation of combinations

The new Act contains adequate provisions for the regulation of mergers, amalgamations and acquisitions.³⁰ Mergers are a legitimate means for the firms to grow but from the point of view of competition policy, the horizontal mergers are generally under suspect, as they tend to abuse their dominant position.³¹ The Act mandates that "No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."³² Combinations include mergers, amalgamations, joint ventures, acquisitions, takeover, (friendly or hostile). Combination regulation touches upon the earlier two aspects of anti-competitive agreements and abuse of dominance. But, specific threshold limit is prescribed and a pre-notification procedure is provided in relation to combinations. Pre-notification in the case of combinations above a particular threshold under the Act has been made optional.³³ Hence,

28 See further on this point, S.Chakravathy, *op. cit.* 17, at 41.

29 The Competition Act, 2002, Sec. 4.

30 *Id.*, Secs 5 and 6.

31 There are also conglomerate mergers entered into between enterprises operating in different markets such as between software firm and an electronic firm.

32 *Supra* n. 29 Sec. 6(1).

33 Sec. 5 (2), *Id.*, where there is notification, the Commission will decide within a stipulated time, failing which it will be presumed that the Commission does not have any objection to the combination (Sec. 31).

mergers and amalgamations below the threshold are made very easy and simple.³⁴ The Act states that a pre-notification of the said combination or intended combination to the (CCI) is mandatory if the combined assets of two parties exceed Rs. 500 crores or the turnover exceeds Rs. 1500 crores and if one of the parties belongs to a group (business conglomerate managed by a single individual) whose assets value Rs. 2000 crores or whose turnover is Rs. 6000 crores. For this purpose, a "group" means two or more enterprises, which, directly or indirectly, are in a position to – exercise 26% or more of the voting rights in the other enterprise; or appoint more than 50% of the members of the board of directors in the other enterprise; or control the management or affairs of the other enterprise.³⁵

A period of 90 days for approval or rejection of the proposed combination is provided for the CCI and if the CCI does not give any decision even after the completion of 90 days after notification, the proposal is deemed to be accepted.³⁶

The Act does not provide any list of factors to be taken into account while considering the application for approval or undertaking an investigation into combinations. However, the draft law listed certain factors to determine the nature of combination which may have the effect or is likely to have appreciable adverse effect on competition, viz. – actual and potential level of competition through imports in the market; the extent of barriers to entry to the markets; the level of combination in the market; the degree of countervailing power in the market; the likelihood that the combination would result in the parties to the combination being able to significantly increase prices or profit margins; the extent of effective competition remaining in the market; the extent to which substitutes are available in the market or is likely to be available in the market; the market share of the parties involved in the combination, individually and as a combination; the likelihood that the combination would result in the removal from the market of a vigorous and effective competitor; the nature and extent of vertical integration in the market; the possibility of a failing business; the nature and extent of innovation; and whether the benefits of the combination outweigh the adverse impact of the combination, if any.³⁷

Unfair trade practices

The provisions relating to unfair trade practices as enumerated in sections 36 to 36E of the MRTP Act have been omitted and pending complaints against

34 Threshold limit under the Act has been fixed on the basis of assets rather than market share, as the latter may not be the correct barometer to determine affluence adversely of competition.

35 Sec. 5.

36 Sec. 31 (11).

37 Cf. S. Chakravarty, *op. cit.*, at 52-53.

such trade practices before the MRTP Commission have been transferred to relevant consumer fora after the commencement of the Act.³⁸

Competition fund

The Act provides for the establishment of Competition Fund, which will be credited by:³⁹ (a) all Government grants received by the Commission; (b) the monies received as costs from parties to proceedings before the Commission; (c) the fees received under this Act; (d) the interest accrued on the amounts referred to in clauses (a) to (c).

The competition commission of India (CCI)

As stated above, the Act provides for the establishment of an effective competition authority with a well-defined role as an adjudicator and a catalyst in the promotion of competition advocacy. In furtherance of this mandate, the CCI, in place of MRTP Commission, has since been constituted.⁴⁰ The CCI shall consist of a Chairperson and not less than two and not more than ten other members to be appointed by the Central Government.⁴¹ For the selection of the chairperson and other members of the CCI, the Central Government would constitute a committee.⁴² The CCI will have a principal bench and additional benches and will have one or more mergers benches, as the case may be, to deal exclusively with matters related to combinations 42A. Its task is to look into violations of the Act, a task which could be undertaken by the Commission based on its own knowledge or information or complaints received and references made by the Central Government, state governments or statutory authorities.

38 The Consumer Protection Act, 1986, has been amended to this effect in December 2002, which became effective w.e.f. 15 March 2003.

39 Sec. 51 of the Act.
40 Commission was constituted w.e.f. 14.10.2003, without a chairman so far. Its constitution became a disputed issue and was challenged before the Supreme Court of India, as it would not be headed by a judge, like other commissions and tribunals constituted under other Acts, but by a person who is qualified to be a judge of a high court or has special knowledge or professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management etc. which in the opinion of the Government may be useful to the Commission. The case has since been decided after the Government has agreed to make necessary changes in the Act in this regard. *Brahm Dutt v Union of India*, (2005)2 SCC 431.

41 The Competition Act, 2002, Sec. 8. The Chairperson and other members should be person of ability, integrity and standing.

42 The committee shall be consisting of a retired judge of the Supreme Court or a High Court or a distinguished jurist or a senior advocate for five years; a person with professional experience of not less than 25 years in international trade, economics, business, commerce or industry; joint secretary in the Ministry of Finance and Company Affairs; and a nominee of the Central Government who shall act as the Chairperson of the Committee. See The Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 vide G.S.R. 303(E), dated 4.4.2003, published in the Gazette of India, Ext., Pt. II, S. 3 (i), dated 4.4.2003.

The Commission can pass orders for granting interim relief or any other appropriate relief and compensation or an order imposing penalties, etc.⁴³ The CCI has the power to impose penalty for the contravention of its orders, failure to comply with its directions, making of false statements or omission to furnish material information, etc. It can levy upon an enterprise, exemplary penalty for offences committed under the Act up to 10 per cent of the average of the turnover for the last three preceding financial years. Further non-compliance with the orders of the Competition Commission entails civil imprisonment up to one year and a penalty of not exceeding Rs. 10 lakhs.⁴⁴

The decision or order of the Commission is appealable to the Supreme Court of India. Any person aggrieved by any decision or order of the Commission may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order to him on one or more grounds specified in section 100 of the Code of Civil Procedure, 1908 arising out of such decision or order. However, in case of delay in filing such appeal, the Supreme Court may allow filing of appeal within a further period not exceeding sixty days if the appellant can satisfy the Court that he was prevented by sufficient cause from filing the appeal within the said period of sixty days.⁴⁵ The CCI is empowered to adopt procedures and rules specifically suited to competition cases.⁴⁶

The CCI is not merely a law enforcement agency, but would be actively involved in the formulation of the country's economic policies, which may adversely affect competitive market structure, business conduct and economic performance. Apart from giving advice to the Government on competition policy, it shall also take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.⁴⁷ Thus, the CCI has been entrusted with the following two basic functions: i) to administer and enforce competition law and policy to foster economic efficiency and consumer welfare; ii) to be involved proactively in Government policy formulation to ensure that markets remain free, fair, open, flexible and adaptable.

Extra-territorial jurisdiction

Looking into the reach of international agreements, entered into in pursuance of different WTO Agreements, the new Act has extra-territorial reach. In case any agreement that has been entered outside India and is anti-competitive in terms of section 3 of the Act; or any party to such agreement is outside India; or any enterprise abusing the dominant position is outside India; or a combination

43 Sec. 33 and 34.

44. Chapter VI of the Act.

45 Sec. 40.

46 Sec. 36.

47 Sec. 49.

has taken place outside India; or any party to combination is outside India; or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, if such an agreement, combination or abuse of dominant position has or are likely to have an adverse effect on competition in the Indian market, the CCI shall have the power to inquire into such agreement or abuse of dominant position or combination if they have or are likely to have an appreciable adverse effect on competition in the relevant market in India.⁴⁸

VI MRTP Act and The Competition Act – A Comparison

The Competition Act has brought out certain fundamental changes in the MRTP (which is still the extant law in substantial respects) that are enumerated in the Table below.

S. No	MRTP Act, 1969	Competition Act, 2002
1.	Based on the pre-liberalization era	Based on the post-reform scenario.
2.	The objective of the Act is to prevent concentration of economic power to common detriment, to control monopolies to prevent monopolistic and restrictive practices.	The objective of the Act is to prevent practices having adverse effect on competition and to promote as well as sustain competition to protect consumer interests at market places to ensure freedom of trade.
3.	The size of the firm is the factor to determine dominance.	Based on the structure as a factor.
4.	Competition offences implicit and not defined.	Competition offences explicit and defined.
5.	Lists out 14 offences per se negating the poinciple of natural justice.	Recognizes only 4 offences, deemed to be against the principle of natural justice, rest are subjected to the "rule of reason".
6.	Entity having the status of dominant position is considered bad.	The entity having dominant position is not bad <i>per se</i> , but abuse of dominant position is considered bad.
7.	Registration of agreements, in general, compulsory.	There is no requirement of registration of agreements.
8.	No regulation on combinations.	Combinations are regulated beyond a threshold limit.

48 Sec. 32

9. Definition of "group" wider. "Group" definition has been simplified.
10. MRTP Commission's role mainly advisory, no role in competition advocacy. MCCI can initiate *sue motu* proceedings and levy penalties; has competition advocacy role.
11. The Commission members were appointed by the Government. CCI members selected by a committee constituted by the Government.
12. The Act covered unfair trade practices. Unfair trade practices are omitted from the Act and transferred to consumer fora.
13. No provision for a fund for its activities, Provision for a Competition Fund has been made.
14. Focused on consumer interest at large. Focuses on competition in the economy and public interest at large.
15. The Act was reactive and rigid. The Act is proactive and flexible.

VII WTO Agreements and The Competition Act, 2002.

While enacting the new Competition Act different WTO agreements have been kept in view, for example, licensing of IPRs, technical barriers to trade, professional services, government procurement, foreign investment; mergers, acquisitions and take-overs. The Act aims, *inter alia*, to check the abuse of dominant positions and establish procedures dealing with mergers and acquisitions.

The Act covers horizontal as well as vertical agreements. The provisions are more stringent in case of horizontal agreements. Agreements regarding prices, quantities, bids and market sharing are *per se* illegal, but other horizontal agreements are made subject to the "rule of reason" test to term them illegal (based on US law approach). Vertical agreements, on the other hand, have not been subjected to the rigours of competition law. However, where a vertical agreement has the character of distorting or preventing competition, it will be placed under the surveillance of the law. The tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, resale price maintenance are subjected to "rule of reason" test.

The Act, however, does not deal directly with the intellectual property rights, which are monopoly rights in context. On the contrary, the provisions relating to anti-competition agreements will not restrict the right of any person to restrain any infringement of intellectual property rights granted in India or to impose

such reasonable conditions as may be necessary for the purposes of protecting or exploiting such intellectual property rights. But licensing arrangements related to intellectual property rights, which are likely to affect adversely the prices, quantities, quality or varieties of goods and services and will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with intellectual property rights. Examples of this juxtaposition may be related to refusal to deal, in order to create or maintain monopoly; refusal to license technology without any reasonable justification, at the cost of consumers' interests; anti-competitive licensing practices to manipulate the market; vertical agreements or mergers to limit competition; non-working and inadequate supply of a protected innovation; and exclusive grant back conditions, etc.

However some of the activities of the holder of the IPRs merit their consideration under the Act. For example, there are increasing instances of abuse of patent rights by patent holders by means of controlling output and supply, maintaining thereby artificial prices and imposing unjustified conditions upon licensees. Further, the owner of a copyright, patent or other forms of IPRs may issue a license for someone else to produce or copy the protected invention, design, work, trademark etc. and in the process the terms of the licensing contract may restrict competition or impede technology transfer. There should be a place in law to take action to prevent anti-competitive licensing that abuses IPRs. TRIP agreement allows member countries to deal with such abusive trade practices under Articles 31 and 40.⁴⁹ However, by not containing any provision on the IPR abuses, the Competition Act in a sense, infers that IPR laws override competition law but in fact the contrary is the truth. The competition authority envisaged under the Act, if acts in the spirit of the objects of the Act, will be the ideal body to deal with IPR abuses and provide necessary inputs to the government on the subject matter. The inadequacy in the Act should be addressed suitably to deal effectively with IPR abuses to strike a balance between IPR protection and competition law.

VIII Drawbacks in the Act

The Competition Act has so far become operative only partly and the CCI, which has been constituted by the Government as a market regulator, has not been constituted fully. The actual impact of the Act will be known only after its substantive provisions viz. sections 3 to 6, come into force. As such, however, the Act manifests certain lacunae. For example, section 54 (in force) confers

⁴⁹ Arts. 31 and 40 of the TRIPs agreement provide for, compulsory licenses and control of anti-competitive practices respectively.

unfettered powers on the Central Government to exempt any class of enterprises from the application of the Act, or any provision thereto and for any such period, in the interest of the security of the State or public interest or for giving effect to any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any country/ countries or any enterprise which performs a sovereign function on behalf of the Central or a state government. The grounds on which this exemption power will be invoked are not well defined and are vague. As a result, a large number of enterprises can be left out of the purview of the Act. Moreover, it will give the handle to the Government to invoke this power on any flimsy ground or extraneous considerations.⁵⁰ This requires reconsideration and the CCI should be empowered to review the action taken by the Government under section 54, to avoid any abuse of this power.

The Central Government also enjoys unbridled power in the matters of policy framing and issuing directions on questions of policy, other than those relating to technical and administrative matters, which shall be binding on the CCI.⁵¹ The decision of the Central Government whether a question is one of policy or not shall be final. The Government also has the power even to supersede the CCI, against which the CCI can make a representation to the Government.⁵² Such provisions thus seriously affect the independence and efficacy of the CCI. The CCI should be allowed to function in an independent manner and should have the power to review government policy on competition. In fact consultation by the Central Government in evolving competition policy with the CCI should be made mandatory, instead of discretionary, as contemplated in the Act.⁵³ This reflects a half-hearted approach on the part of the Government to empower the CCI to be the sole arbiter in competition matters.

The Act is vague on the relationship between CCI and other sectoral regulators. For example, there is a need to have some provision related to exit barriers in the case of sick industries under the Sick Industrial Companies Act (SICA), which have to be referred to the Board for Industrial and Financial Reconstruction (BIFR), and the corresponding provisions in the Industrial Disputes Act, 1947, to keep an enterprise competitive. The CCI should have the over-riding on all other sectoral regulators, if the actions taken by them affect competition. The other drawbacks are that, the Act does not address the

50 The experience with such an exemption power under other laws has been very controversial, for example under the Essential Commodities Act; the Industrial (Development Regulation) Act, etc. It is doubtful that public interest is the sole motivating factor in these cases.

51 Sec. 55, in force.

52 Sec. 56.

53 Sec. 49, paras (1) and (2).

abuses of IPRs, which are monopoly rights for limited period of time. The definition of the term, 'group', given in Explanation (b) under Section 5 of the Act appears to be inadequate to describe the realities of group control; the terms like 'agreement', 'cartel', 'person', 'dominant position' appear to be defined in a manner, which may not fully cover the concepts. The most important term for decisions of the Commission is 'appreciable adverse effect on competition.' The Act provides for the factors to be considered, for example, market share, size of competitors, economic power of the enterprise, benefits to consumers, relevant geographic market, relevant product market etc. in deciding the cases related to anti-competitive agreements, dominant position and combinations. Additionally, however, these factors need reliable statistics relating to industry and trade. The gap in the relevant statistics is particularly felt after the announcement of the policy of liberalization, when such regular collection of statistics at the firm level was discontinued by Government agencies.

Attention may be invited to the provisions of Section 20(3) of the Act to enhance or reduce the assets or turnover limits of the enterprises to fall within the jurisdiction of the Competition Commission for inquiry into combinations. These variations are to be effected on the basis of the Wholesale Price Index. The constituents of this Index and those of the assets of an enterprise are totally unrelated and hence the use of this Index is not suitable for the purpose.⁵⁴

IX Conclusion

The efficacy of the new competition law has to be seen in its implementation, which will be evident in due course of time. But the new Act is a step in the right direction by harmonizing the competition policy with international trade and policy. The stated drawbacks, however, require some consideration on the part of policy makers to make the new Act effective and workable. The unbridled powers of the Government in all important matters, including the power to supersede the CCI need to be examined if the Act has to create an impact.

