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Statement of Ownership and other particulars about the ***Delhi Law Review***

Place of Publication	Faculty of Law University of Delhi Delhi - 110 007
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	Sudhir Printers, Indian 151, Desh Bandhu Gupta Market Karol Bagh, New Delhi - 110 005
Publisher's Name, Nationality and Address	Prof. Gurdip Singh, Indian Head and Dean Faculty of Law University of Delhi Delhi - 110 007
Editor's Name, Nationality and Address	Prof. Gurdip Singh, Indian Head and Dean Faculty of Law University of Delhi Delhi-110 007

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Dated: September 30, 2011

DELHI LAW REVIEW
VOLUME XXX: 2011

Mode of Citation: XXX DLR (2011)

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Annual subscription:
Rs. 150/- (Domestic); US $ 20 (Overseas)

Back volume of Delhi Law Review from Vol. I (1972) to Vol. XXIX (2007) are available @ Rs. 150/- (Domestic) and US $ 20 (Overseas) each (subject to availability)

Published by the Faculty of Law, University of Delhi, Delhi-110 007 and printed at Sudhir Printers, 151, Desh Bandhu Gupta Market, Karol Bagh, New Delhi-110 005, Phone: +91 11 23522683, Mobile +919810334493

DELHI LAW REVIEW

Volume-XXX:2011

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NATIONAL GREEN TRIBUNAL: WHITHER (IN)JUSTICE?

C.M. Jariwala[*]

I. Introduction

In the year 2008 it has been reported[1] that the world countries nearly, numbering forty one, have adopted different approaches—some have adopted environmental tribunal and this includes Kenya, South Africa, Guyana, Philippines, China, Bolivia, Chile, India and Tanzania. There are others where the ordinary courts or administrative courts handle environmental litigations; for example, Norway, Finland, Belgium, Chile, Thailand, Sweden and Uganda. In some of the above countries the environment courts/tribunals exist even at the grassroot level, making the forum available at the door steps of the litigants. A few have green judges who handle such litigations. Apart from this scenario, the environmental law academics are having conflicting opinions whether there should or should not be a special forum to administer environment justice. There are scholar like justice Preston[2] Lord Woolf,[3] Alyson,[4] Brian,[5] Carnwarh[6] who advocated in favour of such dispute settlement mechanism. The salient support taken by them includes expertised justice, efficiency, cost and speedy justice.[7] On the other hand, Rajamani Lavanya,[8] Calendaria & Ballesteros,[9] wanted to keep the *status qua* on the ground which included competence of the existing courts, fragmatisation of judicial system, ghetto-ization of judges, insufficient case load, increased cost, limitation on professional growth and promotion of judges.[10]

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1 See George Pring and Catherine Pring, *The Access Initiative Report on Greening Justice Creating and Improving Environmental Courts and Tribunal* 11 (2009).

2 B.J. Preston, "Operating on Environment Court: The Experience of the Land and Environment Court of N.S.W.", *Env. & Plan. Law Journ.* 386 (2008).

3 Lord Woolf, "Are the Judiciary Environmentally Myopic", *Jour. of Env. Law*, Vol. 4, 1 (1992); Alyson C. Flournay, "Scientific Uncertainties in Protection of Environmental Decision – Making", *Harvard Env. Law Rev.*, Vol. 15, 333-5 (1991).

4 Alyson C. Flournay, "Scientific Uncertainties in Protection of Environmental Decision – Making", *Harvard Env. Law Rev.*, Vol. 15, 333-5 (1991).

5 Brian Wyne, "Uncertainty and Environment Learning: Reconceiving Science and Policy in the Preventive Paradigm", 2 *Global Environmental Change* 111 (1992).

6 Robert Carnwarh, "Environmental Enforcement: The Need for a Specialized Court", *Jour. of Plan. & Env. Law*, 806 (1992).

7 George Pring and Catherine Pring, *The Access Initiative Report on Greening Justice Creating and Improving Environmental Courts and Tribunal* 14-16 (2009).

8 Rajmani Lavanya, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability" 19 *Jour of Envt. Law* 293 (2007).

9 S. Calendaria and M.M. Ballesteros, "The Myth of Generalist Judge: An Imperical Analysis of Specialization in Federal Courts of Appeal", 61 *Stanford Law Rev.* 519 (2008).

10 George Pring and Catherine Pring, *The Access Initiative Report on Greening Justice Creating and Improving Environmental Courts and Tribunal* 17-18 (2009).

The environmental litigations, unlike other disputes, involve complex techno-science and interdisciplinary issues. There are different matters to decide: whether some components or the environment as a whole is affected because of pollution; what is the degree of pollution; to what extent damage is done to different components of environment; how much is the cost to compensate the loss and repair and regenerate the damage; and what is the appropriate penal sanction in the matter. If the existing courts decide these matters without technical expertise, the US Supreme Court warned that 'it will loose confidence of people'.[11]

Because of these problems, in India right from the Tiwari Committee Report of 1980 the Supreme Court repeatedly suggested and even directed to constitute a separate specialized forum to handle environmental litigations; the Law Commission of India recommended the constitution of environmental courts; and finally in 2010 the Parliament by law has established the Green Tribunal. In this journey, the present study mainly focuses attention on the merits and demerits of the legislation so as to find out how successful the tribunalized environmental justice may be in India.

The study become more challenging in the light of the arguments pressed before the Keenen's Court in the Bhopal Mass Disaster and also the opinions of environmental law scholars who urged that the Supreme Court of India is the 'most powerful court in the world' or it 'stand tall in the world courts' or it has brought in 'dawn and not dusk'.[12] Further, the study cannot adopt a myopic view of the Indian scene only. 'No study can be complete without taking a stock of the outside world experiences which will give an insight into their successes and failures. This will give an opportunity to suggest as to how best their experiences may be accommodated in the present legislation.

II. Comparative Scenario

In the comparative study,[13] the Australian environment court deserves special attention in view of the fact that the Supreme Court of India in *A.P. Pollution Control Board* v. *M.V. Nayudu*,[14] opined that "the Land and Environment Court of New South Wales in Australia, established in 1980 could be the ideal". Unfortunately

[11] *Daubert* v. *Merrel Dow Pharma* (1993) 113 S. Ct. 2786.

[12] Upendra Baxi and Thomas Paul, *Mass Disasters and Multinational Liability: The Bhopal Case* 76, 224, 226 (1986). See also C.M. Jariwala, "The Directions of Environmental Justice: An Overview" in SK Verma and Kusum (eds.), *Fifty years of the Supreme Court of India Its Grasp and Reach* 494 (2000); C.M. Jariwala, "Environmental Justice: A Journey from *Ratlam Municipality* to *M.C. Mehta*", in P. Nagabooshanam (ed.), *Environmental Law Policy and Perspective* 54 (1995); Ashok A. Desai, *Environmental Jurisprudence* 39 (1998).

[13] See for details, S. Eracman (ed.) *European Environmental Law Legal and Economic Appraisal* (1977); George Pring and Catherine Pring, *The Access Initiative Report on Greening Justice Creating and Improving Environmental Courts and Tribunal* (2009); 186th *Report. Law Commission of India*, on Proposal to Constitute Environment Court (2003); P.B. Sahasavanman, "The Need For Environmental Courts", *Handbook of Environmental Law* 153 (2009).

[14] AIR 1999 SC 812.

the Court has not examined experiences of other countries but jumps to this conclusion, a case of hurried baseless conclusion. The New South Wales Court is a superior court of record. It consists of judges and at least nine technical and conciliation assessors who shall act as commissioners of the court. Its jurisdiction includes, hearing appeals, judicial review, enforcement of the provisions of the Environmental Planning and Assessment Act, 1979. The environmental court has the appellate jurisdiction which includes the environmental planning and protection appeals, local government appeals, appeals against environment criminal offences and also civil enforcement in relation to environmental matters. However there are some areas of jurisdiction which could be exercised alone by the judge members though assisted by the commissioners.

Section 12 prescribes detailed qualifications for the commissioners. For example, it requires experience in the administration of local government and town planning; environmental planning; knowledge and experience in environmental science; environment assessment, land valuation, architecture and building construction, natural resources or urban design or heritage. Section 22 ensures that the court shall provide appropriate remedy and shall ensure complete and final determination so that multiplicity of proceeding is avoided. Section 29 gives the freedom to the Chief Justice to decide about the place of sitting of the court; here a concept of mobile court emerges so that the court could reach to the spot of an accident or polluted area. This is further supported by the provisions of section 34A which talks of 'on-site hearing'. Section 38 absolves the court from following formal and technical procedures; however, the proceedings shall be in the open court. The court is under obligation to administrator environmental justice as expeditiously as possible.

The most cited other experience is that of New Zealand where the environment court was established in 1996 under the Resources Management (Amendment) Act, 1996. It consists of judges and commissioners. In enforcement proceedings it is only a judicial member who presides over the bench. Lawyers do normally represent the parties but any one may appear in person before the court. Further, the court encourages individuals and groups to represent themselves. The judges are appointed by the Governor-General on the recommendation of Ministry of Justice for a period of five years. A care is taken that the judges have a mix of knowledge and experience of various subjects; including commercial and economic affairs, planning, resource management, environmental science, architecture, engineering, minerals, and alternative dispute resolution process. Under section 238, the court may compel the parties for mediation and arbitration to resolve the dispute and a high number of cases are resolved by such agreement which will, then be validated by the court. The unusual scenario of the New Zealand court is that it may impose cost against unsuccessful parties which ranges from $ 8,500 to $ 20,000. Such an approach is adopted in Vermont, Britain, Canada, Australia and

also other common law countries where the winner gets the total cost, a case of cost shifting. It may be pointed out that in many cases success or failure depends on an effective and purposeful arguments and submission of right kind of material in support. Moreover, it will penalise even the NGOs if they lose the case. In such circumstance a heavy cost for no fault of the party will, in many cases, discourage the genuine petitioners, resulting in injustice to environment. Another novel provision is that the party is given choice to prefer the commissioner to hear their cases. It will, it is pointed out, remove any feeling of imposition from above and the court will be free from bias. A harsher penalty is also seen in the law which extends to two years imprisonment or fine up to 200 thousand dollars and for continuance of the offence it is 1000 dollars per day. But the question remains: how far these heavy penalties will survive in the light of large number of exceptions under sections 341, 341A and 342 of the New Zealand Resource Management Act, 1991, as amended by the Act of 1997?

A resume of the select provisions of other countries is marked by disparity in qualifications required; Malawi and Finland prefer suitable qualification while Trinidad, Tobago and Belgium prefer long experience in the field. Indonesia requires a judge to have undergone a course on environmental law at the basic law degree together with certification to handle environmental litigations. In Brazil the industry, Bar Association, NGOs, etc. also participate in appointment of judges to the environmental court. Some environment courts like Canada, Australia, Netherland charge very heavy fees whereas in Denmark, Sweden, Kenya no fee is charged.

Apart from the above position one can find a sad development in the growth of the specialist courts. The countries like US, Scotland, Finland, and Austria are going back to the old court system. South Africa is one where such experiment has been thrown to wind. The governments of Bahamas, Guyana, and Jamaica are considering to wind up the existing system. Tanzania and Fiji are some of the countries where the legislation is in existence but the forum has yet to see the light of the day. Does it not show a wave back to judicial justice from tribunalization?

III. Pre-Green Tribunal Era

It was in the year 1980 that the Tiwari Committee[15] made suggestions for the establishment of separate courts to handle environmental issues. But unfortunately such report was put in the cold storage with hardly any compliance by the governments. In *M.C. Mehta* v. *Union of India*,[16] the Supreme Court brought on record the difficulty in handling techno-science issues in handling environmental litigations and since 1987 the Apex Court is, time and again, directing/recommending

[15] *The Report of Committee for Recommending Legislative Measures and Administrative Machinery For Ensuring Environmental Protection*, Dept. of Science and Technology, Govt. of India (Sept 15, 1981).

[16] *M.C. Mehta* v. *Union of India*, (1984) 1 SCC 312.

the Union of India to constitute environmental courts.[17] The Estimate Committee of Ministry of Environment and Forests also supported such a move.[18] Meanwhile India was going through the aftermath of the Bhopal mass disaster with no technical and scientific input in the administration of the environmental justice and, therefore, a need of specific dispute settlement forum was felt. In view of this, the Supreme Court of India in the *Charanlal Sahu* case[19] directed the central government to constitute a tribunal to determine and settle claims of victims of disaster or accident. In order to have a separate dispute resolution mechanism, Parliament in 1995 enacted the National Environment Tribunal Act, 1995, a legislation which came to an end without the tribunal seeing the light of the day, a sad story of the legislation. Is it not a case of contempt of the House for frustrating the intention of Parliament? Does such exercise not infringe the principle of legitimate expectations? Is there no question of accountability? Was it not a wastage of the precious time of the Parliament? If yes, who will be accountable and compensate for it. It was unfortunate even the activist Apex Court did not interfere into a such matter.[20]

It was in *A.P. Pollution Control Board* v. *M.V. Nayadu*[21] that Jagannath Rao, J. directed the Law Commission of India to look into the need of constitution of environmental courts on top priority. But the top priority matter took two long years and the Commission submitted its Report in 2003.[22] The Commission on the basis of preparatory materials recommended to constitute environmental courts.

After six long years in 2009, the recommendations were given due recognition by Parliament and on July 29, 2009 National Green Tribunal Bill was introduced in Lok Sabha. There was hardly any major change in the National Green Tribunal Act, 2010 over the provisions of the Bill. It may be pointed out that Justice Jagannadha Rao in the *A.P. Pollution Board* case[23] had directed the central government that such experiment "requires to be studies and examined in depth from all angles". Thus the judicial verdict remained unresponsive on the deaf ears of the government.

IV. The Indian Experience – NGTA 2010

The discussion on the salient features of the National Green Tribunal Act, 2010 (NGTA) is divided under the following heads:

[17] *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965, *Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613; *Vellore Citizens Welfare Forum* v. *Union of India* (1996) 5 SCC 647; *A.P. Poll. Cont. Board* v. *M.V. Nayadu*, 1999 (2) SCC 718 and 2001 (2) SCC 62.

[18] 61st *Report, Estimate Committee*, Min. of Env. & Forest (1987-88).

[19] *Charan Lal Sahu* v. *Union of India* (1990) 1 SCC 613

[20] *A.K. Roy* v. *Union of India*, AIR 1982 SC 710.

[21] (2001) 2 SCC 62.

[22] 186th *Report of Law Commission of India on Proposal to Constitute Environment Courts* (2003).

[23] *A.P. Pollution Board* v. *M.V. Nayudu*, AIR 1999 SC 812.

A. Objectives

The objectives of the present legislation were: The implementation of international decisions at Stockholm and Rio where India was a party. Secondly, article 21 of the Constitution of India has been given an expansive meaning resulting in emergence of neo-fundamental rights, including the right to healthy environment which needed an effective judicial protection. It may be pointed out that a reference to article 21 in this legislation has not much relevance as its enforcement is specifically provided in articles 32 of 226 of the Constitution of India. Further, it leaves out the inclusion of the relevant constitutional mandates: the fundamental duty of the citizens towards environment (article 51Ag) and also the fundamental obligation of the State to protect and improve the environment (article 48A). This could have completed the constitutional environmental *triveni sangam*. Further, the sources of this enactment are the decisions taken at the Stockholm and Rio Conferences, a reference which has been given in almost majority of the environmental legislations. But unfortunately both the Conferences did not specifically advocate for a specific tribunalized justice and as such the aforesaid reference is misplaced in the present case. Furthermore, the demand of constitution of an environmental court was first discussed in the Tiwari Committee and a detailed infrastructure of such courts was recommended by the Law Commission. It is unfortunate that these important exercises were not given due place in the objectives of the legislation.

B. Constitution of Tribunal

In an attempt to bring a change over from the environmental courts to tribunal and v*ice versa*, the present legislation makes an important attempt in this direction and tries to meet out the persistent demand of expertised justice. The environmental justice which will be delivered by this alternative dispute resolution mechanism will be now judicial expertised justice. The further plus point with this forum is that the expert members will measure justice with techno-science scale, leaving little scope of judges forging their philosophy of either justice to environment or development. The examples are not unknown: justices like Krishna Iyer, Bhagwati and lately Kirpal, Khare and Anand have tried to see that the balance is tilted towards environment; whereas, there were other set of judges who dominated on the development side, which includes for example, justices like Desai, Sen, Ahmadi and Patnaik.[24] The speedy justice at a cheaper cost is another hope from the present legislation.

It is too early to say whether the Tribunal will be able to administer environmental justice in a better way but problems still remain: how for the two sets of persons with different expertise will go hand in hand; will the expert leave

[24] See C.M. Jariwala, "The Directions of Environmental Justice : An Overview", in SK Verma and Kusum (eds.), *Fifty Years of The Supreme Court of India Its Grasp and Reach* 470 (2000).

the bench and satisfy himself with the laboratory experiments before any decision is taken; will the expert member be allowed to deliver decision on behalf of other members; will the persons who have no legal background and having no experience of administering justice be able to successfully participate in the niceties of legal jargons; the scientific results are uncertain and, therefore, can the expert member be allowed to rewrite the order; if the bench constitutes a judge and two non-judicial members, will not expertise dominate over the judicial justice; and lastly, the most important question is: how far the tribunal will attract the highly placed eminent non-judicial members? Only time will answer these question. However, it seems to be a herculean task to allow the expert members to administer due justice. The support to this stand gets from the Supreme Court and high courts, wherein the courts have time and again faced the difficulty with the experts and their reports which had in some cases conflicting opinions, disparity in reports, wrong advice/ report and even played politics.[25] In such a scenario the question is: will the bench not face such crisis in administering tribunalized environmental justice?

The composition of tribunal includes a full time chairperson and minimum ten and maximum twenty full time judicial and expert members respectively. In this connection it may be pointed out that the Law Commission in its report had also suggested an inclusion of a person from the Bar. In India, with the flood of environmental litigations over the period of time, lawyers have developed a special skill to successfully handle such litigations, the well-known example is of M.C. Mehta. And, therefore, a provision for an eminent environmental person from the Bar must also find a place is the constitution of the tribunal. The above provisions make an important improvement over the part-time system and system of commissioners. Further, looking to the existing number of environmental litigations the provision for the maximum of twenty members in each case, it seems, will not create the problem of large backlogs of cases, if any.

The qualifications for the appointment for the chairperson is that he must be a judge of the Supreme Court of India or Chief Justice of a high court. It is the National Tribunal and as such it would have been better had a judge of the Supreme Court of India only adorn the office of the chairperson. Apart from the above qualification which is applicable to a judicial member, even a sitting or retired judge of a high court may also become a judicial member of the tribunal. The inclusion of judges of the Supreme Court and high court is necessary because the tribunal has been put on par with the high court in environmental litigations and moreover they can balance the justice scale judiciously.

In case of the expert member, the qualifications are: a degree in Master of Science-Physical and Life Sciences with doctorate degree or Master of Engineering or Master of Technology with at least fifteen years experience in the relevant field

[25] *See* for a detailed discussion, C.M. Jariwala, *Environment and Justice*, 73-75 (2004).

out of which at least five years practical experience in the field of environment and forests in a reputed National level institution.[26] The areas of practical experience have been further expanded to include pollution control, hazardous substance management, environment impact assessment, climate change management, biological diversity management and forests conservation. It may be pointed out that the requirement of Degree of Master of Engineering or Technology is very vague. It should have been better had the qualifications included specific specialization in environment. Moreover, there are litigations covering the areas including agriculture, ecology, soil, animals, property, medicine, economics, management, noise, etc. These areas, it is suggested, need specific mention so that the expert members have micro-specialization in the concerned field of environment to better understand the issues and administer justice. This has become necessary in the micro-specialized world.

It may be pointed out that in the given eligibility requirement even a junior scientist or teacher may be appointed. The question is: can such a person be put on par with a Supreme Court or high court judge? The protocol demands that only highly placed experts with eminence must adorn the office. There is no scarcity of such persons, the top IITs, technical universities and institutions and institutes conducting techno-science researches in India may provide such non-judicial members.

The alternative qualification[27] is fifteen years administrative experience and in this, five years are required in dealing with environmental matters in the central or a state government or in a reputed national level institution. It is surprising that in case of this category no academic specialized qualifications are prescribed. Moreover, it will give a place even to bureaucrats to administer environmental justice. Further there may be cases where initially for five years the persons concerned might have handled environmental matters but in the last ten years he may be holding an administrative position looking after purely the administrative work of a department of government or an institution. The question is: can he be a befitting person to hold the office of a member of the national tribunal? In view of this, it is suggested that the first qualification given in section 5(2)(a) is enough with the aforesaid suggested reforms:

The chairperson shall be appointed by the central government in consultation with the Chief Justice of India. Should the term 'consultation' in this regard may mean 'concurrence' as has been interpreted by the Supreme Court under article 124 of the Constitution of India[28]? The other members shall be appointed on the recommendation of such selection committee as may be prescribed. There is nothing

[26] See Sec. 5(2)(a).
[27] See Sec. 5(2)(b).
[28] See *S.C. Advocate-on-Record Assn.* v. *Union of India*, AIR 1994 SC 268; and also *In re Presidential Reference*, AIR 1999 SC 1.

in section 6(3) which specifically provides as to who will make the selection committee and appointment—a case of bad drafting. Is it the central government or the chairman of the tribunal? In the subsequent provisions regarding removal of the members it is the central government who has been given of the power of removal, as such, the harmonious construction would tilt the balance in favour of the central government.

The members shall hold the office for a term of five years. In case of expert members the question is: should the term be five years? With the changing time the contents of study of science and technology also change fast. Moreover, the neo-environmental litigations will need different experts to provide input in environmental justice. In such circumstances the legislation should have provided a shorter tenure of expert members so that new areas experts find a place on the bench from time to time or else a commissioners' panel to extend a helping hand to the tribunal in case of need. It may be pointed out that looking to the present involvement of NEERI, rather monopolization, in the dispensation of environment justice, there are other leading IITs and research institutes which also need to be involved in such exercise.

The Act provides that the members shall not be eligible for reappointment. It may be pointed out that in case of Administrative and Tax Tribunals, there are provisions in the respective legislations for the reappointment of members. It is suggested that a well experienced member, if given a chance to be reappointed, will administer experienced justice. There are provisions not only for removal of the members on the grounds mention in section 10(1) but also an important provision, to suspend the members in case of an inquiry pending against him, a provision which is missing in the Constitution of India in case of impeachment proceedings against a judge of the Apex and high court.

There exists disparity in the age limit for which a member shall hold the office. Section 7 and its proviso after proviso provide different retirement age limits for different members, ranging from sixty-five, sixty-seven and seventy years. It is suggested that instead of varied age limit, the members should be allowed to continue for a full term of five years. This will avoid *aya ram* and *gaya ram* situation and will allow the members to administer a matured environmental justice. It may be pointed out that when a judge or chief justice of a high court is appointed as a judge of the Supreme Court, his term does not terminate with the age limit laid down for the high court i.e. 62 years. Further, in view of longevity of life in India today even a person with seventy years of age continues to contribute purposeful services.

Another flaw that exists in the provision of appointment of the judicial members is that, they shall also be appointed on the recommendation of such selection committee as may be prescribed; whereas, if the judicial members have to be removed then a consultation with the Chief Justice of India is required. Will it not be better, had the provisions for the collegium, presently operating in the appointment of the

judges of the Apex and high courts, be given a place in the appointment and removal of judicial members? Moreover, is it wise to ask a judge of the Supreme Court, a chief justice of high court or judges of high courts to apply for the position of membership of the tribunal and face a selection committee?

Section 5(4) imposes a ban on any member, including the chairperson, not to accept any employment for a period of two years[29] in any institution or under a person who has been a party to the proceeding before him, except the employment in central or state government or local authority or a government corporation or company. Thus the ban will only apply to employment in a private establishment. Will such arbitrary discrimination not attract the provisions of article 14 of the Constitution of India? Will such a long ban that too only on a private entity not infringe article 19(1)(g)? Furthermore, the present section, it may be pointed out, envisages two years time within which the proceeding would conclude. The environmental litigations have seen a long time battle extending to a period more than ten years.[30] Will the two years ban have any meaning in such cases? Further there is a distinction between employment and engagement. The members, after their retirement from the services of the Tribunal, may start environment NGO to make all efforts to protect and improve the environment and advice even the concerned parties whose cases were proceedings before them when they were on the bench. Will an engagement giving advice come under the ban?

C. Jurisdiction and Powers

The tribunal has been given wide jurisdictions. Looking to the matters which will come before the tribunal, can it be said that all of them will be confined to only 'green' India? But looking to the environmental litigations which have come before the Supreme Court and high courts, they are not merely confined to greenery or green matters, rather they involved large number of components of environment. Thus it is submitted that the 'green' label requires replacement by 'environment'. The jurisdiction of the tribunal is divided into two: first, the original; and second, the appellate. In case of the original jurisdiction, section 14 provides that the Tribunal shall have jurisdiction over all civil cases. However there are two limitations: Firstly, there must be a substantial question relating to environment involved. Secondly, the question must arise out of the implementation of the seven legislations mentioned in Schedule I to the Act of 2010.[31] This Schedule strangely excludes the Wild Life (Protection) Act, 1972, an important component of environment, and a large number

[29] The 2009 Bill provides ban of one year only, Sec. s. 5(4).

[30] See, for example, *M.C. Mehta* v. *Union of India*, AIR 1997 SC 734. (12 years); *M.C. Mehta* v. *Union of India*, AIR 2000 SC 3052 (15 years). For detailed discussions see C.M. Jariwala, *Environment And Justice* 36-39 (2004).

[31] The legislations included are: The Water Act, 1974; The Water Cess Act, 1977; The Forest Act, 1980; The Air Act, 1981; The Environment Act, 1986; The Public Liability Insurance Act, 1991; and The Bio-Diversity Act, 2002.

of legislations related to environment to which the Tiwari Committee pointed out their number to two hundred. Thus to this extent the present legislation has a myopic operation by providing a limited jurisdiction.

Section 16 earmarks the appellate jurisdiction to cases where any person is aggrieved by any direction, order or decision made on or after the commencement of the Act under six legislations, keeping the Public Liability Insurance Act, 1991 out of the jurisdiction. In both the jurisdictions the date of limitations is different. In the first case it is six months from the date on which the cause of action arose; however a grace period of further sixty days is given in case of sufficient cause. In case of appeal, it is thirty days from the date of communication of direction, order or decision to the party; however grace period of sixty days on sufficient cause is also provided. It is suggested that the limitations should have been treated on par in both the cases so that in genuine cases the limitation does not debar any person to take recourse to the tribunal.[32] This will not allow the scrupulous litigants to drag on the environmental litigations for an undue long time, resulting in justice delayed—justice denied. The environmental litigations cannot afford such undue delay.

In the jurisdictional matter it may be pointed that the Act does not refer to articles 32 and 226 which provide in themselves a fundamental right and constitutional right respectively to enforce fundamental rights. This raises the question: can a statute put an eclipse on article 32? Furthermore, the tribunal is given original jurisdiction: will it bypass the jurisdiction of the high courts under article 226, which itself gives a constitutional right to enforce fundamental right? The Act has no specific answer but the position is that the Act cannot do so. Section 22 provides that a person aggrieved by any decision of the tribunal may file an appeal to the Supreme Court. This section talks about the ordinary appellate jurisdiction of the Supreme Court but there is no mention of article 136 which provides for special leave to appeal by the Supreme Court. This is an extra-ordinary jurisdiction given to the Apex Court, which, it may be pointed out, cannot be impliedly restricted by any statute. In such a situation, is not it a doubtful proposition that the recourse to the Ttribunal is very limited? Will not the cost of litigation accelerate if first recourse is taken to the tribunal? In view of the aforesaid conflict there is an apprehension that the tribunal may hardly get many disputes to decide, raising a question mark on its very existence. It is time a serious consideration must be given to the above problems.

It may be pointed out that in the tribunal apart from judges, there are expert members as well and, therefore, the question comes: should the tribunal, like International Court of Justice, be also given an advisory jurisdiction? There are matters like approval of mega projects, government's environmental decisions or policy, which when approved or framed, could be set aside by the judiciary. In

[32] In this regard special mention may be made of s. 15(3) extend the limitation period to undue long span of 'five years' and a further grace time of another 'sixty days'.

some cases crores and crores of rupees are invested and in other, the industrial processes have already started. But at this late stage the courts come down heavily on them. It is suggested that the tribunal be also given advisory jurisdiction. And lastly PIL which has been the backbone of the environmental litigation must also find a place in process of the tribunal.

Recapturing to the powers of the tribunal, it has been authorized under section 15(1) to provide relief and compensation to the victims of environmental pollution; restitution of property damaged; and restitution of the environment polluted. The word 'victims' is not defined under the Act. The question is: will it cover men, animals, plants, soil and property who were also victims of pollution?[33] However looking to the separate heads for compensation provided in Schedule II, the word 'victims' will extend to include animals, plants, soil, land and properly. The question is why should such victims remain uncompensated and with no restitution. If one looks to the sad outcome of the *Oleum Leak* case[34] or the *Bhopal Mass Disaster* case[35], the sole concern of the judiciary was to compensate only the human beings; whereas the victims included animals, plants, soil, underground water and what not. Fortunately, the heads are stretched to include even loss to business or employment, but unfortunately there is a confusion about the private property. Item (e) of the Schedule provides 'damage to private property'; while item (l) exclude private property. It is submitted that in cases of pollution many a time private property also suffers damage and, therefore, private property should not be subject to exclusion under the heads for the claim of damages. Further the lists include the heads for compensation to any loss arising from handling of hazardous substance but it does not include hazardous wastes which also equally damage the environment and its components. In India we have also separate regulations governing the hazardous waste. A reference to hazardous wastes, it is suggested, must also find a place in Schedule II.

Further, over and above the powers mentioned in the Act, the tribunal shall have all those powers vested in the civil court under the Code of Civil Procedure, 1908. The decision given by the majority members shall be binding. In case the bench is equally divided then the matter shall be heard by the chairperson. Further, if still they are equally divided then the matter shall be referred to the other bench. There is also a provision for award of costs and also costs in case of false or vexatious litigation including lost benefits due to any interim injunction. It is submitted that in order to discourage such litigations, provision for exemplary cost should have been provided. The orders or decisions of the tribunal are to be executed by a civil court having local jurisdiction. There is an important provision in section 24 which allows the compensation ordered for the damage of environment to be deposited in the

[33] See, *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965; *Union Carbide Ltd.* v. *Union of India*, AIR 1990 SC 273 where compensation was given only to human beings.