54 V.T.Korde, "The Competition Act, 2002: Introduction and Critical Review" paper presented at the National Seminar on India's New Economic Laws: WTO in Context, organized by the IJI in April 2003.

HUMAN RIGHTS AND SOCIAL AUDITING OF LEGAL EDUCATION IN BANGLADESH: WHY, WHEN AND HOW?

Dr. Mizanur Rahman*

I Introduction

LEGAL EDUCATION in Bangladesh dates back to the days of *British raj* in India. Upon independence from Pakistan in 1971, Bangladesh inherited a legal education that well suited the requirements of a colonial power. It did not even experience the filtration process that was deemed necessary to make legal education socially responsive and reflect the aspirations of a newly independent country. To be precise, legal education in Bangladesh hitherto has not received the treatment it deserves. Its role in the ultimate delivery of justice in the society has not been sufficiently studied and its potential power in the dispensation of justice has remained largely unexplored. Resultant effect is poor quality of legal education with its consequential impact on the administration of justice.

Legal education provides the nation the personnel who run the vehicle of justice in the society. To quote an author:

"Legal education needs to be viewed as part of total commitments for a legal order and the rule of law in relation to the society and its development. Law, legal education and development are not only interrelated with each other but have become an integrated concept for any developing society seeking to ameliorate the socio-economic condition of the people through democratic and peaceful means."¹

It is in the class rooms of the law faculties and law colleges, that the future lawyers, judges and substantial number of legislators, human rights activists and social reformers are nurtured and groomed. Therefore, the questions as to what is taught in the law classes, who are taught, how are they taught, by whom they are taught and what goals and visions are set before them, are paramount questions for the society. Unfortunately, in Bangladesh the education of the future lawyers, who see their task to work for social change, has met historically with formidable indifference.² We just don't seem to care much and

certainly do almost nothing about specially preparing those whose vocation is to work with the subordinated: the poor, the women, the minorities etc.

Legal education in Bangladesh regularly resists change- change of any sort. Calls for transformation of what goes on in our law faculties somehow get deflected, delayed or diluted. Inertia no doubt plays its role as does flat-out laziness. Academicians of every ilk not only prefer thinking that they already do a good job but would rather dodge the possibility that they themselves may not be equipped to participate meaningfully in a newly conceived training programme.

Under these circumstances, it may not be surprising to note that no serious institutional research has been conducted to evaluate legal education in the country. However, sporadic and isolated studies accomplished by a few individuals, both academicians and practicing lawyers, reflect the social mood regarding legal education in the country. This article is based on a few such studies.

The prevailing general impression about legal education is that it is divorced from social realities and the graduates it produces are indifferent, if not totally antagonistic, to the 'social engineering' functions of a lawyer. This is, the author contends, the outcome of traditional learning and regnant lawyering. In order to bring about a fundamental change in legal education, this article proposes to resort to 'anti-generic learning' and 'rebellious lawyering' in its various manifestations.

II Objectives of Legal Education in the Context of Bangladesh

Almost a decade ago I wrote elsewhere that "Legal education in Bangladesh has been a dismal failure."³ Nothing noticeable has taken place since then. Contemporary legal education teaches law students to approach practice as if all people and all social life were homogeneous. As regards their academic training, Dr. Shahdeen Malik, rightly points out, that legal education in our country primarily aims at familiarizing students with main provisions of law and explaining doctrinal foundations of legal regulations of society.⁴ Another law teacher, attempting to broaden and rationalize the aims of legal education in Bangladesh writes:

"Legal system and legal education modeled on English pattern is based on analytical thought and tradition, which consider law to be a self contained discipline whereunder the principles of law applicable to a

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1 M.Amir-ul-Islam, "In the Quest for a Modern Education in Law", Paper presented at Bangladesh Law Teachers' Association (BLTA) Symposium on 'Legal Education in Bangladesh: Problems and Prospects', Dhaka, (21-22 November 1992), 10.

2 Mizanur Rahman, *Anti-Generic Learning and Rebellious Lawyering: A Challenge to Regnant Legal Education and Lawyering in Bangladesh*, in Mizanur Rahman (ed), *Human Rights and Empowerment*, Dhaka 139 (2001).

3 Mizanur Rahman, "Clinical Legal Education in Bangladesh: Establishing a New Philosophy?", Chittagong University Studies-Law, Vol. 1 (1996).

4 Shahdeen Malik, *Continuing Legal Education*, pamphlet circulated by Legal Education Committee of the Bangladesh Bar Council I (1995).

particular fact-situation can be deducted from the statutes. Such an approach completely disregards any enquiry into the socio-economic-political consideration and conditions under which the law was passed and into the socio-economic background of the conflict-situation which may be before the court for decision. Thus, analytical approach cannot contemplate social justice in the context of the country's multifarious problems of over-population, scarcities and violence. Problem solving approach rather than a merely analytical/ definitional approach is the need of our society and the legal education must be oriented in this direction.⁵⁵

Writing on the same problem of aims and objectives of legal education, Barrister Amir-Ul-Islam observed:

"Besides helping the students to master the lawyering skills, legal education must be able to help develop inter-disciplinary approach for building the personality and the intellectual ability to understand the society and the human situation in a changing social order."⁵⁶

An American scholar giving his views on legal education in Bangladesh wrote:

"a. Legal education must inform students about crucial societal issues, including poverty alleviation, the role of women, the environment and human rights, and must focus on ways in which the legal system can help to solve the problems plaguing society. In other words, legal education must not teach students simply what the current law says, but rather it must provide students with the vision and skills to make the law more responsive to the development needs of this country. Put simply, it must train students to be social engineers.

b. Legal education must not only teach students about legal theory, but must prepare students to engage in the practice of law or law-related professions. Students, therefore, must learn not only how to be outstanding lawyers but also outstanding members of the judiciary, government service, NGOs or industry. To accomplish that goal, legal education must impart skills in research, drafting, oral communication, interviewing, interpreting and advocacy...."⁵⁷

The message is clear. Law graduates must be versed in legal knowledge and information, which is relevant for social and economic development. They

5 Shafigue Ahmed, "Legal education in Bangladesh: Problems and Prospects", key-note paper presented at BLTA Symposium, *op.cit.* at 1.

6 M.Amir-ul-Islam, *op.cit.* at 10.

7 Jay Erstling, Reform of Legal Education in Bangladesh, Consultant's Report submitted to the Bangladesh Bar Council 3 (1994).

must be conscious of the social values of law. They must be sensitized to the needs of cross sections of people and they must learn to apply law to maximize social benefits; to use law to reform society and hence promote social engineering role of law. Dean Shah Alam writes: "Law graduates, the would-be lawyers, judges and legislators must acquire sufficient motivation to take law to the people in order to serve them in distress and, when necessary, to make laws or to reform existing ones to serve them better. Law is called upon to defend people from ills and evils of the society and to accelerate social advancement that must manifest in economic growth, poverty alleviation and protection of human rights. Law graduates must understand this mission of law and be motivated to ensure that law does not fail in its mission."⁵⁸

III State of Contemporary Legal Education in Bangladesh

Most people don't ever pay much attention to law, much less legal education. Perhaps this should not be surprising. Even law students and law teachers do not spend much of their day-to-day time talking about legal education - at least not in any serious and publicly shared way. For most people "legal education somehow seems not quite intellectual enough to be taken seriously and not quite interesting enough to inspire anything provocative."⁵⁹

Let us begin with what academics might call a critique of legal education but what more accurately portrays what we should realize about what we do and how we do it in our law faculties.

Too few general approaches- some think only one-dominate our legal education

A look at the course offerings of all the law faculties in Bangladesh portray an awful homogeneity of general approach. Even the four-year undergraduate course offered by the university law faculties does not differ from the two-year post graduate course offered by the law colleges affiliated with the National University. This homogeneity may simply mean that law faculties have "got their act together"- they have all agreed (if only tacitly) about what it is they are doing and how to do it best. However comforting this view may be few people I know in legal education actually buy it. Moreover, few other self conscious disciplines train their future practitioners in so peculiarly uniform fashion. Elsewhere, vying conceptions of competence and excellence make for often radically different approaches to learning and training. Our law faculties simply seem unwilling or unable to imagine and to implement serious alternatives to what nearly all of them now find themselves doing.

8 Professor M. Shah Alam, "Legal Education in Bangladesh: Search for Reforms, Consultant's Report to the World Bank, TOR 4 5 (1997).

9 Gerald Plopez, *Rebellious Lawyering: One Chicanoes Vision of Progressive Law Practice*, Westview Press 309 (1992).

Our legal education has more or less cleverly avoided confronting the fundamental question. Instead, our teachers engage in largely empty analysis bend over an incomplete methodology of inquiry that lacks a positive ethical, moral and political grounding. These factors, together with others that include an ancient curriculum structure that restricts experimentation, and perhaps more importantly, relieves our faculties of serious obligations to develop more inventive and flexible approaches to the basic substance of legal education, the status and power of the Bangladesh Bar Council examination, and the value structure of the job of the lawyer, fashions a system that is one only of law but not of justice.

Too few models of teaching and learning—some think only one—shape the structure and routines of the general approach to legal education in Bangladesh

You know in advance what most courses will look like at the different law departments— they will meet always as a large group in a classroom for three/ four hours a week throughout the academic year. The 'big classroom' model dominates our teaching and learning. The other model of segregating big classes into small tutorial groups have long been banished by the Dhaka University Department of Law, presumably the best centre of learning in the country.

It is true that within the same department you can also find different models of teaching and learning, but it is the 'big classroom' model that sets our legal education's rhythm and fulfills its claim to educational legitimacy.

It is not just that in the big classroom model the group always meets as a group in a classroom for three or four hours a week. It is also true that in the big classroom there is just too much of the same kind of teaching and too much of the same kind of learning. In fact, it would not be surprising to find most of the teachers' ideas in the student notes from previous years classes. One critic, speaking of legal education in another jurisdiction, observed: "Instead of a partnership in the learning process and a method by which teacher and student discuss a problem in order to further the understanding of each.... prevalent style in law schools is merely a means to direct the student to a position predetermined by the teacher."¹⁰ To be more accurate, in our teaching model, teachers exercise, but almost never share power with students and teachers are the ones ultimately who act and students are the ones ultimately acted upon.

However, in challenging the big classroom model of teaching, no one should want to convert learning into a non-aural, atomistic enterprise. Nor should anyone

¹⁰ Carolyn S. Bratt, *Beyond the Law School Classroom and Clinic— A Multi-Disciplinary Approach to Legal Education*, 13 *New England Law Review* 199 at 203 (1977).

underestimate and under-appreciate the importance of reinforcement and reemphasis, nor neglect the role of a teacher's influence on the students' learning spirit. Still, why not convert previous lecture notes in to written commentary on the principal text? And why not aspire to an aural community of learning by employing a set of pedagogic vehicles that demand more from students than simply taking yet another set of lecture notes? Instead of having so much pass through the teacher, why not help student galvanize one another?

Why not? The truth is that most teachers who practice their teaching in the big classroom don't have a very self-conscious idea of why they do what they do. They simply find themselves, like their students, trapped in a largely unexamined set of structures and routines. Indeed some teachers and students seem to have cut somekind of a deal. The students permit themselves to be bored, boring and infantilized, so long as no one challenges too openly their disengagement. The teachers permit themselves to be bored, boring and thoroughly unambitious so long as no one examines too closely their teaching. Neither demands too much of the other and neither exposes the considerable fatuousness of their time spent together.

True, there are extraordinary teachers, who challenge the status-quo and involve students in a two-track power-sharing process. Yet, even if these extraordinary teachers were everywhere in legal education, a curriculum dominated by the conventional big classroom model of teaching and learning would still badly under-educate our future lawyers.

Too few skills make their way into and get serious attention in the general approach to legal education.

For a long time and until very recently and then again in very limited terms, legal education in Bangladesh seems resolutely against offering anything like adequate training in the range of skills demanded of various lawyers. Some claim "skills training" is beneath law departments— the elitism hypothesis. Still others claim, that "skills training is beyond those who teach in the law faculties"— the incompetence hypothesis. Finally, others still claim that "skills training" is best done after you become a lawyer— the wise division of responsibility hypothesis.¹¹

There is continuing truth of one sort or another in each of these hypothesis. If 'skills training' isn't in fact beneath, beyond, too expensive, or too unwise for law faculties to provide, then certainly there are many who perceive the truth in one or more of these self absolutions. However, the reality is that our legal education always taught skills— not many to be sure, and obviously not nearly as

¹¹ Keeton, *Teaching and Testing for Competence in Law Schools*, 40 *Madison Law Review*, 203, 212-214 (1981).

well as they might. Still, skills are, in part, precisely what's being passed on in the curricular preoccupation with learning to read and use cases. But that the very idea of skills training remains, even today, off to the side of the basic legal education curriculum reflects, in my opinion, a largely unappreciated fact that legal education has been and still is almost entirely about law and is only incidentally and superficially about lawyering. Law teachers think, teach and write about the law of contract, or the law of environment, and only barely about what lawyers do for and with people partly defined by contract law or environmental law. Law teachers spend enormous energy tinkering with the doctrinal formulations of discrimination law but devote almost no resources discovering whether and in what ways discrimination law and the work of discrimination lawyers penetrate the lives of millions of people for whom they are ostensibly designed.

Too little theory, of any sort, makes its way into and gets serious attention in the general approach to legal education

Since our legal education focuses on too few skills, one might assume that they at least pay serious attention to theoretical questions. But that again is wrong. Our courses spend a great deal of time and effort transmitting the law of property, tort, company, constitution in a way which is nothing much more than the fairly uninspired and uncritical statement of rules or principles of law—what some like to call “black letter law”. By contrast, our courses invest very little time and effort explicitly identifying and elaborating underlying theoretical conceptions—conceptions of human interaction, of conflict, of the capital market, of problem-solving, and of the state. At the end of four years of honours education, law students probably are not sufficiently, if at all, equipped to describe and critique the political and economic theories underlying various legal arrangements. It seems questionable, whether our students truly comprehend even the “black letter law” since they “do not have an understanding of its social and political history and how it concretely affects everyday problems.”¹² Thus, our legal education continues to reflect, as much as anything, what the teachers feel both equipped to put into their teaching and rewarded for doing with their teaching. Law faculties do now what they have always done and teachers train now much as they themselves were trained. Consequently and ironically, our legal education and law teachers simply reproduce one another.

Our teaching and learning model has created a stereotype: during the first year, students seem generally to accept the need for and may respond well to

¹² *Ibid.* at 205-206.

the unfolding of method through content—the regnant style of teaching, with long hours in the library reading reference books etc. But certainly beginning in the second year, and perhaps even earlier, most of the students come to understand that they can pick up the patterns of arguments, rules and policy concerns that constitute a particular body of doctrine without engaging at all actively in the regimen that the teacher pursues in and around the classroom. Students appreciate that they need only read cases cursorily (if at all), need only become passive and happy listeners in the classroom (if they attend at all), and still learn and use legal doctrine in just the way demanded by the teacher and eventually become an honours graduate. All they need do is diligently gather the appropriate note book, get hold of the class notes from a classmate or from a senior student, and spend a short intense period of time making the information of their own, in part by putting it to use on old exam questions. Thus, the joint efforts of teachers and students in our legal education have transformed the big classroom into something much resembling a “correspondence course.”

Too little of everyday life makes its way into and gets serious attention in the general approach to legal education

Theory and skills are not the only aspects of thought and practice sacrificed to doctrine. So too is everyday life. Too little of what people do think and feel and too little of how institutions work and change and get reinvented makes its way into the curriculum. On the whole, law faculty materials, exercises and conversations tend to abstract away from both daily routine and rich description and to position students at a considerable distance from the very human events with which law and lawyers regularly deal. Too much of legal education seems, in short, schematic, ungrounded and bloodless. “Abstracting law both from human events and from the emotional responses which those events should spark implicates serious political concerns.”¹³ As long as far too little of everyday life makes its way into and gets serious attention in the general approach to legal education, we can expect that too many of our future lawyers will continue to believe that they do their best work only and always at a distance from and without a deep appreciation for those with whom they work. By ignoring the soul of the law and that of human being who happens to be a lawyer, our legal education converts law students into expressions of “technique”, causing their human side to atrophy and leaving many of them unprepared to face the moral chaos and distortions inherent in law practice in Bangladesh.

¹³ M.V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 *G.Wash. L. Rev.* 276 (1984).