[34] *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965.

[35] *Union Carbide Corpn.* v. *Union of India*, AIR 1992 SC 248.

Environment Relief Fund. The money so deposited shall be utilized by the authority in such a manner as may be prescribed. Previously such money was deposited in the Consolidated Fund and it was utilised for general purposes. Now the money so deposited in the Environment Fund will be utilized only to repair or regenerate the damaged environment.

Section 17(1) brings the concept of strict liability in case of death, injury or damage caused by an accident. The legislations in Schedule section 17(3) specifically brings 'no fault' principle in such cases. The person responsible shall compensate the loss under all or any head mentioned in Schedule II. Section 17(2) takes care of joint liability in case of combined activities and in such a case the tribunal is empowered to provide for apportioned compensation on an equitable basis. These provisions will now also cover those cases which escaped liability in previous legislation. Previously, in case the individual pollutants were within the prescribed standard when they joined but such pollutants combined with pollutants of other industries and thus exceeded the prescribed standard in such cases no penal sanction was attracted against the individuals. Such eventuality is ruled out in the present Act.

D. Penal Provision

The Act of 2010, for the first time, comes out with a heavy penalty in terms of fine. Section 26 provides that whoever fails to comply with any order or decision of the tribunal he shall be punishable with imprisonment extending to a period of three years, a lower punishment in the history of enhanced punishment or fine which may extend to ten crore rupees or both. In case the contravention continues then an additional fine of rupees twenty-five thousand for every day during such continuance shall be levied. However, in case a company is guilty then the fine shall be increased to twenty five crore rupees and rupees one lakh per day for its continuance. Further, the non-compliance is made non-cognizable offence under section 26(2). It is unfortunate that the harsh penalty is neutralized by sections 27 and 28 wherein if the company or the government department could prove that the offence was committed without knowledge or due diligence was exercised in preventing the commission of such offence, then in their cases no penalty will be attracted. Thus the mandatory application of principles of no fault liability, strict liability and polluter pays principle prescribed by the Act of 2010 are badly diluted, leaving the main actors, polluting the environment, to go scot free. Those with open eyes could defy the orders or decisions of the tribunal may take the umbrella of above pleas for their protection. Is not it contrary to the principle of sustainable development and against environmental justice?

E. Miscellaneous

The Act, surprisingly, does not allow public interest litigation mechanism which was already provided under the draft Bill in section 18(2)(e) and has been a

well established process before the Supreme Court and high courts and, therefore, the draft provisions be reinstated. In order to dispose of application or appeal, the Act provides a time schedule of six months from the date of filing of application or appeal. In the light of the experiences shown in the disposal of environment litigations at the high courts and Supreme Court levels, can such a lofty hope of expeditious disposal be achieved is a very doubtful proposition. Further, section 20 imposes a mandatory duty on the tribunal to apply the principles of sustainable development, the precautionary principle, the polluter pays principle and the no fault principle, while passing any order, decision or award. It may be pointed out that these principles have been declared by the Supreme Court, in catena of cases[36], as a part of law of the land. Moreover, the parameters of these principles will change with changing time and circumstances and are subject to varied definitions. Further, the vision of the tribunal should not be constricted by a few statutory principles. Over the period of time and with the changing needs some more principles may be required to be applied. In such circumstances, should the tribunal wait and see that/those principles become first a part of a law and then only apply. It seems that the recommendation on this count given by the Law Commission in its 186th report has been blindly incorporated in the Act without due consideration in this regard.

F. Repeal of the Existing Laws

The Act of 2010 repeals firstly the law which did not come into force for last fifteen years, the National Environment Tribunal Act, 1995; and secondly, the National Environment Appellate Authority Act, 1997. The cases pending before the Appellate Authority shall stand transferred to the green tribunal on its establishment. The officers and other employees who were on deputation shall stand reverted back to their parent departments and those appointed on contract basis shall be entitled to claim compensation for three months salary or for the residual of their services whichever is less. It may be pointed out that the Act of 1997 came into force long back and the officers and employees working on permanent and contract basis for such a long time, if not absorbed, they will be on the road. The legislation in order to do justice should have made some provisions for the continuance of the experienced persons instead of paying some money and saying good bye to them.

V. Epilogue

The present study brings out that the leading international environment conferences, referred to in the Statement of Object and Reasons and the Long Title to the Act, hardly throw any light in this regard. Is not time ripe that the world community must now discuss and resolve as to what may be the appropriate dispute

[36] See, e.g., *Indian Council for Envirolegal Action* v. *Union of India*, AIR 1996 SC 1446; *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *M.C. Mehta* v. *Union of India*; AIR 1997 SC 73; *A.P. Poll. Control Board* v. *M.V. Nayudu*, AIR 1999 SC 812.

settlement mechanism, which the nations in general and nation as individual, adopt to ensure justice to the environment.

The comparative experiences by and large favoured expertised justice; however there were different approaches as to how should it be operationalized: commissioners v. non-judicial members. None of the models have history of long operation and, therefore, they are presently in the operational stage, contributing to no concrete directions. However, there are certain comparative exercises which may provide important lessons to India. Some of them may be: a well qualified and experienced panel of experts. In this regard the Indonesian requirement of exposure of environmental law and a certificate thereto deserves special attention. Some of the leading IITs have the law departments which could render a great service in the present context. The accessibility must be less technical and speedy and cheap justice are some of the good points.

On the other hand, the court's power to order for compulsory mediation, heavy penalty on the guilty and the concept that 'the loser further loses' will do more harm than justice. Though India may learn useful lessons from them with the condition that the Constitution of India has now environmental *triveni sangam* vision wherein the large litigants take refuge.

The pre-green tribunal scenario has a sad story to tell of a half hearted approach: one, confined only to environment accidents; and the other, limited to appellate jurisdiction. The sad story becomes more unfortunate as both the exercises hardly provided any contributions in the environment justice delivery jurisprudence. The efforts so made and the cost involved from the drafting stage to its final enactment have gone to drains. Who has suffered? The answer is, 'we the people of India'. Who is accountable for such a loss? However, one important direction which emerges from the exercises of 1995 and 1997 that it gave a start for an alternative settlement forum in the administration of environmental justice.

The present legislation was built up on the infrastructure of the 1995 Act, the large portions from different chapter of the Law Commission's report were incorporated in the Act of 2010 and further it has almost copied the provisions of the Bill of 2009. All these reflect that the Members of Parliament were either not so concerned or had no time to devote for justice to environment or could hardly contribute to the techno-scientific issues—an environmental illiteracy. It is not only the judiciary but also the legislators who need a training programme on environment and environmental law so that such persons being trained can become well-equipped and self sufficient to participate in the passage of the Bill. Furthermore, like the judiciary, the House while discussing complex techno-science issues must be provided with the services of experts so that a serious fruitful and purposeful debate may be held in the House. Thus there is need of a panel of commissioners for the House. The law schools have also an important responsibility to make positive

contributions in this regard by training the students to have knowledge and skill to help in successfully administering environmental justice as the future lawyers, judges and legislators.

One thing which needs serious attention is the expression 'green' has a limited operation as compared to the expansive term 'environment'; moreover, none of the world models have given this title. It is, therefore, suggested that the Act must be given widest wings to fly all around instead of confining simply to the 'green' beauty. Furthermore, since 1981 the environmental legislations in India have taken shelter under the international decision and in the present case the international decisions nowhere talk about the tribunalized environmental justice, a misplaced source of legislative power. In such circumstances, a time has come when 'environment' must find a place in List III - Concurrent List.

Coming to constitution of the Tribunal, it provides for a fairly large number of both judicial and non-judicial members which may be able to face future flood of environmental litigations, if any. In the combination of judicial and non-judicial members there is no scope for the eminent environment lawyer to be a member. The present law needs to open such avenue. Further, two important reforms are also needed in this regard: first, the chairperson of the National Tribunal must be a sitting or retired judge of the Supreme Court of India. Second, the non-judicial members' qualifications should be so reframed that only highly eminent experts with micro specialization are appointed.

On the selection side of members, the judges must be selected through the collegiums and the expert members by a selection committee and its constitution must find a specific place in the NGTA. The Court's experiences in working on expertised opinion, and also the points made out above against the engagements of expert members, it seems, it is doubtful that the combination will successfully continue in environmental litigations in India. It would be better the legislation provides that the bench shall be headed by a judge and he shall deliver the award or decision of the tribunal. Furthermore, in the jurisdictional conflicts between the Supreme Court and the tribunal, the constitutional remedies cannot be put in eclipse. Moreover, generally the litigants will approach in the first instance to the Supreme Court for a final verdict in the matter with a minimum cost, thus, will it not put a question mark on the very existence of the tribunal. It is true that any new system brings problems and challenges but it is the duty of the legislature to sort out them before the system itself faces the crisis of existence.

The present legislation fortunately takes care of large areas to be compensated and relief as compared to the Bhopal Mass Disaster where large number of victims remained uncompensated and unattended. It has been given original jurisdiction to move at the first instance, a good start. Further, the speedy justice envisaged in the legislation ensures the fundamental right to speedy environmental

justice. The statutory recognition of the 'no fault' principle, principle of strict liability, deserves appreciation. But how far these developments will successfully be implemented is a question which only time will answer after the tribunal becomes functional. The legislation for the first time comes down very heavily on the defaulting persons, which indeed is a good move. But the question remains: have the heavy sanctions halted divesting damage to environment? Will not it drive out the small industrial houses? Thus its sustainability in total perspective needs serious relook. The Act now makes known to the concerned authorities and the people in general about the settled environmental principles. It would have been better had the tribunal been allowed to apply many more in case of need and its judicial activism could evolve new principles. The last but not the least, the positive contribution of the Green Act is that compensation against degradation of environment will go to a separate fund which will be utilised for the benefit of environment. But the past three decades experience has been that this item of compensation has least attracted the attention of the courts.

So what do we need now? Before the tribunal faces challenges for its very existence, the Parliament must step in and remove the aforementioned hurdles and disparities, otherwise the sad scenario, mentioned above in the comparative world, may also operate in India.

INTERNATIONAL OVERVIEW OF ENVIRONMENTAL COURTS AND TRIBUNALS

Paul Leadbeter

I. Introduction

ECTs [Environmental Courts and Tribunals] are looked to as one solution for fairly and transparently balancing the conflicts between protecting the environment and promoting development; for managing cases more efficiently and effectively; for supporting greater public information, participation, and access to justice; and for achieving more informed and equitable decisions. A number of prominent ECT models have paved the way and provided successful examples for other nations. Environmental justice advocates have been persuasive that specialized ECTs can be an efficient and effective way of achieving environmental goals. In addition, international governmental organizations such as the United Nations Environmental Programme (UNEP) and national foreign aid agencies have supported the creation and implementation of ECTs as part of their efforts to promote environmental democracy, access to justice, rule of law, and sustainable development[1].

Prior to 1993 State of South Australia had a system for the merit review of a wide range of land use planning decisions before a specialized Planning Appeal Tribunal. Criminal and civil enforcement of laws was however, prior to 1993, dealt with in the general courts at magistrate and district court level.

II. International Requirements

There are no international conventions or treaties which deal specifically with specialist environmental courts or tribunals. This is not altogether surprising. Whether or not to create and use a specialist court would generally be considered to be a matter exclusively within the province of nation states and not something requiring international regulation. However, the desirability of having courts or review bodies for the purpose of reviewing government decisions on matters of environmental significance has been the subject of international discussion and policy. It has been particularly important from the point of view of ensuring that citizens have adequate access to justice in this area. The starting point is in my opinion, Principle 10 of the Rio Declaration[2] on Environment and Development which provides:

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1 Pring, George and Pring, Catherine, "Greening Justice-Creating and Improving Environmental courts and Tribunals", *The Access Initiative* 11 (World Resources Institute, 2009).

2 Rio Declaration on Environment and Development, Adopted by the UN Conference on Environment and Development at Rio de Janeiro, 13 June 1992, http://www.unep.org (January 12, 2011).

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

In their very detailed and impressive work on Greening Justice,[3] George and Catherine Pring note first, that this principle has its genesis in the earlier documentation produced by the United Nations Experts Group on Environmental Law of the World Commission on Environment and Development, "Legal Principles for Environmental Protection and Sustainable Development"[4].

Article 6 of those Principles provides that States shall inform in a timely manner all persons likely to be significantly affected by a planned activity and to grant them equal access and due process in administrative and judicial proceedings. Article 20 provides that States shall grant equal access, due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by transboundary interferences with their use of a natural resource or the environment.

Pring (in part quoting an earlier piece by Philippe Sands) makes the point that Principle 10 of the Rio Declaration has "provided the benchmark against which the compatibility of national [judicial] standards can be compared and inspired the development of a number of hard laws" and has noted that a number of subsequent binding treaties have provided very strong access to justice rights.[5]

The Greening Justice report is just one of a number of sequential reports prepared by a group of five non-governmental organisations known as 'The Access Initiative', formed following concerns that 10 years on from the Rio Earth Summit implementation of Principle 10 had not been as focused as it could (and should) have been. It is "designed as a guide to government, judicial and civil society leaders and members of the public who are interested in creating or reforming a specialised environmental court or tribunal (ECT) to improve access to environmental justice."[6]

3 Pring, George and Pring, Catherine, "Greening Justice-Creating and Improving Environmental courts and Tribunals", *The Access Initiative* (World Resources Institute, 2009).

4 Adopted by the WCED Experts group on Environmental Law on August 4, 1987, http://www.un-documents.net/ocf-a1.htm (January 12, 2011).

5 *Supra* note 3 at 8.

6 *Supra* note 3 at xiii.

In 2002, at Cartagena, UNEP's Governing Council approved a set of guidelines on compliance with and enforcement of multilateral environmental agreements. These guidelines have been developed with the cooperation of more than 70 states and many other stakeholders. A manual to which the guidelines are annexed has been prepared to facilitate use of the guidelines. There is an extensive and comprehensive range of guidelines. Guideline 41 addresses institutional frameworks and in particular guideline 41(o) promotes "provision of courts which can impose appropriate penalties for violations of environmental laws and regulations, as well as other consequences." In the expanded discussion of this guideline it is noted that "courts are the most prevalent formal institutional setting for sanctioning the violation of environmental laws and regulations and ensuring compliance with environmental laws and standards." It further notes that almost every country in the world has courts of one form or another and that in some parts of the world specialist courts have been created to deal specifically with environmental cases. While the guidelines state that, "the establishment of an environmental court is not strictly necessary for ensuring that environmental cases are handled appropriately ...", they advise that in states where the judicial structure accommodates specialist courts, the concept of a specialist environmental court may warrant consideration. One could read the guidelines as implicitly endorsing the concept of specialist courts and tribunals.

In December 2006, at a New Asian- African Strategic Partnership-UNEP Workshop on Environmental Law and Policy jointly convened by the governments of Indonesia and South Africa in Jakarta and Bandung, Indonesia, 58 experts from 40 Asian and African countries including India considered the problems and needs in environmental law and policy facing their countries and as a consequence developed a set of recommendations to move forward and address those problems. These recommendations became known as the Bandung Roadmap for Advancement of Environmental law in support of the New Asian-African Strategic Partnership[7].

Of particular note in the roadmap is Principle 7(k) which seeks to "promote the development of mechanisms to facilitate the prevention and peaceful settlement of environmental disputes, including the use of arbitration, environmental court and other practical dispute resolution mechanisms." Thus, a number of mechanisms at the international level, while not directing the creation and use of specialist courts and tribunals are nevertheless putting them forward as a worthy consideration for countries looking at establishing appropriate mechanisms for dealing with environmental disputes.

Leading the way in terms of future international approaches it is also worth mentioning the Aarhus Convention[8] (Convention on Access to Information, Public

[7] www.unep.org/dec/docs/Bandung-Roadmap-info-note.pdf (January 13, 2011).

[8] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998, www.unece.org (January 12, 2011).

Participation in Decision-making and Access to Justice in Environmental Matters) which was done at Aarhus in Denmark on 25 June 1998. The convention was open for signature by state members of the Economic Commission for Europe as well as states having consulting status with the Commission.[9] However, other states which are members of the United Nations may accede to the convention upon approval by the majority of the parties.[10] To date, it appears that outside of Europe, only French Guiana in South America has acceded to the convention.

The Aarhus Convention is important because it foreshadows a new approach and direction in terms of the commitment by nation states to guaranteeing and improving existing mechanisms within their states for accessing information on environmental matters, for improving public participation in decision-making on such matters and for providing much improved and greater access to justice on such matters. From the perspective of environmental disputes and the law, article 9 is most important. It requires the parties to the Convention to do a number of things:-

(i) Provide a review procedure before a court of law or another independent and impartial body, of decisions made on request for information.

(ii) Provide access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision act or omission on a range of environmental issues. This right is to be available to persons having a sufficient interest or maintaining the impairment of a right. The convention does not prescribe what is a "sufficient interest" leaving that to the requirements of national law but does require that the interest be one which is consistent with "the objective of giving the public concerned wide access to justice within the scope of this convention."[11]

Thus while the Aarhus Convention does not specifically require the provision of specialist environmental courts or tribunals is it is clear that the existence of such bodies would help facilitate the achievement of the objectives of the convention. It is also indicative of developments in the European community, which coincidentally has a number of countries with specialist environmental courts and tribunals. It is also frequently held out as an example of a more generous set of rules for broad and comprehensive public participation in matters of an environmental nature.

III. Some Observations on the Development of Specialist Environmental Courts

In the introduction to the Greening Justice report Lalanath de Silva, the Director of The Access Initiative for the World Resources Institute states[12] that specialised courts, tribunals and judges are not new and have existed in ancient and

[9] Art. 17, Aarhus Convention, see *supra* note 9.

[10] Art. 19(3), Aarhus Convention, see *supra* note 9.

[11] Art. 9(2)(b), Aarhus Convention, see *supra* note 9.

[12] *Supra* note 3 at xi.

modern times.[13] South Australia has a number of specialist courts and tribunals at both the federal and state government level as I am sure does the Indian legal system. For example, South Australia has a Residential Tenancies Tribunal, Industrial Relations Court, Mining Warden's Court, Social Security Appeals Tribunal, Youth Court, Drug Court, Coroners Court, and a range of professional disciplinary tribunals, and an Equal Opportunity Tribunal to name but a few. South Australia also has its own Environment, Resources and Development Court which includes among its areas of work land-use planning, pollution issues, environmental authorisations and native title matters. Judge Jack Costello will address this workshop in detail on the composition and function of this court.

Much has been written justifying the creation of specialist environmental courts and tribunals and others have also propounded reasons why such specialist bodies are not appropriate. Briefly, reasons which the Greening Justice report has identified as being justifications for the creation of specialist environment courts and tribunals include:

(i) They can create a group of decision-makers who have knowledge and experience in the environmental law area. They can also accommodate non-lawyer members who have technical or scientific expertise in areas such as environmental science, land use planning, water, engineering and pollution control.

(ii) Such bodies can speed up the process of hearing and determining appeals if environmental matters are taken out of the mainstream court lists (which in many countries suffer from lengthy backlogs and delays).

(iii) They are a visible and obvious example of government action in response to community demands for greater levels of environmental protection.

(iv) With regard to costs specialist courts can adopt particular costs rules which can reduce costs for certain parties. For example, in South Australia, third party planning appeals (where a challenge has been made by way of appeal to a planning authority's decision on a particular development proposal) are not subject to any cost orders. This means that each party bears their own costs but no one else's costs, whether or not they win or lose the case.

(v) Uniformity — Pring argues that there is a need for consistency in decisions. In my opinion, proper application of the doctrine of precedent together with the convention that the various judicial members of a court will endeavour to ensure their decisions are consistent with those of other court members will go a considerable way towards achieving this in any

[13] In ancient Rome, de Silva notes that the Praetor Urbanus adjudicates disputes between Roman citizens while the Praetor Peregrinus adjudicates disputes between foreigners.

court system. Where the specialist environmental courts can, however, very usefully ensure uniformity is in relation to be application of penalties in criminal matters. Experience in South Australia suggests that where the specialist court deals with such matters rather than the general courts it results in the application of more consistent penalties and higher penalties than if the matters were dealt with in the ordinary magistrates court.

(vi) Pring also argues that, "The single biggest barrier to the first step of access to justice is the issue of standing — the credentials required to open and get through the door of justice. Specialist ECTs may be empowered to define standing more broadly or in ways not legally or politically feasible for the general courts, opening the door to public interest litigation (PIL), interested third parties, and class actions aimed at protecting public rights and the rights of future generations, not just individual or adjacent property owner rights."[14]

(vii) Such courts provide a demonstrable commitment on the part of the government to environmental justice.

(viii) They can ensure greater accountability of government departments if those departments know that their actions and decisions can be reviewed by an independent environment court.

(ix) Such courts better facilitate the fast tracking of urgent cases. It avoids matters being placed in the "too hard" basket.

(x) Specialist courts tend to have more flexible rules of procedure and evidence and less formality and processes. In South Australia, the Environment Resources and Development Court is quite accommodating of unrepresented litigants in ways that would not normally be countenanced in the conventional court system.

(xi) Specialist courts are more inclined to promote, require and facilitate the use of alternative dispute resolution mechanisms such as conciliation, mediation, third-party neutral evaluations and arbitration.

(xii) It is argued that specialist environmental courts can be specifically empowered to take a more integrated approach to dealing with a range of environmental laws particularly where the legal system has not required integration of the disparate laws in development and environmental assessment processes. In South Australia and also in the state of Queensland, there are integrated development assessment processes. Thus if someone seeks development approval for a land-use which has elements

[14] *Supra* note 3 at 15.

which may require the use to also obtain an environmental authorisation under separate legislation to address the waste generated by the proposed activity[15] the planning authority undertaking the land use planning assessment is required to consult with and either have regard to or follow the direction of the state Environment Protection Authority which is the authority responsible for issuing the environmental authorisation relating to the waste component of the development proposal.

(xiii) One of the very real advantages is that related to what Pring calls "remedy integration". The fact that the one court, when dealing with one matter can call upon civil, criminal and administrative jurisdictions in the same forum is very useful.

(xiv) Experience has generally been that specialist environmental courts and tribunals allow greater public participation in the review process. This is particularly allowed through more open and liberal standing provisions.

(xv) It is also argued that specialist environmental courts and tribunals can provide a more flexible approach to resolving an issue. For example, in South Australia, where a full bench of the court is comprised of a judge and two non-lawyer experts where particular design or technical matters have been the subject of contention, the experts will sometimes suggest an alternative solution to those matters which has been acceptable to the parties and assisted in the resolution of the dispute.

(xvi) Pring notes that, "Given the mandate to balance environmental and economic rights to achieve sustainable development, and the freedom to be creative problem solvers, many judges have become activist advocates for protection of the environment." Whether or not this is a desirable thing is debatable. Presumably many would not object to an activist judge where the activist judge was advocating their particular cause. However they may think differently if the activist judge takes a different position from their viewpoint. In the following list of arguments from the opponents of specialists courts the undesirable aspects of this particular approach are also noted.

Pring[16] has noted the following issues have been raised by the opponents of specialist environmental courts and comments that the same issues and arguments are used to resist any form of judicial specialisation.

(i) Why favour the environmental area? Other areas could equally claim a need for specialisation.

[15] For example, if the land use involves a waste disposal component.

[16] *Supra* note 3 at 17-18.

(ii) Some express concerns about specialised courts resulting in the marginalisation of environmental cases resulting in them getting less attention, poorly qualified decision-makers and less money compared to the general courts.

(iii) There exists the potential to isolate and fragment the judicial members of the specialist court from other judges in the legal system.

(iv) Opponents of specialised courts often argue that it is better to allow specialisation of certain judges within the existing system. Those judges then sit and hear the environmental cases. This already happens to some extent on an ad hoc informal basis in Australia. In Indonesia there is a policy that only judges who have undertaken some environmental law training can sit on cases involving environmental law matters.

(v) If, from time to time, there are not enough environmental cases what do the members of the specialist environmental court do? Should the judges sit in other areas? What about courts which had non-legal expert members? At times when there is low work levels how do you keep those members occupied? In the absence of legal qualifications and experience they are obviously not able to sit in and determine matters in other courts. At least the judicial members of such courts can sit in other jurisdictions if required. If environment judges have lesser workloads on a regular basis this may create resentment with other members of the judiciary.

(vi) A separate court can be an additional cost burden.

(vii) Where land use planning and environmental protection and authorisation systems are not integrated there can be some public confusion as to where to take appeals if the environment court does not have jurisdiction in all areas.

(viii) How do you classify cases as being environmental cases for the purposes of going before the specialist environment court?

(ix) Some have expressed concern about the court and its appointment processes being controlled by powerful vested interests. This is particularly the case where the environment minister is the minister responsible for the appointments.

(x) On occasions there had been concerns expressed that the persons appointed to the court may have a biased point of view. For example, if, prior to appointment to the court they worked externally within or for the conservation movement exclusively or for the development industry when practising law could they be perceived as favouring those particular interests in their judicial approach? This, so it is argued, ultimately makes

persons who are required to use the court distrust the court and the members of the court which has the overall effect of undermining public confidence in the court. In the writers opinion this argument underestimates the ability all lawyers who are appointed to be members of any court to respect the fact that they are required to act in an independent, objective and judicial manner. Certainly, within the common law system, that has always been a requirement of lawyers who are appointed to the bench and I can see no reason why that traditional approach and attitude will not continue with respect to members of the profession who are appointed to the bench of a specialist environmental court or tribunal.

(xi) Obtaining adequately trained and experienced members for the court can be a problem in some countries.

(xii) Judges involved in the decision-making may go beyond their narrow application of the "rule of law" and develop their own unique jurisprudence.

(xiii) Some judges appointed to the court may find it limits or restricts their opportunities for career advancement.

(xiv) There are some concerns that such specialists courts will be seen as inferior to the mainstream general courts. This results in the court receiving less respect, resources and support from the government and community generally.

Whatever the arguments for and against specialist environmental courts they have been very popular particularly in the last decade. In 2009, the Greening Justice report identified[17] over 350 specialist environment courts and tribunals in 41 countries. Some countries, such as the Philippines, have many.[18] A very diverse range of countries have implemented such courts and tribunals and in countries like Australia with a federal structure, each of the states has their own particular bodies with responsibility for environmental matters.

In South Australia, the specialist Environment Resources and Development Court had its genesis in an earlier Planning Appeal Tribunal. That tribunal was first established in 1968 as a Planning Appeal Board with judicial and non-legal expert members and then in 1982 it became a Planning Appeal Tribunal. It sat as a three-member bench with one judge and two lay expert members. It had no criminal jurisdiction. Where breaches of the planning legislation occurred, separate action had to be taken in the district court, sometimes at the same time as the subject land or development was being considered in an appeal in the tribunal. To be most effective

[17] *Supra* note 3 at 11.

[18] 117 as at 2009. See *ibid.*

specialist courts and tribunals require a broad range of powers and, in my opinion, both civil and criminal jurisdiction.

It is also contended that specialist environmental courts and tribunals work most effectively where there is an integrated development assessment system. That is, the assessment and decision-making processes for matters involving land use planning, environmental pollution, water quality and quantity control, waste management and the impacts of proposals on biodiversity—all need to be linked. Where there are statutory review and appeal mechanisms available in relation to decisions made on such matters than one court is able to review all the relevant issues and information.

IV. Elements of Successful Specialist Environmental Courts and Tribunals

As noted earlier 41 countries have established environmental courts or tribunals. Judge Jack Costello will discuss the specialist Environment Resources and Development court in South Australia of which he is a judge. The South Australian court has, to a significant extent, modelled itself on the Land and Environment Court in New South Wales. The New South Wales court was according to the chief judge, the Honourable Justice Brian J Preston, the first specialist environmental superior court of record in the world. The New South Wales Land and Environment Court differs from the South Australian court in that it is situated at Supreme Court level[19] whereas the South Australian court sits at district court level.[20] Appeals may be taken as a matter of right from the Environment Resource and Development court to the South Australian Supreme Court on questions of law and with the leave of the court on questions of fact[21]. The state of Queensland also has a specialist planning and environment court. In the states of Victoria and Western Australia environmental matters are dealt with by a specialist division of the state administrative tribunals.[22] The island state of Tasmania and the two territories, the Australian Capital Territory and the Northern Territory have specialist tribunals.

The Australian courts and tribunals have many characteristics in common with many of the specialist environmental courts and tribunals elsewhere in the world. An excellent list of all the known courts and tribunals as at 2009 is contained in appendix 1[23] to the Greening Justice report.

Rather than refer to specific courts or tribunals and their particular practices, an effort has been made to highlight the Greening Justice report's findings on best

[19] The Supreme Court is the highest level of court within the states in Australia.

[20] The district court is the next level down from the Supreme Court.

[21] Sec. 30, Environment Resources and Development Court Act, 1993.

[22] In Victoria — Victorians civil and administrative Tribunal, planning and environment list; In Western Australia — state administration tribunal, development and resources listed.

[23] *Supra* note 3 at 106-109.

practices for environmental courts and tribunals which are discussed in each chapter of the Green Justice report and then separately listed in appendix 2 to the report.[24] The findings have been made following the completion of a comprehensive two-year worldwide study undertaken by the authors of that report. The Greening Justice list of best practices has been summarised below:

A. Type of Forum

The best forum is an independent judicial court, with a high public profile, decision-makers with a high standard of training in environmental law and with published decisions. The independence of the body from political pressure or punitive action following decisions unfavourable to the government of the day is imperative.

B. Legal Jurisdiction

There needs to be an integrated environmental and land-use planning court with civil, administrative and criminal jurisdiction, appropriate and adequate enforcement powers and providing a one-stop shop for decision review and remedy provision.

C. Court Decision Level

The ideal situation involves a specialist environmental court or tribunal at trial and appeal level. Apparently Sweden, Finland, Belgium and Japan all have this type of model. If a two level structure is not possible (and in many places the costs of such a scheme would be a major deterrent) then Greening Justice's findings suggest that it is better to have the court or tribunal at the trial level, the reason for this being that it is then likely there will be a better informed decision with less likelihood of appeal made earlier in the dispute resolution process.

D. Geographic Area

The courts which provide the best access to justice are those which try to make themselves accessible, by either travelling on circuit or providing links through tele and video communications. An essential characteristic of an effective court is the ability to visit sites which are the subject of the dispute.

E. Case Volume

Greening Justice states "Best estimates are that at least 100 actual case filings per judge per year are required to justify a standalone ECT".[25] The message appears to be that specialist courts can start small and grow if the volume of cases requires it.

[24] *Id.* at 110-113.
[25] *Id.* at 111.

F. Standing

"ECT laws and rules that provide the best access to justice authorise standing for 'any person' raising an environmental issue, including individuals, citizen and community groups, businesses, NGOs, and future generations. The ECT can be given authority to dismiss and/or penalise frivolous, vexatious, or otherwise improper filings, rather than use standing restrictions as a " doorkeeper"."[26]

G. Costs

"[The] incorporation of as many cost-mitigation tools as possible is recommended to enhance access to justice and support citizen's rights to be heard, including those filing public interest lawsuits. These include:

(i) Reducing or waving filing, transcript, and other court fees

(ii) Efficient court management techniques, such as directions hearings

(iii) Allowing parties to represent themselves without attorneys

(iv) Government funding for public interest plaintiffs

(v) Public environmental prosecutors

(vi) Government agency representation

(vii) Ombudsman offices

(viii) Proponent or intervener funding

(ix) Attorney and expert fee legislation

(x) Alternative dispute resolution

(xi) Judges having discretion not to shift costs to the losing side, except in frivolous or otherwise abusive or improper cases

(xii) Legislation giving judge's discretion in awarding costs against PIL plaintiffs in jurisdictions following the 'loser pays' rule

(xiii) Not requiring security for costs for an injunction in appropriate cases

(xiv) Taking action against SLAPP suits."[27]

H. Access to Scientific and Technical Expertise

The Greening Justice study found that the best specialist environmental courts and tribunals had access to independent neutral scientific and technical expertise. The courts did this by having a blended bench comprised of a judge and members (without legal training) but with relevant scientific and technical expertise.

[26] *Ibid.*
[27] *Ibid.*

The report gives as examples of these courts the Land and Environment Court in New South Wales and Environmental Court of Appeal in Sweden. The South Australian Environment Resources and Development Court has a bench membership of this nature. It has a number of full-time commissioners (who are not legally trained) and whose expertise is in the area of land use planning law (reflecting the fact that this area comprises a significant proportion of the courts workload). The court also has a range of part-time commissioners with expertise in a number of different technical areas. It is the responsibility of the presiding judge in any appeal to determine which part-time commissioner would be best qualified to sit on a particular matter. The Greening Justice report also notes that the ideal courts are those where the court has the power to appoint or engage an individual expert of its own volition (i.e. in the absence of any request from the parties). The Environment Resources and Development Court has this power in order to get an investigation report done by an expert on a "question of a technical nature arising in any proceedings".[28] The person who prepares such a report becomes an officer of the court[29] and the court may adopt the report in whole or in part.[30] Interestingly, in South Australia the costs of obtaining such reports are to be borne equally by the parties although the court has the discretion to direct otherwise.[31] In my experience this power has been rarely used. The courts practice appears to be that if it believes there is a deficiency in the evidence adduced by the parties to proceedings it will raise that deficiency with the parties and invite them to take their own steps to remedy it. Parties generally prefer to take up the invitation thereby giving them more "control" over the witness.

The Greening Justice report also noted that the courts which dealt with scientific and technical expertise best also had practice rules in place allowing the judges to control the various experts called by each party. It suggests rules worth considering include:

(i) Making experts first duty to the court, rather than the parties paying the fees

(ii) Assuring the public and parties who cannot afford expensive experts that they can rely on other parties' experts to testify truthfully and objectively

(iii) Allowing the judge to require parties' experts to have a prehearing facilitated meeting to resolve all areas of agreement and disagreement and write a joint report to the court and parties

(iv) Allowing the judge to lead, organise, and sequence experts' testimony to maximise efficiency and effectiveness

[28] Sec. 27, Environment Resources and Development Court Act, 1993.
[29] Sec. 27(2), Environment Resources and Development Court Act, 1993.
[30] Sec. 27(3), Environment Resources and Development Court Act, 1993.
[31] Sec. 27(4), Environment Resources and Development Court Act, 1993.

(v) Permitting the filing of amicus curiae reports or briefs by independent experts."[32]

I. Alternative Dispute Resolution

The Greening Justice report identified alternative dispute resolution (ADR) as being an important component of the service provided by a specialist environment court or tribunal. Mediation, in particular, was seen as being very useful in terms of increasing the level of access to justice. It concluded from its investigation that the following components were advisable:

(i) A court annexed and court paid service

(ii) Including directive or evaluative mediation

(iii) Provider should be mediation trained (ideally credentialed) attorneys experienced in environmental law approved by the ECT

(iv) ECT staff mediators are preferable to using judges or decision-makers as mediators

(v) Mediation should not be mandatory, but all cases filed with the ECT should be assessed at intake for the appropriateness of ADR and referred if appropriate

(vi) Formalised screening rules providing a reliable, transparent process should be developed and used to evaluate all cases

(vii) A process for incorporating needed scientific — technical information and opinion into the mediation should be adopted

(viii) Mediated settlements/agreements should be reviewed and approved by the ECT and made enforceable orders

(ix) Other alternative means for professional mediation can be considered if the ECT budget cannot provide mediation at no charge to litigants

(x) Part of a "multi-door" courthouse concept, providing access to a variety of ADR and adjudication processes in one place.[33]

J. Competence of ECT Judges and Decision-Makers

The Greening Justice report stresses the importance of the judges and other members of the specialist environment courts and tribunal being approved by a neutral process. They need to be well qualified and experienced in the area of environmental law. They need to be given security of tenure and have a court budget

[32] *Supra* note 3 at 112.
[33] *Ibid.*

which cannot be manipulated by politicians, unhappy with the court's decisions. Salaries need to be commensurate with other salaries paid to judges in other courts. It also recommends that the judges continue to undergo training in environmental law and other needed skills through a judicial training institution (as presently occurs in the Philippines).

K. Case Management

The Greening Justice report's conclusions on the issue of case management were as follows:

> Proactive use of case management tools can measurably enhance access to justice and ECT operations. The most helpful, according to both parties and decision-makers who were interviewed, are case management itself, directions hearings, ADR screening, and IT. However, each of the tools entail costs in time and money to establish, learn, implement, evaluate, and fine tune. No jurisdiction studied has incorporated all the possible case management tools to improve efficiency and access to justice, in part because new tools are constantly being developed and made available to the judicial system.[34]

L. Enforcement Tools and Remedies

In South Australia the Environment Resources and Development Court has civil, administrative and criminal enforcement powers. This combination of powers is very useful. A wide range of enforcement powers gives the court significant flexibility. The Greening Justice report recommended that sufficient enforcement options need to be provided to the specialist courts "to allow judges to effectively resolve the environmental disputes, monitor outcomes, and/or sentence criminal violators".[35] It concludes from its range of interviews that the ideal package of enforcement powers should enable the court to:[36]

(i) Issue interim relief or preliminary injunctions at an early stage in proceedings

(ii) Issue injunctions without a security bond all stages

(iii) Deny or substantially amend a development proposal

(iv) Award substantial monetary fines and penalties, dedicated to environmental restoration or environment protection

(v) Order remediation

[34] *Supra* note 3 at 113.
[35] *Ibid.*
[36] *Ibid.*

(vi) Design alternative and/or creative sentences to fit the violation.

The South Australian Environment Resources and Development Court has this range of powers within its jurisdiction.[37]

V. Conclusion

There have been a sufficient number of specialist environmental courts and tribunals now in existence for a sufficient period of time in various jurisdictions throughout the world to enable some valid observations to be made about the operation of these bodies. The significant work undertaken by the authors of the Greening Justice report has resulted in invaluable details about these institutions.

The Australian experience with specialist environmental courts and tribunals has overall been a very positive one. Some would argue that some of our courts and tribunals could be a bit more flexible with their approach to standing although in my experience, limitations on standing in relation to certain matters dealt with in some courts are often the result of limitations imposed by the courts enabling legislation or the statutes governing the area of concern, such as land-use planning control or the authorisation of environmentally significant activities.

Establishing such a system of specialist courts has to be more expensive. Where finances are particularly constrained an alternative might be to establish a specialist division within an existing court as has occurred in at least two of the Australian states where specialist environmental divisions have been created within existing administrative Tribunals.[38]

Ultimately the test as to whether specialist environmental courts and tribunals are effective is:

(i) If access to the courts (for the purposes of review) by persons concerned about activities having an impact on the environment is improved;

(ii) If decision makers, mindful of the Court's review powers, give appropriate and due regard to the environmental impact of proposals at the time of making their decisions to ensure they are consistent with ecological sustainability;

(iii) If when breaches of environmental laws occur, the court is able to exercise a range of enforcement options, and

(iv) The court is perceived to be independent, and fair in its dealings with the general public, government and industry.

[37] See, e.g., in relation to land use planning matters the powers vested in the court under sec. 88 of the Development Act, 1993.
[38] *Supra* note 22.

LIMITED PROSPECTS FOR ENVIRONMENTAL JUSTICE IN THE UNITED STATES

David D. Peck[*]

I. Introduction

The environmental justice movement has taken root in many countries worldwide. In tracing the history of environmental justice the important, some might even say critical, role played by courts in many parts of the world deserves prominent mention. In Asia alone the growth in the number of so-called "green benches" over the past twenty years is a phenomenon in itself. According to an April 2010 brief published by the Asian Development Bank under the subject of "law and reform policy," there are special environmental tribunals of one kind or another in Bangladesh, the Peoples Republic of China, India, Japan, Malaysia, Pakistan, the Philippines, and Thailand.[1] Some of these countries have moved beyond subject-matter jurisdiction and related substantive law, into the area of specialized training for judges. In Indonesia, for example, only judges trained in environmental law may hear environmental cases. Although not all of these courts are focused on environmental justice as compared to environmentalism, they provide an institutional forum within which proponents of environmental justice may advocate change, and provide a specialized judicial infrastructure that is missing in the United States.

II. Environmental Justice Mechanisms in India and the United States

India was among the first nations to "have embraced an environmental right, and 'fostered an extensive and innovative jurisprudence' on it."[2] This has been principally accomplished through the extension of constitutional jurisprudence in connection with the discovery of fundamental rights in article 21 of the Constitution of India. As one observer put it, "under the canopy of article 21 of the Constitution so many rights have found shelter, growth and nourishment…though the article appears to be negative in its grammatical form, it has in reality been given a positive effect by judicial interpretation."[3] Thus under article 21, there is a right to life, and concomitant rights to a healthy environment,[4] to the enjoyment of pollution-free

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1 Asian Development Bank: Law and Policy Reform. *Asian Judges: Green Courts and Tribunals, and Environmental Justice*, Brief No. 1, April 2010, 3-4, http://www.adb.org last accessed on January 25, 2011).

2 Lavanya Rajamani, "The Right to Environmental Protection in India: Many a Slip Between the Cup and the Lip?" *Review of European Community & International Environmental Law* 274-286 at 274 (Nov. 2007).

3 P.M. Bakshi, *The Constitution of India* (Universal Law Publishing Co., 10th Ed., 2010).

4 *M.C. Mehta* v. *Union of India*, AIR 1987 SC 1086; *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.

water[5] and pollution-free air.[6] In the case of *Vellore Citizens Welfare Forum* v. *Union of India* the Apex Court went further than the proclamation of fundamental rights relative to environmental justice, establishing a formal judicial mechanism: a "Green Bench."[7] Recently, the Central Government was scheduled to introduce Bill Number 63 of 2009, creating a national green tribunal by legislative act, perhaps made in response to recommendations made in the Law Commission of India's 186th Report.[8] The 2009 Bill was passed into law and the Lok Sabha has now taken action to create its own judicial enforcement venue in the area of environmentalism, and possibly of environmental justice as well.[9]

The work of the Supreme Court of India and other Indian courts in the area of environmental justice has not been without its critics. More than ten years after the judicial declaration of the fundamental rights mentioned earlier and the establishment of the Green Bench in *Vellore*, observers have noted a disparity between the statement of fundamental environmental rights on the one hand, and their elusive realization on the other. Lavanya Rajamani noted in 2007 that "the use of such ambitious aspirational language [by the Supreme Court of India] in the context of fundamental rights indicates a willingness, neigh an enthusiasm, to cast utopian and poorly defined goals in rights language."[10] One Indian Supreme Court advocate was reported to say that since "the [2010 National Green Tribunals Act] is not based on the absolute liability principle…environmental disasters like the Bhopal Gas tragedy can always recur as the polluters can get away easily…. Thus, the question is whether the essence of the preamble [of the 2010 National Green Tribunals Act] is reflected in [the provisions of] the Act."[11] Another advocate reportedly commented that, "the crucial problem with this Act is the issue of access to justice for the poor and helpless, the major victims of environmental disasters. There is no provision which aids them," raising the question of whether the newly established National Green Tribunal is aimed more narrowly at purely environmental concerns or will address the broader issues of environmental justice and article 21

5 *B.L. Wadhera* v. *Union of India*, AIR 1996 SC 2969.

6 *Indian Council for Enviro-legal Action* v. *Union of India*, AIR 1996 SC 1446. To the American observer, one wonders if the multiplication of fundamental rights relative to environmental justice may conflict with other article 21 fundamental rights relative to economic development which arguably, or at least potentially contribute to pollution and urban sprawl such as the right to shelter recognized in *U.P. Awas Avam Vikas Parishad* v. *Friend Co-operative Housing Society Ltd.*, AIR 1996 SC 114, and the right to livelihood recognized in *Madhu Kishwar* v. *State of Bihar*, AIR 1996 SC 1864.

7 *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715.

8 Bill Number 63 of 2009, *The National Green Tribunal Bill, 2009*. Law Commission of India, *One Hundred Eighty Sixth Report on Proposal to Constitute Environmental Courts* (September 2003).

9 J. Balaji, "Lok Sabha Passes Green Tribunal Bill," *The Hindu* May 1, 2010, http://www.thehindu.com (January 25, 2011); Approved by the President of India on 02 June 2010, http://www.indiaenvironmentportal.org.in (January 25, 2011).

10 *Supra* note 2 at 284.

11 Ashkay Deshmane, "Green Tribunal Act Can't Avert Environmental Calamatics," *Daily News & Analysis*, 21 June 2010, http://www.dnaindia.com (January 25, 2011), quoting Advocate Sanjary Parikh.

and environmental rights as defined by the court in the decisions referenced earlier.[12] Whether or not the new national tribunal will meet and overcome these criticisms, from the perspective of an American observer, there *is* a National Green Tribunals Act in India and there is a national green tribunal.

The United States is notably absent from lists of nations with "green benches." It may be argued that it does not need one. The United States has a relatively strong (as compared to several nations adopting green benches) existing environmental monitoring and enforcement agencies, including the Environmental Protection Agency, as well as other federal and state agencies, arguably obviating the need for an extraordinary judicial institution dedicated exclusively to the subject of the environment or of environmental justice.[13] In Fiscal year 1970, the EPA's budget was slightly in excess of one billion dollars, with a workforce of 4,084. By Fiscal year 2010 the budget was in excess of ten billion dollars with a workforce of 17,278.[14] In contrast, the budget of India's Ministry of Environment & Forests for fiscal year 2005-2006 was Rs. 387.6 lakh, or about USD $850,000 in 2011 dollars.[15] The EPA is active in levying fines, and encouraging environmental cleanup. In 2010, the EPA and its tribunals levied $4.9 million in fines in the Northwest Region alone, and supervised $107 million of pollution control and clean-up.[16] The lack of a subject matter restricted green bench in the United States should not be hastily viewed as an abandonment of environmental enforcement or concern, although debate over the nature and quality of the EPA's work is subjected to debate.

Although there is no national green bench or similar tribunal that does not mean there are no green benches at other levels of government in America. There are a few. The State of Vermont created a special Environmental Court in 1989, with its subject-matter jurisdiction aimed at the protection of the environment and human health based upon *existing* laws, to prevent unfair economic advantages gained by violators of environmental law, and to ensure even-handed compliance with the law.[17] The State of Tennessee created the Shelby County Environmental

[12] *Ibid.*, quoting Advocate Krishnedu Mukherjee.

[13] Additionally, there are no federal green benches due to the organization and governance of the Supreme Court itself. The United States Supreme Court consists of nine justices who effectively remain on the court until they resign or die. There are no "benches" or subdivisions of the U.S. Supreme Court. Each Justice has one vote on a case, and all are individually empowered to rule on every case. The Chief Justice has one vote, the same as any other Justice, and exercises duties that are largely administrative, having no authority to organize "benches." There are no provisions in Supreme Court rules, the law of the United States, or in the Constitution authorizing the creation of sub-divisional "benches." The U.S. Supreme Court is therefore not empowered to solve the question of access to environmental justice through the creation of "green benches."

[14] Data extracted from the official EPA website, http://www.epa.gov/ (February 2, 2011).

[15] Report of the Ministry is available online at *envfor.nic.in (February 2, 2011)*.

[16] The Seattle Times, "EPA levied $4.9 million in penalties in Northwest," 06 December 2010, available online at http://seattletimes.nwsource.com (February 2, 2011).

[17] Based upon a symposium speech given by Judge Meredith Wright, "Vermont's Environmental Court," http://www.nepa.gov.jm (January 25, 2011).

Court in 1991. The purpose of this court is to "ensure that out children's legacy was that of a better Memphis (the county seat of Shelby County)."[18] Such specialized courts are exceedingly rare in the United States, and they mainly address environmental law as such, not environmental justice. In fact, if one searches the web using the phrases "green bench" and "United States" the resulting hits are largely advertisements for lawn furniture stores.

III. Definitional Challenges

How is it that the United States, once a leader and innovator of "rights" laws in the 1960s and 1970s, has no environmental court? The United States Supreme Court has not identified any fundamental rights relative to environmental justice. The lack of fundamental rights reflects in part the fact that the "rights era" of American constitutional law, at its height in the 1960s and 1970s, seems to have come and gone. In the past three decades, there have been attempts to gain recognition of animal rights,[19] of a right to die in the context of physician-assisted suicide,[20] for example, none of which has produced the rights desired. The court thus seems unwilling to recognize additional fundamental rights in these areas, and there is no indication that rights will be recognized in the area of environmental justice in the near future. But specifically in the area of environmental justice, the failure may be due to the inability of the environmental justice movement itself to define itself as apart from environmentalism, or apart from other movements aimed at racial, gender or socio-economic justice.

There is no universally accepted definition of the environmental justice movement's aims and objectives, or definition of exactly what environmental justice is as distinguished from "environmentalism" which aims primarily at the preservation and management of natural resources and wilderness. In 1991, the First National People of Color Environmental Summit was held in Washington, D.C. The Summit produced seventeen principles of environmental justice, a functional and early definition of environmental justice in the United States: "our vision of the environment is woven into an overall framework of social, racial, and economic justice."[21] This broad definition is, of course intertwined with the substance of environmental law. Thus racism, color, national origin, or income are tied to existing environmental law concepts and categories: "development, implementation, and enforcement of environmental laws, regulations, and policies," conflating environmental management and protection with the much more expansive, and far

[18] Larry E. Potter, "Shelby County Environmental Court," http://www.vacantproperties.org

[19] *United States* v. *Stevens*, 559 U.S. (2010), Docket Number 08-769.

[20] *Gonzales* v. *Oregon*, 546 U.S. 243 (2006). Although the Court upheld the Oregon Death With Dignity Act, it refused to recognize a "right to die" as such, ruling on the case narrowly as to the authority the government exercises over the prescription of controlled substances.

[21] Ronald Sandler and Phaedra Peluzzo, "Revisiting the Environmental Justice Challenge to Environmentalism," in Ronald Sandler and Phaedra C. Pelluzzo (eds.), *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (MIT Press, 2007).

more complex, issues of racial and socio-economic equality and justice. Opponents, consequently, cast the concept of environmental justice in terms of claims of racism, or socio-economic class distinctions, but only loosely associated with concepts of environmental management or protection. In light of the racial and socio-economic elements of environmental justice, opponents also criticize the movement by calling "into question [its] very philosophical base ... [which] as defined by its advocates, it depicts a world where poor and black neighborhoods are as environmentally pleasant as rich and white ones."[22]

The lack of clear definition coupled with the perception that environmental justice is essentially racial, gender, or socio-economic justice by other means, arguably dilutes the effectiveness of the movement in America, and attracts opponents from a substantial conservative political presence in the United States. Additionally, the argument may be made that there are already-existing judicial doctrines and mechanisms through which claims of racial or gender discrimination may be asserted pursuant to the due process and equal protection clauses of the Fifth and Fourteenth amendments of the Constitution and laws enacted by Congress and the state level; that consequently, there is no pressing need to use environmental law or concepts to address racial or gender injustices. Additionally, "Critics of the environmental justice movement," noted M. Nils Peterson, "claim it has no scientific basis in fact, but rather is a mask for efforts of minorities and other disenfranchised groups to gain political power" by non-democratic means.[23]

The lack of clear definition and the politico-philosophical challenges faced by proponents of environmental justice has not resulted, however, in a complete lack of effort to implement some form of environmental justice in the United States. Nevertheless it has produced only limited political solutions, weakened by an accepted categorization primarily as environmental law measures and little more, and by a near-complete lack of enforcement mechanisms. President Bill Clinton included some provisions relative to environmental justice in Executive Order 12898 (11 February 1994), which were subsequently adopted by the Environmental Protection Agency. As defined by the EPA:

> Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income *with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies*. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate

[22] Walter Block and Roy Whitehead, "The Unintended Consequences of Environmental Justice," 100 *Forensic Science International* 57–67, at 62 (1999).

[23] M. Nils Peterson, *et al.*, "Moving Toward Sustainability: Integrating Social Practice and Material Process," in Ronald Sandler and Phaedra C. Pelluzzo (eds.), *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (MIT Press, 2007).

> share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.[24]

This definition, arguably unknown to most Americans, states many principles of environmental justice, but links them directly to environmental law, conflating environmental justice with environmentalism. This indicates some lack of comprehension about the inseparable human and socio-economic aims embraced by the environmental justice movement in the United States even at the highest levels of government. Furthermore, although the definition provides minimal clarification of environmental justice, "the goals of Executive Order 12898 are not being achieved by the Environmental Protection Agency...Since Executive Order 12898 lacks fines for non-compliance...there is little incentive to comply."[25] Not only is there no green tribunal to enforce the law, there is no actual mechanism within the executive branch to enforce it if there were.

IV. Property Rights Challenges

Even if there were a clearer definition of environmental justice, there are other serious challenges facing proponents of environmental justice and the establishment of green tribunals in America. Such challenges are derived from the American conceptualization of private property rights on the one hand and the limits of governmental regulation on the other, as well as the limitations placed upon the commerce clause powers of congress pursuant to the so-called New Federalism espoused by members of the U.S. Supreme Court.

Americans tend to treat personal property rights with near-reverence, grounded in a widespread conviction that the essential purpose of government is to guard personal property rights. John Locke's famous Second Treatise on Government exercised a profound influence upon the justifications formulated by American colonists to validate independence from Great Britain. Locke succinctly stated the proposition this way: "The great and chief end therefore, of Men uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property." The famous revolutionary watchword phrase, "no taxation without representation" tied the alienation of property by the government with the right to participate in the government, so as to regulate such takings, to see to it that, in the

[24] http://www.epa.gov (January 22, 2011). Also cited in Kevin DeLuca, "A Wilderness Environmentalism Manifesto: Contesting the Infinite Self-Absorption of Humans," in Ronald Sandler and Phaedra C. Pelluzzo (eds.), *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (MIT Press, 2007); The EPA has no universally accepted methods for determining whether or not this definition is met.

[25] Celeste Murphy-Greene and Leslie A. Leip, "Assessing the Effectiveness of Executive Order 12898: Environmental Justice for All?" 62(6)*Public Administration Review*, 679-687, at 683 (Nov.-Dec., 2002) . One wonders if interest in environmental justice is waning at the EPA, which published "quarterly" bulletins on Environmental justice beginning in 2002, until apparently dropping the practice in 2007. See http://www.epa.gov January 25, 2011).

area of taxation in this case, the government secured the "preservation of their property" One way or the other.[26] On some occasions, the framers of the constitution recognized, the common welfare requires the taking of some personal property to achieve a greater end. The constitution consequently contains the "takings clause" of the fifth amendment: "nor shall private property be taken for public use, without just compensation." The takings clause becomes significant in the context of environmental justice at the point where a deepening level of governmental regulation of property constitutes the effective taking of that property, triggering compensation based upon the fifth amendment takings clause.

Pennsylvania Coal Company v. *Mahon* established the rule that once a certain level of regulation is reached, it constitutes a public taking, requiring compensation to property owners. In *Mahon*, a mining company had contracted in the 1880s to mine coal under the surface of Mahon's habitation. A 1921 Pennsylvania law, the Kohler Act, prohibited such mining if it would damage the habitation. The company, therefore, could not mine the coal it had purchased under Mahon's habitation pursuant to the provisions of the Kolhler Act. Suit was brought, and on appeal to the U.S. Supreme Court, Justice Oliver Wendell Holmes, Jr. authored the majority opinion, concluding that, "if regulation goes too far it will be recognized as a taking."[27]

Whereas Environmental Justice calls for an eventual end of inequitable environmental burdens being placed upon communities because of such factors as race, gender, ethnicity, or socio-economic status, the reasoning of the takings clause focuses analysis upon private property rights, not justice. The clause balances the public interest in regulating property use against the right of the owner to the peaceable enjoyment of their property, and other inherent indicia of ownership. The Supreme Court provided such a balancing test in the 1960 case of *Armstrong* v. *United States*: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[28]

In the case of *Lucas* v. *South Carolina Coastal Council* (1992) the Court addressed takings by means of environmental regulation, bringing the Takings Clause and environmental law into the same case. Justice Scalia, writing for the majority, developed a "categorical takings" doctrine, by which a private owner must be compensated for property when "a regulation declar[ing] 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant

[26] The complete text of John Locke's *Second Treatise on Government* is widely available on the internet. See, http://www.gutenberg.org/ebooks/7370 (January 25, 2011).

[27] *Pennsylvania Coal Company* v. *E.J. Mahon*, 260 U.S. 393 (1922), 415.

[28] *Armstrong* v. *United States*, 364 U. S. 40 (1960), 29.

background principles would dictate, compensation must be paid to sustain it."[29] The applications of the takings clause to environmental regulation, the kind of regulation arguably needed to establish environmental justice, illustrates how the American conceptualization of private property may form a considerable obstacle to realizing environmental ends, and by extension to the achievement of environmental justice. Professor Richard J. Lazarus noted that,

> The nature of ecological injuries also creates considerable pressure for change in property law doctrine. Restrictions designed to address ecological injuries invariably limit the exercise of private property rights in natural resources. These limitations disrupt, sometimes severely, settled economic expectations in those resources. The distributional repercussions are considerable, and they fuel major conflicts in various political arenas regarding how private property rights in natural resources should be defined and protected. In extreme circumstances, moreover, those on the losing end of the policy determinations file lawsuits challenging any resulting limitations on their exercise of property rights as unconstitutional Fifth Amendment takings of private property requiring the payment of just compensation."[30]

The economic demands placed upon private property through the re-conceptualization of property rights required by environmental regulation are arguably enhanced when issues of collective justice and the redistribution of environmental burdens are added to the discussion. Unless and until the members of the court see environmental issues themselves as broader than private property rights, there is small likelihood that this institution will engage questions of environmental justice and environmental burden redistribution.

V. "New Federalism" and Commerce Clause Limitations

Chief Justice John Marshall declared in the 1819 case of *McCulloch* v. *Maryland* that, "this government is acknowledged by all, to be one of enumerated powers."[31] Congress cannot act on any matter except as authorized in the Constitution, and possesses no general welfare powers with which to fashion environmental law, regulation, or provisions for securing environmental justice. The commerce clause is the broadest of all congressional powers and might be used to address environmental justice, but it too has its limitations. Article I, section 8 of the U.S. Constitution provides that Congress shall have power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The

[29] *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), at 1030.

[30] Richard J. Lazarus, "Restoring What's Environmental About Environmental Law in the Supreme Court," *UCLA Law Review* 703-812, at 752-753 (February 2000).

[31] *McCulloch* v. *Maryland*, 17 U.S. 316 (1819).

Supreme Court has interpreted the commerce power both broadly and narrowly at various times throughout American history, in an effort to create and balance complimentary national and state powers regarding commerce. The power of Congress over interstate commerce is plenary, but it has no authority over intra-state commerce. The power of each state over its internal commerce is limited primarily by its effect on interstate commerce or other restrictions on state power contained in the U.S. Constitution. In the 1824 case of *Gibbons* v. *Ogden*, the Supreme Court recognized that "the power over commerce with foreign nations and among the several states is vested in Congress *as absolutely as it would be in a single government*."[32] However, the court long ago recognized that the commerce power of congress did not grant powers concerning what are known as "police powers," meaning the power to regulate the safety, health, welfare, and morals of the people. Those powers have been allotted to the states since the time they were essentially defined in 1837 case *New York* v. *Miln*, and are known as "*state* police powers."[33] The commerce clause and the state police powers doctrine form the core tensions that delimit and define American federalism. Environmental law and regulation, unknown at the time these powers were defined, exists principally within this tension, as does the question of environmental justice. To understand the limited prospects for environmental justice in the United States, one must understand the limitations imposed upon the subject by federalism.

Although power of congress in the areas of interstate, inter-Indian tribe, and international commerce is plenary,[34] the definition of what commerce "is" has been the subject of ongoing debate. Beginning with the 1895 case of *United States* v. *E.C. Knight Company*, the Supreme Court defined commerce narrowly, to exclude labor and manufactures.[35] The Court ruled:

> That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within

[32] *Gibbons* v. *Ogden*, 22 U.S. 1 (1824).

[33] *New York* v. *Miln*, 26 U.S. 102 (1937). Although parts of the case (concerning the power of a state relative to vagrants, vagabonds, etc.) were later overruled, the doctrine of state police powers has remained largely intact.