Too little conversation and too little coordination, simultaneous and sequential, mark the general approach to legal education

Even if law teachers don't pay close attention to theoretical literature, practice or to everyday life, you might at least expect that most do know a great deal about and talk a great deal about what's going on in their own curriculum. But here again, one would be extremely disappointed. Law teachers know how to grouse to one another about evaluating examination scripts, how to complain to one another about administrative lapses in the Chairman's office, how to moan to one another about certain pushy students, and, of course, how to gossip about one another. But by and large, law teachers don't appear to think much about and certainly don't talk to each other about precisely what's going on in their own courses and their own teaching. And as a group they seem never to have figured out how to learn about and how together to do something about the training they provide and the collective impact they have on their own students and on the communities their students ultimately serve.

When teachers don't talk, the possibilities for sensible coordination-simultaneous or sequential-are severely limited. How can teachers who teach the same first year students sensibly coordinate when they don't even know exactly what and exactly how they variously teach? How can teachers who teach courses that students perceive as related and sequential, coordinate if they don't learn about and discuss what each does and might do with their respective materials and in their respective classrooms? Moreover, when teachers don't talk regularly about how and what they teach, it becomes increasingly difficult for them even to see themselves as a team with a collective impact on students. The prevailing picture in the law faculties, I am afraid, depicts that too many law teachers have largely abandoned collective responsibility both for the curriculum as a whole and for the experience of students who progress through their own departments.

Too generic a vision of people, traditions, and experiences pervades the general approach to legal education

Contemporary legal education in Bangladesh conceives of and treats people-their traditions, their experiences, their institutions-as essentially generic. Legal education teaches law students to approach practice as if all people and all social life were homogeneous. The bulk of our law graduates have been working with or litigating for the subordinated. However, anticipating and responding to the problems of the politically, socially and economically subordinated group demands a range of practical know-how and intellectual sophistication that extends beyond litigation competence. It demands knowing how to work with clients and not just on their behalf, it demands knowing how to collaborate with

allies rather than ignoring their actual or potential role in the situation, it demands knowing how to take advantage of and how to teach self-help and lay lawyering and not just how to be a good formal representative, and it demands knowing how to build coalitions, and not just for purposes of filing a lawsuit. In sum, anticipating and responding to the problems of the politically and socially subordinated group requires training that reflects (and in turn, helps produce) an idea of lawyering, compatible with a collective fight for social change-a "rebellious idea of lawyering" at odds with the conception of practice that now reigns over legal education and the works of lawyers.

Too fragmented, too regnant legal education imparted by the Bangladesh Bar Council

Bangladesh Bar Council's (BBC's) decade old initiative in launching a set of continuing legal education programmes was primarily in response to the lapses of regnant legal education in the country. But these courses almost never extend outside the boundaries of litigation. Like the four years of law study at the universities, it basically shuns entire dimensions of practice, integral to the needs of the subordinated people and the lawyers with whom they work. Worse still, BBC courses are offered by people many of whose qualifications, both academic and professional, are at the least, doubtful. Moreover, these 'new teachers' have internalized the very same idea of lawyering that generic legal education teaches and that serves so inadequately for all those in the fight against subordination. Worse still, they seem all too willing to protect their own "achievements" by refusing to extend the boundaries of both continuing (post-law faculty) legal education and their own conception of practice. In short, the BBC programme, along with the law faculties, has become part of the problem for the subordinated rather than becoming part of the solution.

The as yet unsettled dilemma over the language of the law

Dean Shah Alam writes: "Bangladesh is a mono-lingual country. Yet, it has a language problem in legal education, and for that matter, in legal profession."¹⁴

Our language problem can be traced to long presence of English as the dominant language in legal arena, both in legal education and in profession, which has overshadowed Bengali and never actually allowed it to come to prominence, although it was only too natural to expect that the mother tongue, the state language of Bangladesh, Bengali, would gradually replace English. But it did not happen. Rather we have steeped in a linguistic dilemma which received a very interesting reflection in Professor Erstling's words:

¹⁴ M. Shah Alam, *op cit.* at 20.

It is ironic that Bangladesh, a country whose quest for independence includes a struggle for the maintenance and integrity of Bangla, still faces the question of what role the English language must play in legal education. I think it is fair to say that Bangladesh, like many other developing countries, suffers from what might be termed "language imperialism". Bangladesh not only inherited a transplanted English legal system that adopted English as the language of the law, but now finds that English is the predominant language of international commerce, diplomacy and law. The unfortunate but undeniable result is, that legal education in Bangladesh faces a dual burden. If law students are to be educated to play a meaningful role in this nation's future, they must develop competency in English. At the same time, steps need to be taken to fortify the role of Bangla in legal education to ensure that the national language has a healthy future in the law.¹⁵

Thus legal education in Bangladesh is beset with age old problems. No meaningful intervention, whether governmental or in public initiative, has yet taken place. The consequence has been utterly frustrating for legal education in general. The present status of legal education resembles much the same way as was described by an insider almost ten years ago:

Law graduates having traditional legal education through lecture method of teaching in big classrooms feel unprepared to interview and counsel clients, draft and file papers, prepare a case, conduct trials, examine witnesses and argue a case before the judge. They in fact do not acquire the skill to apply the knowledge of substantive laws learned in classes to the actual situations of clients. *They also feel that they have not gained the experience to understand the role of a lawyer in the society.*¹⁶

Here, I would like to expound a personal experience. In successive courses of Continuing Legal Education conducted by the Bangladesh Bar Council, I used to ask the participants on why they chose to be lawyers? With the exception of a negligible few, who consider the profession to be financially lucrative, the obvious answer was their determination to fight the inequalities inherent in our socio-economic system and they thought that the best way to fight them is through lawyering. Quite interestingly, their perception and understanding of the 'inequalities' is not a product of law school training but is a result of their personal observation and experience. The natural question that emanates from

¹⁵ Jay Erstling, *op. cit.*, at 18.

¹⁶ Shafigue Ahmed, "Post Final Practical and Creative Skills Training Course", CLEP Bulletin, Vol. 1, No. 2 (July, 1994) 8.

this scenario is: should not legal education be able to help develop the intellectual ability to understand the society and the human situation in a changing social order?

* IV Winds of Change: Clinical Legal Education in Bangladesh

By the early 1990s the situation of legal education became such that the students no longer wanted to be taught the traditional way and the teachers could no more teach the former way. To these objective, conditions was added the subjective conditions of physical presence, albeit temporary, of such actors as the Ford Foundation (David Chiel), the Asia Foundation (Kim McQuay), Prof. David McQuaid Mason of the University of Natal, South Africa, and Prof. N.R. Madhava Menon of the National Law School of India University, Bangalore, India. Interaction of the objective and the subjective factors led to what today may be termed as 'revolutionary changes in the legal education in Bangladesh' in the form of introduction of clinical legal education (CLE).

Introduction of CLE was considered a thoughtful and careful effort and response to the needs of legal education. However, CLE was perceived differently by different schools though in essence CLE "...is directed towards developing the perceptions, the attitudes, the skills and the responsibilities which the lawyer is expected to assume when he completes his education in the Law School..... It is certainly not limited to the mere training in certain skills of advocacy. It has wider goals in enabling the students to understand and assimilate responsibilities as a member of a public service in the administration of the law, in the reform of the law, in the equitable distribution of the legal services in society, in the protection of individual rights and public interests and in upholding the basic elements of 'professionalism'. Clinical experience in law school, therefore, is a unique opportunity for the student to learn under supervision, many aspects of the 'hidden curriculum' essential for preparation to think and act like a lawyer".¹⁷

Thus the broad objectives of CLE in a country like Bangladesh are: a) to acquaint the students with the lawyering process and to develop skills of advocacy; b) to expose students to the social reality and instill sense of societal responsibility in professional work; c) to make one aware of the limits of legal system and appreciate alternative lawyering skills including exposition to alternative dispute resolution; d) to sensitize students to the necessity of ensuring access for all to justice; and e) to develop a sense of professional ethics.

¹⁷ N.R. Madhava Menon, Clinical Legal Education: Concepts, Concerns and Methods. Paper presented at the BLTA Symposium on 9-11 November, Dhaka (1993) 1.

V Societal Realities and New Dimensions in Legal Education:

Human rights as Core Values

Street Law

Very soon it was realized that in a society with mass illiteracy, objectives of CLE were almost unattainable. If basic human rights and specific rights of any particular community are to be protected, it is necessary that the people are conscious and aware of the rights they are entitled to as human beings or as members of any particular group or profession. Ignorance of individual rights is more likely to render the rights vulnerable to violation by public authorities or by private circles. Need for public legal education was thus quite acutely felt. While legal aid is issue based, whether it concerns individuals or groups, seeking remedies when injustice or conflict has already taken place, public legal education is general in nature, seeking to minimize the chances of violation of rights, arming the citizens to be on their guard to defend their rights. In this context, Law clinic¹⁸ introduced Street Law as a vehicle for imparting public legal education.

Street Law has its own background and history in Bangladesh. But its sophistication and development is intricately related to Prof. David McQuaid Mason and his experiments with Street Law in South Africa. Much has been drawn from the experience of street law in countries of Eastern Europe and the Commonwealth of Independent States, especially the contributions of Prof. Arkady Gutnikov of St. Petersburg and Prof. Monika Platek of Warsaw have been crucial. However, street law has been adapted to the conditions of Bangladesh and within a short time its vernacular counterpart-Protidiner Ain¹⁹ (Everyday law) became popular with the school children in Dhaka and Chittagong.

From rebellious to empowerment lawyering

No sooner did our street lawyers went to the slums and hard core poor, that they realized that mere dissemination of knowledge and information is not enough for empowerment of the poor. Encounters with the harsh realities of life made it clear to our students that regnant legal education leads to traditional lawyering which leads to no structural change in the power-frame of the society. Students understood that regnant approach to learning and traditional lawyering are unacceptable and rebellious lawyering²⁰ is therefore indispensable.

18 Law clinic is the acronym given to the clinical legal education programme of the Faculty of Law, Dhaka University. The programme was designed by Mizanur Rahman jointly with Cathy Lincoln under a Ford Foundation grant.

19 A text book entitled *Protidiner Ain* has been written by a group of law students and edited by Mizanur Rahman. It has been widely acclaimed in the secondary schools of Dhaka and Chittagong.

20 Mizanur Rahman in *Sipra* n. 2.

Law clinic believes that rebellious lawyering must involve: legal and non-legal approaches to problems; know how to work with others at fighting social and political subordination; understands how to be part of coalitions, how to build them, for greater than litigation, interests; nurture sensitivities and skills compatible with a collective fight for social change; and do the work i.e. lawyering, from within, close to the ground.

Rebellious lawyering is ultimately lawyering for empowerment. In its turn, empowerment lawyering envisages that litigation is only one of many means to an end; involvement of the poor/community in everything the lawyer does; willing to confront lawyer's own comfort with an unjust legal system; necessity of community legal education for purposes of: informing individuals and groups of their rights, writing manuals and other materials, training lay advocates, and educating groups for confrontation.

Empowerment lawyering is essentially a deliberate and well thought political act of the lawyers. No sooner than the idea of empowerment lawyering was mooted in the Lawclinic, the traditionalist (which is also the conservative school) forces erected stumbling blocks: anti-generic learning and rebellious lawyering was ostracized as unbecoming of a law school. What could not be done within the formal structure of the law faculty had to be done outside the faculty, at its periphery. A small group of public spirited law teachers together with a few students established their own platform to pursue pro-people legal education and training. Very soon it came to be known as ELCOP- Empowerment through Law of the Common People, now registered as a society. In subsequent development, ELCOP in its attempt to train students in the spirit of rebellious lawyering, introduced two important, distinct but intricately related, programmes, namely the Human Rights Summer School and the Community Law Reform.

Human Rights Summer School (HRSS)

Human Rights Summer School (HRSS) has been contemplated as the breeding ground of anti-generic rebellious lawyers, sensitized to the needs of the time and society. It is a two-week long residential programme directed to intensive training in human rights jurisprudence and advocacy. In a short span of three years, the HRSS has been able to reshape existing concept of legal education, question the efficacy and validity of traditional learning and regnant lawyering, remold the graduates in the spirit of social engineering and imbibe in them a commitment to engage in empowerment lawyering. Within a short period since its inception in 2000, the HRSS has become a truly international centre of human rights learning and teaching, and the law students crave to have placement there.

21 Stephen Wexler, *Practicing Law for the Poor*, 79 *Yale Law Journal* 1049 (1970).

Community Law Reform (CLR)

The HRSS is followed by the Community Law Reform project (CLR). The CLR is also an offshoot of the vision of anti-generic learning and rebellious lawyering. As we started the street law programme and the human rights summer school, as we interacted more and more with the poor and the downtrodden, we understood that "poverty will not be stopped by people who are not poor. If poverty is to be stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve the poor must put his skills to the task of helping poor people organize themselves."²¹ Therefore, we concluded, what is necessary is a kind of progressive lawyering that will enable a community or a group to gain control of the forces which affect their lives. In other words, social justice to become a reality must be preconditioned by empowerment of the poor and disadvantaged people. Quite regrettably, even progressive forms of lawyering within the regnant set up fall within the pitfalls of traditionalism and empowerment of the community does not take place. So CLR was initiated with a view that students, the would-be rebellious lawyers could go to the community, live with the community members, share their grief and agony, organize the community, identify its potential leaders and subsequently train them. In ELCOP parlance we call it Developmental lawyering or Community Lawyering.

Developmental lawyering focuses on the role of a lawyer in community development and empowerment.²² The foundation of the developmental lawyering model consists of being prepared to take on roles that more closely fit the multifaceted needs of the community. These roles can only be defined by the particular contexts in which the developmental lawyer functions. The paradigm of the 'rebellious lawyer' must expand to accommodate that reality. Certainly, the developmental lawyer must bring to the table his or her 'legal' skills. These skills may be why the client approached the lawyer in the first place. But we know only too well that the chronic problems in poor societies like in Bangladesh are not strictly, or even primarily, legal. The need is to create community leaders and institutions capable of marshalling and utilizing power. Thus, the developmental lawyer must be prepared to participate, albeit in varying degrees, in community organization, project planning, development and implementation. He or she must be aware of and participate in the social, political, and economic aspects of community action.

What follows from the foregoing analysis is, that a developmental lawyer cannot dispense with his or her full gamut of responsibilities unless he or she is

22 Mizanur Rahman, *Developmental Lawyering- A Wake-up Call*, in Mizanur Rahman (ed), *Human Rights and Development*, Dhaka 177-188 (2002) 1.

a good community organizer. Loosely organized groups or community often need organizational support to enable them to undertake programmatic missions. Developmental lawyers need to provide this kind of support to new, nascent or loosely organized, poor and vulnerable groups.

A developmental lawyer's ultimate objective is to identify and train community organizers and leaders from within the community. But until that happens, the developmental lawyer has to discharge that responsibility. Participating in an organizing capacity offers flexibility not generally found in a lawyer-client relationship in other forms of lawyering. In this case, the developmental lawyer must function as an organizer until outside assistance can be obtained or until internal capacity comes to the fore. An organized group is a precondition to a successful struggle against subordination. Some authors define it as community lawyering.²³ The year 2000, has essentially been a turning point in legal education and prospective rebellious lawyering in Bangladesh when a group of law students from the Dhaka and the Chittagong university under the supervision of some of faculty members had literally gone to the communities.²⁴ Two weeks of community advocacy contributed to a fundamental change in their lives- they now refused to be educated in the old, traditional way.

VI Conclusion

It is still premature to construe whether the new dimensions in legal education in Bangladesh has been able to produce this new breed of lawyers able to impact administration of justice in the sense of empowerment of the poor. The challenge is huge and daunting. This is unlikely to happen until we have a new breed of lawyers trained in anti-generic legal education. ELCOP understands that law students will appreciate and understand the magnitude of the problems of the poor only when they go to them, live with them, listen to their vows and share their sorrows and sufferings and in that context organize them. The experience, which they will get, will stir their minds and they will be more responsive to the social needs of the underprivileged when they enter their profession. Developmental lawyers can assist their clients to voice their concerns effectively and achieve greater access to justice through avenues other than litigation. Our developmental lawyers, therefore, must be both 'rebellious' and 'progressive' at the same time.

23 Jane E. Schukoske, *Empowerment of Community Members Through Grass-Roots Organization: What Roles for Lawyers?* in Mizanur Rahman (ed), *Human Rights and Empowerment*, Dhaka 102-109 (2001).

24 Findings of the first community law reform research have been published in: Mizanur Rahman & Taimin Hussain Shawon (Eds), *Tying the Knot, Confidence Building and Community Law Reform in the Chittagong Hill Tracts*, Dhaka (2001).