[34] There is insufficient room to discuss the limitations of the "dormant" commerce clause upon the ability of states to regulate the environment, or, through environmental regulation, to pursue environmental justice (except strictly within the borders of a given state). For readers interested in limitations placed upon the states via the "dormant" commerce clause see: *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389-95 (1994); *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 98-108 (1994); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 367-68 (1992); *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 339-49 (1992); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 954-58 (1982); *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979); and, *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 629 (1978).

[35] *United States* v. *E.C. Knight Company*, 156 U.S. 1 (1895). The court went on to state that "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce." See also *Kidd* v. *Pearson*, 121 U.S. 1 (1888).

> the jurisdiction of the police power of the State...The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce.[36]

Not until the global depression of the 1930s did the Supreme Court revisit the "commerce versus manufactures" dichotomy, expanding the commerce power of congress to include what some critic argued was in effect a "national" police power not permitted by the Constitution.[37] The E.C. knight era of restricted commerce powers (1895 to 1937) was not conducive to the development of environmental protection, and the bulk of national environmental legislation emerged from within expanded commerce clause doctrines post 1937.

The key constitutional principle allowing for the expanded congressional power is called the "affects doctrine." Under this doctrine congress may regulate activities that have a substantial impact upon interstate commerce. This, according to the 1942 case of *Wickard* v. *Filburn*, congress may regulate an activity so long as it exerts an economic effect on interstate commerce in the aggregate. This opened the way for environmental legislation, and (more significantly for proponents of environmental justice) opened the way for the extension of civil rights and liberties. This included provisions of the Civil Rights Act of 1964, regulating the activities of hotels and restaurants relative to racial discrimination, and consequently could once have formed a basis for the creation of environmental justice laws should the political environment in the United States change and more effectively promote environmental justice agenda.[38]

In recent years, however, the Supreme Court has restricted the scope of the commerce clause in the context of what is called new federalism. The extension of commerce power through the affects doctrine that, in large part, made the Civil Rights Act of 1964 possible, may be a thing of the past. The 1995 case of *United States* v. *Lopez* signaled the end of the *Wickard* v. *Filburn* era in which individual activities of arguably local, intrastate commercial impact, when taken in the aggregate, would suffice to create a constitutional basis for congressional action.[39] Rather than the rational basis lens through which the court once reviewed uses of the commerce power, *Lopez* established a more restrictive tripartite test. Exercise of the commerce power by congress is constitutional so long as it regulates (1) the

[36] *Ibid.*

[37] *NLRB* v. *Jones-Laughlin Steel Corporation*. 301 U.S. 1 (1937).

[38] Civil Rights Act of 1964, (Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964).

[39] *United States* v. *Lopez*, 514 U.S. 549 (1995).

channels of interstate commerce, (2) the instrumentalities, persons, or things in interstate commerce, or, (3) activities that *substantially* affect or relate to interstate commerce. The third category exercises the strongest influence over the constitutionality of environmental law, and is the lens under which it is examined in light of new federalism. Scholars, including Christopher H. Schroeder note that at least two of the justices in the *Lopez* decision indicated that the decision did not reach to issues of environmental legislation. Nevertheless, the tripartite *Lopez* test has called into question a number of federal environmental laws:

> The Court's revamped approach involves careful scrutiny of arguments used to connect regulation to commerce under the emerging category three jurisprudence. Questions can be and have been raised about Congress's authority to regulate isolated wetlands, or to protect endangered species that lack any known commercial value, or to impose liability for the on-site disposal of hazardous substances by industrial concerns, or to regulate the arsenic content of drinking water. To address any of these topics authoritatively, specific statutes and regulations must be individually analyzed.

One is left to doubt whether or not the new federalism restrictions articulated in *Lopez* will not restrict laws designed to secure environmental justice, wherein congressional power would be aimed at issues of racism, gender discrimination and socio-economic disparity which are less obviously commercial in nature.[40]

Furthermore, in the 2000 case of *United States* v. *Morrison*, the court invalidated portions of the *Violence Against Women Act*, which was directed at providing access to federal courts in order to remedy gender-based violence, a remedy arguably essential to environmental justice.[41] The court in *Morrison* acknowledged that there was a "voluminous congressional record" supporting the "assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence," there was an insufficient connection between that bias and an activity that substantially affected interstate commerce,[42] raising doubts about the ability to satisfy the doctrine of "substantial affect" in areas of environmental injustice.

[40] Charles H. Schroder, "Environmental Law, Congress, and the Court's New Federalism Doctrine," 78 *Indiana Law Journal* 413-457, at 417-419 (2003).

[41] *Violence Against Women Act*, 42 U.S.C. §13981; *United States* v. *Morrison*, 529 U.S. 598 (2000). For arguments regarding access to federal courts and environmental justice see comments on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) http://www.lawyerscommittee.org (January 25, 2011), referencing Clifford Rechtschaffe, *et al.*, *Environmental Justice: Law, Policy, and Regulation* 429 (2nd Ed. Carolina Academic Press, 2009). See also Eileen Gauna, "The Environmental Justice Misfit: Public Participation and the Paradigm Paradox," 17 *Stan. Envtl. L.J.* 3 (1998) cited in Lazarus (supra).

[42] *United States* v. *Morrison*, 529 U.S. 598 (2000).

VI. Conclusion

This brief essay has only touched upon issues relative to the limited prospects for environmental justice in the United States. The environmental justice movement in the United States has not achieved the goals state in the 1991 declaration of seventeen principles of environmental justice. There is no national green bench or other tribunal charged with securing environmental justice. In part this is due to an inability to clearly define what environmental justice is, particularly environmentalism. The EPA has been assigned the task of implementing environmental justice, but its organization and authority are aimed at regulating the environment, not toward racial, gender or socio-economic justice. Federal courts, particularly the Supreme Court of the United States, are not empowered, by law or by their own internal rules, to create "green" benches, to provide a specific judicial mechanism to secure environmental justice. Additionally, private property rights in America and the provisions of the fifth amendment takings clause combine to restrict the prospects for environmental justice laws and the judicial mechanisms necessary to make it a reality. Finally, restrictions on the commerce power of congress under new federalism limit the power of congress to reach issues of justice via commerce.

RESOLUTION OF ENVIRONMENTAL DISPUTES IN VICTORIA

Alice Skipper[*]

I. Introduction

Australian courts have been amongst the forerunners for the robust development of environmental justice, with a number of specialist environmental courts and tribunals currently operating across the country aimed at improving decision-making on key environmental issues. Countries such as India, China and the Philippines are now also beginning to explore the benefits of specialist courts to deal with environmental litigation, improve environmental jurisprudence, reduce costs and above all promote better access to justice. According to a recent report, *Greening Justice*, over 350 environmental courts and tribunals have been established in 41 countries, all designed to respond to the growing community demand for better environmental protection.

The development of specialist environmental courts is largely a result of dissatisfaction with the way that traditional courts have handled environmental issues in the past. There is an increasing demand for judicial decision-makers to possess greater environmental expertise to respond to the growing complexity of environmental laws. Advancements in technology, and the speed at which information is disseminated in today's world, also creates a greater awareness of environmental issues and drives the need for prompt decisions.

This paper provides an analysis of the specialist tribunal established in Victoria to deal with a range of civil and administrative matters including the application of planning and environmental laws. It will focus on the structure and functioning of the Victorian Civil and Administrative Tribunal (VCAT) and the benefits of such a tribunal, as well as the criticisms that are sometimes directed to tribunals of this kind and suggested reforms to improve access to justice. It also introduces the key legislative documents used in Victoria to protect the environment, including the Planning & Environment Act, 1987 (Vic) and the Environment Protection Act, 1970 (Vic). The paper will conclude with a commentary on the recent developments in environmental litigation, particularly in relation to climate change.

II. Australian Environmental Law

Australia is unique in its array of climatic diversity, fragile ecosystems and various land-forms, and therefore demands unique environmental responses to the challenges posed by this environment. It is a country of extremes, from the tropical rainforests in the north, to the arid deserts in the centre and the dense forests

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in the south. Its population lives primarily in large metropolitan cities on the coast, as well as in numerous other towns spread out across the regional, rural and outback landscape. These extremes, coupled with over 200 years of European settlement, have resulted in countless of environmental challenges that must now be combated with robust environmental laws.

Problems such as soil erosion, broad-scale land-clearing, over-grazing, rising salinity and a loss of biological diversity continuously plague regional and rural Australia whilst air, water and land pollution are a constant threat to many of the major Australian cities. Even with some of the most robust environmental laws in the world, Australia must be vigilant in ensuring that its mining, agriculture, forestry and tourism sectors, as well as its insatiable thirst for urban development and expansion, does not cause lasting environmental degradation.

In Victoria, as with all Australian states and territories, there is no single unified code of environmental laws. Instead, environmental laws have accumulated over time from various statutes, regulations, policies and practices, jurisprudence developed from the interpretation of these documents and more traditional common law principles such as nuisance and negligence.

With the development of new environmental laws comes the need for an appropriate forum within which to challenge and uphold these laws. Litigation has always been a useful avenue for individuals, companies and activists seeking to challenge the environmental policies of governments. However, litigation in its traditional form involves significant time, cost and complexity, with environmental protection remedies traditionally being sought in superior courts such as the Supreme Court in each State and the High Court of Australia. The introduction of specialist environmental courts in Australia was therefore in response to various barriers to environmental justice, and has, since the inception of the first specialist environment court in New South Wales in 1980, led to greater protection of our environment and a greater recognition of environmental jurisprudence.

III. Benefits of Environmental Specialist Courts

Almost all environmental decisions have implications not only for the environment but for the broader community. The rapid expansion of public interest environmental litigation in the last 25 years attests to this fact. A system is therefore required which abides by the rules of procedural fairness and natural justice, is available to the public, provides for the calling of witnesses and cross-examination, access to documents, reasons for a decision and a right to appeal an error of law. In effect, the system must be transparent, consistent and contribute to the development of environmental jurisprudence.

Whilst traditional courts have dealt with environmental matters in the past, the introduction of environmental principles such as 'sustainability', 'ecologically sustainable development' and the 'polluter pays' principle drove the need for expertise

not previously seen in generalist courts. Environmental specialist courts and tribunals therefore became an answer to the call for specialist knowledge and expertise.

Specialist courts and tribunals have also emerged to fill the void left by courts refusing to review issues beyond procedural or legal defects. Thus merits review tribunals developed involving an objective assessment of the facts, an identification of the applicable law and the application of relevant policy before substituting the tribunal's decision for the original one.

Specialist courts and tribunals have a number of other benefits, including the ability to dictate their own particular processes, rules, practices and management styles in order to resolve disputes, which adds a level of flexibility not previously seen in the traditional court structure. Perhaps one of the greatest benefits of specialist courts is the low cost and informality compared to traditional courts. Costs are often the biggest deterrent to the pursuit of environmental justice, with unsuccessful legal challenges being exposed to an award of legal costs in addition to lawyer and barrister fees, filing fees and general disbursements. Australian environmental specialist courts in particular have embraced the flexibility that a specialist court can offer in resolving a dispute, including mediation, arbitration and conciliation conferences. Not only are these measures more cost-effective for the parties, but they save considerable time and court resources.

IV. Criticisms of Environmental Specialist Courts

There are of course criticisms levelled at specialist courts and tribunals that must be taken into consideration. Some courts have been labelled as having weak enforcement mechanisms and lacking the power to follow through with remedies. However, such a criticism can easily be countered by a strong environmental enforcement agency with a willingness to take action, such as the Environment Protection Authority that exists in various forms in each state and territory in Australia. Similarly the criticisms levelled at Victoria's specialist tribunal for its lack of criminal jurisdiction to deal with environmental crimes can be countered by legal reform, additional resources and a courageous Parliament willing to initiate change.

In any event, criticisms are often welcome by those who lead specialist courts and tribunals, in that criticism leads to reform and improved environmental outcomes. The Victorian Civil and Administrative Tribunal has recently undergone a 10-year review and many of the recommended changes are currently being implemented to improve the functioning of the tribunal.

V. Victorian Civil and Administrative Tribunal

Victoria's justice system has four main institutions: the supreme court, the county court, the magistrates' court and the Victorian civil and administrative tribunal (VCAT). Whilst the supreme court and the county court are reserved for matters

that tend to be long and complex, and the magistrates' court has the growing task of adequately providing criminal justice, VCAT responds to the demand for quick and efficient civil and administrative outcomes in a range of legal practice areas.

VCAT commenced in 1998 after the consolidation of 15 Victorian boards and tribunals to bring them under the one banner. The tribunal was established under the Victorian Civil and Administrative Tribunal Act, 1998 (Vic) (VCAT Act) and is often referred to as a 'super tribunal' or 'one-stop shop' for legal disputes. It is still the biggest tribunal in Australia (and perhaps in the world), dealing with over 85,000 applications a year with an expenditure of $35 million. The tribunal is subject to the following legislation:

(i) Victorian Civil and Administrative Tribunal Act, 1998

(ii) Victorian Civil and Administrative Tribunal (Fees) Regulations, 2001

(iii) Victorian Civil and Administrative Tribunal Rules, 2008

(iv) Tribunals and Licensing Authorities (Miscellaneous Amendments) Act, 1998

In accordance with the VCAT Act, a supreme court judge leads VCAT as president, and county court judges serve as vice presidents. Applications are heard and determined by deputy presidents (appointed on a full time basis), senior members and ordinary members (appointed on a full time, part time or sessional basis). Members have a broad range of specialized skills and qualifications that enable VCAT to hear and determine matters of varying complexity and subject matter.

VCAT has three divisions: the civil division, the administrative division and the human rights division. The civil division deals with a range of civil disputes involving credit, consumer matters, domestic building works, owners corporation matters, residential and retail tenancies, disputes between co-owners and use or flow of water between properties. The administrative division reviews decisions made by government agencies and local councils involving land valuation, planning and environment, decisions made by bodies such as the transport accident commission, state taxation, business licences such as motor trading, clubs and bars, legal practice matters and health professionals such as medical practitioners, dentists and psychologists. The human rights division deals with matters relating to guardianship and administration, discrimination, racial and religious vilification, health and information privacy and decisions made by the Mental Health Review Board.

Since its inception the tribunal has acquired a number of new jurisdictions and added new lists to its original structure. VCAT acquires new jurisdictions through enabling enactments, and has the functions conferred on it under various Acts, regulations and rules. One of the highest volume jurisdictions in VCAT is the planning and environment list. This list reviews decisions made in relation to planning permits,

including decisions whether to grant, refuse or amend a planning permit, or a decision to impose conditions on the planning permit. Planning permits are issued by local councils (or other relevant planning authorities which can sometimes include the Minister for Planning) for land use and development proposals such as subdivisions, dwellings, offices, advertising signage, service stations, childcare centres and aged care facilities. The list also makes enforcement orders, for example, to stop a development from commencing or proceeding, and can hear and determine applications for declarations about the status of a planning permit or planning scheme, or an application to cancel or amend a planning permit.

It is important to remember that VCAT is not a court but a civil and administrative tribunal. It does not have a criminal jurisdiction as is the case in New South Wales land and environment court. Yet whilst the importance of the criminal justice system cannot be underestimated, civil litigation affects a much larger volume of people, more directly and more often. An expeditious and economical civil forum is therefore critical to providing adequate access to justice.

To maintain its flexibility and accessibility, certain legal rules, such as the onus of proof and the rules of evidence, do not apply in VCAT. Whilst the tribunal must apply the relevant law objectively and impartially, hearings can be conducted in a manner of different forms including mediation and conferences. In VCAT hearings within the planning and environment list are usually conducted by one or two members in an informal setting. Often hearings take place at a common table shared by the members and the parties to break down the barriers and fear often associated with litigation. If there is a question of law to be determined, one member will always be a legally qualified member or judge, with other non-legal members possessing special expertise in areas such as planning, engineering or science. If unexpected legal questions arise before a non-legal member sitting alone, they can be referred to the legal member for determination.

It is also important to keep in mind that VCAT belongs to the community and is not the exclusive jurisdiction of judges, members or lawyers. Legal representation is therefore optional and self-representation is advocated and accommodated by the provision of the necessary assistance both prior to and during a hearing. VCAT is also bound to observe the rules of natural justice, and has the added requirement of being bound to comply with Victoria's Charter of Human Rights and Responsibilities Act, 2006 which requires every public authority to act consistently with fundamental human rights.

The level of 'standing' required to bring actions in various environmental courts and tribunals also differs between each jurisdiction, however, all such courts and tribunals in Australia have more relaxed standing requirements than the traditional court structure. The common law rules of standing are fairly narrow and generally operate to allow only those with an economic or property interest in the

subject matter to bring an action. However, standing can be expressly granted by legislation, as is the case in VCAT.

Under section 77 of the Planning and Environment Act, 1987 (Vic) an applicant for a permit may apply to the Tribunal for a review of a decision of a responsible authority to refuse to grant a permit. Under the Environment Protection Act, 1970 (Vic) a person whose interests are affected by a decision to issue a works approval, or issue, amend or remove the suspension of a licence, can apply to the tribunal for review of the decision.

Section 5 of the Victorian Civil and Administrative Tribunal Act, 1998 (Vic) defines "interests" in very broad terms, expressly stating that interests are not limited to proprietary, economic or financial interests and that persons' interests may be either directly or indirectly affected by a decision. VCAT is also a forum in which the costs of each party are usually borne by the parties themselves. However, VCAT may award costs against a party in exceptional circumstances, such as where the proceedings are vexatious or there has been a failure to comply with an order of the Tribunal.

VI. Reform of VCAT

Whilst the tribunal offers a quick, cheap and informal venue within which to resolve civil and administrative environmental disputes, there has been an increasing demand from the legal community in Victoria to expand VCAT's powers to that of the NSW land and environment court, to include a criminal jurisdiction. This is evident in the need to bring more enforcement actions for environmental pollution offences, a task currently bestowed upon the environment protection authority in Victoria and on various government departments in other states and territories under statute.

In Victoria, the EPA took only 11 companies to court for pollution and waste offences or licence breaches in 2010, compared to over 137 prosecutions brought in New South Wales. Whilst the NSW department of environment and climate change (responsible for bringing such actions) has a wider ambit than the Victorian EPA, even on comparable offences, more than double were brought in NSW, and mostly in the NSW land and environment court.

The benefits of having a judge or magistrate with specialist environmental expertise to deal with environmental criminal matters is that it develops and enhances environmental jurisprudence, leads to consistency and improves efficiency whilst reducing costs. In Victoria pollution and waste offences and breaches of EPA licences must be brought in the Magistrates' Court of Victoria, resulting in slower processing times. more cost and judgements determined by those with less environmental expertise. Judgements in the Magistrates' Court are also not published adding to the difficultly in developing a strong body of case law and precedents for environmental crimes.

Other criticisms against the operation and functioning of VCAT have recently been addressed as part of VCAT's 10-year review recently conducted. This review invoked both praise and criticism for the Tribunal's operation. Whilst the planning and environment list continues to process large volumes of environmental disputes at relatively low cost, there have been significant delays of late due to a large back-log of cases. This has recently been resolved by the introduction of both a short cases and a major cases list. The short cases list is designed to deal with matters that have limited parties, limited issues and are capable of being heard and decided in less than two hours. Matters are listed within 8-10 weeks of lodgement and innovative procedures or on-the-spot oral decisions are encouraged. The major cases list hears matters involving developments worth $5 million or more and aims to deliver a decision within approximately 16 weeks of an application being lodged. If parties cannot meet the timeframes set for practice day hearings, mediation and final hearings the matter is taken out of the List and reverts back to the general planning & environment list.

The tribunal has also improved access to justice by providing a 'duty lawyer' service similar to that which exists in the magistrates' court. The duty lawyer position is staffed by Victorian Legal Aid and provides unrepresented parties with free and confidential legal advice and can appear if required on behalf of the person requiring aid. Other recommendations that arose from the VCAT review included a demand for increased use of technology such as remote electronic filing of applications, an SMS hearing reminder system (that is currently being developed) and educational videos on the website and throughout the tribunal building to encourage self-representation. VCAT is also aiming to improve its access to regional and rural areas of Victoria and engage a larger percentage of the under-represented aboriginal community. Tribunals must also ensure that their own members are getting adequate induction, education, training and support. The tribunal has therefore committed to providing better training to its members to improve decision-making.

Expert opinion is often required in matters in the planning & environment list including specialist opinions from ecologists, engineers, architects, town planners, hydrologists, environmental scientists and heritage experts. However, access to experts is often not an issue of equality but rather of funding and availability, resulting in certain individuals and community groups being unable rely on this evidence. One suggested reform is for the Tribunal to maintain a list of Tribunal-appointed experts in various fields of expertise. Such a tool redresses the imbalance between those litigants with funding and those without, whilst also avoiding the criticism that is often made about an expert witness' impartiality.

VII. Victorian Environmental Legislation

The functions of VCAT under the following enabling Acts are allocated to the planning and environment list:

(i) Aboriginal Heritage Act, 2006

(ii) Catchment and Land Protection Act, 1994, section 48 (land use conditions and land management notices)

(iii) Conservation, Forests and Lands Act, 1987, section 76 (variation and termination of land management co-operative agreements)

(iv) Environment Protection Act, 1970

(v) Extractive Industries Development Act, 1995

(vi) Flora and Fauna Guarantee Act, 1988, sections 34(3), 41 and 41A (interim conservation orders)

(vii) Heritage Act, 1995

(viii) Local Government Act, 1989, sections 185 (imposition of special rate or charge) and 185AA (imposition of a special rate or charge)

(ix) Mineral Resources (Sustainable Development) Act, 1990, except sections 88 (land valuation list), 94 and 95 (occupational and business regulation list)

(x) Owners Corporations Act, 2006, part 6

(xi) Planning and Environment Act, 1987, except sections 94(5) and 105 (land valuation list)

(xii) Plant Health and Plant Products Act, 1995, section 39 (costs and expenses of inspectors)

(xiii) Subdivision Act, 1988, except sections 19 (land valuation list), 36 and 39 (real property list)

(xiv) Transport Act, 1983, section 56 (decisions of the Public Transport Corporation or Roads Corporation)

(xv) Water Act, 1989, except sections 19 (real property list) and 266(6) (land valuation list)

(xvi) Water Industry Act, 1994, except section 74 (real property list)

The key pieces of environmental legislation and the most commonly exercised powers in the Planning and Environment List are found in the Planning & Environment Act, 1987 (Vic) (P&E Act) and the Environment Protection Act, 1970 (Vic) (EP Act). These two Acts are discussed in further detail below.

A. Planning and Environment Act, 1987 (Vic)

The P&E Act commenced in 1987 in Victoria and introduced a framework for integrating controls in land use, development planning and environment

protection. The Act provides for planning controls which overlap with related legislation such as the EP Act. Given that the objects of the P&E Act were formulated around the same time that the principles of ecologically sustainable development were emerging internationally, the Act takes on many of the same themes. The EP Act has also been amended over the years to reflect the principles of ESD, in particular the polluter pays principle.

The P&E Act provides for a standard set of planning provisions to be developed, known as the Victoria Planning Provisions. All local municipalities in Victoria are covered by their own planning schemes, but each has the Victoria Planning Provisions in common. Planning Schemes bind everyone including ministers, government departments and local councils, except where they are expressly exempted from its application. Each planning scheme has a set of state and local policy and strategic statements, a selection of standard zones, a selection of permissible overlays which generally denote more permanent characteristics of the area, incorporated documents and planning maps.

Planning schemes contain a range of measures to protect the environment, including the often-used clause 52.17 which creates a permit requirement to remove, destroy or lop native vegetation unless an exemption applies. There are also a large number of environmental overlays dealing with matters such as environmental significance, vegetation protection, significant landscape, wildfire management or land subject to inundation. Planning permits issued under a planning scheme are reviewed and enforced at VCAT. The tribunal can consider both the merits of planning permit applications and any procedural or legal issues. It also has the power to enforce planning schemes, planning permits and the P&E Act generally, cancel or suspend planning permits and make declarations regarding the status of any planning control. It is only on a question of law that an appeal can be directed to the supreme court.

Whilst it is the responsibility of the relevant local council to enforce planning controls, any person can make an application to VCAT for an order to restrain a person who is breaching conditions of a planning permit or the planning scheme. Interim and permanent enforcement orders can be sought from the tribunal, however, costs are more likely to be awarded in these instances to the successful party given the higher standard of proof required and the potential negative impact on a person's rights. If enforcement orders are breached they can be pursued by prosecution in the magistrates' court.

B. Environment Protection Act, 1970 (Vic)

The EP Act brings control of land, air and water pollution under one statute and was the first Australian statute to do so. The Act establishes the environment protection authority (EPA), which has a wide range of powers, duties and functions to set policy, regulate and enforce pollution controls and conduct public education.

The basic philosophy of the EP Act is centered around preventing pollution and environmental damage by setting environmental quality objectives and establishing programs to meet them.

The EP Act provides for the creation of state environment protection polices (SEPPS) which are pivotal to the performance of the EPA's functions and have the effect of law. All other processes under the EP Act are to be consistent with these policies. SEPPs identify the beneficial uses of the environment (for example, air, water quality), set out indicators used to measure environmental quality and how environmental quality objectives will be achieved. SEPPs deal with issues such as ambient air quality, prevention and management of contaminated land, groundwater and control of noise from music, trade, industry or commence. The EP Act also provides for the creation of Industrial waste management policies (IWMPs) which were one of the measures introduced into the EP Act by the *Environment Protection (Industrial Waste) Act 1985* to improve the management of industrial wastes. In 2002 the *Environment Protection Act* was also amended to allow the EPA scope to develop more general waste management policies not relating to industry (WMPs).

The EPA's statutory functions under the Act include the issuing of works approvals and licences, research development and demonstration approvals, pollution abatement notices, clean up notices and waste transport permits and certifications. Works approvals are public documents issued by the EPA under the Act and are required for industrial and waste management activities that have the potential for significant environmental impact. Works approvals permit the construction of a plant, installation of equipment or the modification of processes.

EPA licences are required for all scheduled premises unless the premises are exempted in the Regulations. Licences cover the actual operation of the site and set operating, waste discharge limits and waste acceptance conditions as appropriate.

Under the EP Act the public has no standing to prosecute for offences under the Act and this duty is therefore left to the EPA. Section 59(2) of the EP Act takes away common law rights to prosecute for offences of a public nature (in contrast to the NSW Protection of the Environment Operations Act, 1997, section 219 where any person may initiate proceedings with leave from the Land and Environment Court). Whilst the EP Act has resulted in many successful prosecutions for environmental offences, the remainder of this paper will focus on climate change-related litigation that has largely been brought in Victoria under the P&E Act in relation to development approvals.

VIII. Climate Change Litigation

One of the more interesting streams of litigation arising recently in Australia is in response to climate change impacts, such as rising sea levels, coastal erosion and inundation, potential flooding and storm surges. Whilst there has not yet been any cases in Australia that have apportioned liability to a company for its climate

change impacts, the effects of climate change have been assessed by Australian courts and tribunals in the context of development applications. Climate change litigation has arisen not in the context of environmental pollution, but in the context of development consents, most frequently dealing with the impacts of climate change on our use of the land.

Certain states in Australia, along with their judicial members, have been more progressive than others in terms of environmental litigation, with the Chief Justice of the New South Wales land and environment court leading the way. CJ Brian Preston has noted that there is value even in unsuccessful environmental litigation because important community matters are being brought to the attention of governments and can therefore act as a catalyst for government action.

Ever present for local governments is the risk of liability for failing to consider the climate change impacts of development proposals. Issues such as the risk of storm surges, extreme weather events, bushfires and coastal erosion must all be taken into account by these bodies in their assessment and approval of development and land use, to avert a potential climate change-based lawsuit.

In 2008, VCAT made the landmark decision of refusing development consent to six coastal dwellings, based on the threat of storm surges and rising sea levels as a result of climate change.[1] Despite the lack of any direction in Victoria's Planning Provisions in relation to climate change impacts and coastal sea level rises, VCAT, along with other courts and tribunals around Australia, have begun to apply the principles of ecologically sustainable development (ESD) and the precautionary principle to development proposals with the aim of integrating the potential impacts of climate change into our planning systems.

Similar judicial rulings on coastal developments and sea level rises have been made in other states throughout Australia, including the New South Wales decision of *Walker* v. *Minister for Planning*[2] in 2007. In this case, Justice Peter Biscoe of the land and environment court overturned a decision by the NSW Planning Minister which allowed for a substantial property development along a section of the NSW coastline, due to the Minister's failure to consider and address climate change issues. Biscoe, J. found that the Minister had failed to consider *"whether changed weather patterns would lead to an increased flood risk in connection with the proposed development in circumstances where flooding was identified as a major constraint on development of the site."*

As was established in *Gray* v. *The Minister for Planning and Ors*[3] in 2006, the minister is required to consider the principles of ESD in his decision-making process. *Gray* concerned a development proposal for a coal mine in New

[1] *Gippsland Coastal Board* v. *South Gippsland SC & Ors (No 2)* [2008] VCAT 1545.
[2] [2007] NSWLEC 741.
[3] [2006] NSWLEC 720.

South Wales, which required an Environmental Assessment Report to be prepared under the *Environmental Planning and Assessment Act* 1979 (NSW) (EPA Act). In his application to the Court, Gray argued that this Report was void on the basis that it failed to take into account the indirect greenhouse gas emissions of the coal mine. Justice Pain agreed, stating that, even though there is no explicit requirement to take into account the principles of ESD in the EPA Act, the principles are implied under the public interest, which is a relevant consideration for the decision-maker.

Following the decision in *Gray*, the NSW Planning Minister issued a new State Environmental Planning Policy which requires that climate change impacts, including downstream impacts, must now be considered in development applications for mining, petroleum production and extractive industries.[4]

A 2007 Queensland case involving a proposal by mining company Xstrata to expand its coal mine illustrates that, while there was policy support at a State level in Queensland in 2007 for reducing greenhouse gas emissions, governments in Australia will still intervene to facilitate development approvals for major projects. Xstrata came under court scrutiny when environmental groups challenged the proposed expansion of a coal mine and sought to impose conditions 'to avoid, reduce or offset the greenhouse gas emissions that are likely to result from the transport and use of the coal from the mine.' However, the Land and Resources Tribunal of Queensland found no causal link between the new mine's greenhouse gas emissions and a discernible impact on climate change, following the line of thought that US courts have taken.[5]

Appealing to the supreme court, the objectors argued that the Tribunal had incorrectly informed itself of material not before the parties and concluded that anthropogenic greenhouse gas emissions had not been proven to contribute to global warming. Whilst the supreme court ruled to remit the matter back to the tribunal for re-hearing, the Queensland government intervened with legislation that retrospectively validated the expansion of the mine.[6] The mine can now go ahead without waiting for the tribunal's decision on whether Xstrata would be required to offset some of the greenhouse gas emissions the coal mine will generate. The case highlights the current tension between how courts will respond to climate change and the political responses of our governments.