Meanwhile, what started as a mere protest to regnant legal education has, over the years, gained specific socio-political dimension. CLE movement with emphasis on human rights has provided students with sufficient space to freely exercise their minds, has directed teachers to switch from 'monologue' to 'dialogue/discussion', has 'empowered' the students to challenge the *status-quo* and has implanted the belief that the fundamental task of lawyers is not only to interpret the law but also change the law. Legal education in Bangladesh has thus and only recently begun to engage the students in social engineering.

ENVIRONMENTAL POVERTY, DEVELOPMENT AND THE STATE IN PERSPECTIVE OF LESS DEVELOPED COUNTRIES

Vijay Kumar*

I Introduction

THE NEED for adoption of developmental model based on the concern for environment came to be reflected in the Stockholm Declaration adopted by the United Nations three decades back. It became more pronounced with the publication of World Conservation Strategy in 1980 by the World Conservation Union, the Brundtland Report (Our Common Future, 1987) and the Rio Conference (1992) supplying the developmental basis of free trade at international level. However, in view of the different developmental stages of the developed and less-developed countries, the environmental and developmental norms have different repercussions in these countries. With no perceptible change in the developmental and environmental conditions and with that in the living conditions of the people in our country and in other less-developed countries, these issues remain quite open requiring constant scrutiny.

The problem

Human development through various stages has been marked by exploitation of nature, the extent of such exploitation differing from one stage to the other, dependent on human capability. The excessive use of natural resources for the sake of development on the one hand, and unevenness of such development on the other, have affected the nature-man relationship adversely, particularly with the development of industries. Although the industrial development saw the man come out of the feudal shackles, it brought in its wake its own shackles in the form of capitalism¹ and consequently haphazard urbanization and slums as also the pollutants like toxic gases, smoke and wastes causing impoverishment of the environment. The concomitance of such an environmental poverty with both development and non-development is indicative of the fact that environmental problems arise not only due to man's interaction with nature but also with man. Since human living is confined to several political entities having different economic and social bases, the perceptions about life and environment came to be circumscribed by these factors. With the state regulating human

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¹ See Bertrand Russell (in collaboration with Dora Russell), *The prospects of Industrial Civilization*, 37-38 and 62 (1923); G.D.H. Cole, *A Short History of the British Working Class Movement*, 1789-1947 20-23 (1947) and *Introduction to Economic History*, 1750-1950, Macmillan & Co., London, 41-43 (1952).

conduct and taking on developmental activities, it became the pivot of human life. However, various states being at different levels of development having variations in respect of resource-people relationship, methods of production and distribution, their outlook towards the human beings and nature came to differ.

The economic, social and political contradictions among various countries and limiting of the developmental outlook of the states generally to their own territorial boundaries inspite of the development of the international legal order and organizations gave rise to narrow and biased perspective and paved the way for environmental exploitation of the less-developed countries by the more developed ones. The devastating effects of modern weaponry² and the increasing activities of multinational corporations³ in less-developed countries have the effect of creating harmful environmental conditions. In fact, the profit motive and capital accumulating approach as also the top-sided competitive conditions have the built-in mechanism detrimental to human life and environment. The transmission of the developmental environmental poverty of rich nations to the non-developmental environmental poverty⁴ of the poor ones enlarges the sphere of the latter. The economic poverty of the less-developed countries facilitates such a shifting such as diversion of toxic wastes⁵ mostly labelled as recyclables. The industrialized countries legally pour scrap iron, lead (including acid batteries) other materials and discarded plastics all over the world⁶. The poorest people of the main importing countries in eastern Asia working on these materials-smelting the metals separating Pb from batteries and sorting plastics likely to be contaminated with hazardous chemicals or germs without adequate safeguards

2 For the ill-effects of the chemicals used in Vietnam war or rice and other crop plantations as well as vast areas of forest land, (See Evgeni Fyodorov, *The Arms Race and Ecology in Social Problems of Man's Environment: where we live and work* (under the general editorship of P. Fedoseyev and T. Timofeyev 271 (1981). Also see David Day, *The Eco Wars, True Tales of Environmental Madness* (First Ed. London, Harrap, 238 1989). In respect of the computerized Gulf war causing civilian casualties and environmental destruction on a large scale in Iraq and Kuwait, see Chris Hables Gray H.B.Fenn & Co., (1996) *Post modern war: The New Politics of Conflict*, London: Routledge 36-50 (1997).

3 While the commercial behaviour of these corporations results in changing consumption and production pattern in less-developed countries to their detriment, the negligent behaviour causes colossal loss to human life and environment as happened due to the leakage of lethal Methyl Isocyanide (MIC) gas from a subsidiary company of Union Carbide Corporation at Bhopal on the night of December 2-3, 1984.

4 The term 'Developmental Environmental Poverty' indicates impoverishment of the environment caused by the harmful effects of development and the term 'non-developmental environmental poverty' denotes such impoverishment caused by harmful effects of non-development.

5 Between 1986 and 1991, 175 million tonnes of hazardous wastes were offered on formal world markets. See Guardian 1992, quoted in Jennifer A. Elliott, *An Introduction to Sustainable Development* 63 (1999). It was reported by the American Environmental Protection Agency that 80 million tons of hazardous waste was being produced by America alone each year. See David Day, *Eco Wars*, supra n. 2 at 199.

6 See John J.W. Rogers and P. Geoffrey Feiss, *People and the Earth: Basic Issues in the Sustainability of Resources and Environment*, Cambridge University Press, 265 (1998).

- become the most sufferers of such imports⁷. Trading in such wastes connotes trading in environmental poverty. A policy bias is, indeed reflected in getting rid of their developmental environmental poverty by the developed countries by making less industrialized countries dumping grounds for their toxic wastes⁸ at the cost of millions of poor. The Basel Convention of 1993 attempting to regulate the dumping of many types of toxic wastes came to be dilted because of having no penalties for violation and also that European Union reclassified much of the hazardous waste as non-hazardous, just before the convention was signed⁹. Such a policy bias, obviously, lacks comprehensiveness of the environmental problem and simply leads to a conflicting environmental situation at the global level since the pollutants have the effect of disturbing the ecological balance of the biosphere wherever they are placed. The notion that it affects the ecology of a society of different race, colour, religion, culture, language and thinking smacks of a narrow racist view of the environmental problem¹⁰. Taking a complete view of the environment and its problems at the global level, indeed, requires a whole view about the people and the nature divided into various political entities.

The more pervasive problem pertaining to the environment and development affecting the less-developed countries adversely is the thrusting of the free trade agenda on these countries by the developed countries through the international forums like the GATT, WHO, WTO, Rio Summit (Agenda 21) and the Johannesburg Summit. The free trade based developmental policy, being in contradiction to the welfare policies of the less-developed countries, has the effect of widening the economic contradictions between the haves and the have-nots in the long run.

II Development Perspective

At the international level, the development perspective has differed both historically and geographically - from the old *laissez faire* to the modern trade liberalism via the interventionist welfare state, on the one hand, and radical changes in economic relations (individualistic to socialistic) and with that in the relations of the people with the state, on the other, providing different models of development. However, with the disintegration of the Soviet Union and

7 *Ibid*.

8 Asia's vulnerability led it to receive 5.4 million tons of toxic wastes between 1990 and 1993 from Australia, Canada, Germany and United States as per Green Peace estimates. See Danan J. Singh, 'Clamp Down on Toxic Waste Trade', *The Hindustan Times*, New Delhi, Nov. 30 16, (1995). The crowded Europe sent waste to Africa where people living near the waste dumps got sick and died. See supra n. 6.

9 See supra n. 6.

10 Such an environmental racism is visible within the United States also where much of the waste is put in areas occupied either by the African Americans or native Americans (Indians). See supra n. 6.

dominance of liberal capitalist economy at International level, the free-trade based development perspective became pronounced and came to be reflected in International documents as a panacea even for the less-developed countries, where unlike the western countries, the natural course of development has not been characterized by free-trading and capitalism. This trend influences the policy choice of the less-developed countries for development negatively.

Development being basically a systemic positive phenomenon signifying not only the material welfare of the people but also humane values based on cooperation and non-exploitation requires a positive societal change. However, the qualifying word 'sustainable' prefixed to it is indicative of the fact that the negative interaction between the developmental activities and the natural resources has affected the environment adversely. This puts a question mark before the basic relationship between the resources, people and the state. Since development denotes a positive change in living conditions of the people, sustainable development would require systematic and scientific development and not a haphazard one. Mere economic growth at macro level would not thus meet the requirement of sustainable development¹¹ for making the concepts of liberty and equality meaningful. Shifting of emphasis from economic and social development and basic needs to human development¹² hardly negates the basic needs factor. If human development aims at enhancing the capabilities of the people ensuring their participation in the developmental process¹³, it cannot be achieved with hunger and deprivation of the people. Thus, enhancement of capabilities¹⁴ or the well being freedom¹⁵ too implies the fulfillment of basic requirements.

The aftermath of the Second World War saw the recognition of Human rights by the international documents and incorporation of basic human needs of food, clothing, housing, medical care, education and necessary social services into them¹⁶. As a remedial measure, the International Covenant on Economic, Social and Cultural Rights, 1966, (entry into force 23 march 1976) enjoined the states parties to improve methods of production, conservation and distribution

11 See Francis Stewart, *North-South and South-South* 36-37 (1992).

12 Such a shifting came with the publication of the report of the United Nations Committee for Development Planning in 1988, the United Nations International Development Strategy for the 1990s (1989) and the first annual Human Development Report by the UNDP (1990). See Griffin Keith, *Studies in Globalization and Economic Transitions* Macmillan, 231-33 (1996).

13 *Id.*, at 233-34.

14 *Id.*, at 233.

15 See Amartya Sen, *Inequality Reexamined*, Oxford, Oxford University Press 40 (1992).

16 See the Universal Declaration of Human Rights, 1948; The International Covenant on Economic, Social and Cultural Rights, 1966 and the Declaration on the Right to Development, 1986.

of food, inter alia, by developing or reforming agrarian systems. However, the experience of the less-developed countries depicts that the legal measures could bring about only peripheral changes in the agrarian systems and thus basic needs of the vast population remained unfulfilled in these countries. For instance, the Indian effort for reforming the agrarian system through the zamindari abolition and ceiling laws could not bring about the desired changes in accordance with the Constitutional norms of distributive justice contained in clauses (b) and (c) of Art. 39¹⁷. The Ninth plan unequivocally states that the basic character of the agrarian economy has not undergone any structural change despite attempts at land reforms over the successive plan periods¹⁸. Thus, despite the land reforms, land holdings remain concentrated with a small section of the rural society¹⁹. Indeed, reforming the agrarian system through the legal measures involves the built-in hurdles generated by the economic and social set-up, which limit the making as well as implementation of laws. This also holds good in respect of other less-developed countries having feudal base and less capitalistic development. However, in contrast to this, China's success in improving the living conditions²⁰ reflects the importance of resource-people relationship in providing basic needs with added force.

The Stockholm Declaration in linking environment with economic and social development acknowledges the fact that poverty forms the base for environmental problems in less-developed countries. In order to avoid environmental degradation and to confer social, economic and environmental benefits on all, the Declaration enjoins the states to apply planning for developing

17 The Zamindari abolition laws were particularly marred by exemptions in the form of self-cultivated holdings and payment of huge amount of compensation. The Ceiling law too, were generous in providing for exceptions and fixing the ceiling limit, besides their circumvention by the big landholders. See Vijay Kumar, *The Continuation of Zamindari by the Zamindari Abolition Laws*, KLU (1987-89) 13-15 Kurukshetra University, Kurukshetra; Fallacy of Distributive Justice in Land Relations in Rural India 34 J.L.L. (1992).

18 See Government of India, 9th Five Year Plan (1997-2002) 24.

19 Distributive ordering in land relations came to have its obvious limitations due to availability of less quantity of surplus land as a result of implementation of ceiling laws, (being less than 2 percent of the total cultivated area) and a large number of beneficiaries. It came to be revealed that out of the total 74.9 lakh acres declared surplus, 52.13 lakh acres could be distributed among 5.5 million beneficiaries by the end of the Eighth Plan. The position remained virtually the same at the end of the Ninth Plan and there could be no progress in the detection of concealed land and the distribution to the landless rural poor. See Government of India, 9th Five year plan (1997-2002) Vol.-II 25 and 37, and 10th Five Year Plan (2002-2007) vol.-II, 301.

20 See Jean Dreze and Amartya Sen, India: Economic Development and Social Opportunity, Oxford University Press, Delhi 33-34 (1995) and Hunger and public Action Oxford University Press 204-205 (1989).

human settlements and urbanisation²¹. However, such a planning and consequential benefits being dependent on overall developmental planning in a country are, obviously, limited by economic and social relations and the character of the state. The fundamental rights to freedom, equality and adequate conditions of life²², therefore, also become circumscribed in the like manner. The Declaration on the Right to Development²³ by making right to development an inalienable human right and the human person the central subject of development recognizes the individuality of human beings irrespective of natural barriers. By putting the individual and collective responsibility of human beings for development in promoting and protecting an appropriate political, social and economic order for development and recognizing the right of self-determination²⁴, it professes the individual and collective freedom for a systemic choice, thus putting serious limitations on state actions. This connotes that the individuals have a right not to be forced by their respective states to accept developmental plans unlikely to improve their living conditions which, in turn, means that they can, in no way, be coerced to submit to the exploitative conditions. This may have contradictory affect since the state establishment in less-developed countries largely controlled by conservative elites interested in maintaining existing societal relations, can hardly relish systemic change.

Brundland's definition of 'sustainable development' in terms of present and future needs²⁵ is subject to several constraints. It is, indeed, difficult to measure needs of the present and future in absolute terms and strike a balance between the two. Again, needs of the people would differ according to the production and consumption patterns and the way of life. Then, there is the crucial question - who will determine the needs? Obviously, these needs are determined by people controlling the state who can hardly remain unbiased in determining such needs because of their status quonist approach. This may give rise to a wide gap between the determined needs and the actual needs of the common people particularly in the less-developed countries where the elitist approach of planning has a tendency to neglect the peripheral areas and the

21 See United nations on the Human Environment: Final Documents (adopted on June 16, 1972) Principles 8, 15. Declaration of the United Nations Conference on the Human Environment, Stockholm, (adopted on June 16, 1972).

22 *Id.*, Principle 1.

23 Adopted by General Assembly Resolution 41/128 of December 4, 1986.

24 *Id.*, Preamble and Art. 2.2.

25 Brundland defines sustainable development as, "development that meets the needs of the present without compromising the ability of future generations to meet their needs". Quoted in IUCN/UNEP/WWF (1991), *Caring for the Earth, A Strategy for Sustainable Living*, (Gland, Switzerland: (1991); 10 and David Reed, *Sustainable Development, An Introductory Guide*, Earthscan Publication Limited, xv, (1995).

people²⁶. With the making and implementation of welfare laws in such countries being grounded in political manoeuvring, this neglect becomes characterized by systemic conditions like resourcelessness, poverty, illiteracy, feudal outlook and corruption. The elitist planning lacks motivation and approach for the development of the rural areas and the urban peripheral areas particularly the slums. Such a bias is not, therefore, only urban as against rural areas as viewed by Michael Lipton²⁷ but also a systemic one. Consequently, while the developmental planning in cities in respect of houses, roads, sewer age, drainage, water, electricity and transportation facilities is totally on elitist lines, there is utter lack of planning in respect of these matters in villages. The operational rural base of such countries being feudal in character, the institutions responsible for the development of villages are generally utilized by feudal elements for their own benefit in collusion with the state officials. The Indian experience depicts that the functioning of the *Panchayats* institutions has been marred by vested interest seeking their own benefit instead of people's welfare²⁸.

Thus, the elitist developmental planning carries contradictions and results in deprivation of resource base of the vast populace as is further reflected by the construction of big dams and utilization of forests by the state for commercial purposes²⁹ at the cost of survival of millions of affected village people, the fulfillment of whose needs is linked with the agricultural land and the forests. This makes people's interest and the state's interest contradictory. Legal prohibition in respect of the usufruct rights of the local population in the forests for fuel, fodder, and minor forest produce makes it more explicit³⁰. Such a developmental approach can hardly be in tune with sustainable development or human development. In the absence of systemic change in resource-people relationship, incorporation of basic needs into national human rights documents

26 While tracing the causes of the spread of the planning ideology in South Asia, Gunnar Myrdal observed three decades back, "... those who think, speak and act for the new nations - politicians, planners, administrators, professionals, industrialists and businessmen-are only a minute upper stratum in the total population forming a rather secluded circle and living fairly comfortably, they must be inclined to protect themselves by a system of illusions in whose preservation they have a vested interest. See Myrdal, Gunnar, *Asian Drama: An Inquiry into the Poverty of Nations*, Vol.II, Harmondsworth: Penguin, 721 (1968).