What these decisions reveal is that courts at present will be unlikely to rule that a company has committed a tort through their contribution to climate change, but will be more inclined to rule that a company must take potential greenhouse gas emissions into account when conducting environmental assessments.

[4] State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW), cl 14(2).
[5] *Re Xstrata Coal Qld Pty Ltd & Ors* [2007] QLRT 33.
[6] *Queensland Conservation Council Inc* v. *Xstrata Coal Queensland P/L & Ors* [2007] QCA 338.

The South Australian supreme court has also assessed the impacts of climate change on coastal developments in the decision of *Northcape Properties Pty Ltd* v. *District Council of Yorke Peninsula*[7], through the consideration of coastal erosion and buffer zones. In response, the Coast Development Board in South Australia adopted the median sea level predictions of the intergovernmental panel on climate change as part of its policy which allows new developments to be reasonably protected from a 1 metre sea level rise by 2100.

In Western Australia the planning commission takes sea level rise scenarios into account when setting development setback distances to ensure that coastal processes do not affect development, and vice versa.[8] And in Queensland, the state coastal management policy provides for "planning to adapt to climate change and sea level rise" so that the coast is managed to allow for the occurrence of these changes while providing protection for life and property.[9]

The potential impacts of climate change on coastal developments was again raised in VCAT throughout 2009-10 with a number of cases being brought that drew attention to the plight of various property owners who were refused permission to develop or subdivide their coastal properties due to predicted effects of climate change. Following changes to the Victoria planning provisions in 2009, including the requirement that decision-makers plan for a sea level rise of not less than 0.8m by 2100, a number of VCAT decisions have required coastal hazard vulnerability assessments to be undertaken in connection with proposed coastal developments. In 2009 VCAT heard the *Myers*[10] case in which a proposed subdivision was objected to by the local council on the basis that the potential implications of sea level rise due to climate change or flooding had not been sufficiently considered. The Tribunal applied the precautionary principle and found that it was necessary to carry out a coastal hazard vulnerability assessment prior to making a decision on the application. Subsequent VCAT cases emphasise the level of prudence now required in coastal developments, including the early preparation of a coastal hazard vulnerability assessment by a suitably qualified engineer or coastal processes specialist to address the implications of sea level rises, coastal erosion and other tidal, flooding and climatic impacts.

As can be seen from much of the case law in relation to climate change, there is an absence of a national approach to climate change-related planning

[7] [2008] SASC 57.

[8] Requirements for setback distances are included in the *State Coastal Planning Policy No 2.6*, which addresses land use planning and development issues specifically as they relate to the protection and management of the coast.

[9] Guidelines for Regional Natural Resource Management Planning in Queensland include a module and guideline entitled: *Adaptation to Climate Change in Regional NRM Plans*, that address climate change adaptation in regional natural resource management plans, target setting and investment strategies, www.regionalnrm.qld.gov.au/policies_plans_legislation.

[10] *Myers* v. *South Gippsland Shire Council* [2009] VCAT 1022. See also *Ronchi & Anor* v. *Wellington SC* [2009] VCAT 1206; *Owen* v. *Casey CC* [2009] VCAT 1946.

decisions, reinforcing the need for clear statements, policies and legislation from governments. Climate change is therefore making its way into environmental legislation and regulations in Australia due to courts' interpretation of ecologically sustainable development and the implementation of the precautionary principle but more is needed from governments, particularly at a national level, if any consistency is to be achieved across the country.

IX. Conclusion

Due to the increased demand for specialist expertise in the resolution of planning and environment disputes, and particularly in relation to the issues posed by climate change, specialist environmental courts and tribunals are more valuable than ever in achieving environmental justice. Whilst there are various models around Australia which can be replicated, each with their own benefits and criticisms, on the whole, they operate to provide better access to justice and more expeditious determinations on environmental matters. With further structural reform, and more robust environmental legislation, particularly to address climate change impacts, Australia's specialist courts and tribunals will continue to operate effectively and efficiently.

COASTAL MANAGEMENT LAW IN TRANSITION: A LOOK AT EVOLVING PARTICIPATORY ENVIRONMENTAL GOVERNANCE IN INDIA

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I. Introduction

The legal framework on coastal zone management in India is undergoing a transition. The five-year long process since 2004[1] to change the Coastal Regulation Zone Notification, 1991 issued under the Environment (Protection) Act, 1986 with the adoption of a new Coastal Zone Management Notification, 2008 was shelved on July 16, 2009 due to unprecedented public opposition. A new example of public participation in environmental governance and law making process is brewing in the country. This is a clear case of how public participation can guide the governance system and how the government can accommodate and utilize public concerns in shaping the law. Taking into consideration of public views and based on the recommendations of the M.S. Swaminathan Committee that looked into the objections raised by various stakeholders, the draft Notification on Coastal Zone Management issued by the Government of India in 2008 to supersede the Coastal Regulation Zone (CRZ) Notification, 1991 was allowed to lapse.[2] Immediately after this, the Government of India rolled out the process of eliciting public opinions in August, 2009 to strengthen the existing CRZ Notification, 1991.[3] Public participation in environmental governance and decision making is becoming a reality in India if we closely observe the current developments. This article traces the recent developments in coastal law making based on public participation in environmental governance and law making process in the country.

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1 The Government of India constituted an Expert Committee under the Chairmanship of Prof. M.S. Swaminathan on July 19, 2004, to review and make recommendations with regard to implementation of Coastal Regulation Zone Notification, 1991. After a comprehensive study, the Expert Committee submitted its report in February, 2005; which called for sweeping changes in the coastal management in the country. The Central Government accepted the Report in 2006 and in order to implement the recommendations the Ministry of Environment and Forests brought out a draft Coastal Zone Management Notification, 2008 vide, S.O. No. 1070(E) which called for integrated coastal zone management.

2 Final Frontier: Agenda to Protect the Ecosystem and Habitat of India's Coast for Conservation and Livelihood Security; Report of the Expert Committee on the Draft Coastal Management Zone (CMZ) Notification, Ministry of Environment and Forests, 16 July 2009.

3 Public consultations were conducted at 10 locations (Mumbai, Chennai, Goa, Cochin, Puri, Puducherry, Vijayawada, Kakdwip, Rajkot and Mangalore) covering 9 coastal States and one Union Territory with the participation of about 4,500 participants.

II. Public Participation in Context

Public participation has been accepted as an integral aspect of environmental decision making. Public participation in environmental decision making augments environmental protection measures and reflects the aspirations of the present and future generations.[4] The support for greater public participation in environmental matters is relatively uncontested.[5] This is because of the benefits offered by the process of public participation. It improves the quality of decisions, promotes environmental citizenship, improves procedural legitimacy and elicits values.[6] Principle 10 of the Rio Declaration recognized the importance of public participation in environmental governance.[7] According to Principle 16 of the World Charter of Nature, 1982, all environmental planning "shall be disclosed to the public by appropriate means in time to permit effective consultation and participation."[8]

One of the three pillars of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 1998[9] is public participation in decision making process. Public participation would take place in different ways. The nature of public participation is divided into three parts in the Convention. First, participation of the public who are affected by the project or interested in decision making of a particular developmental activity.[10] Second, participation of the public in the development of plans, programmes and policies of the government relating to environment.[11] Third, participation of public in the preparation of laws, rules and legally binding norms.[12] Though India is not a party to Aarhus Convention, she has been striving to encourage public participation in its law making and decision making processes.

The National Environment Policy, 2006 incorporates public participation as one of its objectives.[13] It states that the principles of good governance have to be

4 P. Leelakrishnan, *Environmental Law in India* 309 (2005).

5 Stuart Bell and Donald McGillivray, *Environmental Law* 294 (2008).

6 *Id.*, at 295.

7 See Rio Declaration on Environment and Development, 31 ILM 874 (1992). Principle 10 of the Rio Declaration, 1992 states: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

8 General Assembly Resolution 37/7 of 28 October 1982 on the World Charter for Nature, 1982.

9 The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, 38 ILM 517 (1999) entered into force on 30 October 2001.

10 *Id.*, Art. 6.

11 *Id.*, Art. 7.

12 *Id.*, Art. 8.

13 National Environment Policy, 2006, Ministry of Environment and Forests, Government of India, as approved by the Union Cabinet on 18 May 2006.

applied in management and regulation of use of environmental resources. The principles of good governance include public participation as one of its components. The Environmental Impact Notification, 2006 issued under the Environment (Protection) Act, 1986 also incorporates public consultation as one of the four stages of approval process.[14] However, the importance given to public participation and its effect on ultimate decision making or law making process has been always contentious.[15] In the present instance, as this article assesses, public participation has been most successful on the part of the stakeholders and the government has fully accommodated the concerns of public and agreed to change the law making process on coastal zone management based on the inputs of different stakeholders.

III. Need for Coastal Regulation

India has a coastline of about 7,500km,[16] which is less than 0.25 percent of the world coastline. However, it is home to 63 million people, or approximately 11 percent of global population living in low elevation coastal areas. The 73 coastal districts (out of a total of 593) have a share of 17 percent of the national population, and nearly 250 million people live within 50 km of the coastline. The coast also includes 77 cities, including some of the largest and most dense urban agglomerations such as Mumbai, Kolkata, Chennai, Kochi and Visakhapatnam.[17] Nine states and a number of islands in Lakshadweep and Andaman & Nicobar share this vast tract of shoreline. These coasts have varied coastal ecosystems such as sand dunes, mangroves, salt marshes, coral reefs, sea grasses, mudflats, estuaries, etc. The Indian coastal stretch is a very busy economic region with a number of industrial establishments, ports, harbours, and tourism centres.

Due to unsustainable growth paradigms along the coasts and the resultant pollution, the coastal environment of India witnesses large scale degradation. The communities living in and around the beaches face innumerable hardships. The fragile ecosystems of the coastal region got affected and irreparable losses were inflicted on the rare species of plants, aquatic organisms and coastal waters. With a view to regulate the developmental activities in the coastal regions, efforts were made by the Central Government since early 1980s.

The seeds of coastal regulation were sown by the then Prime Minister of India Mrs. Indira Gandhi in 1981 when she wrote letters to all the chief ministers of coastal states calling for appropriate measures to protect the coastal areas in general and to safeguard the 500 meters of landward side from the coasts in particular.

[14] See Environmental Impact Assessment Notification, 2006, S.O. 1533, dated 14 September 2006.

[15] See, e.g., O.V. Nandimath, *Handbook of Environmental Decision Making in India*, 133 (2009) (in the context of Environmental Impact Assessment Notification, 2006).

[16] Of this 5,400 km belong to peninsular India and the remaining to the Andaman, Nicobar and Lakshadweep Islands.

[17] See Report of the Committee chaired by Prof. M.S. Swaminathan to Review Coastal Regulation Zone Notification, 1991, Ministry of Environment and Forests, Government of India, February 2005.

This was followed by the issuance of *Environmental Guidelines for Beaches* by the then Department of Environment and Forests in 1983. As these guidelines lacked legal backing and did not enjoy any binding force, they did not meet with great success. The need was always felt for a legal and effective regulatory framework in the country to address the rapid developments in the vast areas of costal regions.

IV. The Coastal Regulation Zone Notification, 1991

Every coastal nation makes arrangements to protect and manage the coastal environment for the sustainable development of the area. In India, there is no special law to regulate and manage the activities carried out in the coastal areas. Instead, a notification called the Coastal Regulation Zone Notification (CRZ), 1991 was issued by the Ministry of Environment and Forests (hereafter called MoEF) under the Environment (Protection) Act, 1986 which empowered the Central Government to regulate any matter pertaining to environment.[18] According to this Notification, the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters that are influenced by the tidal action in the landward side upto 500 meters fro the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL were defined as the coastal regulation zone.[19] High Tide Line denotes the line on the land upto which the highest water line reaches during the spring tide. In case of rivers, creeks, and back waters HTL will apply to both sides of the water bodies and the distance should not be less than 100 meters or the width of such water body whichever is less. The seaward side is not governed by the 1991 CRZ Notification.[20]

The coastal areas within 500 meters of High Tide Line in the landward side are divided into four categories to facilitate regulation. The categories are as follows:

Category I (CRZ - I)

This category covers two kinds of areas – ecologically sensitive areas and the area between LTL and HTL. The ecologically sensitive areas include all important areas like the national parks, marine parks, sanctuaries, reserve forests, wildlife habitats, mangroves, coral reefs, the areas close to breeding and spawning grounds of fish and other aquatic lives, areas of outstanding natural beauty, or historical importance, the heritage sites, areas rich in genetic diversity, and the areas likely to be inundated due to rise in sea level consequent upon global warming and any other area notified by the Central Government of the concerned State or Union Territory.

The Notification has extensive restrictions for developmental activities in CRZ-I. New constructions are not permitted in this zone except for the projects relating to Department of Atomic Energy, pipelines and conveying systems or

[18] Coastal Regulation Zone Notification, 1991, S.O. 114(E) MoEF, dated 19 February 1991.

[19] *Ibid.*

[20] *Ibid.*

transmission lines, and the facilities that are essential for activities permissible under this zone. However, the Notification permits any construction activity between the LTL and HTL for carrying water for cooling purposes, gas and similar pipelines are permitted. Similarly, it allows some necessary activities in areas between LTL and HTL which are not ecologically sensitive and important.

Category II (CRZ – II)

The already developed areas within the municipal limits or in urban areas which are substantially built up and with drainage, roads and other facilities like water supply and sewerage are covered in this category. The Notification puts restrictions on new developments and allows constructions only on the landward side of the existing road or roads approved by the Coastal Management Plans.

Category III (CRZ – III)

The relatively undisturbed rural areas and the less built up urban areas within the municipal limits and those stretches which do not fall under Category I or II constitute CRZ – III.

Category IV (CRZ – IV)

The coastal areas in the Andaman and Nicobar Islands, Lakshadweep and small islands, except those which are identified as CRZ-I, CRZ-II, or CRZ –III are governed under this category.

When there was a delay in implementing the Notification, certain public spirited people moved the court for speedy implementation of the Notification. In public interest litigation, *Indian Council for Enviro-Legal Action v. Union of India*,[21] the Supreme Court of India noticed that even though, the Notification was issued in 1991, it was not implemented until 1996. The Court passed orders to all the coastal States and Union Territories to prepare and submit the coastal zone management plans (CZMPs) for identifying and clarifying the regulation zones as per CRZ Notification. Since 1996, there have been demands and suggestions from various stakeholders, central/ state governments, local communities, associations and N.G.O.s to amend the Notification for permitting certain activities. To consider these demands, the MoEF constituted the following seven expert committees between 1996 and 2003 to look into different aspects of coastal regulation:

(a) The B. B. Vohra Committee on issues relating to tourism.

(b) Prof. N. Balakrishnan Nair Committee on issues relating to Kerala Coastal Regulation Zone.

(c) Fr. Saldanha Committee (I) to advise on withdrawal of ground water and extraction of sand in Andaman & Nicobar Islands.

[21] (1996) 5 SCC 281.

(d) Fr. Saldanha Committee (II) to examine specific issues relating to CRZ.

(e) The D. M. Sukthankar Committee (I) to examine the issues relating to Mumbai and Navi Mumbai.

(f) The D.M. Sukhtankar Committee (II) to prepare a National Coastal Zone Policy of India (NCZP) and

(g) Dr. Arcot Ramachandran Committee on Ocean Regulation Zone.

V. M.S. Swaminathan Committee to Review CRZ Notification, 1991

Based on recommendations of the Prime Minister's Office (PMO), the MoEF set up an Expert Committee in July 2004 under the chairmanship of Prof. M. S. Swaminathan to comprehensively review the CRZ Notification, 1991 in the light of the findings and recommendations of all previous committees, judicial pronouncements and representations of various stakeholders.[22] The Committee was asked to suggest suitable amendments to make the regulatory framework consistent with well established scientific principles of coastal zone management. The broad Terms of References (TORs) for the Committee were: (a) to review the reports of various committees appointed by the MoEF on coastal zone management, international practices and suggest the scientific principles for an integrated coastal zone management best suited for the country; (b) define and enlist various coastal and marine resources and recommend the methodology for their identification and the extent of safeguards required for conservation and protection and (c) to revisit the CRZ Notification, 1991 in the light of above and recommend necessary amendments to make the regulatory framework consistent with recommendations on above two TORs and the Environment (Protection) Act, 1986.[23]

The Committee extensively studied the problems faced by the coastal zones due to natural and developmental reasons and the response of the CRZ Notification in regulating the coastal affairs. The Committee, which submitted its report on 14 February, 2005 highlighted major issues to be tackled and recommended a scientific approach with the help of integrated coastal zone management for solving and managing most of the coastal problems.

The Committee concluded that "we should build on the strengths of existing regulations and institutional structures, eliminate weaknesses in regulatory procedures and fill gaps in core areas, such as ecological economics and social and gender audit, where our national competence is inadequate."[24] The Committee opined that the goal of coastal regulation should not end with conservation alone, but also enhancement of the living and non-living resources of the coastal zone. The absence

[22] MoEF Order No. 15(8)/2004-IA.III, dated 19 July 2004.
[23] *Ibid.*
[24] *Supra* note 16 at 117.

of inter-departmental and Centre-State coordination is the biggest roadblock in fostering a sustainable coastal zone management strategy in India.[25]

The Committee suggested a National Coastal Zone Management Action Plan (NCZMAP). The objective of NCZMAP is to protect the livelihood security of the coastal fishermen and other communities with public participation and to protect ecosystems that sustain productivity of the coastal areas while promoting sustainable development that contribute to nation's economy and prosperity. The Committee suggested reclassification of coastal zones into four Coastal Management Zones (CMZ)[26] instead of the present four Coastal Regulation Zones (CRZ). For the purposes of NCZMAP, the coastal zone is defined as an area from the territorial waters limit (12 nautical miles), including its sea-bed up to the landward boundary of the local self-government abutting the sea coast. It also includes inland water bodies influenced by tidal action, including its bed and the adjacent land area up to the landward boundary of the local self-government abutting such water bodies. In the case of ecologically sensitive areas, the entire notified area or biological boundary of the area will be treated as a coastal zone.

In order to implement the recommendations, the Committee has proposed an institutional structure for sustainable coastal zone management. It consists of a National Board for Sustainable Coastal Zone Management as the apex body with three institutional structures to assist (i) National Coastal Zone Management Authority to implement the NCZMAP; (ii) establishment of a National Institute for Sustainable Coastal Zone Management to work on policy and legal issues, conflict resolution studies and capacity building of coastal zone managers; and (iii) setting up of an All India Coordinated Projects for Sustainable and Integrated Coastal Zone Management. This will act as a platform for inter-agency and inter-institutional partnership.

The Committee also recommended drawing of setback lines (vulnerability lines) in some coastal management zones[27] based on vulnerability of the coast to natural and anthropogenic hazards. Vulnerability mapping is not a new phenomenon as this has been followed in many countries in the west. The Committee has suggested seven parameters, namely, elevation, geology, geomorphology, sea level trends, horizontal shoreline displacement, tidal ranges, and wave heights for drawing vulnerability lines.

The Committee recommended 12 guiding principles for management of coastal and marine areas. They are (i) ecological, cultural, livelihood and national

[25] *Ibid.*

[26] CMZ I area covers the areas designated as ecologically sensitive (ESA). CMZ II area consists of coasts identified as areas of particular concern (APC) such as economically important areas, high population areas and culturally or strategically important areas. CMZ III consists of all other open areas including the coastal seas but does not include CMZ I, CMZ II and CMZ IV. CMZ IV consists of Islands of Andaman & Nicobar and Lakshadweep.

[27] For CMZ II and III.

security should be the cornerstone of an integrated coastal zone management policy; (ii) coastal zone should include an area from territorial limits (12 nautical miles), including its sea-bed to the administrative boundaries or the biological boundaries demarcated on the landwardside of the sea coast; (iii) regulation, education and social mobilization should be the three major components of a participatory and sustainable coastal zone management strategy with the full involvement of Panchayat Raj institutions; (iv) protection and sustainable development of the marine and coastal environment and resources in conformity with the international law, as laid down in the United Nations Convention on Law of the Sea (UNCLOS) 1982, and as per the suggestions of Chapter 17 of the Agenda 21, the Convention on Biological Diversity 1992, and the Jakarta Mandate 1995 on Integrated Marine and Coastal Area Management (IMCAM); (v) coastal regulation to be based on sound scientific and ecological principles and safeguarding natural and cultural heritage; (vi) application of precautionary approach for potential threats of serious or irreversible damage to ecologically fragile critical coastal systems and to living aquatic resources; (vii) significant or irreversible risks and harm to human health and life, critical coastal systems and resources including cultural and architectural heritage to be considered unacceptable; (viii) coastal policies and regulations should be guided by gender and social equity as well as intra-generational and inter-generational equity; (ix) coastal protection and bio-resources conservation policies should be guided by techno economic efficiency, precautionary approach, polluter-pays principle and public trust doctrine; (x) application of principles contained in the Biodiversity Act 2002 for coastal bio-resources management; (xi) regeneration of mangrove wetlands, coral reefs and sea grass beds as well as the promotion of coastal forestry and agro-forestry programmes should confer short and long-term ecological and livelihood benefits; and (xii) short term commercial interests should not be allowed to undermine the ecological security of our coastal areas and the coastal zone management should be based on cohesive, multi-disciplinary and multi-dimensional vision.[28]

The Government of India accepted M.S. Swaminathan Committee Report in 2006 and the MoEF was asked to implement the recommendations of the Committee, by initiating the process of repealing the CRZ Notification with a new Notification on Coastal Zone Management.

VI. Draft Coastal Management Zone Notification 2008 And Public Participation

The MoEF notified a draft Coastal Management Zone Notification on May 1, 2008 in accordance with the Environment (Protection) Act, 1986 inviting objections and suggestions on the provisions of the notification within 60 days from the date of issue of notification i.e., till the June 30, 2008. As there were many representations and requests from various stakeholders, including from the

[28] *Id.*, at 101.

government's of Tamil Nadu, Goa and Puducherry, the above said Notification was re-notified on July 22, 2008[29] to extend the time period for suggestions and objections.

The objective of this notification was to ensure protection and sustainable development of coastal stretches and marine environment through sustainable coastal zone management practices based on sound scientific principle taking to account the vulnerability of the coast to natural hazards, sustainable livelihood security for local communities and conservation of ecologically and culturally significant coastal resources.[30] While the CRZ Notification, 1991 was based on management of coastal areas through regulation, the draft CMZ Notification, 2008 proposed management through planning.

Unlike the CRZ Notification, 1991 that defined Coastal Regulation Zone on the landward side up to 500 meters from the High Tide Line (HTL) and regulated the activities in inter-tidal areas between Low Tide Line (LTL) and HTL, the CMZ Notification, 2008 defined "coastal Zone" to mean the area from the territorial water limits (12 nautical miles measured from the appropriate baseline) including its seabed, the adjacent land area along the coast, and inland water bodies influenced by tidal action including its bed, up to the landward boundary of the local self government or local authority abutting the sea coast, provided that in case of ecologically and culturally sensitive areas, the entire biological or physical boundary of the area may be included, as specified under the provisions of Environment (Protection) Act, 1986.

The draft CMZ Notification, 2008 provided for Integrated Coastal Zone Management (ICZM) and prescribed development of ICZM Plan (ICZMP). It divided coastal zones into 4 CMZ areas. While the CRZ Notification, 1991 made Category -1 (CRZ-I) a no development zone, with minimal activities permitted over there, the CMZ-I under the CMZ Notification, 2008 differs from its predecessor in the sense that the range of activities is defined through and ICZMP. CRZ-II and CRZ-III are regulated zones based on the nature of development in urban and rural settlements but CMZ-II covers the areas of particular concern such as economically important area, high population density areas, culturally and strategically important areas. CMZ-III covers all other open areas including coastal waters and tidal influenced inland water bodies excluding the areas covered under CMZ-I , II and IV. CMZ -IV consists of island territories of Andaman & Nicobar, Lakshadweep and off islands.

The draft CMZ Notification, 2008 proposed to setup a National Board for Sustainable Coastal Zone Management. As a management methodology and approach for the CMZ Notification, 2008 provided for notification of setback lines along the entire coast excluding CMZ-I and CMZ IV areas.

[29] Coastal Management Zone Notification, 2008, S.O. 1761 (E), MoEF, dated 22 July 2008.
[30] Rule 1 of CMZ Notification, 2008.

After the issuance of draft CMZ 2008 Notification, a large number of suggestions and objections were received by the MoEF from a wide cross-section of stakeholders – ranging from the state governments, civil society organizations, fisher folks' organizations and concerned individuals.

The Centre for Environment Education (CEE) was commissioned by the MoEF to conduct meetings across the country to facilitate public consultations. The CEE conducted 35 consultations all over the country with the representatives of local communities and civil society groups and submitted its report to the MoEF in September, 2008. There was widespread opposition to the draft CMZ Notification, 2008.

The draft Notification has also been rejected by the fisher folks' organizations and environmental NGOs. Even the private sector operators expressed unhappiness about the 2008 Notification.[31] It was apprehended that the setback line or vulnerability line would unduly affect the livelihood interests of the fisher folks and other local communities. It was also feared that the new Notification may affect the accessibility rights of local communities and will serve the interests of industrial and other corporate operators.

The main concern of the stakeholders was that the scientific management regime proposed in the draft Notification would be subjected to misuse and misinterpretation. Most of the objections were targeted towards the ambiguous and uncertain scientific terminology used for demarcation of setback line. Many believed that the demarcation of setback line would face difficulties on scientific and data front and would delay the implementation of the Notification.

Most of the stakeholders sought clarifications on setback line, ecologically sensitive areas and integrated coastal zone management and the methodology for management etc. They suggested that the CRZ 1991 Notification needs to be retained and, if needed, improvements can be made in that. According to them, the CRZ Notification, 1991 has enough scope to manage coastal zones efficiently and if implemented effectively, it can serve the purpose. Some feared that the draft 2008 Notification would promote Special Economic Zones (SEZ) with the adverse impacts on coastal ecosystems and the rights of local communities.

The representatives from different groups, particularly the local communities contended that they should be involved in the entire process of formulation and drafting of any new notification since its inception.

All the eight coastal state governments that provided written comments were opposed to the draft CMZ Notification and called for withdrawal of it.[32] Karnataka, Kerala and Goa governments feared that this new notification would legalize all the violations made so far under the CRZ Notification, 1991.

[31] See *supra* note 2 at 11.
[32] *Id.*, at 11-12.

The Parliamentary Committee on Science and Technology, Environment and Forests also examined the draft CMZ Notification, 2008. The Parliamentary Committee visited various coastal states and met different stakeholders to get to know their real concerns. After consultations, the Parliamentary Committee observed that the Ministry "should not make haste in implementing the CMZ Notification without addressing the conflict of interests between the stakeholders – mainly the fisher folk and coastal communities" and recommended that "CMZ Notification be kept pending/in abeyance till mechanisms/instruments – executive and legislative – are put in place for inclusion and integration of coastal communities through participative, decision-making and control instruments."[33]

Even though the practice of issuing draft notifications and bills inviting comments of public in law making process has been in place in India for a quite long time, public participation on this occasion was so effective and organized and had a huge impact on the coastal law making process. The unique aspect that has to be noticed on this occasion is that the central government has facilitated the public consultation process in many places, evaluated the objections of stakeholders with the help of credible expert committees and other agencies such as CEE and accommodated their concerns in the law making process.

VII. Report of the Expert Committee and Recommendation for Lapse of CMZ Notification, 2008

The MoEF constituted a four-member Committee[34] on June 15, 2009 under the Chairmanship of Prof. M. S. Swaminathan to examine the comments received by the MoEF on the draft CMZ Notification, 2008, and to advise the government on the policy and legal framework for Integrated Coastal Zone Management. The Committee reviewed the 2008 Notification and carefully examined the suggestions and objections from different stakeholders. After deliberations, the Committee recommended to the central government to let the CMZ Notification 2008 lapse and strengthen the CRZ Notification 1991 by way of amendments. This is the first instance that a law or Notification was allowed to lapse due to public concerns. The Committee recommended the continuation of existing CRZ Notification, 1991 and suggested incorporation of suggestions and objections and to issue a revised CMZ Notification, 2008. It also suggested altogether a new Notification integrating the key features of CRZ Notification, 1991 and CMZ Notification, 2008. The Committee suggested that the CRZ Notification, 1991 may be retained as the basic framework and suitable modifications or amendments may be made into it to strengthen its provisions "taking into account the new challenges likely to arise from climate

[33] *Id.*, at 9-10.

[34] Prof. Swaminathan as the Chairperson; and Ms. Sunita Narain (Director, Centre for Science and Environment), Dr. Shailesh Nayak (Secretary, Ministry of Earth Sciences), and Mr. J. M. Mauskar (Additional Secretary, MoEF) as members.

change induced sea level rise, and the growing pressure of population on coastal resources and biodiversity."[35]

The Committee noted that the Indian coast is doubly vulnerable today and is facing unprecedented pressures due to industrial and urban development and climate change. It recommended initiation of consultations to amend the CRZ Notification, 1991 appropriately. It outlined eleven specific areas for coastal governance.[36] These include, checking CRZ violations through space technology and legal reform, protection of fisher families, addressing Mumbai's developmental concerns, regulation of ports, pollution management, management of island ecology, new coastal protection regimes, protection of mangroves and protecting seaward side. The Committee observed that these changes will surely benefit the lives and livelihood of about 25 percent of the Indian population living within 50 kms of the coastal line and also nearly 10 million fisher folks who directly depend on the coastal resources. The Committee opined that even though the present coastal zones based on 500 meters are unscientific "it is preferred because it is time tested and clearly understood."[37]

VIII. Public Consultations to Strengthen CRZ Notification, 1991

After the recommendations of the Expert Committee and lapse of the draft Coastal Management Zone Notification, 2008, the MoEF commissioned the CEE once again to conduct nation-wide public consultations to enhance awareness on the recommendations of the expert committee and to elicit views of the public to strengthen the CRZ Notification, 1991. The CEE conducted 10 public consultations between August, 2009 and February, 2010, after widely publicizing about the consultations through fisher networks, coastal and fisher federations, newspapers and websites.

Out of 10 public consultations, the first five were conducted in Mumbai, Chennai, Goa, Puri and Cochin and were chaired by the Minister of State for Environment and Forests himself. This shows the openness and commitment on the part of the central government to give importance to public participation in law making process. The other five consultations were held in Puducherry, Andhra Pradesh (Vijayavada), West Bengal (Kakdwip), Gujarat (Rajkot) and Karnataka (Mangalore). Over 4500 fisher folks and other coastal communities participated in the consultations. About 85 percent of the participants belonged to fisher and other coastal communities. The others included panchayat members, and local leaders, NGOs, tour operators, academicians, professionals and government officials. Of all the participants, about 18 per cent were women.[38]

[35] Letter of the Committee to the Minister, MoEF, dated July 16, 2009; Report of the Expert Committee on Coastal Zone, July 2009, at 1.

[36] See *supra* note 26 at 15-26.

[37] *Id.*, at 11.

[38] The Report of the Public Consultation with fisher folks and community to strengthen Coastal Regulation Zone (CRZ) Notification, 1991, Centre for Environment Education (CEE) for MoEF, March 2010.

The coastal communities and fishers welcomed the decision of MoEF to allow the draft CMZ Notification, 2008 to lapse and reintroduce CRZ Notification, 1991 with improvements. While they agreed that sustainable development of the coastal areas is indispensable, they reinforced their views that protection of coastal ecology and basic rights and livelihood of fisher communities should be the central element of coastal zone planning. All the participants strongly expressed their views to consider original CRZ Notification, 1991 without the amendments as the base document to further strengthening it.[39] The participants stressed that any drafting process of improved CRZ Notification must ensure the involvement of representatives from the fisher and other local communities. The participants expressed that instead of a Notification under the Environment (Protection) Act, 1986, a new Act will help putting a stop to frequent amendments. However, they insisted that if the Act could not be brought out, a clause must be introduced in the existing CRZ Notification, 1991 that an amendment to CRZ Notification can only be done through public consultation process with the involvement of local fishers and other coastal communities.[40]

The local communities felt that the need to integrate all the laws and policies on marine and coastal areas should be discussed and integrated into the improved CRZ Notification since they have direct bearing on their lives. They also demanded establishment of "*Fishers Court*" on the lines of Consumer Court in order to deal with the cases related to fishers issues, sea safety, insurance coverage, CRZ violations, compensation claims disaster risk resolution, pollution control, etc. They also demanded that the traditional rights of fishers should be protected through legislation as in the case of the Traditional Forest Dwellers Act, 2006. All the participants stressed that the existing dwelling units of the fishers and other coastal communities falling within the coastal zone should be protected as it is. They also insisted that over withdrawal of ground water in the coastal areas need to be controlled to reduce salt water intrusion.

IX. Draft Proposal of CRZ Notification, 2010 and the Ongoing Public Participation

As per the recommendations of the Report of the Expert Committee on the draft Coastal Management Zone (CMZ) July, 2009 and the responses from the national level public consultations conducted by the CEE, the MoEF has published a Draft Proposal of Coastal Regulation Zone Notification, 2010 (hereinafter called the Draft Proposal)[41] in April, 2010 under sub-section (1) and clause (v) of sub-section (2) of Section 3 of the Environment (Protection) Act, 1986 and solicited suggestions, comments and objections from the public.

[39] *Id.*, at 2.
[40] *Ibid.*
[41] Draft Proposal of Coastal Regulation Zone Notification, 2010, MoEF, April 2010.

The Draft Proposal seeks to supersede the CRZ Notification, 1991. The Draft Proposal carefully balances livelihood security to the local communities, conservation and protection of coastal stretches, its unique environment and marine areas and promotion of sustainable development based on scientific principles while taking into account the natural hazards in the coastal areas and sea level rise due to global warming.

The Draft Proposal retains the basic provisions of the CRZ Notification, 1991 and introduces some changes wherever required. Land between the Low Tide Line (LTL) and the HTL was a no development zone in the 1991 Notification, while it is referred to intertidal zone in the Draft Proposal. It proposes time bound actions for many important activities. It contains a list of prohibited activities within the CRZ area. It strives to phase out the existing practices of discharge of untreated waste and effluents from industries, cities and towns and other human settlements within a period of two years from the coming into force of this Notification.[42] The dumping of city or town waste, industrial waste, fly ash for the purpose of land filling or otherwise, or any existing practice on these lines should be phased out within a period of one year. The state and union territory governments should prepare an action plan for allocating adequate budget to deal with pollution of coastal areas and waters in a time bound manner. An action in this regard should be submitted to MoEF within six months from date of issue of this Notification for approval. Thereafter, their Action Plans should be implemented by the State/UT Government in a time bound manner. MoEF/Central Pollution Control Board (CPCB) will monitor the implementation of the Action Plan.

As per the Draft Proposal, the MoEF will undertake a study to determine the coastal stretch that are undergoing shoreline changes, and classify such coastal stretches as 'high eroding sites', 'medium eroding sites' and 'low or stable sites'. The MoEF along with the State Authorities/Government Departments and scientific institutions will identify the causes of such shoreline changes and take necessary measures to minimize such erosion within a stipulated period of time not exceeding two years from the date of issue of this Notification. Till such time no port projects will be permitted in the high eroding sites. These classifications of the stretches indicating the shoreline changes will be mapped on the Coastal Zone Management Plans.

The Draft Proposal establishes a new procedure for all projects attracting clearance under this Notification. All construction and township projects more than 20,000 sq meters will be approved in accordance with EIA Notification, 2006. In case of projects less than 20,000 sq meters, they will be approved by the concerned planning authorities in accordance with this Notification after obtaining recommendations from the concerned Coastal Zone Management Authority (CZMA).

[42] *Id.*, Rule 3.1. (v).

The MoEF is understood to have received many comments and suggestions on the Draft Proposal. After taking into account the comments received from the public the MoEF is expected to take further action on finalizing the CRZ Notification, 2010.

X. Conclusion

The withdrawal of the CMZ Notification, 2008 that sought to supersede the CRZ Notification, 1991 succinctly demonstrated how the public participation can change the course of law making process. The response of the MoEF in this regard needs to be appreciated for the reason that it has considered the objections and suggestions made by the public objectively and accepted the recommendation by the Expert Committee to let the 2008 Notification lapse on the given circumstances. This is a classic example of environmental governance with the help of public participation as it is for the first time that a government has rolled out extensive public consultation process and agreed not to go ahead with a draft Notification based on the concerns of the stakeholders. This is not an easy step for any government. The openness to conduct more public consultations on the new Draft Proposal with the fisher folks, local communities and civil society organisations from August, 2009 to March, 2010, that too in the presence of the Minister of MoEF to get to know views of the concerned public on coastal management further demonstrates the transition taking place in India on the democratic environmental governance. It is a welcome step and has to be appreciated and emulated by the other ministries while making laws. If such public participation happens in monitoring the implementation of environmental laws, the state of environment in India will a change for the better.

LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA: AN APPRAISAL

*Topi Basar**

I. Introduction

Traditional Knowledge (TK) commonly refers to knowledge, innovations and practices of local or indigenous communities across the world. It is knowledge that has developed over centuries of experience and relates to practical aspects of life in the rural sector. It has been orally transferred from one generation to the next. TK tends to be collectively owned by certain community, family or region and many of which are in public domain as a free and easy accessible knowledge. It is not possible to name all the existing TK possessed by the indigenous and tribal communities in India and elsewhere. Mainly it comprises of rich medicinal knowledge of the usage of plants, animals, micro organisms, traditional medical treatments like village mid wives, bone setters, faith healers, snake bite treatment, bio-conservation, organic farming, folk traditions, to name a few.

It is an established fact that TK plays an important role in the global economy and is valuable not only to those who depend on it in their daily lives but also to modern industry and agriculture.[1] The value and contribution of TK is immense in the field of pharmaceutical and medical sciences.[2] The World Health Organization has reported that countries in Africa, Asia and Latin America use traditional medicine to help meet society's primary healthcare needs. In Africa, up to 80 percent of the population uses traditional medicine for healthcare. In India, this percentage goes up to 70 percent.[3]As per several findings, most of the modern pharmaceutical industries have been developed on the basis of medicinal plants discovered by indigenous peoples and local communities. It is reported that over 95 per cent of the world's genetic resources and TK associated with it originate and are concentrated in developing countries.[4]

In this era of knowledge based economy, which ultimately becomes intellectual property of one that converts the knowledge into a product for industrial application. In this whole cycle of economy, existing TK could be a vital component. The traditional and indigenous communities have always regarded TK as their intellectual property asset in an informal context.

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1 Bruce M. Campbell and Martin K. Luckert, *Uncovering the Hidden Harvest: Valuation Methods for Woodland and Forest Resources*, (Earthscan, London, 2002).

2 S.A. Laird and K. ten Kate, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit Sharing* 78-79 (Earthscan Pubs. London, 1999).

3 WHO Fact Sheet No.134, revised May 2003 cited in S.K. Verma, "Protecting Traditional Knowledge - Is a Sui Generis System an Answer?", *J. World Intell. Prop.* 765 (2004).

4 Grethel Aguilar, "Access to Genetic Resources and Protection of Traditional Knowledge in the Territories of Indigenous Peoples", *J. Environmental Science and Policy* 241-256 (2001).

II. Need for Protection of TK

India is well known for her rich cultural heritage and vast resources of TK. But she is equally famous for misappropriation or bio-piracy of its TK by others.[5] This is a grave challenge for India. For instance, grant of patents on turmeric, basmati rice by the U.S Patent and Trademark Office and on neem by the European Patent Office, and its subsequent revocation due to India's legal challenge exemplify the extent of misappropriation of India's TK.

To make it worse, there is a lack of adequate legal framework for the preservation and protection of TK from unlawful misappropriation. The existing legal measures in India having some bearing on TK are not really enforced. In the event of successful commercial application of TK by the private corporations, the real holders of TK get no reward or benefit in any form. The same is true even after the inception of National Biological Diversity Act, 2002 that requires that benefit sharing, prior informed consent and mutually agreed terms be made a compulsory feature of commercialization of TK by the appropriating party.[6] Also, many types of TK are not covered under the present legal framework.

In the early 90s, a series of misappropriation of age old Indian TK jolted the nation from her deep slumber. Such incidents also revealed the economic potential of TK in its modern application and the vulnerability of the custodian of TK. Absence of legal protection measures both nationally and internationally made it very difficult for India to legally challenge the patenting of her TK abroad.

(i) Turmeric Patent

Turmeric (*Curcuma longa*) is a plant of the ginger family yielding saffron-colored rhizomes used as a spice for flavoring Indian cooking. Its unique properties also make it an effective ingredient in medicines, cosmetics and as a color dye. As a medicine, it is traditionally used to heal wounds and rashes.

In 1995, two expatriate Indians at the University of Mississippi Medical Centre were granted a US patent on use of turmeric in wound healing.[7] The Council of Scientific & Industrial Research (CSIR) filed a re-examination case with the US PTO challenging the patent on the grounds of existing prior art. CSIR argued that

[5] The term "misappropriation" in respect of genetic resources (GR) and traditional knowledge (TK) is not yet commonly defined. See, WIPO document WIPO/GRTKF/IC/16/5, Art. 1 reads:
"Any acquisition, appropriation, revelation or utilization of traditional knowledge by unfair or illicit means shall constitute an act of misappropriation and misuse.-Misappropriation and misuse also include / shall include deriving / any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means that constitutes an act derive / commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or fails to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge. "

[6] The Biological Diversity Act, 2002 (BDA) and its TK related provisions are discussed below in this paper.

[7] Turmeric Patent Application No.174, 363 was filed on December 28, 1993 and was awarded US Patent No. 5,401,504 on March 28, 1995.

turmeric has been used for thousands of years for healing wounds and rashes and, therefore, its medicinal use was not a novel invention.[8] Their claim was supported by documentary evidence of TK, including ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association.[9] Despite an appeal by the patent holders, the US PTO upheld the CSIR objections and cancelled the patent. After a complex and expensive legal battle, the US PTO re-examined the patent and all the claims were cancelled on the ground that it was not a novel invention.[10] The patent was finally revoked on 28 March, 1999. The turmeric case resulted in a landmark judgment case and for the first time, a patent based on the TK of a developing country was successfully challenged.

(ii) Neem Patent

Since ages, the neem extracts have been used in Indian households and in agriculture for its varied properties. They are used against pests and fungal diseases that attack food crops; the oil extracted from its seeds being used to cure cold and flu; and mixed in soap, it provides relief from malaria, skin diseases and even meningitis.

In 1990, European Patent Office (EPO) granted a patent to the US Corporation W.R. Grace Company and US Department of Agriculture for a method for controlling fungi on plants by the aid of hydrophobic extracted Neem oil.[11] In 1995 a group of international NGOs and representatives of Indian farmers filed legal opposition against the patent. They submitted evidence that the fungicidal effect of extracts of neem seeds had been known and used for centuries in Indian agriculture to protect crops, and therefore, was a prior art and not patentable. In 2000, the EPO revoked the patent after the opponents successfully argued that there was prior public use and that claims were therefore not novel. The patent holders appealed against it.[12] But, a legal history was made in 2005 when the Technical Board of Appeals, EPO revoked the patent in its entirety concluding a ten-year battle in the world's first collective action against bio-piracy.[13] One of the potent arguments of the patent holders was that the concerned Indian traditional knowledge had never been published in an academic journal, therefore, such knowledge did not amount to "prior art" (*prior art* is the term used when previously existing knowledge bars a patent). The US patent law recognizes TK as prior art only if it is described in a printed publication.[14]

[8] Re-examination request was made vide Request No. 90/004.433 dated October 28, 1996.

[9] See XXII *Journal of Indian Medical Association* 273-276 (1953).

[10] Philippe Cullet, *Intellectual Property Protection and Sustainable Development* (LexisNexis Butterworths, New Delhi, 2005).

[11] Neem Patent No. 436257 published by EPO on September 14, 1994.

[12] Neem Patent Case Appeal, Technical Board of Appeals, EPO No.T416/01 (2005). The EPO revoked the patent on March 8, 2005.

[13] Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press, 1997).

[14] It may be pointed out that such rigid requirement will exclude many oral TK held by tribal and indigenous communities which are not recorded or codified in any form.

(iii) Basmati Patent

It is known all over the world that Basmati rice has originated in India and Pakistan. Basmati is famous for its long, aromatic and tasty characteristics and is a leading export food item of the country.

In 1997, a US company named Rice Tec was granted a patent by US PTO on 'basmati rice lines and grains' on the basis of 20 claims that it had submitted.[15] The said patent covered claims covering not only novel rice plant but also various rice lines; resulting plants and grains, seed deposit claims, method for selecting a rice plant for breeding and propagation. Its claims 15-17 were for a rice grain having characteristics similar to those from Indian Basmati rice lines. The said claims 15-17 would have come in the way of Indian exports to US, if legally enforced. After an uproar in the country, the Indian Agricultural and Processed Food Exports Development Authority (APEDA) successfully opposed it.

Evidence from the Indian Agricultural Research Institute (IARI) Bulletin was used against claims 15-17. The evidence was backed up by the germplasm collection of Directorate of Rice Research, Hyderabad since 1978. The Central Food Technological Research Institute (CFTRI) scientists evaluated the various grain characteristics and accordingly, the claims 15-17 were attacked on the basis of the declarations submitted by CFTRI scientists on grain characteristics. Eventually, a request for re-examination of this patent was filed on April 28, 2000. Soon after filling the re-examination request by the APEDA, Rice Tec on its own withdrew claims15-17 and claim 4.[16] And the US PTO dropped the term '*basmati rice lines and grains*' from the definition of the remaining patent.

(iv) Indian Wheat

In 2003, Monsanto, a US multi-national biotech company, one of the biggest seed corporation was assigned a patent on wheat named 'Nap Hal', developed from Indian farmers' wheat variety. It had obtained the wheat genome from a gene bank. The patent application was filed at the EPO in Munich under the simple title 'plants.'[17] On 27 January, 2004, Research Foundation for Science Technology and Ecology (RFSTE) along with Greenpeace and Bharat Krishak Samaj (BKS) filed a petition at the European Patent Office (EPO), Munich, challenging the patent rights given to Monsanto on Indian indigenous landrace of wheat. The patent was revoked in October 2004 and it once again established the fact that patents on biodiversity, indigenous knowledge and resources are based on bio-piracy and there is an urgent need to ban all patents on life and living organisms including biodiversity, genes

[15] Basmati Patent Appl. No. 272,353 filed on July 8, 1994. The USPTO granted Basmati Patent No. 5,663,484 on September 2, 1997.

[16] See, http://www.tkdl.res.in/tkdl/langdefault/common/Biopiracy.asp?GL=Eng. (last accessed on January 10, 2011).

[17] Patent No. EPO 445929 BI granted on wheat named Nap Hal developed from traditional Indian Wheat variety.

and cell line.[18] Vandana Shiva, environmental activist and a lawyer challenged Monsanto wheat biopiracy in the Indian Supreme Court also.[19]

After a vigorous campaign worldwide, on October 2004, the EPO revoked Monsanto patent on the Indian variety of wheat. This was the fourth consecutive victory for India against bio-piracy and wrongful patents after turmeric, neem and basmati.

(v) Amla (Indian Gooseberry)

Amla or Indian gooseberry is the fruit of a tree found mainly in India, Sri Lanka, Malaysia and China. Amla has been used for thousands of years in traditional Indian medicine as an effective detoxifier and rejuvenator. The tree is widely cultivated in India and the amla fruit, has for a long time, been known to possess many other medicinal properties.[20] The US PTO and the Japan Patent Office (JPO) has been doling out several patents for this traditional Indian herb that was so explicitly labeled as the Indian Ginseng. The Natreon Inc, a New Jersey-based company that held the patent was incidentally having a field day exploiting the precious Indian herb. The company having learnt of the medicinal properties of these herbs from 5000 years old India's indigenous medicinal system has resourcefully re-label them as functional foods and resell it in the Asian markets.[21]

(vi) Pudina and Kalamegha

The most recent case relates to the Chinese pharma company, Livzon's bid to patent the medicinal properties of pudina and kalamegha for treating bird flu.[22] India through TKDL claimed that the medicinal properties of pudina and kalamegha have been long known in Indian traditional medicine, and such has been mentioned in ancient *Ayurveda* and *Unani* texts dating back to the ninth century.[23] As a result, on June 10, 2010 the EPO cancelled the decision to grant patent to the firm.[24]

This brings to the fore the quintessential question, how ethical is patenting of TK in any form? TK is a cultural and social creation and acquiring proprietary rights over it is not a good practice.

In the post intellectual property rights regimes, the instances of bio-piracy of TK have rapidly increased raising an important question: whether the patent rights

[18] Vandana Shiva, *Monsanto's Biopiracy*, http://www.countercurrents.org/en-shiva270404.htm. (January 14, 2011). See also, Vandana Shiva, *Wheat Biopiracy: The Real Issues the Government is Avoiding*, http://www.organicconsumers.org/articles/article_8463.cfm (January 14, 2011.)

[19] *Research Foundation for Science, Technology & Ecology* v. *Union of India & Ors.*, Supreme Court of India, Writ Petition (Civil) No. 71/1999.

[20] Technology Information Forecasting and Assessment Council (TIFAC), Intellectual Property Rights (IPR), Vol. 7, No. 5, May 2002.

[21] See http://www.naturalproductsinsider.com/articles/2008/10/caprosr.aspx (January 17, 2011).

[22] Patent No. EP1849473 granted on January 19, 2007.

[23] *Times of India*, June 24, 2010.

[24] TKDL gave evidence of ancient usages of Pudina and Kalamegha documented in its digital database on traditional knowledge on May 20, 2010 to the EPO. See http://www.tkdl.res.in/tkdl/langdefault/common/outcome.asp?GL=Eng (February 12, 2011).

have become a tool for misappropriation of TK? Indeed, a complex issue that has no ready answers to it. These developments brought about some significant changes in the Indian legal framework, in an effort to deal with varied problems in this area. Although far from adequate, some of the key measures are assessed below.

III. Recent Legislative Measures

A. The Patents Act, 1970 with its latest Amendments of 2005

The most important provisions on TK in the Patents Act, 1970 are thus:
Section 3(p) - What are not inventions:

> An invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.[25]
>
> Section 25(1) - Opposition to the patent:
>
> (d) That the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.
>
> (e) That the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim.
>
> (j) That the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention.
>
> *(k) That the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.*

Under sec. 64, on the same grounds as mentioned above, any patent granted may be revoked subject to the provisions contained in the Act whether granted before or after the commencement of the Act on a petition of any person interested or of the Central Government by the Appellate Board or on a counter-claim in a suit for infringement of the patent by the High Court.

The Act and the amendment of 2005, is a welcome change for the protection of TK in the wake of growing patents based on TK. The problem is that the Act only aims at defensive protection of TK so as to dissuade its wrongful patents but gives no positive rights on the custodian of TK or any collective right to oppose the patent nor any right of benefit-sharing etc. It does not provide for disclosure of TK as the

[25] It may be noted that there is no specific case yet throwing light on sec. 3(p) of the Patents Act.

source if used in the invention of a new product, unlike the requirement to disclose the source or origin of biological material used for a biological invention. Moreover, the term traditional knowledge is not defined anywhere in the Act. The Act clearly cannot protect the rights of TK holders or ensure any economic compensation or benefit. It only prohibits mere duplication or replication of TK without any novelty or inventive step. Ironically TK is used as a major lead or input in inventing an altogether new product or thing without any trace or reference to TK in its final product. But, ethically, it cannot be said that the new invention is completely devoid of TK. This factor has been completely overlooked in the Act.

B. The Biological Diversity Act, 2002

India became a signatory to the United Nations Convention on Biological Diversity (UNCBD) signed at Rio de Janeiro on June 5, 1992.[26] The said Convention reaffirms the sovereign rights of the states over their biological resources. Its main objective is conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of utilization of genetic resources. India is rich in biological diversity and associated traditional and contemporary knowledge system relating thereto.

In order to implement and give effect to the UNCBD, India enacted the Biological Diversity Act, 2002 (BDA), an Act with the principal objective to provide for conservation of biological diversity,[27] sustainable use of its components[28] and fair and equitable sharing[29] of the benefits arising out of the use of biological resources,[30] knowledge and for matters connected therewith or incidental thereto.

The Act creates a three-tier system for the implementation of its purposes: the National Biodiversity Authority (NBA) at the national level, State Biodiversity Board (SBB) at the State level and Biodiversity Management Committees (BMC) at the local level. This system was also meant to be a response to check the alarming increase in bio-piracy and restrict bio-based trade. Its mandate was also to look at conservation of biodiversity and TK as a whole.

The NBA is the nodal agency in the country for implementing the BDA. For obtaining any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization or transfer the results of any research relating to biological resources occurring in, or

[26] The Biological Convention came into force on the December 29, 1993.

[27] BDA, 2002, sec. 2 (b): Biological Diversity" means the variability among living organisms from all sources and the ecological complexes of which they are part and includes diversity within species or between species and of ecosystems.

[28] *Id.*, sec. 2 (0): "Sustainable use" means the use of components of biological diversity in such manner and at such rate that does not lead to the long-term decline of the biological diversity thereby maintaining its potential to meet the needs and aspirations of present and future generations.

[29] *Id.*, sec. 2 (g): "fair and equitable benefit sharing," means sharing of benefits as determined by the National Biodiversity Authority under Sec. 21.

[30] *Id.*, sec. 2 (c): "biological resources" means plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value but does not include human genetic material.

obtained from India, an application is to be made to the NBA for its approval. Approval by the NBA is also required for applying for a patent or any other form of intellectual property protection for any invention based on biological resource obtained from India. The NBA can grant approval subject to such terms and conditions as it may deem fit such as imposition of royalty.[31] The NBA may while granting the approval impose a benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of intellectual property rights.[32] No person shall transfer any biological resource or knowledge associated thereto without the permission of the NBA. The NBA may grant approval for such transfer subject to payment of royalty as it may deem fit.[33]

A National Biodiversity Fund has been created, where the NBA may direct any amount of money given by way of benefit sharing to be deposited. The Fund is to be applied for channeling benefits to the benefit claimers, conservation and promotion of biological resources, socio-economic development of areas from where such biological resources or knowledge associated thereto has been accessed.[34] But if biological resource or knowledge is accessed from specific individual or groups of individuals or organizations, the NBA may direct that the amount be paid to them directly in accordance with any agreement or as decided by the NBA. The NBA may on behalf of the central government, take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with it.[35]

At the state level, the SBB has the authority to deal with matters of access to biological resources and associated knowledge by Indians for commercial purposes and restrict any activity, which violates the objectives of conservation, sustainable use and equitable sharing of benefits. However, as far as the Union Territories are concerned, the NBA shall perform all the functions of the SBB and the NBA has been vested with the power to delegate any or all of its powers to a person or a group of persons specified by the central government.

The SBB shall also create a State Biodiversity Fund that will be used for management and conservation of heritage sites, compensating and rehabilitating people affected by notification of sites as heritage sites, conservation and promotion of biological resources and socio-economic development of areas accessed to obtain biological resources. It is compulsory to give prior intimation to the SBB by any citizen, body corporate, association or organization for obtaining any biological resource for commercial utilization, or bio-survey and bio-utilization. But, this is

[31] *Id.*, sec. 19.
[32] *Id.*, sec. 6 (2).
[33] *Id.*, sec. 20.
[34] *Id.*, sec. 27.
[35] *Id.*, sec. 18 (4).

not applicable in the case of local people or communities, growers and cultivators of biodiversity and vaids and hakims practicing indigenous medicine.[36]

At the local level, there is the BMC, created for the purpose of promoting conservation, sustainable use and documentation of biological diversity, preservation of habitats, chronicling of knowledge relating to biological diversity and others.[37] The NBA and the SBB shall consult the BMC while taking any decision relating to the use of biological resources and knowledge associated within its territorial jurisdiction.[38] Also, a Local Biodiversity Fund shall be constituted by the state at the local level.[39] The Fund shall be used for conservation and promotion of biodiversity and for the benefit of the community within the jurisdiction of the local bodies.[40]

Most importantly, the central government is empowered to respect and protect the knowledge of local people relating to biological diversity, as recommended by the NBA through such measures, which may include registration of such knowledge at the local, state or national levels, and other measures for protection, including a *sui generis* system[41] in the light of art. 8 (j) of the UN Convention on Biological Diversity, 1992.[42]

C. Biological Diversity Rules, 2004

In exercise of the powers conferred by sec. 62 of the BDA, 2002, the Central Government has made the following rules:

1. To organize comprehensive programmes regarding conservation of bio-diversity, sustainable use of its components and fair and equitable sharing of benefits arising out of the use of biological resource and knowledge.[43]
2. To build database for information and documentation of biological resources and associated TK through bio-diversity registers and electronic data bases.[44]
3. The NBA shall consult the concerned local bodies before granting approval to any person for access to biological resources and associated knowledge.[45]
4. The NBA shall take steps to widely publicize the approvals granted and periodically monitor compliance of conditions.[46]

[36] *Id.*, sec. 7.
[37] *Id.*, sec. 41 (1).
[38] *Id.*, sec. 41 (2).
[39] *Id.*, sec. 43 (1).
[40] *Id.*, sec. 44 (2).
[41] *Id.*, sec. 36.
[42] Convention on Biological Diversity, 1992, art. 8 (j): ... respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices..
[43] Biological Diversity Rules, 2004, rule 12 (viii).
[44] *Id.* rule 12 (xiii).
[45] *Id.* rule 14 (3).
[46] *Id*, rule 14 (10).

5. The formula for benefit sharing shall be determined on case-by-case basis.[47]
6. The quantum of benefits shall be mutually agreed between the persons applying for such approval and the NBA in consultation with the local bodies and benefit claimers.[48]
7. Where biological resources or knowledge is accessed from a specific individual or a group of individuals or organizations, the agreed amount is to be paid directly to them through the district administration.[49]
8. The BMC will advise SBB or NBA on any matter referred to it by them. It will maintain data about the local vaids and practitioners.[50]

The main thrust of the BDA and the Rules made there under is on access of biological resources based on biodiversity, benefit-sharing, its conservation from the commercial perspective. The Act treats TK only as an ancillary matter. It fails to recognize the varied complex issues concerning TK. Moreover, there are many types of TK such as, for instance, oral folk culture and art forms and traditional medicinal systems that cannot be covered under the Act. Also, it fails to protect the core content of TK and its diversity is not taken into account.

The Act and the Rules therein have made NBA as the nodal authority to deal with all the matters.[51] The issue of conservation of biological diversity and TK are indeed a matter of serious concern today. However, both require separate institutional machinery and treatment to address the varied complex issues in their respective field. Problems pertaining to TK are complex and vast. It needs a separate body or authority to deal with it effectively. The best way is to develop a *sui generis* law for TK in the country. A TK specific legislation, of course in harmony with the existing laws, having a separate TK protection body/board at the National, State, District (connecting villages) levels is the need of the hour. The NBA is already overburdened and further burdening with the responsibility of protecting TK on them will not serve the purpose.

D. Traditional Knowledge Digital Library (TKDL)

In India, large body of TK is contained in ancient classical and other literature, often inaccessible to the common man and even when accessible rarely understood. Documentation of this existing knowledge, available in public domain, of various traditional systems of medicine has become imperative to safeguard the sovereignty of our TK and to protect it from being misappropriated in the form of patents on non-original innovations.

[47] *Id.*, rule 20 (3).
[48] *Id.*, rule 20 (5).
[49] *Id.*, rule 20 (8).
[50] *Id.*, rule 22 (7).
[51] It may be mentioned here that NBA has been authorized to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with it. But there is no report of any such step taken by the NBA until now.