27 John Harris (ed.) *Why Poor People Stay Poor*, in *Rural Development, Theories of Peasant Economy and Rural Change*, (published 1982, reprinted 1992) 66-69.

28 See Report of the Committee on Panchayat Raj Institutions (Aug. 1978), New Delhi, 7. Even giving of constitutional status to panchayats by the Constitution 73rd Amendment 1992, could not revitalize them due to pervading feudal outlook besides the lack of proper and effective control mechanism and audit system regarding accountability of the Village Headmen for utilization of funds. See Vijay Kumar, "The Constitutional Status of Panchayats - Old Wine in a New Bottle" AIR 1996 (Vol.83) Journal Sec. 171.

29 The Indian Forest Act, 1927, Sec. 5 empowers the state governments to make grants and contracts.

30 *Id.*, Sec. 5 and 26.

either directly or through judicial interpretation³¹ does not have any significant bearing on development since such rights are merely declaratory leaving the people at the mercy of adversarial litigation against the mighty state. Moreover, they do not lay down any binding duty on the state to provide basic needs in material terms.

III Liberalizing the Environment and Development

The free-trade based developmental and environmental norms thrust on the less-developed countries by the developed ones which are dominating the United Nations organization and other international forums, without keeping in view the varied economic and social conditions of the less-developed countries, has given rise to inconsistencies in international policies. This is vividly depicted by the norms of the United Nations Conference on Environment and Development held at Rio. The Conference sought to achieve environment and development goals, *inter alia*, by trade liberalization and making trade and environment mutually supportive³². Accordingly, trade liberalization has been made the basis for sustainable development not only in industry but also in agriculture and other sectors³³, irrespective of its likely diverse effects on the economies of less-developed countries. Agenda 21 links sustainable agricultural development with free-trade with a view to facilitating the integration of agricultural and environmental policies³⁴ without having regard to varying agrarian relations in different countries. This in fact is an echo of GATT negotiations in the form of Dunkel proposals at the time. The objectives set forth in the Agenda clearly require the governments to take into account the results of the Uruguay round of multilateral trade negotiations while promoting an open multilateral trading system. It may be mentioned that providing the global remedy of free trade as the basis of sustainable development overlooks the fact that sustainable development is basically a national phenomenon. Needless to say, sustainable development through free trade has to be basically limited by the resource-development relationship and the character and policies of the individual states.

31 For instance, the Indian Supreme Court has interpreted Art. 21 of the Constitution guaranteeing right to life or personal liberty to include, *inter alia*, livelihood (*Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180; *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, AIR 1997 SC 152; shelter (*Prabhakaran Nair v. State of Tamil Nadu*, AIR 1987 SC 2117 and *Chameli Singh v. State of Uttar Pradesh*, AIR 1996 SC 1051); for pollution free water and air (*Subhash Kumar v. State of Bihar*, AIR, 1991, SC 420); education (*Mohini Jain v. State of Karnataka*, AIR 1992, SC 420 and *Unni Krishnan v. Union of India*, AIR 1995 SC 922) health and medical care during service and post retirement (*Consumer Education and Research Centre v. 401 AIR 1995 SC 422*).

32 See Agenda 21, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 03-14, 1992) 2.

33 *Id.*, at 3.

34 *Id.*, at 162.

Free-trading has come in western countries in the natural course of development on capitalistic lines while it is not so in case of less-developed countries where economic systems are characterized by subsistence agriculture. The agricultural sector of the western countries came to be industrialized with industrial development and the machinery replaced the man and animal power in various agricultural operations. In this process, agriculture came to be dominated by big farmers and they, in turn, are controlled by the multinational corporations due to their dependence on these corporations for trading as well as for various farming needs³⁵. This led to trading in agricultural products becoming oligopolistic³⁶ and more beneficial for the industrially developed countries³⁷ with a wide network of transnational corporations³⁸ controlling the vast market throughout the world³⁹. The agricultural set-up of the less-developed countries is not so industrialized. The farming in such countries still depends largely on man and animal muscle. With small and scattered farms and traditional farming, the agriculture is of subsistence nature. Lack of capital and credit facilities makes it a slow moving occupation. Thus, there is little scope for free-trade mechanism to attain sustainable agricultural development in the given set-up of such countries. Particularly, in less-developed countries like India and others of South Asia having feudal base and its structural constraints⁴⁰, concentration of land with few people, vast number of agricultural labourers including the bonded ones, petty farmers having small strips of land, a large number of scattered small size holdings⁴¹, old methods of agriculture and less

35 See Annie Taylor, World Trade and its Environmental Impacts in Philip Sarre and John Blunden (ed.), *Environment, Population and Development*, Hodder and Stoughton 217-18 (1996).

36 It has been found that 77% of the world trade in cereals is controlled by the biggest five transnational companies, the Canadian giant Cargill alone controlling 60% of the world trade in cereals. See a Report by Christian Aid, Madden, (1992) and the Ecologist 79-80 (1993), quoted in Annie Taylor, *supra* n. 35 at 218.

37 Looking the World Exports by major areas, while the share of Industrial area (all western Europe, United States, Canada and Japan) in 1990 and 1995 was 71.1 and 69.7 percent respectively, that of developing countries (including Korea, Hong Kong, Taiwan and Singapore) was only 21.9 and 22.2 percent respectively in the said years. See GATT and WTO, International Trade, Various issues quoted in A.G. Kenwood and A.L. Lougheed, *The Growth of the International Economy 1820-2000: An Introductory Text*, 4th edn., Routledge, 4th Ed. 300, (1999).

38 Of the World's largest transnational corporations, 176 belong to 6 developed countries (Japan 62, USA 53, Germany 23, France 19, UK 11 and Switzerland 8) having 85.5% of global profits. See Le Diplomateque, April (1997) at 6, quoted in David P. Forsythe, *Human Rights in International Relations* 193 (table 82) (2000).

39 It may be noticed that 500 such corporations control 70% of the total world trade, 80% of foreign investment and 30% World Gross Domestic product. See The Ecologist, *supra* n. 36.

40 See Ghose, Aje Kumar (ed.), *Agrarian Reform in Contemporary Developing Countries* 9-11, (1983) Ronald J. Herring, Land to the Tiller: The Political Economy of Agrarian Reform in South Asia, Yale University Press 17-49 (1983); and Pradhan H. Prasad, Poverty and Agricultural Development, Economic and Political Weekly, Dec. 14 (1985) at 21.

41 According to 10th Five Year Plan, small and marginal holdings constitute 78.2% of all holdings and operate about 32.4% of total area. See *Supra* n. 19 at 528.

yield, introduction of open market system would lead to further widening of the already existing contradictions. This would give rise to more migration from rural areas to urban areas in view of payment of higher wages thus leading to further environmental problems in cities. Since it is the small section of big farmers only who have self-sufficiency for investing on inputs and modern methods of production, they would be the only beneficiaries under such a system. The vast number of middle and small farmers, tenants, share-croppers and agricultural labourers who are actually involved in production making process, would remain silent spectators due to paucity of funds and non-availability of proper credit facilities⁴² as also due to the build-in hurdles of subsistence agriculture. In such a situation, how can the development and environment be mutually supportive if there is no opportunity for development for a large section of society? Poverty itself is an anti-environment factor, for instance, in case of poor rural migrants living in urban slums. Thus, linking of an open, multilateral trading system with environmental policies appears to be contradictory since in the absence of proper development, adoption of merely multilateral trading system and sound environmental policies may not have positive impact on environment. Agenda-21 is, indeed, more concerned about trade than environment is clear from the fact that it lays emphasis on ensuring that environment related regulations or standards including those related to health and safety standards do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade⁴³. In view of this, even an environmentally sound regulation may be declared to be arbitrary or unjustified if trade interests are not to be compromised. It is evident that the free-trading system has led to the disturbing of consumption and production patterns of less-developed countries due to introduction of consumer goods of different choice by the multinational corporations of developed countries, for example, junk food and drinks. Consumption of food and drinks by the people not consonance with their climatic conditions and food habits invites diseases and creates unsound environmental conditions. Production of such consumables in less-developed countries creates unnatural demand for such goods with the same result. The fact that such a demand for consumer goods is created by luring the children into accompanying play things advertised extensively, depicts the unfair nature of such a trading bordering on criminality.

42 The plan document shows that the much publicized cooperative credit came to be controlled by the rural rich and the lower sections of the rural society - small and marginal farmers, tenants, share croppers, landless agricultural labourers and rural artisans could not be benefited by it. See Government of India, 6th Year Plan (1980-1985) 177.

43 *Supra* n. 32 at 8.

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Agenda 21 recognizes the stressing effect of the growth of world population and production together with unsustainable consumption patterns on the use of land, water, air, energy and other resources⁴⁴ but it appears to have side-tracked the question of entitlement and the relationship between resources and the people. The effects of the growth of the population, production and consumption patterns depend on the relations which the control-mechanism over land, water and other resources creates in different countries. With concentration of ownership of resources with a small section of the people and subsistence agriculture characterized by scattered holdings of marginal and small farmers, the growth of population has the effect of creating poverty, slums, illiteracy, unemployment and, in turn, the environmental degradation. The uneven agrarian relations in such countries generate built-in hurdles which hinder the developmental process. In view of the given agrarian relations, reviewing and developing of policies in respect of use of land and the sustainable management of land resources⁴⁵ have to remain confined to the limits of such agrarian relations. With feudal base and hold of propertied interests over law-making in less-developed countries, the direction to the governments for implementing policies to influence land tenure and poverty rights positively⁴⁶ do not carry much weight in view of the vast population in less-developed countries being dependent on agriculture including a large number of agricultural labourers.

The Agenda, in fact, recognizes the limited role of states in the given set-up and, in a way, their failure in providing for encouragement to the establishment of non-governmental organizations for reducing urban poverty and improving the quality of life for low income families⁴⁷. But the non-governmental organizations and individuals lack enough resources and capacity besides motivation⁴⁸ to cope with the huge problems of systemic poverty and environmental degradation.

Needless to say, the action plan of the Rio Summit remained unimplemented thus requiring another Summit with a view to reducing poverty world wide and lowering damage to environment. Like the earlier Rio Summit, the Johannesburg Summit⁴⁹ also appeared to be a forum for the rich countries to push their agenda

44 *Id.*, at 27.

48 *Id.*, at 106.

46 *Id.*, at 161.

47 *Id.*, at 59 and 61.

48 The motivations of NGOs are controlled by the funding agencies. An NGO is considered as a collection of people who work for the poor live with the rich and pretend to change the world to make a better place for themselves. See Subel Seh, *The Hindustan Times*, New Delhi, Jan. 22, (2004) at 10.

49 United Nations World Summit on Sustainable Development held at Johannesburg from Aug. 26 to Sept. 04, 2002.

of free-trade in the name of environment, sustainable development and poverty eradication. The Summit reaffirmed its commitment to achieve sustainable development based on the Rio Principles in accordance with the global programme entitled Agenda 21⁵⁰. The Plan of Implementation of World Summit on Sustainable Development, 2002, while endorsing the Rio Principles and the full implementation of Agenda 21, laid emphasis on sustainable development goals in respect of developing countries as related to the internationally agreed poverty related targets and goals including those contained in Agenda 21, the relevant outcomes of other United Nations conferences and United Nations Millennium Declaration⁵¹. Although the Plan recognizes the role of national policies and development strategies⁵², the basic contradiction between the free trade and the fundamental developmental goals of the less-developed countries⁵³ have obviously been sidetracked. It is the vast difference between the interests of the less developed and developed countries that led to the failure of the Cancun WTO Ministerial Meet in Sept. 2003, due to the united opposition from the less developed countries to the agenda of the developed countries setting aside the developmental agenda of Doha conference of 2001⁵⁴. The global norms of free-trade have the effect of the dilution of the welfare activities of the state thus affecting the character of the welfare state negatively. Privatization, lessening of the protection of labourers and lesser spending for poverty reduction and basic facilities like health, education, shelter and social security are its obvious consequences. This limits the reach of the developmental activities, thus widening the hiatus between the rich and poor further. The poverty in less developed countries, being not only relative but also absolute⁵⁵, negates its solution on self-help basis. Indeed, poverty and deprivation continue to haunt the various parts of the world, with 1,100 million people living on less than

50 See Johannesburg Declaration on Sustainable Development (42 ISLL, 2002 (Indian Society of International Law, N. Delhi) 565-569.) Also see www.johannesburgsummit.org/html/documents/summit_docs/.

51 See Official Documents 42 IJL, 2002, *supra* n. 50 at 570-652.

52 *Ibid.*
53 The constitutional documents of the less-developed countries basically provide for economic and social justice for fulfilling the basic needs of the vast population and developing the backward people. For instance, see The Constitution of India, 1950, Part IV, Directive Principles of State Policy; Constitution of People's Republic of Bangladesh 1971- Part-II, Fundamental Principles of State Policy; Constitution of Islamic Republic of Pakistan, 1973, Part II, Chapter 2 Principle of Policy; Constitution of Kingdom of Nepal, 1990, Part 4- Directive Principles and Policies of the State; Constitution of Sri Lanka, 1997, Chapter VI- Directive Principles of State Policy; Constitution of Brazil, 1988, Fundamental Principles.

54 See K.A. Bardi Nah (Cancun, Sept. 15, 2003), *The Hindustan Times*, New Delhi, Sept. 16 2003, 17.

55 The Human Development Report reveals that about 790 million people remain hungry and food insecure and about 1.2 billion live on less than \$ 1 a day in income

\$1 (PPP US \$) a day and 831 million people remaining undernourished⁵⁶. Region wise, South Asia, Sub-Saharan Africa and East Asia and Pacific have larger share of such a poverty and deprivation, the people living on less than \$1 (PPP US \$) a day and remaining undernourished being 432 millions and 312 millions respectively in South Asia, 323 millions and 185 millions respectively in Sub-Saharan Africa and 261 millions and 212 millions respectively in East Asia and the Pacific⁵⁷. Besides, 1197 million people do not have access to improved water resources and 2,742 million people are deprived of adequate sanitation in the world⁵⁸. In South Asia, 225 million people are without access to improved water resources and 944 million people do not have access to adequate sanitation⁵⁹. In Sub-Saharan Africa and East Asia and the Pacific people without access to improved water resources are 273 million and 453 million respectively and adequate sanitation is not available to 299 million people and 1,004 million people respectively in these regions⁶⁰.

IV Conclusion

Diversion of poverty of their environment in the form of hazardous wastes by the developed countries to the environment of less-developed ones does not solve the problem on the global level but simply shifts its place and the likely victims. Instead, devising of their means by the concerned countries to cope with it may better the environmental cause. The environmental poverty being inextricably linked with economic and social poverty in less developed countries, the isolated interaction of legal norms with environmental factor is rendered ineffective. The ultimate solution of the harmonious nature-life relationship lying in correcting the economic and social distortions originating from the very set-up, the character and behaviour of the state becomes of prime importance in this respect in the given set-up. Such a systemic poverty of the less developed countries, having its roots in the long course of development militates against the uniform solution based on the application of liberal trade mechanism. The developmental process in less developed countries, being slow and haphazard and grounded in political manoeuvring is obviously limited to peripheral changes, leaving structural hurdles untouched. The working of the free trading system in such countries would, therefore, be circumscribed by such limitations. Indeed, the introduction of free trading system at the global level through the international law and the institutions has affected the character of the state negatively, thus reducing the ambit of state welfare in less developed countries.

56 See United Nations Development Programme, Human Development Report (2004) Table 2, Eliminating Poverty: Massive Deprivation remains (2000) 129. Available at <http://hdr.undp.org/reports/global/2004/>.