Bitter experiences of turmeric, neem, basmati and many other cases led to the creation of this mammoth digital database of TK called TKDL, a first of its kind in the world. TKDL is a collaborative project between the Council of Scientific and Industrial Research (CSIR), Ministry of Science and Technology and Department of AYUSH, Ministry of Health and Family Welfare, and is being implemented at CSIR. An inter-disciplinary team of Traditional Medicine (Ayurveda, Unani, Siddha and Yoga) experts, patent examiners, IT experts, scientists and technical officers are involved in creation of TKDL for Indian Systems of Medicine. The project TKDL was initiated in the year 2001.[52]

TKDL provides information on TK existing in the country, in languages and formats understandable by patent examiners at International Patent Offices (IPOs), so as to prevent the grant of wrong patents. TKDL thus, acts as a bridge between the TK information existing in local languages and the patent examiners at IPOs.

The project TKDL involves documentation of TK available in public domain in the form of existing literature related to Ayurveda, Unani, Siddha and Yoga, in digitized format in five international languages which are English, German, French, Japanese and Spanish. TKDL gives legitimacy to the existing TK and enables protection of such information from getting patented by the fly-by-night inventors acquiring patents on Indian TK systems. It prevents misappropriation mainly by breaking the format and language barrier and making it accessible to patent examiners at International Patent Offices for the purpose of carrying out search and examination.[53] Thus, making it a potent evidence of prior art in digitized format.

It has been reported that up till May 2010 with the help of TKDL database, fifteen patent applications at EPO have been withdrawn.[54] The most recent case is that of Chinese pharma company Livzon's bid to patent the medicinal properties of 'pudina' and 'kalamegha' as mentioned earlier. It has become a model for other countries on defensive protection of their TK from misappropriation.

E. Other Important Legislations

Besides the abovementioned Acts and Rules impacting TK directly, there are other relevant laws having some important bearing on TK. They are complementary in nature.

(i) The Protection of Plant Varieties and Farmers' Rights Act, 2001: There are number of provisions in the Act which apply indirectly in the context of TK. Most importantly provisions relating to access and benefit - sharing and the whole chapter on Farmers' rights in effect provide protection for 'traditional agricultural knowledge'.[55]

[52] See TKDL website, http://www.tkdl.res.in (February 12, 2011.).
[53] *Ibid.*
[54] *Ibid.*
[55] See, Cullet, *supra* note 10.

(ii) The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006: It recognizes the rights of forest dwelling STs and other traditional forest dwellers' right of access to biodiversity and community right to intellectual property and TK related to biodiversity and cultural diversity.[56]

In addition, some other laws also offer ample scope of protection for TK if used creatively. The potential of which is not yet explored. For instance, the Geographical Indications of Goods (Registration and Protection) Act, 1999,[57] the Trade Marks Act, 1999[58], the Copyright Act, 1957[59] and the Designs Act, 2000 could be used in relevant areas of TK that fall under these categories of law.

IV. Conclusion

The Government of India has shown keen interest to address the issue of TK protection. It is evident from the creation of various task forces, working groups, funding of private and institutional projects on TK and conducting conferences and capacity building programmes and the creation of a few bills and drafts on TK. The most recent initiatives are the creation of Task Force on TK under Federation (FICCI) with an aim to look into all aspects of Indian TK, consider the scope of protection that exists currently and what should the format for new legislations, if required. Currently, the draft Protection, Conservation and Effective Management of Traditional Knowledge Relating to Biological Diversity Rules, 2009, is open for the public consultation process.

In consideration of the above, the existing Indian laws are insufficient to protect and preserve TK. Therefore, India should develop an effective *sui generis* mechanism that prevents the misuse/misappropriation and the exploitation of TK and lays down a framework to facilitate access and benefit sharing of such knowledge. India should also develop mechanisms to ensure that the TK is promoted amongst the new generations.

The inadequacies in the current laws may be plugged by having in place a single legislation with focus and clarity. There is a need to protect both oral and documented TK. The IPR regimes only recognize the documented TK, whereas oral TK are

[56] Sec. 3(1) (k), The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

[57] The relevant provisions may be used by TK holders of a particular region producing a special or distinct quality of good originating in that region which is based on their TK to collectively register it under the Act and become a joint proprietor of the GI good.

[58] For instance, provisions on "Collective Marks" in Chapter VIII of the Trade Marks Act. Collective mark denotes a trademark distinguishing the goods or services of members of an association of persons, which is the proprietor of the mark from those of others. The indigenous people who are producing traditional handicrafts and artworks can form an association and apply for Collective marks as provided in the Act.

[59] The Act can be used to protect the artistic manifestations such as folklore etc of TK holders especially artists who belong to indigenous and native communities, against unauthorized reproduction and exploitation.

deemed as public domain knowledge and therefore freely available. In India, many tribal and indigenous communities do not record their TK in any permanent form. They are orally taught and practiced for many generations. The laws need to protect their rights also. The support should be provided to document all kinds of TK as unpublished and uncodified TK poses a risk of being stolen. Apart from adopting a *sui generis* measure the existing relevant laws should be suitably modified wherever it is necessary to complement the overall protection of TK. At the moment, the protection measures are widely scattered in various enactments lacking coherence and comprehensiveness. Additionally, such enactments lack a holistic approach. It is a painstaking task to locate TK related laws in the huge bodies of laws before us. Myriad issues of TK call for a special treatment and holistic approach. Therefore, the best possible option is to have a single and comprehensive *sui generis* (one of its kind) legislation for TK.

LEGAL AID IN INDIA

*Manoj Kumar**

I. INTRODUCTION

A common representation of Goddess of Justice, 'Themis', is a blind-folded woman holding a set of scales, so that no distinction is made, inter alia, whether the person before her, seeking justice is rich or poor. But keeping in view the social realities prevalent in India, the fact that the accused or the plaintiff is rich, makes a lot of difference so far as access to justice is concerned. A few of the sensational cases recently reported in the newspapers bear ample testimony to the fact that being rich carries with it many privileges which make them more equal than equals before the law.

In a welfare state like India, with the salubrious provisions in the Constitution as enshrined in Parts III and IV dealing with Fundamental Rights and the Directive Principles of State Policy like arts. 38 and 39-A, etc. with an emphatic stress in the preamble on Justice, it can be said that the State is duty bound to uphold and provide justice to all and sundry in spite of social stratification, economic differences and political convictions so that every citizen is equal before the law and entitled to equal protection of laws. In justice dispensation system, we do have the provision for the legal aid to fill in the gap between the rich and the poor so far as the question of access to justice is concerned.

Lord Denning has noted that since the Second World War, the greatest revolution in the law has been the system of legal aid. He further states that legal aid means "that in many cases the lawyer's fees and expenses are paid for by the state."[1] This has been considered to be fundamental in providing access to justice in every justice administration system of the world including India.

The concept of justice has indispensable adjuncts like the rule of law, equality before the law, equal protection of the law, for the resolution of conflicts which institutions that make and/or laws have to take into consideration. Justice implies fairness and the implicit recognition of the principle of equality.[2] The preamble to the Indian Constitution invokes 'justice – social, economic and political' as a core principle.

Two of the basic purposes, which are intended to be served by providing access to justice in the form of legal aid, are:

> (a) to ensure that every person is able to invoke the legal processes for redressal, irrespective of social or economical status or other incapacity; and

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1 Lord Denning, *What Next in Law* 81(London Butterworths, 1982).

2 John Rawls, *A Theory of Justice* 11 (Harvard University Press, 1971).

> (b) that every person should receive a just and fair treatment within the legal system.[3]

Legal aid may be taken as a movement that envisages that the poor should have easy access to justice. It implies that the decisions rendered are not only fair and just taking account of the rights and disabilities of parties *sans* the economic disparities, but it also seems to be fair and just by providing the helping hand in the form of legal aid.

'Legal Aid' has a facet in the form of organized effort by the bar councils, the community and various governmental agencies to provide the services of lawyers free, or for a token charge, to persons who cannot afford the usual exorbitant fees.

The need for helping litigants in resolving disputes is recognized as one of the significant social services. Legal aid is a kind of human right in the context of conflicts and contradictory interests. The Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations Organization[4] imposes an obligation on states, which ratified the resolution, to strive, by teaching and educating, to promote respect for rights and freedom and by progressive measures, national and international, to secure their universal and effective recognition and observance, among the people of territories under their jurisdiction.

> Whatever standards a man chooses to set for himself, be they religious, moral social or purely rational in origin, it is the law which prescribes and governs his rights and duties towards the other members of the community. This somewhat arbitrary collection of principles he has very largely to take as he finds and in a modern society it intends to be so diverse and complex that the help of an expert is often essential, not merely to enforce or defend legal rights, but to recognize, identify and define them.

It has been rightly said that:[5]

It is a cardinal obligation of legal profession in every part of the world to establish and maintain legal aid schemes, as it is an essential part of the administration of justice in a democracy.

According to Justice P.N. Bhagwati, "Legal aid means providing an arrangement in the society so that the machinery of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of rights given to them by law."[6] The poor and illiterate persons should

3 S. Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* 1 (Lexis Nexis Butterworths Publications, 2004).

4 General Assembly of United Nations Organization, Resolution 217A(3), 10 December.

5 Mathews and Outton, *Legal Aid and Advices* (London Buttorworths, 1971).

6 *Report of the Legal Aid Committee* 5 (1971).

be able to approach the courts and their ignorance and poverty should not be an impediment in the way of obtaining justice from the courts.[7]

It can be taken to be well established that legal aid provides free legal assistance to the poor and needy persons or socially or economically disadvantaged persons in civil or criminal disputes before any court or tribunal. Legal aid intends that the right to have equal access to justice is not denied to any person by reason of poverty or helplessness or any physical or mental disability. It makes justice meaningful to all persons living in a society.

William J. Brennan, a U.S. Supreme Court Judge has rightly emphasised the importance of legal aid in the following words:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But Injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury and the Poor, who need it most cannot have it because its expenses puts it beyond their reach, the threat to the continued existence of a free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."[8]

It is, thus, clear that inability to consult or to be represented by a lawyer may amount to the same thing as being deprived of the security of law.[9] Rawls' first principle of justice is that each person is to have an equal right to the most extensive total system of equal basic liberties, compatible with a similar system of liberties for all. Legal aid is the method adopted to ensure that no one is debarred from professional advice and help because of lack of funds.[10] Our law, it has been cogently said by Cohn,

> [M]akes access to the courts dependent upon the payment of the fees and renders assistance by skilled lawyers in many cases indispensable. Under such a legal system the question of legal aid to those who cannot pay must not be allowed to play a Cinderella part. Its solution decides nothing less than the extent to which the State in which that system is in force willing to grant legal protection to its subjects. Where there is no legal protection there is in effect no law. In so far as citizens are precluded from access to courts, the rules of law, which they would like to invoke, are for them as good as non-existent. The question whether legal aid should be granted in a few exceptional cases and as

[7] *Ibid.*
[8] 287 U.S. 45 (1932).
[9] Mamta Rao, *Law relating to Legal Aid and Lok Adalats*, 338 (Eastern Book Company, 2005).
[10] *Supra* note 2

> a matter of charity only or whether it should be claimed as a matter of right by anybody who is financially unable to secure it himself goes therefore to the foundations of law."[11]

II. Legal Aid in US and UK

The right to counsel in criminal cases, by the accused, is very important and has been considered so fundamental that many countries have incorporated it in their Constitutions or in the Bill of Rights. Most of the countries in the world have made it a constitutional right to have the assistance of a lawyer or a counsel in criminal proceedings. In the United States, this right of an indigent accused, in a criminal trial, is guaranteed by the sixth amendment and is applicable in all states.[12]

In the United States, an organized legal aid movement for the poor began in 1876 with the establishment of an organization for providing legal assistance for the then arrived immigrants by the German Society of New York. The first legal aid office was established in New York City in the year 1876. Legal aid is provided, as of right, to needy and deserving persons facing criminal trial. The legal aid corporation has been constituted which is manned, managed and monitored by the American Bar Association and many other American Law Societies or organizations provide the services of attorneys.[13]

From the very outset, the rationale behind legal aid is the supposition that in every society there are individuals who are unable to participate in the legal system. Therefore, it is of prime importance for the system of justice and for society as a whole, to provide such individuals voluntary services of advocates. In the beginning, legal service was not provided on humanitarian grounds as a grant of legal services by advocates to poor clients who they met by chance. Rather, it was a social service under the third party subsidy of "an independent organization". Legal aid was a diffused movement till 1919. Reginald Heber Smith, an advocate with the Boston Legal Aid Society, published the work –'*Justice and the Poor*'- which paved the way to some outstanding new ideas. The important idea was that there was a 'collective social responsibility' on the Bar to provide opportunities for the unrepresentative masses to secure access to the justice system and it was indeed a crucial development in public interest law.[14]

The earliest legal aid movement appears to be of the year 1851 when some enactment was introduced in France for providing legal assistance to the indigent. In Britain, the history of the organized efforts on the part of the state to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor,

[11] "In legal aid for the poor", 59 *LQR* 250-251(1943).
[12] Madabhushi Sridhar, *Alternative Dispute Resolution, Negotiation and Mediation* 106 (Lexis Nexis Butterworths Publications, 2006).
[13] *Ibid.*
[14] *Supra* note 9 at p.13.

Viscount Simon appointed Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the state.[15]

In England, however there is no such right in the Common Law instruments like 'Poor Persons Defense Act, 1930' to provide legal aid to the poor at public expenses. Under the chairmanship of Lord Widgery, CJ, the Widgery Commission constituted in 1966 considered the question of legal aid in criminal proceedings. However, its report was not considered satisfactory by the government. A special committee, known as 'Justice in 1970', was appointed, which submitted its report in 1971. It highlighted the situation that in magistrates' courts, the legal aid system was not practised and the accused were unaided or unrepresented. Thereafter, a 'duty solicitor system' was introduced where a solicitor appointed from the legal aid panel, attended court, prior to the court sitting and interviewed the accused, coming before the court for the first time. He would tender advice as to which plea should be taken by the accused and also applied for bail or for adjournment, if necessary. He could also advised him on the need for applying for legal aid.[16]

III. Legal Aid in India

A. Historical Background

Legal aid movement in India has been influenced by contemporary legal developments in foreign countries especially England. Till 1946, it existed in a negligible form. However, a few voluntary organizations did some valuable work in this field. It was only after the publication of Rushcliff Committee Report (England) in 1946 that the legal aid movement in India gathered momentum.[17] After independence, the schemes of legal aid developed under the aegis of Justice N.H. Bhagwati of Bombay High Court and Justice Trevor Harris of Calcutta High Court.[18]

The matter of legal aid was referred to the Law Commission of India to make recommendations for making the legal aid programme an effective instrument for rendering social justice. Coming up with recommendations in its XIV Report, under the Chairmanship of noted jurist, M.C. Setalvad, the Commission opined that free legal aid was a service, which should be provided by the state to the poor. The state must, while accepting the obligation, make provision of funds to provide legal aid to the poor. The legal community must play a pivotal role in accepting the responsibility for the administration and working of the legal aid scheme. It owes a moral and social obligation and, therefore, the Bar Association should take a step

[15] "Legal Aid Movement in India - Its Development and Present Status", WWW.nalsa.org.in

[16] *Supra* note 12 at p.107.

[17] Roma Mukherjee, *Women Law and Free Legal Aid in India* 30(Deep & Deep Publication, New Delhi, 1998).

[18] N.H. Bhagwati and Trevor Harris, "Law as Struggle" in Rajeev Dhawan (ed.), *Public Interest Litigation in India*, 36 *JILI* 325 (1994).

forward in rendering legal aid voluntarily. These would include representation by lawyers at governmental expense to the accused persons in criminal proceedings in jails and appeals substitution. The Commission also recommended that in order XXXIII, CPC, the word 'Pauper' be included with 'Poor Persons'.[19]

Acting on the recommendations of the Law Commission, the Government of India in 1960 prepared a national scheme of legal aid providing for legal aid in all courts including tribunals. It envisaged the establishment of committees at the state, district and tehsil levels. However, due to the inability of the states to implement the scheme because of lack of finances, the scheme did not survive.[20] The Government of India again formed an expert committee under the Chairmanship of Justice Krishna Iyer in 1973[21] to consider as to how the state should go about devising and elaborating the legal aid scheme. The committees came out with elaborate recommendations regarding establishment of legal aid committee in each district, in every state and at the national level. It was also suggested that an autonomous corporation be set up, legal clinics be established in Universities and lawyers be urged to help.

The Government of India also appointed a committee under the chairmanship of Justice P.N. Bhagwati J to effectively implement the legal aid scheme. The Committee encouraged the concept of legal aid schemes and *Nyayalayas* in rural areas. The Committee in its report recommended the introduction of the concept of legal aid in the Constitution.[22] Accepting this recommendation, article 39-A was introduced in the Directive Principles of State Policy in Part IV of the Constitution of India.

In 1980, a committee at the national level was constituted under the chairmanship of Justice P.N. Bhagwati to oversee and supervise legal aid programmes throughout the country. This committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. In 1987, Legal Services Authorities Act was enacted to give a statutory base to the legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November 1995 after certain amendments were introduced therein by the Amendment Act of 1994. Justice R.N. Mishra, the then Chief Justice of India, played a key role in the enforcement of the Act.[23]

The National Legal Services Authority was constituted on 5th December 1995. Justice A.S. Anand took over as the Executive Chairman of the National Legal Service Authority on 17th July 1997. Soon after assuming the office, the Chairman initiated steps for making the National Legal Services Authority functional.

[19] *Supra* note 17, pp. 31-34.

[20] *Supra* note 9 at 349.

[21] Government of India, *Processual Justice to the Poor* (1973) (Justice Krishna Iyer Report).

[22] *Supra* note 9 at 349.

[23] *Supra* note 15.

The first member secretary of the Authority joined in December, 1997 and in January, 1998, other officers and staff were also appointed. By February, 1998, the office of the National Legal Services Authority became fully functional for the first time.[24] To bring out the desired result, Parliament made certain Amendments in 2002 in the Legal Services Authorities Act. The Legal Services Authorities Act, 1987 provides for the establishment of legal services authorities at the national, state and district levels for providing free and competent legal services to the weaker sections of the society.[25]

B. Legal Aid and Indian Constitution

The concern of the framers of the Constitution for the poor is reflected in the Preamble as well as in the Fundamental Rights[26] and Directive Principles of State Policy[27] enshrined in the Constitution. The Preamble lays down the socio-economic goals of the Constitution which seeks to ensure *inter-alia* 'justice social, economic and political', 'equality of status and opportunity', and 'the dignity of the individual'. The concept of social justice is reflected in the fundamental rights dealing with the right to equality,[28] the right to life and personal liberty[29] and the right against exploitation[30] guaranteeing 'humanist equality' while that of 'economic justice' is contained in the Directive Principles of State Policy aiming at abolishing inequalities through the instrumentality of law. More specifically, under the Directive Principles of State Policy, the state is obliged to promote the welfare of the people and also to ensure to all, adequate means of livelihood, equal pay for equal work for both men and women, the right to work, to education and to assistance in case of want, just and humane conditions of work, living wage for workers, free and compulsory education for children, promotion of educational and economic interests of Scheduled Castes and Scheduled Tribes and other weaker sections, protection against abuse of health and strength of workers and the tender age of children. They also enjoin the state to make provisions for the proper distribution of wealth and its sources of production so as to subserve the common good.

The framers of the Constitution of India desired that the citizens and the government are to strive for the establishment of an egalitarian society in which full and equal justice is guaranteed to all irrespective of position at which one is stationed at life. The Constitution thus emphasizes on the equality of justice. The preamble to the Constitution promises to all its citizens, social, economic and political justice.

[24] *Ibid.*
[25] Mohammad Ahmad, "Legal Aid Movement in India and the constitution", 42 (314) *Civil, Military Law Journal*, 146 (2006).
[26] Part III, Constitution of India.
[27] Part IV, *id.*
[28] Arts. 14-18, *id.*
[29] Arts. 20-22, 24, *id.*
[30] Arts. 23-24, *id.*

Article 14 provides that "the state shall not deny to any person equality before the law or the equal protection of laws within the territory of India."[31] The Preamble to the Constitution and article 14, give much emphasis on equal justice. For maintenance of equal justice in real sense, every person should have opportunity to seek justice. The economic inequality at times prevents a poor person from seeking justice. In such conditions, free legal aid to the poor and weak persons becomes a necessity for bringing about equal justice in real sense.

Article 21 declares, "No person shall be deprived of his life or personal liberty, except according to the procedure established by law." Likewise, article 22 (1) provides that "No person who is arrested shall be detained in custody without being informed as soon as may be the grounds for such arrest nor shall he be denied of the right to consult and to be defended by a legal practitioner of his own choice"

Articles 38 and 39-A of the Constitution are notable. According to article 38(1), "the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice- social economic or political shall inform all the institutions of the national life." Access to justice through free legal aid is also specifically provided to help people who suffer from economic and other disabilities. These provisions are intended to remove social and economic inequalities to make opportunities available in reality.

Prior to the forty-second amendment of the Constitution made in 1976, there was no express provision in the Constitution regarding legal aid. By this amendment a significant step has been taken in this direction giving constitutional status to legal aid programme. Article 39-A added in 1976, provides that "the state shall secure that the operation of the legal system promotes justice on a basis of equal opportunity and shall in particular provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reasons of economic or other disabilities."

The right to free legal aid is an essential ingredient of a reasonable, fair and just procedure implicit in the guarantee of the right to life and personal liberty under article 21.[32] This is the constitutional right of every accused person who is unable to engage a lawyer due to poverty.[33] The state is under the mandate to provide a lawyer to an accused person if the circumstance of the case and needs of justice so require provided the accused person does not object to the provision of such lawyer.[34]

C. Legal Aid and Statutory Provisions

1. *The Code of Criminal Procedure, 1973(Cr.PC)*: The Cr.PC contains express provisions in relation to the free legal aid. Section 304(1) of the Cr.PC

[31] *Supra* note 26.
[32] *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1369.
[33] *Ibid.*
[34] *Ibid.*

provides that where in a trial before the court of session, the accused is not represented by a pleader and where it appears to the court that the accused has no sufficient means to engage a pleader, the court shall assign a pleader for his defense at the expense of the state.

Section 304(2) provides that the high court may, with the approval of the state government, make rules for the mode of selecting pleaders for defense under section 304(1), the facilities to be allowed to such pleaders by the courts, the fees payable to such pleaders by the government and for carrying out the purpose of section 304(1).

Section 304(3) provides that the state government may, by notification, direct that as from such date as may be specified in the notification, the aforesaid provisions of sub-sections (1) and (2) of section 304 shall apply in relation to any class of trials before other courts in the state as they apply in relation to trial before the courts of session.

Section 304 thus makes it clear that the state is under an obligation to provide legal assistance to a person charged with the offence triable before the court of session. It enables the state government to direct that this provision shall apply in relation to any class of trials before other courts in the state.

2. *The Code of Civil Procedure, 1908(CPC)*: Order XXXIII of the CPC provides for suits by indigent persons. On the application to sue as indigent person is being granted the plaintiff shall not be liable to pay court fees and in case he is not represented by a pleader, the court may if the circumstance of the case so requires, assign a pleader to him. This benefit has now been extended to the defendant also. According to rule 18 of Order XXXIII and the provision contained therein, the central government or the state government may make such supplementary provisions as it thinks fit for providing free legal services to those persons who have been permitted to sue as indigent persons. Order XLIV of the CPC makes provisions in respect of appeals by indigent persons.

3. *The Legal Services Authorities Act, 1987*: The Legal Services Authorities Act, 1987[35] came into force with effect from 9.11.1995. It was made applicable by the Legal Services Authorities (Amendment) Act, 1994.[36] This Act has been enacted to constitute the Legal Services Authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizens by reason of economic or other disabilities that the objectives laid down in the preamble to provide justice- social, economical and political- are achieved. It was enacted to effectuate the constitutional mandates enshrined under articles 14 and 39-A of the Constitution of India. The object is to provide 'access to justice for all' so that justice is not denied to citizens by reason

[35] Act 39 of 1987.
[36] Act 59 of 1994.

of economic or other disabilities. However, in order to enable the citizens to avail the opportunities under the Act in respect of grant of free legal aid, it is necessary that they are made aware of their rights.

The National Legal Services Authority is a statutory body, which has been set up for implementing and monitoring legal aid programs in the country. The Supreme Court Legal Services Committee has also been constituted under the Act. In every high court, the High Court Legal Services Committees are being established to provide free legal aid to the eligible persons in legal matters coming before the high courts. The Legal Services Authorities Act, 1987 also provides for constitution of the State Legal Services Committees, High Court Legal Services Committees, District Legal Services Committees and Taluk Legal Services Committees.

According to section 2(1)(a) of the Act, legal aid can be provided to a person for a 'case', which includes a suit or any proceeding before a court. Section 2(1)(a) defines 'court' as a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions. As per section 2(1)(c), 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter.

It may be noted that legal services under this Act include rendering of any service in the conduct of a case or legal proceeding before any court, authority or tribunal. It may be in the form of providing advocates at the state expenses, or making payments of the court fees on behalf of any person who are eligible for legal aid, or any other expenses connected with the litigation.

The Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favour may decide to provide him counsel at state expense pay the required court fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

Under the Legal Services Authorities Act, 1987, every citizen whose annual income does not exceed Rs 9,000.00 is eligible for free legal aid in cases before subordinate courts and the high courts. In cases before the Supreme Court, the limit is Rs 12,000.00. This limit can be increased by the state governments. Limitation as to income does not apply in the case of persons belonging to the scheduled castes, scheduled tribes, women, children, physically handicapped, etc.

One of the major causes for popular dissatisfaction with the administration of justice in India today is said to be not too unfounded belief among a growing number of Indians that the system of justice operates unequally and to the

disadvantage of the poor. The system works unequally where adversaries in the judicial process are not on equal footing. This is made abundantly clear in the following passage from the famous case of *Powell* v. *Alabama*:[37]

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to issue or otherwise inadmissible. He lacks both the skill and knowledge adequate to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more is it of the ignorant and illiterate, or those of feeble intellect.

It is common knowledge that the complexities of an adversary system of justice, which we have inherited from the British, necessarily demand legal representation for ensuring equal justice under law. To adapt an observation of Chief Justice Marshall, of the US Supreme Court, "the legal process comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all." If, for any reason, economic or otherwise, lawyers' services are not available and if the machinery of justice cannot be employed, then the theoretical protection that the individual possesses under the law is of no practical use to him. It is a social responsibility to ensure universal access to law and, in the case of a welfare state like India, if necessary, at public expense. Legal aid is undoubtedly one of the most important devices by which the benefits of the rule of law can be made available to the poor. Legal aid is an indispensable part of the equipment for streamlining the working of the legal system.

Furthermore, the availability of legal services to the poor does help the society itself by the greater stability achieved through providing an outlet other than violence for their real and supposed grievances. To conserve the legal order, the neglected sections of society must be given a stake in the legal process. The legal system must mean the same thing to the poor that it means to the rich.

The focus of legal aid is on distributive justice, effective implementation of welfare benefits and elimination of social and structural discrimination against the poor. It works in accordance with the Legal Services Authorities Act, 1987 which act as the guideline of rendering free justice.

[37] 287 U.S. 45 (1932).

It would be interesting to know the special problems of the rural poor and the urban poor separately and also to find out as to how they compare with the legal problems of the non-poor living in rural and urban India. An efficient organization of a legal services delivery system may have to take account of all these differences in legal needs of the poor and design the program accordingly.

A study of the history of the Legal Services Authorities reveals that the Legal Service Authorities have been constituted for each state. These Authorities have been rendering legal services to the poor and disabled persons entitled under the Legal Services Authorities Act, 1987.

Not much work has been done on legal aid programmes in India. There are numerous questions regarding legal aid, e.g. how does the law affect the poor, downtrodden and disabled persons? What is the prevailing place occupied by legal aid in India? The major difficulty that confronts one in answering these questions is the paucity of data on the legal problems of the poor, the influence of poverty on the administration of justice and the resources needed for a national legal aid programme. Except for sketchy impressionistic references in the reports of various legal aid committees, very little attention has been given to the analysis of the legal problems of the poor at the academic, official or professional levels.

D. Judicial Approach

Equal justice demands access to law and justice to both the poor and the rich and unless concession is provided to the poor persons, article 14 regarding equality will be futile and a mockery. It will be ideal to speak of the blessings of liberty unless the poor enjoy the equal protection of law. Therefore, article 14 should be interpreted by radical and progressive way in order to convert legal equality in to social equality.

Now, article 21 has been reinforced by article 39-A. Therefore, the state must give facility to be defended by counsel to the accused. Article 22(1) of our Constitution is more or less similar to 'due process of law' contemplated in the Constitution of U.S.A. The wordings of article 22(1) of the Constitution are stronger which provides that no arrested person shall be denied the right to consult and be defended by an advocate of his choice.

The judicial approach towards legal aid was not very much progressive in the earlier days of independence of India. In the cases of *Janardhan Reddy* v. *State of Hyderabad*[38] and *Tara Singh* v. *State of Punjab*[39] the court adopted narrow view holding that "legal aid is a privilege given to the accused and it is his duty to ask for a lawyer if he wants to engage one or get his relations to engage one for him.

[38] AIR (1951) SC 217.
[39] AIR (1951) SC 411.

The only duty cast on the Magistrate is to afford him the necessary opportunity to do so."

Although legal aid was recognized by the courts as a fundamental right under article 21 reversing their earlier stance, the scope and ambit of the right was not made clear. This was done in *Sunil Batra* v. *Delhi Administration*[40]where the two situations in which a prisoner would be entitled for legal aid were given. First, to seek justice from the prison authorities and second, to challenge the decision of such authorities in the court. Thus the requirement of legal aid was brought about in not only the judicial proceedings but also proceedings before the prison authorities which were administrative in nature.[41]

The court has reiterated this again in *Hussainara Khatoon* v. *State of Bihar*[42]. The Court in this case said; "It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the Court's process that he should have legal services available to him. Free legal service to the poor and the needy is an essential element of any 'reasonable, fair and just procedure'."