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

SEXUAL HARASSMENT IN EMPLOYMENT AND EDUCATION: CAUSES, CONSEQUENCES AND PREVENTION

Dr. Suman Gupta*

I Introduction

SEXUAL HARASSMENT is a social evil and a rights issue. Unfortunately, it continues to be a significant problem not only in workplace but also in educational institutions and in society at large. Sexual harassment though is widespread¹ but only recently it has been investigated cross-culturally. The increasing awareness and emphasis on gender justice is leading to growing resentment towards incidents of sexual harassment. There is an increase in the efforts to guard against such violations, but the problem requires international examination. It is because globalization is bringing different cultures in contact² as well as individuals of different nationalities and cultures are interacting through multinational corporations, Internet, international conferences, universities etc.³

II Causes of Sexual Harassment

Sexual harassment in the workplace has undoubtedly existed from the day women sold their labour in the marketplace. Until recently, it was unacknowledged and invisible only because it was so widespread as to be experienced as normative. The entry of increasing number of women both in the workplace and in education has greatly affected the interactions between men and women. Historically, men have occupied the majority of high-status positions in the workplace as well as in education, whereas most women have been employed in low-income and low-status occupations. Women's jobs had

been traditionally seen as "extensions of the female sex role"⁴, in which women are expected to be caring and accepting male authority and domination. The increasing employment of women, however, has created an impetus for change within the family, school, college, and community at large, in which traditional gender roles are involved. These dramatic changes have inherently brought conflict.

The Power Theory of sexual Harassment,⁵ explains that sexual harassment is both a tool and a result of male dominance in the society. The function of sexual harassment is to manage the ongoing male-female interactions and to maintain male dominance occupationally and therefore economically by intimidating, discouraging, or precipitating removal of women from work.⁶ Some men find women who enter into male-dominated domains a threat to male supremacy and thereby are motivated to harass such women. Thus, sexual harassment is related to the traditional inferior social status of women. It is less prevalent where women have the highest social status e.g., Scandinavian countries. Conversely, it is more common where women have the least social status e.g., India.

Sexual harassment across countries where there are differences in the status culturally ascribed to women can also be proved by using Gender Empowerment Index (GEM) developed by the United Nations Development Programme (UNDP).⁷ The GEM reflects differences between men and women in a country across three major areas: income-earning power (economic empowerment), share in professional and management jobs (occupational empowerment), and share of parliamentary seats (political empowerment).

Risk factors for sexual harassment

The factors responsible for sexual harassment are (1) Gender, Age, and Physical attractiveness, showing that the younger and attractive women are more frequent targets of sexual harassment. (2) Marital Status, as unmarried, divorcee, separated, or cohabitating women face higher rate of harassment in

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1 A. Barak Cross-cultural perspectives on sexual harassment. In W.O. Donohue (ed.) *Sexual Harassment: Theory, Research, and Treatment*. Needham Heights, MA: Allyn & Bacon (1997).
2 HJM, Hermans, & Kempen, HJG (Moving cultures: The perilous problems of cultural dichotomies in a globalizing society. *American Psychologist*, 53, 1111-1120, (1998).
3 Matatoni, RJ. US Multinational companies: Operations in 1998. Surveys of current business 80, 26-45. MNCs are biggest employer overseas. MNCs influence workers' perceptions, customs, behaviors, and local laws (2000).

4 Martin, S.E. Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status, in J. Freeman (ed.), *Women: A feminist perspective*. Mountain View, CA: Mayfield (1989).

5 Rosperda, K., Richman, J., & Nawyn, S. Doing Power: The Confluence of Gender, Race, and Class in Contra power Sexual Harassment. *Gender & Society*, 12, 40-60 (1998).

6 Tangri, SS., Burt, MR., & Johnson, LB Sexual Harassment at Work: Three Explanatory Models, 38, *Journal of Social Issues*, 33-54 (1982).

7 United Nations Development Program, *Human Development Report 1997*, New York: Oxford University Press (1997).

comparison to married and widowed women, (3) Workplace characteristics, i.e. high levels of sexual harassment are associated with male-dominated work groups. The unprofessional environment where employees are treated with disrespect, or where employees are expected to engage in activities not formally a part of the job, reports more sexual harassment than in professional environments. The presence of negative stereotypes and prejudices can create a fertile ground for discrimination and sexual harassment. Further, environments in which women are viewed as sex objects and/or as inferior to men create a climate more conducive to the domination and denigration of women. (4) Generally the men, who hold more traditional attitude towards women, exhibit stereotypic behaviors, emphasize male social and sexual dominance, and demonstrate insensitivity to others, are usually sexual harassers. Men simultaneously experience both positive and negative feelings about women, especially in workplace. They reflect coexisting desire for dominance and intimacy, which results in hostile and benevolent forms of sexism.

Hostile sexism refers to sexist antipathy towards women based on ideology of male dominance and superiority and hostile form of sexuality. Benevolent sexism refers to positive and protective (but sexist) attitudes towards women and a desire for heterosexual intimacy. Either form increases the men's tendency to engage in sexually harassing behaviors, although their motivations and awareness that their behaviors are harassing may greatly differ. Women are also more likely a target of harassment as they avoid reporting harassing behavior because of: self-blame, self-doubt; fear of retaliation; lack of support; feelings of humiliation and embarrassment; lack of knowledge about sexual harassment, the laws, and/or institutional remedies and a fear that they will not be believed and/or that their complaints will not be handled objectively or effectively.

Consequences of sexual harassment

Sexual harassment may be best conceptualized as one manifestation of the way in which sexual violence against women is committed in society. In the rape-prone culture, women are socialized to expect violence in their everyday lives, and such violence is treated as normal. Sexual violence is the most graphic and visceral tool of women's subordination and sexual harassment is a tool of oppression. Harassing words are meant to instill fear, heighten bodily discomfort, and diminish the sense of self-respect. Even those women who do not experience any direct form of sexual violence, experience fear which invade nearly all aspects of their public and private lives. Although most of the sexual harassment is not physically violent, women subjected to harassment demonstrate elevated

fears of rape, and of crime, in general. They avoid places and people where they have been or may be harassed further.

Sexual harassment can result in myriad effects on both the harassed individual and the organization in which they are employed. It occurs in a multitude of forms with varying degrees of physical, psychological, and financial threat to its victims. The result is that the victims suffer highly negative physical, emotional, social, and work-related performance costs, which have been identified as 'sexual harassment trauma syndrome'.⁸ In organizations, where authorities take casual attributions, victims of sexual harassment suffer depression and helplessness. Victims become assured that all their attempts to end sexual harassment are futile and this results in helplessness, hopelessness, depression, or other psychological sequel. Sexual harassment that also involves sexual coercion or any type of sexual assault has the capacity to induce fear, anxiety and other negative emotions. Sexual harassment has the power to shatter assumptions about the world, which can result in feelings of betrayal, distrust, and questions regarding one's ability to judge other people. This is particularly true when the harasser is someone the victim respects. Additionally, if the victim attempts to cope with the harassment by ignoring it, but it persists, feeling of helplessness may intensify and victim's sense of vulnerability may increase. Intrusive thoughts, nightmares, and somatic symptoms may result from the struggle to assimilate the harassment. Sexual harassment victims suffer losses in many areas of their lives other than the financial losses. Social relationships are changed and psychological and physical health may be compromised. It also threatens one's financial resources, work, family status, self-esteem, and belief systems. Many other losses, which may be suffered by the victims occur, include a lost job, loss of status among workers, failure to receive a raise or promotion, loss of inter personal support systems, and many other traumatic experiences.

Sexual harassment, thus, affects its victims, whether in employment or in educational institutions as they don't talk much in the workplace/or in class, don't want to go to work/or to school or college, they want to change their work/or seat to get away from the perpetrator, they find it hard to pay attention in work/or class, they stay away from particular places in work premises/or school, college; they find it hard to concentrate or study, they have trouble in sleeping, they want someone to protect them, they put less efficiency/or lower grades than they would have otherwise, they think about changing the school or college

8 A. Patufi, & R. B. Barickman, *Academic and Workplace Sexual Harassment: A manual of resources*. Albany, NY: Sunny Press (1991).

employer/school or college. The list is lengthy and formidable. Some victims of sexual harassment refuse to report because institutional policies often require confrontation and are thus incompatible. They prefer to deny harassment, ignore or trivialize it and avoid perpetrators. Changing employer, absenting from work or dropping classes or leaving school/college are typical responses that may adversely damage the future of employees or students and their careers.

Effect of sexual harassment on organizations

Earlier, it was believed that sexual harassment does not have any impact upon organizations. However, later on when it was found to exist, it was often dismissed as relatively benign expression of the biological attraction between males and females. However, various researches have shown that sexual harassment results in decreased job satisfaction, declined job performance, decreased motivation, high job changeover and interrupted careers, decreased morale, lowered productivity, increased absenteeism, impaired relationships between co-workers and less social reputation.

Responses to sexual harassment

Majority of people believe that sexual harassment can be and should be handled individually by the person who is sexually harassed. However, sometimes the nature of sexual harassment is such that there are more than one harasser involved. For example, a work environment may be permeated with jokes, graffiti, and comments that are tolerated, supported, and perpetrated by many individuals. Thus, responses to sexual harassment can be on two axes. The first axis is individual attempt to cope with harassment and coping with responses involving other parties like the supervisor, co-workers, spouse, lawyer, or any outside sexual harassment agency. The second axis comprises of indirect responses like ignoring, evading or direct responses such as confronting, consulting superiors, or filing grievances. The intersection of these axes gives rise to four possible categories of responses and coping strategies: individual direct, individual indirect, other-involved direct and other involved indirect.⁹ In an individual indirect response, usually, the harasser is more powerful both physically and organizationally as a result of which the first or even several harassing events are ignored. Thus, the first responses to sexual harassment are that they are ignored. Another individual indirect coping response of victim of harassment is that of avoidance. In individual direct responses, the direct strategies for coping

with sexual harassment can range from confronting the harasser verbally or via a written document, filing a formal complaint, and reporting the harassment to a supervisor, to hitting or insulting the harasser.

Sexual experiences questionnaire (SEQ)

To compare sexual harassment experiences across cultures, Fitzgerald and her colleagues¹⁰ developed Sexual Experiences Questionnaire (SEQ). It is the most frequently used instrument to assess sexual harassment, and is based on Till's¹¹ classic conceptualization of sexually harassing behavior and was designed to assess experiences with five types of sexual harassment, viz., (1) Gender harassment: Generalized sexist remarks and behaviors that is not designed to elicit sexual cooperation but rather to convey insulting, degrading, or sexist attitudes; (2) Seductive behavior, i.e. inappropriate and offensive sexual advances; (3) Sexual bribery, i.e. solicitation of sexual activity or other sex linked behavior by promise of reward; (4) Sexual coercion (5) Sexual imposition i.e. gross sexual imposition, assault and rape, other sexual crimes and misdemeanors.

III Legal Issues Surrounding Sexual Harassment

Sexual harassment is a crucial area of the law and now an impressive body of case law has emerged. The threat of litigation has forced the employers, and educational institutions to take sexual harassment more seriously. These institutions have now drafted policies and procedures to educate employees and management in workplaces, as well as students, staff, faculty and administrators in universities/colleges/schools. Consultants from academia as well as from business also aid them.

Sexual harassment is a violation of the fundamental rights of 'gender equality', the 'right to life and liberty', and the 'right to practice any profession or to carry out any occupation, trade or business'. The fundamental right to carry out any occupation, trade or business depends on the availability of a safe working environment. The right to life means life with dignity. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. It is the responsibility of the State

¹⁰ Fitzgerald, LF, Shultman, S., Bailey, N., Richards, M., Sweekey, J., Gold, Y., Ormerod, M., & Weitzman, L. The incidence and dimensions of sexual harassment in academia and the workplace. 32, *Journal of Vocational Behavior*, 152-117 (1988).

¹¹ Till, F. *Sexual Harassment: A Report on the Sexual Harassment of students*. Washington, DC: National Advisory Council of Women's Educational programs (1980).

⁹ Gutek, B., & Koss, MP. *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment* 42, *Journal of Vocational Behavior*, 28-48 (1993).

to ensure such safety and dignity through suitable legislation and mechanism for its enforcement. The international recognition of sexual harassment as a human rights issue has continued to gain momentum and has now a global acceptance through various International Conventions and norms.

The 1979, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the *Beijing Declaration* directs all States to take all appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women. In 1993, at the ILO seminar in Manila, it was recognized that sexual harassment of women is a form of 'gender discrimination against women'. Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes women rights to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work, which may violate the working environment. The Inter-American Convention to Prevent and Eradicate Violence against Women, held in 1994, in Belgium de Para, explicitly recognized the "Right to work in an environment free of sexual harassment"¹². The Organization of the American States adopted such a right in the same year. On December 23, 2000, a new complaint procedure for female victims of discrimination was passed by United Nations, (UN) allowing women to submit sexual harassment complaints to the UN, if the home country is unwilling to investigate such allegations.

According to Angela King, special adviser on gender issues to the UN Secretary General, "This is a historic step forward in giving women the right of redress... at the international level.... It will act as an incentive for governments to take a fresh look at the means currently available to women at the domestic level to enforce their rights"¹³.

Many countries are now developing sexual harassment laws. These laws vary widely from country to country influenced by the cultures and legal systems of each.¹⁴ Some countries have very specific laws and other have general laws. Unfortunately, many countries still have no laws protecting women against sexual

harassment. Countries not only differ in how they define the term "sexual harassment", they also differ in how they deal with the problem. In some countries, sexual harassment is a crime punishable by imprisonment (France, Brazil), in many other countries monetary damages are awarded to the victim. In some countries, sexual harassment is viewed as a violation of an employee's right to equal treatment, in others it is a labour problem, and in some as a tort. So regardless of how sexual harassment is viewed and treated, there is a momentum to deal with the problem and rules continue to be promulgated.

Japan has developed its own regulations regarding sexual harassment (referred as "Sekuhara") that closely resemble those of United States.¹⁵ Other countries that have developed laws prohibiting sexual harassment in the workplace include Australia, Canada, Germany, South Africa, Argentina, Peru, Bolivia, Venezuela, Columbia, New Zealand, Philippines, France, and Brazil etc.¹⁶ In Germany, regulations explicitly mention that touching the body and making sexual remarks as well as publicly displaying objectionable pictures are examples of sexual harassment under Protection of Employees Act, 1994.¹⁷

IV Legal Definitions of Sexual Harassment

European commission

The concept of sexual harassment is not universally defined. A boost in the direction of a more standardized law and an international definition of sexual harassment occurred when the European Commission in 1990, passed a Council Resolution that defined sexual harassment for the member states. The resolution is similar to the US definition in that it refers to unwelcome, unreasonable, and offensive nature of the conduct.¹⁸ It also includes the concept of the impact of submitting to or rejecting the conduct on the victim's employment. It concludes by discussing the idea of hostile environment sexual harassment, which involves conduct that is hostile, intimidating, or humiliating to the recipient. Countries aspiring to join the European Union are beginning to pass legislation in their efforts to harmonize their laws with those of existing European union members.

12 Inter-American Convention to Prevent, Penalize and Eradicate Violence Against Women.

General Assembly of the organization of the American States. Inter-American Common of Women, 24th Session, 33, I.L.M. 1534, (1994).

13 Cited in Lederer, New Complaints Procedure for Discrimination, Against Women Take Effect. Associated Press World Stream CX 2003 58U6181) (2000, Dec.23).

14 Sigal, J., & Jacobson, H. A Cross-cultural exploration of factors affecting reactions to sexual harassment. Psychology, Public Policy and Law, 5, 760-785 (1999).

15 Kopp, R. Ricochet Effect of US Sexual Harassment Suit. Japan Quarterly, 43, 42-50 (1996).

16 *Ibid.* Aebberhard-Hodges.

17 Protection of Employees Act, 1994. Second Act on Equality for men and women (Germany), Sec. 10.

18 Aebberhard-Hodges, J. Sexual harassment in employment: Recent Judicial and arbitral trends. 135, International Labor Review, 499-533 (1996).

United States

United States began dealing with the problem of sexual harassment only in 1964, and it is still ahead of the World in combating it. In United States, sex discrimination was prohibited in the workplace in 1964, under Title VII, of the Civil Rights Act. This Act prohibits discrimination in the workplace based on race, colour, religion, sex, or national origin. In United States, the Congress passes laws, and the agencies such as EEOC are given the authority to develop work-place rules and courts interpret those laws and rules.

EEOC definition

The Equal Employment Opportunity Commission (EEOC), a U.S. federal agency that oversees the enforcement of Title VII has provided three guidelines for what comprises sexual harassment. According to it, unwelcome sexual advances, requests for sexual favours, and other verbal and physical conduct of a sexual nature constitutes sexual harassment when: Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive work environment.¹⁹

The first two examples are *quid pro quo* type of sexual harassment (a demand or request for sexual activity in exchange for a job related benefit or academic related benefit). The third is referred as hostile environment. Hostile environment is the most common-form. The concept of hostile environment has challenged courts to expand their views of sexual discrimination and offensive conduct.

CEDAW's definition

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) observed, that equality in employment could be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in work place. It recommended that States should take all appropriate measures to eliminate discrimination against women, and provide effective complaints procedures and remedies, including compensation.

Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances. Sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health

19 Code of Federal Regulations, Vol.29, Sec.1604.11 (2000) 186.

and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.

The Supreme Court of India

The Supreme Court of India in *Vishaka v State of Rajasthan*²⁰ took note of the growing social menace of sexual harassment of women at the work place and of the fact that civil and penal laws in India are not adequately providing specific protection to women from sexual harassment. In *Vishaka's* case, the Supreme Court not only suggested definition of sexual harassment, but also prescribed various guidelines to be adopted by institutions to prevent sexual harassment.²¹ Thus, according to the Supreme Court sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as: physical contact and advances; demand or request for sexual favours; sexually-coloured remarks; showing pornography; any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work, whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. Adverse consequences might be vested if the victim does not consent to the conduct in question or raises any objection thereto.

In *Apparel Export Promotion Council v. A.K. Chopra*²², it was observed, Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

20 (1997) 6 SCC 241.

21 (1997) 6 SCC, 252, para 17. Verma, J., (as the former Chief Justice then was), speaking for the three-Judge Bench.

22 (1999) 1 SCC 759. Anand, J., (as the former Chief Justice then was) at 775, para 25.

The Australian human rights and equal employment opportunity commission definition

Sexual harassment is an unwelcome conduct, such as sexual advances and requests for sexual favors, when a reasonable person would feel offended, humiliated, or intimidated by the conduct.²³

V Judicial Evolution of Concept of Sexual Harassment in United States

Williams v. Saxbe (1976)²⁴ was the first case to recognize the legal concept of *quid pro quo* harassment. *Bundy v. Jackson* (1981)²⁵ was the first to recognize the concept of hostile environment. In *Bundy's* case it was ruled that employers could be liable for sexual insults and propositions even if the workers did not lose any job benefits as a result. *Bundy's* is case was followed by *Henson v. City of Dundee* (1982)²⁶. *Henson* further elaborated on hostile environment:

"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."²⁷

In 1985, in *McKinney v. Dolge*²⁸ the court held that physical violence that is not sexual could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex.

Supreme court of United States on sexual harassment

In United States, though the Congress passed Title VII, of the Civil Rights Act and it became the law in 1964 and the EEOC developed rules on sexual harassment in 1980, however, the US Supreme Court for the first time in 1986

23 Human Rights and Equal Employment Opportunity Commission. A Guide to the 1992 amendments to the Sex Discrimination Act of 1984. Canberra: Australian Government Publishing Service (1993).

24 413 F.Supp.654 (DC Cir.1976).

25 614 F.2d 934 (D C Cir.1981).

26 682, F.2d 897, 902 (D.C.Cir.1982).

27 *Id.*, at. 902.

28 765 F. 2d 1129 (D.C.Cir.1985).

issued an opinion on the subject in *Meritor v. Vinson* (1986)²⁹. The US Supreme Court ruled that sex harassment is a type of sex discrimination, and is thus prohibited by Title VII. In 1993, the Supreme Court in *Harris v. Forklift Systems*³⁰ ruled that conduct need not seriously affect an employee's psychological well being to be considered as hostile environment sexual harassment. In *Ellerth v. Burlington Industries* (1998)³¹ the Supreme Court held that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. The defense comprises two necessary elements: that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. It means, that if a tangible employment action is taken by a supervisor against a victim of hostile environment, the employer is vicariously (automatically) liable for the behavior. Similarly, even if the employee suffers no adverse employment action, the employer is vicariously liable unless it can establish both elements of the affirmative defense established by the Supreme Court. The ultimate goal of this is to encourage employers to do all in their power to eliminate sexual harassment in the workplace and to likewise encourage victims to report harassment to their employer so that they may deal with it promptly.

The EEOC's definition of sexual harassment developed in 1980 has remained unchanged in the US, but what has changed is the way in which US Courts have interpreted the sexual harassment laws. The Supreme Court in *Harris*³² noted that mere utterance of an epithet that engenders offensive feelings in an employee would not rise to the level of harassment. The conduct must be severe and pervasive enough to create an objectively hostile or abusive work environment, one that a reasonable person would find hostile or abusive. The

29 477 U.S. 57 (1986).

30 *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

31 524 U.S. 742 (1998).

32 *Supra* n 30.

court mentioned several factors to consider, such as, frequency and severity of the conduct, whether it was physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

An important aspect of *Harris* was, the court's mention of the reasonable person standard. It refers to an element of proof that must be provided by a plaintiff in a hostile environment sexual harassment claim. The victim must prove in part that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, the conduct was unwelcome; and the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. This third element contains two parts: a subjective component (i.e., the behavior must be harassing to the actual victim); and an objective component (i.e., the behavior, to be considered harassing must be so viewed by a reasonable person).

However, two more Supreme Court decisions in 1998 altered the standard of proof required in hostile environment sexual harassment cases under Title VII. Prior to these two decisions, plaintiffs were required to establish that their employer knew or should have known of the harassment and failed to take appropriate remedial action. However after *Faragher* v. *City of Boca Raton*³³ and *Ellerth* v. *Burlington Industries*³⁴ that is no longer the case.

Sexual harassment in educational institutions in United States

Sexual harassment by teachers specifically in schools is commonly experienced and it is a major barrier to career development. In colleges, although the majority of harassment is student-to-student, but there are also cases of harassment by teachers or employees. The most disturbing factor is, that despite having Committees on Sexual Harassment, students who are victims of sexual harassment rarely come forward to report sexual harassment. If they ever tell about sexual harassment, it is usually to a friend. Educational employees also echo the same silence. In United States, sexual harassment in academic institutions is prohibited under Title IX, of the 1972, Education Amendments (work Place sexual harassment is prohibited under title VII of the 1964 Civil Rights Act). United States Congress applied Standards of Title VII of the Civil Rights Act of 1964 when it enacted Title IX, of the Education Amendment Act of 1972. Title IX, prohibits discrimination on the basis of sex and covers virtually all employees, students of university and colleges.

The first case involving students was *Alexander v. Yale University*.³⁵ It established that students have a valid claim for harassment under Title IX just as earlier workplace litigation established employment liability for discrimination under Title VII. In 1986 the US Supreme Court in *Meritor Savings Bank v. Vinson*³⁶ ruled that, without question, sexual harassment is a form of sex discrimination and that hostile environment as well as *quid pro quo* harassment violate Title VII, of the Civil Rights Act of 1964. It also violates Title IX for sexual harassment in educational institutions. The Supreme Court ruled that sexual harassment claims are not limited to simply those for which tangible job benefit is withheld (*Quid pro quo*), but also include those in which the complainant is subjected to an offensive, discriminatory work environment. The Supreme Court extended the EEOC guidelines to the academic community especially to students who are not covered by the statutes governing employer/employee relations. It recognized the significance of harassment in *Harris* v. *Forklift Systems, Inc.*,³⁷ and *Faragher v. Boca Raton*,³⁸ *Franklin v. Gwinnett County Public School*,³⁹ *Gebser v. Logo vista Independent School District*,⁴⁰ and *Davis v. Monroe County board of Education*⁴¹.

VI Supreme Court of India on Sexual Harassment

The Supreme Court of India in *Apparel Export Promotion Council v. A.K. Chopra*⁴² opined that each incident of sexual harassment at the place of work, results in violation of the fundamental right to gender equality and the right-to life and liberty, the two most precious fundamental rights guaranteed by the Constitution of India. The sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.⁴³ It also considered the nature of approach that courts should take while dealing with cases of sexual harassment. The Court held⁴⁴, that in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not swayed by insignificant discrepancies or narrow technicalities or the dictionary meaning of

35 459 F.Supp. 1 (D.C.Conn.1977).

36 477 U.S. 57 (1986).

37 510 U.S. 17 (1993).

38 118 S. ct. 2275 (1998).

39 503 U.S. 60 (1992).

40 118 S. ct. (1988).

41 526 U.S. 629 (1999).

42 *Supra* n. 22.

43 *Id.* at 761.

44 *Ibid.*

the expression 'molestation, they must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated, and where the evidence of the victim inspires confidence, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the delinquent superior officer is wholly misplaced and mercy has no relevance. Any lenient action in such a case is bound to have a demoralizing effect on working women.⁴⁵ The court further held that in cases involving violation of human rights, the courts are under an obligation to give effect to the principles embodied in international conventions and instruments for constructing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law, and also to see that the messages of the international instruments is not allowed to be drowned.

The Supreme Court in *Yishaka v. State of Rajasthan*⁴⁶ noting the absence of enacted civil and penal laws to provide for the effective enforcement of the basic human rights of gender equality and guarantee against sexual harassment, laid down the guidelines and norms for due observance at all work places or other institutions until a legislation is enacted for the purpose. It directed that these guidelines will be strictly observed and shall be binding and enforceable in law until suitable legislation is enacted.

The Supreme Court guidelines

The guidelines and norms prescribed for the preservation and enforcement of the rights to gender equality of the working women⁴⁷ specifically provide that it is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.

Duty of the employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required. All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the steps to ensure express prohibition of sexual harassment (as defined above) at the work place

45 *Id.*, at. 762.

46 *supra* n. 20

47 (1997) AIR SC 3016.

The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender. As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

Criminal proceedings

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

Disciplinary action

Where such conduct amounts to misconduct in employment, as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

Complaint mechanism

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

Complaints committee

The complaint mechanism should be adequate to provide, where necessary, a Complaint Committee, a special counselor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment. The Complaints Committee must submit an annual report to the Government department concerned of the complaints and actions taken by them. The employers and persons in charge will also report on the compliance with the aforesaid guidelines

including on the reports of the Complaints Committee, to the Government department.

Workers' initiative

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

Awareness

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

Third party harassment

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

General strategies adopted during sexual harassment

Most of the students and employees do not tell the harasser to stop. The initial attempts of sexual harassment are often ignored, especially when they are experiencing hostile environment sexual harassment in which the behavior is typically more subtle than in *quid pro quo* sexual harassment.⁴⁸ Furthermore, victims fear retaliation should they confront the harasser. They also do not want their career threatened.⁴⁹ Usually, the students and employees adopt certain strategies,⁵⁰ like avoiding the harassment by staying away from perpetrator, minimizing the harassment and treating it as a joke; denying the harassment;

48 Herzkowitz Elaine and Kalleen Howard The role of the Equal Employment Opportunity Commission and Human rights Commission in dealing with sexual harassment, in Michele Paludi and Carmen, A. Paludi (eds), in Academic and workplace sexual Harassment, Westport, CT Connecticut London (2003).

49 Fitzgerald L., & Omerod, A. Sexual harassment in Academia and the Workplace, in F. Denmark & M. Paludi (eds.), Psychology of Women: A Handbook of Issues and Theories, Westport, CT: Greenwood Press (1993).

50 Fitzgerald, L., Gold, Y., & Brock, K Responses to Victimization: Validation of an Objective Policy, 27 Journal of College Student Personnel, 34-39 (1990).

and attempting to forget it, putting up with the harassment out of the belief that there is no help available, or fearing retaliation, refusing sexual, social offers; or verbally confronting perpetrator, reporting the harassment and filing a complaint, seeking support of others to validate perceptions of the harassment, attempting to evade the perpetrator without confrontation; attempting to placate the perpetrator, or taking responsibility for the harassment. In addition, they do not disseminate and/or enforce the policy statement prohibiting sexual harassment or report information regarding sexual harassment, or have no/ or have inadequate training for teachers, staff and students, or do not intervene officially when sexual harassment occurs, do not support sexual harassment victims, do not quickly remove sexual graffiti, do not give sanctions to individuals who engage in sexual harassment, or do not inform about the sanctions for offenders institutions incidence of sexual harassment.

Comprehensive approach to eliminate sexual harassment in workplace and educational institutions

The curtailment of sexual harassment demand constant scrutiny specifically in higher education, where fluctuation in student constituencies can produce widespread environmental change. The educational institutions and workplaces should exercise "reasonable care" to ensure a sexual harassment free environment and retaliatory-free environment for students and employees. This *reasonable care* adopted from the US Supreme Court ruling in *Faragher v. Boca Raton*⁵¹ includes: establishment and dissemination of effective anti-sexual harassment policy, establishment and dissemination of effective anti-sexual harassment procedures, and offering training in sexual harassment in general and in the organization's policy and procedures specifically.

An effective policy statement, an effective investigatory procedure, and an effective training program can establish an atmosphere of trust that would encourage individuals to come forward with their complaints of sexual harassment. It shall also ensure support outside of the educational institutions and workplace.

Thus effective and enforced policy statements, investigatory procedures, training programs on sexual harassment are three major aspects of exercising reasonable care.

VII Conclusion

The increasing awareness about sexual discrimination and sexual harassment has encouraged various organizations to provide support to women seeking

51 *supra* n. 38

redress in courts. However, legal and technical issues should not be allowed to dominate sexual harassment cases. Any business house or education or administrator who allows his institution to become so oppressive that it reaches the level of a legally defined "hostile environment" is not displaying good management skills. Fighting a legal battle against sexual harassment is not only financially very expensive but is time consuming and mentally exhausting. It also puts tremendous cost on employee or student morale and career potential. Thus, it is better to deal with sexual harassment long before it reaches the courts or causes legal liability. This necessitates a complete understanding of sexual harassment. What it is, how it affects employees and students and how it can be handled in an appropriate manner.

Education about sexual harassment is also necessary for students, not only for life in academics but also in workplace, where most are preparing to enter. The advancements are impressive, but problems remain. This is because the research, publications and studies dealing with sexual harassment are not qualitative.

*INDIA AS AN EMERGING POWER IN THE PRESENT SCENARIO - ACCELERATING FACTORS CONTRIBUTING TO ITS GOVERNANCE

*Dr. Mahavir Singh Kalon**

I Introduction

A NEW balance of power is taking shape in the world. India is gaining in stature as a major player in the unfolding scenario, a full fifty eight years after independence¹. On March 25, the US announced its new strategy to help India to build itself as a major world power in the 21st century. Following that announcement, the visiting Chinese Prime Minister Wen Jiabao, for the first time, recognized that India was more than a regional power and had a global role to perform. His enthusiasm, in fact, envisioned China and India dominating the world economy. It is noteworthy that Russia has never had any difficulty in recognizing India's international role. The European Union also treats India as a strategic partner: When the Japanese premier visited India at the end of April 2005, he could not help but recognize the stark reality and had to look at India beyond the traditional India-Pakistan hyphenation.

The present global balance of power system is different from the 19th century European balance of power under Pax Britannica. In that system Russia, Germany, France, Austro-Hungarian Empire and Britain were able to maintain peace in Europe for almost a century, till it broke down in 1914 leading to the first World War. The 19th century, witnessed balance of power in the shape of the Prussian-Austrian war, the Franco-Germany war, the Crimean war, the Balkan wars and wars of Italian unification. The 20th century bipolar world, too, was a balance of power era. China switched sides leading to the containment of the Soviet Union and its break-up. The 2020, vision document of the National Intelligence Council, called 'Mapping the Future', forecasts that the new balance of power in the 21st century will not lead to any war among the major powers, armed as they are with nuclear weapons and missiles. It is not just the destructive potential of such a conflict, but the globalization process that has reduced such a war to a near-impossibility.

Today, the US and China, the top two rivals in the international system, are also the two engines of global economic growth, symbiotically linked together.

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¹ K Subrahmanyam, 'The New Deal : India as an Emerging Player in the World Order', Times of India, April 26, 2005.

The US strategy towards China is not containment as was adopted towards the Soviet Union in the Cold War, but of economic interaction which will bring about transition to democracy within China. US appears to have concluded that a strong India's interaction with China will help in that transition to democracy. Bipolar deterrence ensured that there was no war between the superpowers. The unprecedented global arms race ended in Paris Agreement, of November 1991. Multipolar balance will be even more stable. The globalised economy will make every power pause and reflect on the global economic and demographic consequences of war, which were not considered in detail during the bipolar era and the second World War. The industrialized world is ageing and its fertility rate is declining. These are serious disincentives in considering the possibility of a global war. Therefore, the new balance of power will operate without military might as the primary currency of power. That does not mean that there will be no global rivalries. Major nations will compete with each other over trade, technology, research and development and per capita incomes. Leading nations will become knowledge-based societies, with knowledge becoming the primary currency of power. The yardstick of determination of new balance of power will be therefore knowledge pools that nations are able to develop on their own, or in collaboration, with one another.

The US understands this well, and that explains its avowed support to help India achieve a significant place in the world by the 21st century. China understands it too, as is evident from the Chinese Premier's plea to augment cooperation with India. Russian President Putin, paid a visit to Bangalore to woo Indian minds. Therefore, those who look at the world in terms of blocs led by the US and China and suggested that India should join China-Russia block are totally out of sync with the emerging situation.

In the emerging reality, there are likely to be no blocs and no wars. The six actors – the US, Japan, the European Union, China, Russia and India, can compete and cooperate with each other to optimum advantage. With respect to the Sino-Indian cooperation, the US state department spokesperson observed, that China was a friend and India a very good friend of US, therefore, the US, was not concerned about the growing cooperation between the two sources. However, a question arises, is India ready with its own strategy in the new world order? Indian reactions to the March 25, announcement of the US and the Chinese Premier's visit to India only suggests that large sections of the political, administrative and academic establishments are trapped in the Cold War mindset. They have yet to adjust themselves to the international system of the 21st century. This is the kind of issue the National Security Council is meant to address.

The emergence of Indian stature in world scenario is flourishing from the major factors duly recognized by Indian intelligentsia for stacking the claim in

the global economy and politics. A number of accelerating factors have enabled India to emerge as a power which include, research and development in science and technology, empowering and educating women, judicial activism, sustainable development, diverting more funds towards health and technical education, right to education's declaration as a fundamental right, strengthening of external affairs, extension of co-operation with neighboring countries.

II Growth in Science and Technology

Importance of science in the present context?

Soon after independence, our country was infested with problems to bring in urgently needed technologies for steel, civil structures, hydro, and thermal power stations. It concentrated on solving basic problems such as feeding the population, providing water, shelter and healthcare. Although India had a weak economy, the political visionaries of the time decided wisely to set up what ultimately became the country's science base – atomic energy, space, CSR, DRDO, DST, etc. The country also set up a powerful educational base including the creation of Indian Institutes of Technology and many universities, having a unique blend of science and technology. Today the country commands a strong position in the world in terms of scientific manpower in capability and maturity. Its economy has strengthened and it is therefore in a position not only to understand technologies that it may borrow but also to create its own technologies with extensive scientific inputs of indigenous origin. In many areas such as pharmaceuticals, India delivers products to the world, backed by a large amount of research and development.

India has thus, come a long way since independence. From mere buyers of technology it has achieved the status of a nation that has made science and technology an important contributor to national development and societal transformation. In a world where power is determined by a nation's share of the world's knowledge, it is important for India to put her act together and become a continuous innovator and creator of science and technology intensive products. Present day scientific knowledge and study must have innovativeness, foresight, and vision.

Scientific challenges for the future

In the last three decades, we have witnessed an unstinted growth in miniaturization of informative technology products. Central to this silicon technology, the feature size transistors has been decreasing relentlessly. It is predicted that miniaturization using silicon microelectronics will find its plateau

2 A. P. J. Abdulkalam, Challenge to science: attracting youth, The Hindu, April 12, 2005.

and its limit will be reached within the next decade. The world is on the lookout for an alternative to silicon. The transformation from microelectronics to nano science and technology is knocking at the door with endless alternatives including molecular transistors, quantum computing and nano electronics etc. In addition to these challenges, Indian scientists are confronted with the task of the development of an anti-HIV/AIDS vaccine, seeds that require minimum water and can provide high yield per hectare to compensate for reduced land availability. There is a need to work on thorium-based nuclear power plants, an integrated mission for stem cell research, a hypersonic reusable launch vehicle, and discoveries and innovations to provide better quality of life to differently challenged people.

III Empowerment of Women

Concept of women's empowerment³

Empowerment of women is a yardstick to assess the progress of a nation. Indian Women therefore need a greater degree of self-confidence, a sense of independence and capability to resist discrimination imposed by the male dominated society. 'Empower' means to make one powerful or equip one with the power to face the challenges of life to overcome the disabilities, handicaps and inequalities. It is an active, multidimensional process enabling women to realize their full identity and powers in all spheres of life, by providing greater access to knowledge and resources, greater autonomy in decision-making, greater ability to plan their lives, greater control over the circumstances that influence their lives and freedom from the shackles imposed on them by custom, belief and practice. Empowerment does not mean setting women against men, rather it aims at making both men and women realize their changing roles and status and develop a consensus for harmonious living in the context of an egalitarian society. It means redistribution of work roles, reorienting their values to the changing world and attitudes and evolving new kinds of adjustments, understanding and trust with each other. Thus, it can be termed as an ideology for carrying democratic values into the family and society, and which demands a basic change in the system of marriage and family, husband-wife relationship, attitude towards gender socialization and remarriage.

It is an established fact that women have been subjected to multifarious exploitation in our male dominated society. Since independence, the Government of India has been making several efforts to empower women, both educated and otherwise, by providing employment opportunities in the organised and unorganized sectors, which the later have used to their full advantage by entering

3 Ambarao Uplaonkar, Empowerment of Women, Mainstream, March 11-17, 2005.

fields that were traditionally dominated by men. Women now are in the role of police officers, constables, bus conductors, business women, autorikshaw drivers, petrol pump managers etc. In order to provide economic independence to the large masses of rural women, the Government of India has launched Self-Help Groups (SHGs) by providing financial assistance and training in small scale industries. In local bodies, women have been given thirty-three per cent representation for asserting their claim in governance of democracy at the grass root level. Moreover, this representation in legislature is also being contemplated by a Bill for representation of women in the governance of the country.

Protection for women

In public sphere, one of the issues of major concern is custodial violence. The utter helplessness of a woman, where guardians of law turn beasts and perpetrate barbaric and inhuman behavior with arrogant triumph full of contempt for law was brought to the notice of the court by a social activist *Sheela Barse*.⁴ In this case the writ petition was based on a letter addressed by *Sheela Barse*, a journalist, to the court complaining about custodial violence against women prisoners whilst confined in the police lockup in the city of Bombay. The court's concern was evident as it directed the Inspector General of prisons in Maharashtra, to issue a circular to all Superintendents of Police to send a list of all under-trial prisoners to the Legal Aid Committee of the district. Similarly, in another case⁵ the court issued numerous directions for the protection and the welfare of women.⁶ The court held, that appropriate directions have been given by the courts to the inmates of protective and remand homes for women and children for providing suitable human conditions in homes and for providing appropriate machinery for effective safeguard of their interests. It also issued a number of directions to the government and various social organizations for taking up appropriate measures for prevention of women from taking up prostitution and to rehabilitate their children through welfare measures.⁷ Directions were also issued for taking disciplinary action against the Station House Officer, the Sub-Inspector and the Lady Medical Officer concerned, in *Gairaula Nuns Rape Case*. The Court also directed the state to pay compensation of Rs. 2,50,000 to each of the two sisters who were rape victims and Rs. 1,00,000 to the other sisters who were assaulted. The exhaustive guidelines to prevent sexual harassment of working women in places of their

4 *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378 and *All India Democratic Women Association v. Union of India*, AIR 1989 SC 1280.

5 *Upendra Baxi v. State of U.P.*, (1983) 2 SCC 308, *Joint Women's Programme v. State of Rajasthan*, AIR 1987 SC 2060.

6 (1983) 2 SCC 308, *Joint Women's Programme v. State of Rajasthan*, AIR 1987 SC 2060.

7 *Gaurau Jain v. Union of India*, AIR 1990 SC 292.

work until a legislation is enacted for this purpose by the legislature were issued by the court in case of *Vishaka v. State of Rajasthan*.⁸ The Supreme Court accorded similar protection to a Bangladeshi woman,⁹ who was raped by the Railway employees in Railway building. Rejecting the argument that the petition was not maintainable, the Court held that even a foreign national could be granted relief under public law.

IV Sustainable Development: Protection of Environment

When the saying, government of the people, for the people and by the people, not appear to be feasible and the policies and programmes are read only on paper and the ground realities do not improve, the judiciary often steps in to provide relief to men and protect the natural resources of the country. The dynamism of our judiciary is evident through a plethora of cases. Its concern to prevent damage to the ecological system was witnessed in *Karal Litigation and Entitlement Kendra v. State of U.P.*¹⁰ where it ordered the closure of lime stone quarries that were flouting the norms of safety of the surrounding inhabitants. In *Shriram Food and Fertilizer's case*¹¹, the court gave directions to the Company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighbourhood for taking adequate safety measures before resuming the manufacturing plant. Taking in view, the prime need of a mechanism to protect the environment of our country, the Apex Court in case of *M.C. Mehta v. Union of India*¹² came down heavily on the Government for its failure to take effective steps to obviate the grave public nuisance caused by the tanneries at Kanpur. In *Indian Council for Enviro-Legal Action v. Union of India*¹³, the Court reiterated that if it finds that the Government or authorities concerned have not taken any action required of them by law and that results in violation of the right to life of the citizens, it will be the duty of the court to intervene. The Apex Court gave specific directions for the protection of the rights and benefits of the workmen. Again in *M.C. Mehta v. Union of India*¹⁴, dealing with the issue of pollution of Taj Mahal and terming it as necessary for protection of Indian heritage, the 292 polluting industries locally operating in the area, that were the main source of pollution were directed to change over within fixed time schedule to natural gas as industrial fuel failing which, they were issued an ultimatum till 31st December,

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1997 and were directed to be reallocated to alternatives plots in the industrial estate outside Taj Trapezium. Similarly in *Narmada Bachao Andolan v. Union of India*¹⁵ and *N.D. Jayal v. Union of India*¹⁶ (Tehri Dam Case), the court noted with concern that despite the fact that some deficiencies in respect of adherence to the environmental norms, the Sardar Sarovar Project and Tihri Dam cases were cleared.

V Cleansing of Public Administration from Corruption

One of the evils that India is facing currently is corruption in public dealings. On account of corrupt officials and their corrupt working, it is impossible to translate ideals of justice into socio-economic reality as desired in the Constitution and welfare legislations. It is a trite saying that the 'power corrupts' and 'absolute power corrupts absolutely'. The discretion and arbitrariness contaminate each other. In this situation there are more chances for the authorities to be corrupt, and thus, there is an urgent need to check corruption in public administration. The role of judiciary in this context becomes significant, even though the courts are required to function within its limits. The court has often taken cognizance of such cases through public interest litigations. It questioned the licensing power of the executive in *Chatalanya Kumar v. State of Karnataka*,¹⁷ a case that has made political history. The contracts for bottling arrack to the appellants and others was questioned in the High Court of Karnataka and the order of the State Government was struck down on the ground that it was unlawful, arbitrary and capricious. In *D.C. Wadhwa v. State of Bihar*,¹⁸ the promulgation of the ordinance again and again by the State of Bihar was challenged on the ground of misuse of the power and fraud on the Constitution. In case of *Municipal, Ratlam v. Vardichand*,¹⁹ the Supreme Court affirmed the order of the Magistrate directing the Municipality of Ratlam to perform its public duty towards members of the public as it had failed to maintain roads and provide sanitary facilities. It was revealed through public interest litigation in *Manohar M. Galani v. Ashok N. Advani*,²⁰ that there was a serious scandal in functioning of some subordinate courts. The High Court took cognizance of the matter and directed an inquiry to be conducted, but here the Supreme Court held that the action of the High Court was illegal.

8 AIR 1997 SC 611.
9 *Chairman, Ry Board v. Chandrama Das*, AIR 2000 SC 988.
10 (1985) 2 SCC 431.
11 *M.C. Mehta v. Union of India*, (1986) 2 SCC 176.
12 (1987) 4 SCC 463.
13 (1996) 3 SCC 212.
14 AIR 1997 SC 735.

15 (2000)10 SCC 664.
16 (2003) 7 SCC 54.
17 AIR 1986 SC 825; *Giani Devender Singh Sant Sapoy Sikh v. Union of India*, 1995, SC 1847.
18 AIR 1987 SC 579; *Sheo Nandan Paswan v. State of Bihar*, AIR 1987 SC 877 at 879.
19 AIR 1980 SC 1622.
20 AIR 2000 SC 202.

The public interest litigation mechanism has proved to be a strong and potent weapon in the hands of the court enabling it to unearth many scams and corruption cases in public life and to punish the guilty involved in those scams. Hawala Scam, Urea Scam, Fodder Scam in Bihar, St. Kitts Scam, Ayurvedic Medicine Scam and Illegal Allotment of Government Houses and Petrol Pump have come to light through the public interest litigation. In case of *Union of India v. Association for Democratic Reforms*,²¹ the petitioners for Democratic Reforms filed a PIL and requested for a direction to implement the recommendations made by the Law Commission, in its 170th report on March 2, 2002. The Supreme Court directed the Election Commission to issue a notification making it compulsory for those contesting elections, to make available information about their educational qualifications, assets, liabilities and criminal antecedents at the time of filing of nomination-papers for the benefit of voters. The Parliament amended the electoral law (Peoples Representation Act) but not as per the guidelines of the Supreme Court. The Supreme Court therefore held, that Parliament has no legislative competence to direct the state authorities to disobey the order of the Court and therefore the amendment made in Sec. 33, of the Peoples Representation Act was violative of the fundamental right of voters to know about their representatives and hence were invalid. It restored its May 2, 2002 order and directed the Election Commission to issue fresh order.

VI Right to Education as a Fundamental Right

The advancement and progress of a nation is closely linked to the education system. While, education in the government and government aided institutions is people friendly in terms of fee structure, lately there has been a mushroom growth in private or self funded educational institutions. Since the seats in the government or government aided institutions are limited, a large number of student aspiring for higher education have no choice but to turn to the private institutes. Unchecked and uncontrolled till recently, these institutes charged arbitrary and exorbitant fees from students totally commercializing the education pattern and making a mockery of the Constitutional goal of making education as a fundamental right of all Indians. In a landmark judgment in *Mohini Jain v. State of Karnataka*,²² popularly known as the "First Capitation Fee Case," the Supreme Court has held that the right to education is a fundamental right under Art. 21 of the Constitution which cannot be denied to a citizen by charging higher fee known as the capitation fee. The right to education flows directly from right to life. The right to life under Art. 21 and the dignity of an individual cannot be

assured unless it is accompanied by the right to education. In this case, the petitioner had challenged the validity of a notification issued by the government under the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, which was passed to regulate tuition fee to be charged by the private Medical Colleges in the State. Under the Notification, the tuition fee to be charged from students was as follows: Candidates admitted against Government seats Rs.2,000/- per year, Karnataka Students Rs.25,000/- per annum and students from outside Karnataka Rs.60,000/- per annum. The petitioner was denied admission on the ground that she was unable to pay the tuition fee of Rs.60,000 per annum. The two judge Division Bench consisting of Justice Kuldip Singh and R.N. Sahai, held that the right to education at all levels is a fundamental right of citizen under Art. 21 of the Constitution and charging capitation fee for admission to educational institutions is illegal and amounted to denial of the citizen's right to education and is also violative of Art. 4, being arbitrary, unfair and unjust. Capitation fee makes the availability of education beyond the reach of poor. The right to education is concomitant to the fundamental rights enshrined under Part III, of the Constitution. The fundamental right to speech and expression cannot be fully enjoyed unless a citizen is educated and conscious of his individualistic dignity. The education in India has never been a commodity for sale, their Lordships declared. Similarly, in *Umri Krishnan v. State of A.P.*,²³ the Supreme Court was asked to examine the correctness of the decision given by the Court in the *Mohini Jain's case*. The petitioners running Medical and Engineering Colleges in the State of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu contended that if *Mohini Jain* decision is correct and followed by the respective State Government they will have to close down their colleges. The five Judge bench by 3-2 majority, partly agreed with the *Mohini Jain's* decision and held that the right to education is a fundamental right under Art. 21, of the Constitution as 'it directly flows' from right to life. But as regards its content the court partly overruled *Mohini Jain's* case and held that the right to free education is available only to children under 14 years, but after that the obligation of the State to provide education is subject to the limits of its economic capacity and development. The obligations created by Arts. 41, 45 and 46 can be discharged by the State either by establishing its own institutions or by aiding, recognising or granting affiliation to private institutions. Private educational institutions are a necessity in the present day context. *Mohini Jain's* case was not right in holding that charging of any amount must be described as capitation fee and saying so, amounts to imposing an impossible condition. It is not possible for the private educational institutions to survive, if they charge fee prescribed by government institutions. The private sector should be involved and encouraged

21 AIR 2002 SC 2112.

22 (1992) 3 SCC 666.

23 (1993) SCC 645.