The court has exhorted the central and state governments to introduce a comprehensive legal service programme in the country. In support of this suggestion, the court has also invoked article 39-A, which provides for free legal aid and has interpreted article 21 in the light of article 39-A. The court has upheld the right to free legal aid to be provided to the poor accused persons 'not in the permissive sense of article 22(1) and its wider amplitude' but in the peremptory sense of article 21 confined to prison situations.

The Supreme Court decision in *Meneka Gandhi* v. *Union of India*[43] stated that when article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but that the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just.'

In *M.H. Hoskot* v. *State of Maharastra*[44], the Supreme Court laid down some banning prescription for free legal aid to prisoners which are to be followed by all courts in India:-

(i) That the court shall furnish free transcript of the judgment when sentencing a person to prison;

[40] (1978) 4SCC 494.
[41] *Supra* note 9 at p. 350.
[42] (1980) 1SCC 98.
[43] AIR 1978 SC 597.
[44] (1978) 3 SCC 544.

(ii) A copy of the judgment shall be delivered to prisoner by the jail authorities with quickness and shall contain written acknowledgement from him;

(iii) If the prisoner seeks to file an appeal or revision, every facility for exercising such right shall be made available by the jail administration;

(iv) If a prisoner is unable to engage a lawyer on the ground of his indigence or incommunicable situation, then the court in the interest of justice and gravity of sentence shall assign a competent lawyer for prisoners defense subject to his approval;

(v) The state shall pay to the assigned counsel a sum as the court may equitably fix;

(vi) These prescription operates by force of article 21 strengthened by article 19(1) (d) read with sub articles 5 from the lawyers to the highest court in case, where the life and personal liberty is in danger.

(vii)To exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court under Article 142, read with articles 21 and 39-A of the Constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court.

In *Fransis Corollie* v. *Union Territory of Delhi*[45], the petitioner, a British National, was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. She felt considerable difficulty in finding a lawyer for her defense for which she moved the Supreme Court. Bhagwati J., while relying on the view taken in *M.H. Hoskot* v. *State of Maharastra*[46] and *D. Bhuvan Mohan Patnaik* v. *State of A.P.*[47], extended the right to legal aid to said detenue as well. In the opinion of the learned judge, the preventive detention law should also satisfy the test of article 21.

An important question regarding legal aid is whether the accused has to ask for a lawyer or a lawyer should be made available without even the demand? This was answered in the case of *Khatri* v. *State of Bihar*[48], where the court held that: - "the Magistrate or Session Judge before whom an accused appears must be held to be under an obligation to inform the accused if he is unable to engage the services of a lawyer on account of poverty of indigence, he is entitled to obtain free legal aid at the cost of the state. We deplored that, in that case, where the accused were blinded prisoners the Judicial Magistrate failed to discharge his obligation and contended himself by merely observing that no legal representation had been

[45] (1981) 1 SCC 608: 1981 SCC (Cri) 212.
[46] *Supra* note 44.
[47] (1975) 3 SCC 185: 1974 SCC (Cri) 803.
[48] (1981) 1 SCC 635: 1981 SCC (Cri) 235.

asked for by the blinded prisoners and hence none was provided. We accordingly directed Magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of State unless he is not willing to take advantage of the free legal aid provided by the state. We also gave a general direction to every state in the country ....to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations, the only qualification being that the offence charged against an accused is such that on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representations."

The Court stated that the right to free legal aid representation would be illusory unless the prisoner was informed of that right. The court directed that the Magistrates and Session Judges should inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the state. The state is under a constitutional mandate to free legal aid to the accused, which is entitled to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State.

The judgement of Supreme Court in *Suk Das* v. *Union Territory of Himachal Pradesh*[49], also reiterates the above proposition. The Court held in this case that "it is now well established that as a result of the decision of this court in *Hussainara Khatoon* case[50], that 'the right to free legal services is... clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons of poverty'."

In *Centre for Legal Research* v. *State of Kerala*[51], the Supreme Court held that in order to accomplish the object of social justice contemplated by article 39(A), the State should encourage voluntary social service organizations to come forward and actively participate in legal aid programme so that benefit of justice reach the common man.

IV. Conclusion

Social justice is a generous concept, which assures to every member of the society a fair deal. Any remedial injury, inadequacy or disability suffered by a member, for whom he is not directly responsible, falls within the liberal connotation

[49] (1986) 2 SCC 401.
[50] *Supra* note 32.
[51] (1986) 2 SCC 706.

of social justice. The provision of legal aid is, therefore, essential in accomplishing equality in society and ensures justice in every walk of life.

Legal aid really can mean the difference between life and death. For the poorest defendants to have truly equal standing before the law, incentives must be given to encourage legal aid services to the poor and needy persons.

The concept of legal aid is of ancient origin and existed right from the evolution of the idea of justice through courts of law. India won political democracy inheriting poverty and scarcities. Unfortunately, even after the lapse of many years, egalitarian society envisaged by the Constitution is a distant dream. Till now, 40 percent of our population lives below the harrowing poverty line without even the basic amenities of life. To end poverty and ignorance, to bring happiness to the millions of suffering people and to wipe every tear from every eye, the idea of free legal aid services to the poor assumes significance and importance. Legal aid assistance to the deprived and unequal members of the society facing the costly and cumbersome legal process in an effort to get justice is equally needed in all societies. Summing up the importance of legal aid in the modern societies, the concept of legal aid has attracted too many countries in the world compared to other socio-legal concepts.

Our Constitution makers have realized that legal aid provisions in the system of judicial administration are an effective instrument for an attack on poverty, social backwardness and lethargy. For that reason alone, we have adopted the concept of legal aid as an integral part of our judicial administration system. It is, therefore, important that the benefit of legal aid should have an adequate content and potency to make the deprived and downtrodden in the democracy enjoy the benefits of freedom, liberty and other rights made available to them as the citizens, without any fear of their extortion or extinction.

DESIGNING THE PROCESSUAL PHASES OF NEGOTIATION: A CRITICAL ANALYSIS

Amrita[*]

> Humanity should question itself, once more, about the absurd and always unfair phenomenon of war, on whose stage of death and pain only remains standing the *negotiating* table that could and should have prevented it.
>
> *Pope John Paul II*[1]

I. Introduction

Negotiation is the primary mode of alternate dispute resolution and has been recognized as a tailor-made process designed and controlled by the parties to resolve their disputes peacefully and arrive at a mutually acceptable decision. The process of negotiation is being increasingly adopted in international organizations, non-profit organizations, governmental branches, trade and commerce, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, commerce and everyday life.

The importance of negotiation as an international dispute resolution mechanism has been recognized globally and has been clearly enshrined in Article 33 of The Charter of United Nations. International treaties and conventions also consistently recognize negotiation as primary mode for settling disputes, nationally as well as internationally. UN Convention on the Law of the Sea, 1982 has also recognized the significance of negotiation as a primary mode of dispute settlements.

Negotiation mainly involves three basic elements: *process*, *behavior* and *substance*. The *process* refers to how the parties negotiate: the context of the negotiations, the role of the mediator in the process, the parties to the negotiations, and stages through which the process goes through. *Behavior* refers to the relationships among these parties, the communication between them, the tactics and the styles they adopt. The *substance* refers to what the parties negotiate over: the agenda, the issues, the positions and interests, the options, and the agreement(s) reached at the end.

This article focuses on the aspect of the *process* in which a successful negotiation is to be conducted. Although it is difficult to lay down a universal set of rules for the process of negotiation as a mode of resolution of disputes because flexibility is considered to be a very useful quality of negotiation process, it is advantageous to lay down the stages and phases every successful negotiation process should go through to provide a basic guideline to the parties from different cultural backgrounds attempting to come together and negotiating on a dispute.

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[1] Think exist quotes, http://thinkexist.com/quotes/with/keyword/negotiating/ (January 15, 2010).

II. Models of Processual Phases of Negotiation

There are two fundamental models of the processual phases of negotiation: *the developmental model and the cyclical model*. Both these models are closely interconnected and progress simultaneously.[2] This article assesses the *developmental model of the processual phases of negotiation*, by analyzing and comparing various developmental models proposed by renowned authors and experts along with their relevance, and endeavours to design a developmental model which can be simpler, suitable, practical and globally accepted model for the parties to negotiation to arrive at the desired agreement.

A. Douglas Model

Anne Douglas, a North American writer propounded three successive phases for negotiation process:[3]

(i) An early phase – In this stage, disagreement is emphasized and outer limits of negotiating range are established. This is the stage at which agenda and other procedural questions have to be arrived at.

(ii) A middle phase – In this phase, the parties reconnoiter the range and identify areas on which some agreement can be reached. This stage is labelled as the contract zone, in which parties considers a number of ways of reaching agreement, investigate each others propensity to make concessions and sacrifices.

(iii) A final phase – This phase is described as the decision making phase, in which either the agreements are reached or negotiations breaks up.

Douglas emphasized that the first phase tends to be characterized by turbulent, conflicting shows of strength, giving way to the calmer and more focused exchanges of the second phase. A further period of potential turbulence may follow before an outcome is reached.[4]

B. Stenelo Model

Stenelo, a Swedish expert, proposed three phase search process and summarized it as follows[5] :

1. Negotiation range – This is the first stage in which parties attempt to determine jointly the issues which the negotiations are to deal and attempt to reduce uncertainty in the process.

[2] P.H. Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective* 82 (Academic Press, New York and London, 1979).

[3] Simon Robert and Micheal Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* 126 (Cambridge University Press, 2nd Ed., 2005).

[4] *Id.* at 126-127.

[5] *Ibid.*

2. Reconnoiter the range – This is known as the contract zone in which range of outcomes to agreement are explored. The parties also search each others strengths and weaknesses.

3. Decision crisis – This is the final stage in which the parties reach an agreement within the framework of the established contract zone by uniting on a set of solutions.

A complex feature of Stenelo's model, being quite identical to the model proposed by Douglas, is that a number of analytically distinct matters are described as needing attention in the 'initial stage': issues have to be identified, an agenda formulated, areas of disagreement delineated and search activities undertaken to reduce uncertainty as to ultimate outcome. This leads to perhaps a complex and complicated guide to the parties as to what exactly are they expected to do in the first phase of their negotiation process in order to provide a sound base to the entire negotiations.[6]

C. *Gulliver Model*

In search for a more detailed model of different phases involved in the negotiation process, Gulliver presents an eight phase processual model. The developmental model propounded by Gulliver signifies that progress in one phase, that is, some accomplishment of the intent of its particular concentration opens the way to the succeeding phase with a different concentration. The eight phased developmental model of Gulliver is as follows[7]:

Phase 1: The Search for an Arena

When the two parties acknowledge the emergence of a dispute between them, there is a need to agree to some place where the negotiations may occur. This reflects that the parties are prepared to enter into negotiations for the ostensible purpose of seeking to discover some tolerable resolution.

Phase 2: Compositions of Agenda and Definition of Issues

Decisions have to be made about which issues to press and in what form, and which are best left out. Emotions may run so high that virtually anything and everything are thrown in, regardless of relevance or possibility of resolution. It is a stage of the presentation of demands, counter demands, and complaints, and the reactions to them.

[6] *Id.* at 127.

[7] Mark Davidheiser, "Culture and Mediation: A Contemporary Processual Analysis from South-Western Gambia (US, Canada, and Tanzania–Gulliver's Cross-cultural Model)" 29(6) *International Journal of Intercultural Relations* 718-719 (November 2005); Simon Roberts and Micheal Palmer, *supra* note 3 at 128-129.

Phase 3: Exploring the limits

This phase has sometimes been characterized by writers as the beginning of real negotiations and Gulliver describes this as 'free-roaming, antagonistic and rhetoric behaviour.'[8] Douglas and Stevens have described it as the first stage. There are efforts, therefore, to probe more deeply and to provoke less guarded information, with a good deal of antagonism and competitiveness.

Phase 4: Narrowing the differences

The emphasis changes from differences, separateness, and antagonism toward coordination, collusion, and even cooperation. The parties begin to look forward towards the possibilities of approaching actual outcomes. The parties begin to propose real offers and demands, often with considerable modification of their previous ones.

Phase 5: Preliminaries to final bargaining

These preliminaries are concerned with one or more purposes: the search for a viable bargaining range, the refining of persisting differences, the testing of trading possibilities, and the construction of a bargaining formula.

Phase 6: Final Bargaining

Bargaining consists of the exchange of substantive proposals about the terms of the agreement for the outcome of one or more issues. With their expectations and preferences set, parties are emphasizing the potentiality of ultimate agreement.

Phase 7: Ritual affirmation

The successful outcome of the negotiations is many a times marked by a ritual of ceremony and reiteration of the full terms of the agreement reached as a symbol of peace and goodwill. But the culmination of the negotiations can also be an impasse or breakdown such that the outcome is a return to the status quo ante or something near that.

Phase 8: Execution of agreement

Where some positive action is required to put the outcome of the negotiation into effect, the execution of the agreement may be handed over to specialists such as administrative or judicial officials, political leaders, lawyers, or a standing committee.

However, in actual, negotiations phases may overlap and not follow each other in a rigid chronology and, given the untidiness of actual social conduct, Gulliver 'caution against insistence on a too neat and coherent model'.[9] Gulliver developed

[8] *Supra* note 3.

[9] *Supra* note 3 at 129.

his framework out of his fieldwork in Tanzania with the Arusha and Ndenduli and his study of public-policy and labour negotiations in Canada and the United States. Nevertheless, out of these diverse cases, Gulliver identified what he saw as cross-cultural information exchanging and bargaining activities. His model can be described in few words as '*a trans-cultural processual template of negotiations*'.[10]

Gulliver's model is nicely detailed, elegant and durable, but subject to few loopholes, like, identification of issues and formation of agenda in a single phase, the idea of dividing the process of bargaining in preliminary and final bargaining making the process more complex and unrealistic. Gulliver's model is also blamed frequently for its closeness to the structure of civil litigation.[11] But the undisputable fact remains that Gulliver's model is a landmark contribution to the jurisprudence of negotiations process.

D. Roberts' Model

Adapted from Gulliver's model, Prof. Simon Roberts suggests an eight phased model of negotiation:

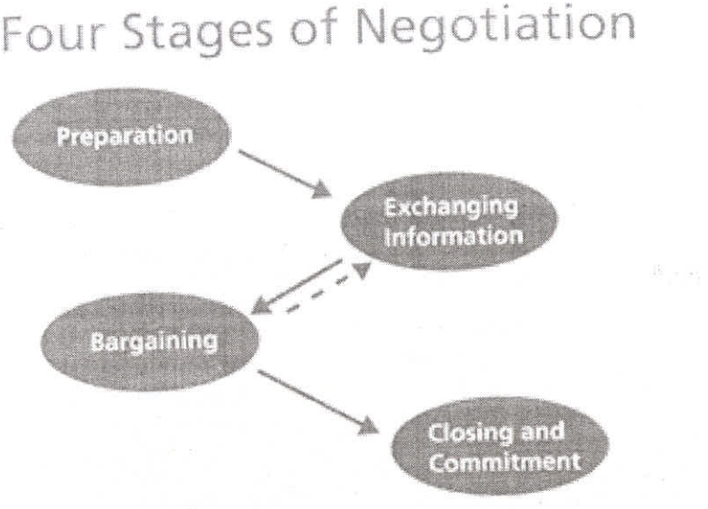
1. Arena - Search for an arena and agreeing to some ground rules of negotiation process. This does not only refer to personal aspects, but also geographical, cultural and social aspects of the negotiation.
2. Issues formation – The issues are identified.
3. Agenda Formation – Here, the mediator distinguishes between the issues parties feel very sensitive and strong with those issues which are negotiable.
4. Exploration – This stage refers to exploring the issues and agendas. The emphasis here is on differences between the parties. There is an expression of hostility and anger within the parties.
5. Discovery – The options of all the possible outcomes are discovered. The differences are narrowed here. Some people call it a 'magical moment.'
6. Positional change – The positions of the parties start changing when they are prepared here to make concessions and give up some demands and expectations.
7. Agreement – The final agreement is reached.
8. Ritual affirmation – This stage signifies the statement of serious intent about the outcome reached. It has a symbolic significance which strengthens the understanding already made.

[10] Mark Davidheiser, "Culture and Mediation: A Contemporary Processual Analysis from South-Western Gambia", 29(6) *International Journal of Intercultural Relations* 713-738 (November 2005).

[11] Simon Robert and Micheal Palmer, *supra* note 3 at 129-130.

In this model, Robert does not talk about the implementation or execution of the agreement because a good agreement is self enforcing and does not need to be implemented. This is considered to be a freely reached agreement as the negotiations are seen as voluntary processes. This model also misses bargaining because many of the negotiations do not pass through this stage of bargaining. Bargaining connotes a sense of sacrifice or surrender of resources or issues by a party which is a pessimistic view of negotiations process.

One of the generalized models suggested by an expert in a concise fashion is as follows:[12]



From Shell, Richard. Bargaining for Advantage: Negotiation Strategies for Reasonable People (Penguin 1999)

III. Comparative Analysis

All the models by different experts unravel different modes of negotiation process and a variety of phases for a successful negotiations process. It is not necessary that all negotiations pass through all these stages as most of the negotiations are over at the stage of issues or discovery. These different models are more so

[12] The four stage model is drawn in part from vignettes discussed during sessions on negotiation during the 2004 AAMC Annual Meeting and the 2004 Executive Development Seminar for Associate Deans and Chairs, presently derived from Shell.

overlapping and subject to change and flexibility as per particular situations of the case. The authors of these models are also comfortable with the idea of overlapping or alterations in the stages as they appreciate the empirical importance of flexibility in the process of negotiation.

These four models suggested by Douglas, Steleno, Gulliver and Roberts respectively nurtures a similar vision and ideology towards the negotiation process, differing only in respect of the detailed and brief explanation of the stage by stage process and categorizing them differently. Broadly, they all fall in the following serious phases:

(i) Turbulent exploratory phase and

(ii) Positional change phase

The initial models by Douglas and Steleno provide a base and a ground on which the negotiation process can stand and get established and the detailed models by Gulliver and Roberts focus on stage by stage explanation of the process the parties should go through to achieve successful outcome of the process.

IV. Proposed Model

Of more interest to this particular piece of research is designing a practical and simplified processual model of negotiation based on the analytical and comparative study of the above models. The proposed model is as follows:

(i) Meeting of the parties and selection of a neutral mediator and arena: This is the first stage after the parties decide to resolve their dispute by means of negotiation. First of all, the parties meet each other in order to decide on the arena or the place where the process of negotiation will take place and to decide on the selection of a trusted and neutral third party known as the mediator. The choice of the mediator is a crucial decision by both the parties as the success and failure of the negotiation process depends significantly on the choice of the mediator.

(ii) Introduction of the mediator and setting of the ground rules and behavioural guidelines of the process: After the place and the mediator is chosen by the parties, the first stage gives way to the second stage where the mediator plays the most active role as an initiator of the process of negotiation. The mediator at this stage introduces himself to the parties to enhance better understanding, goodwill and parties faith in his wisdom. The mediator also sets the rules and behavioural guidelines to be followed by the parties throughout the process to maintain the decorum, smoothness and elegance of the process.

(iii) Introduction of the dispute and identification of the issues involved: After these procedural formalities, the process moves towards resolving the dispute by identifying the real dispute between the parties and various issues for which the parties are concerned. The dispute is identified and clarified by the mediator after preliminary discussions with the parties. After the identification of the dispute, the mediator takes into account all the broad areas of issues towards which the parties are concerned. This is a stage of emotional turbulence and antagonism in which practically everything and anything which comes to the parties mind, either relevant or irrelevant, is thrown into the process.

(iv) Formation of the agenda by narrowing the issues: At this stage, after the broad framework of issues has been formed, the agenda of the negotiations process is fixed by narrowing and filtering down the issues by further identifying the substantive, procedural and psychological interests of the parties. The issues are filtered down by eradicating the irrelevant ones and keeping the ones on which the parties cannot seemingly compromise. This filtering and narrowing is done by educating the parties about the each others interests and the possibility of an agreement in a narrower framework of issues. The parties have now taken a step closer towards each other and the differences and antagonism are clearing the way for coordination and cooperation between the parties.

(v) Exploration of the possible outcomes: After the parties have started coming closer and cooperating in the effort to reduce the framework of issues, various options before the parties to settle the dispute in the most satisfying fashion are analysed and explored. It is very important at this stage for the parties to recognise and understand the importance of exploring the options of possible outcomes of the process which can be acceptable to both the parties. The parties at this stage are expected to mould and alter their offers and counter offers as well as their expectations by understanding and recognizing the position and interests of the other party to come a step closer towards each other. There can be some moments of turbulence while identifying and exploring the possible outcomes, as it will follow a sense of sacrificing positional interests and respecting others interest by the parties.

(vi) Discovery of the possible outcome and arrival at the agreement: After exploring the possible outcomes which have the potential of satisfying the interests of both the parties, the parties move even closer to each other and makes the bold decision of discovering the most satisfying

and sound outcome out of the explored options. The parties at this stage reach an agreement through various strategies of incremental convergence of positions, final leaps to package settlements and development of consensual formulae of agreement.

(vii) Declaration of the agreement reached and its acceptance by the parties: Once an agreement is reached by the parties, it is extremely essential function of the mediator to declare the agreement reached and the acceptance of the terms and conditions of the agreement by the parties. This stage is a crucial stage in the sense that it avoids the chances of confusion and uncertainty in the minds of the parties regarding the agreement and it ensures that they fully understand each and every term and condition of the agreement. This process also ensures that the parties cannot take the defence of uncertainty and misunderstanding at the time of enforcement.

(viii) Ritual affirmation as a symbol of joy and amity amongst the parties: If the process of negotiation results in a mutually acceptable agreement between the parties, than the end of this process is marked by either a ceremony, dinner, drinks or simply a hug, as a symbol of restoration of peace and goodwill.

The proposed model is based on the premise that the parties should focus at protection of their mutual interests during negotiations and should not be rigid on the positions. The success of negotiation lies in protection of interests and not taking positions. In negotiations, it is the task of the mediator to ensure that the process moves from a posture of positional bargaining where each party uses tactics to achieve only personal benefit, to a problem-solving approach which frames each issue as a single problem to be solved through the cooperation of the parties in reaching a resolution mutually acceptable to both. Each phase in the proposed model gives rise to another in a progressive and developmental fashion and ultimately results in the successful completion of the negotiation process when the outcome is reached in the form of a mutually acceptable agreement. The proposed model can be universally used in small and trivial as well as big and complex disputes with a clear understanding by the cross-cultural parties to the negotiation.

The *proposed model is justified* due to the following *advantages* over the existing models:

(i) Focuses on the significance of protection of interests by the parties and discourages parties to be rigid on taking positions which leads to the frustration of the negotiation process in many of the cases.

(ii) Does not divide and differently categorize the processual phases under separate headings, as this model provides a simple step by step guideline

to the parties which can easily be understood by them and be practically followed.

(iii) Avoids the complexity of the process of bargaining which has been suggested as a necessary phase in the eight phased model of Gulliver. Bargaining denotes a sense of sacrifice to be made by the parties, which is not a symbol of a prosperous and amicable mode of resolution of disputes.

(iv) Makes provision in a separate phase that recognizes the need to read the *terms and conditions* of the agreement reached by the mediator to the parties for their better understanding and its acceptance by the parties. It is essential to read out the agreed terms and conditions of the agreement reached to eliminate any room for confusion or misunderstandings between the parties. It is also important for the partied to accept the agreement after it is read out so that they cannot deviate latter from the agreement which they fully understood and accepted. This step has not been expressly mentioned in the detailed model proposed by Gulliver.

(v) Makes a provision in a separate step for the selection of the mediator and the introduction of the mediator to the parties, which is omitted in the existing models. It is absolutely essential for the parties to know the mediator fully well and depose faith in his wisdom and capabilities.

(vi) Lays down an express provision for fixing the ground rules and behavioural pattern to be observed during the process of negotiations which helps this process to move swiftly and smoothly, without any unnecessary obstructions and tactics by the parties.

It is important to recognize that there are a variety of negotiation models proposed in the literature, and each of these models aligns with a unique theoretical approach to strategic negotiation. But the crux and essence of negotiation is to be really found in the daily life and behaviour of human beings to resolve disputes and develop passion towards peace and amity.

V. Conclusion

Although, the heart of negotiation lies in its flexible and tailor-made approach, identification of the processual phases of negotiation carry an enormous amount of significance, primarily, for two reasons: One, it removes the complexities and unnecessary involvement with bargaining and hence avoids deviation from the other stages necessary for the successful completion of negotiations, and another, that it directs the way to parties and facilitates them in moving the negotiations from one phase to the next, smoothly and successfully. Hence, these processual models of negotiation, being the primary mode of alternate dispute resolution, carry enormous significance in as much as it provides a broad outline of the process

within which negotiations have to be successfully conducted and performed, nationally or internationally.

To sum up, it is noteworthy to quote Gulliver, who is of the opinion that "in the desire to avoid these unrealistic simplifications and to acknowledge the much more complex conditions of real life, the present work presents a model that is closer to the messiness of reality, no more susceptible to mathematical manipulation than are the shifting, approximating assessments of actual negotiation. It is a model that accords with the general notion of negotiation as an exploratory interaction between the parties."[13]

[13] Gulliver, *supra* note 3 at 89.

MARTIAL LAW AND HUMAN RIGHTS: PERSPECTIVES ON ARTICLE 34 OF THE CONSTITUTION OF INDIA

*P. Puneeth**

I. Introduction

The problem of reconciliation of liberty of the individual in society with the safety and security of the nation has been one of the eternal problems of governments all over the world. Referring to it, Edmund Burke, in the words of abiding wisdom, has stated thus:[1]

> To make a government requires no great prudence, settle the seat of power, teach obedience, and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. *But to form a free government, that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought and deep reflection.*

Every individual has inherent right to life, liberty and an option for the pursuit of happiness. These rights are inherent and inalienable. It is the primary obligation of the state to protect, preserve and promote these inherent rights of individuals. At the same time, there may occur situations, which compel the state to take certain extra-ordinary measures in order to defend itself against subversive elements. Extraordinary measures proposed to be taken in such situations may result in curtailment of certain rights and liberties, which are considered to be inherent and inalienable. It is in this context that the question as to how far and to what extent individual rights – fundamental right to freedom, safety and security of the person - should be circumscribed in the interest of safety and security of the nation as a whole becomes difficult to answer. It is more so owing to the fact that many eminent political thinkers too have widely differed on this point. For some, the state is a leviathan, a veritable supreme power, which has unbridled extraordinary powers to curtail even the most fundamental freedoms of the individuals whereas for few other thinkers the "state is for the individual and not the individual for the state". Thus, in the making of the Constitution for the governance of the country, reconciling these two supposedly opposite elements is one of the biggest challenges framers of the Constitution encounters.

Framers of the Constitution of India were fully aware of the exigencies of the hours of crisis that may arise in the life of the nation and, thus, made certain extraordinary provisions to enable the state to effectively deal with such crisis situations and to restore the order. Apart from the provisions dealing with preventive detention and emergency, article 34 that provides for imposition of restriction on rights conferred by Part III while martial law is in force is one such extraordinary power designed in the Constitution. Article 34 confers on the Parliament the power to pass an Act of Indemnity for the purpose of indemnifying and validating,

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[1] See L.M. Singhvi, *Freedom on Trial,* 36 (1994).

notwithstanding the guarantee of fundamental rights, any act done, any sentence passed, punishment inflicted or forfeiture ordered during the period when martial law was in force. The endeavour, in this paper, is to understand the serious implications of the exercise of such an extraordinary power on fundamental rights and to examine the efficacy of safeguards provided, if any, to prevent the abuse of such an extraordinary power.

II. Article 34: Text in the Context

Article 34 of the Constitution, which empowers Parliament to pass an Act of Indemnity, after martial law has been in force in any area within the territory of India, was not there in the original draft Constitution. The debates in the Constituent Assembly reveal that article 34 was subsequently added to the draft Constitution as B. R. Ambedkar, the Chairman of the Drafting Committee, thought that, in its absence, fundamental rights guaranteed in articles 20(1) and 21 of the Constitution would make it difficult to pass an Act of Indemnity after martial law has been in operation.[2] It was added at the time of third reading of the draft Constitution i.e., on November 14, 1949[3] only a few days before the adoption of the Constitution on November 26, 1949. Article 34 in Part III of the Constitution reads as under:

> *34. Restriction on rights conferred by this part while martial law is in force in any area:* Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

It is interesting to note that there is no other provision in the entire Constitution, besides article 34, referring to 'martial law'. This term is not defined anywhere in the Constitution. There is no provision specifying by whom and in what circumstances martial law may be proclaimed and the consequences of such a proclamation. There is no other provision in the Constitution from where clear inference can be drawn as to the existence of such a power. It is not even clear as to whether any such prior proclamation is required at all for the Parliament to subsequently pass an Act of Indemnity or not. Article 34 simply assumes the existence of such a power and, thus, empowers the Parliament to pass an Act of Indemnity. It is in this context that the true import and purport of article 34 of the Constitution need to be understood.

A. Martial Law: Meaning

The term 'martial law' has been used in various senses. Wharton's Law Lexicon defines 'martial law' as follows:

> 'Martial law' in a proper sense of the term, means the suspension of ordinary law and the government of the country or part of it by military tribunals. It must be clearly distinguished: (i) from military law, and (ii) from that 'martial law' which forms part of the laws and usages of war. The term 'martial law' is also sometimes used as meaning the common law right of the crown to repel force by force in the case of insurrection, invasion or riot and to take such exceptional measures as may be necessary for the purpose of restoring peace and order.

In the opinion of M.P. Jain, it is in the latter sense that the term 'martial law' has been used in article 34 of the Constitution, where it refers to "a 'condition of affairs', rather than as a 'code of rules', which arises when there is a state of war, insurrection or rebellion in any part of the country. When such a situation arises, force necessary in the circumstances to restore order may be used, and this use of force is characterised as martial law."[4] H.M. Seervai also views 'martial law' in article 34 as a part of the law relating to the maintenance of public order.[5] This is the true sense in which martial law with which we are concerned, in the context, need to be understood. It is the law that replaces the ordinary law of the land in an hour of need to restore peace and order by repelling force by force.

B. Proclamation of Martial Law

The provision relating to power to issue proclamation of martial law is conspicuous by its absence in the Indian Constitution. The absence of such a provision gives raise to several questions, *inter alia*, as to whether any such prior proclamation is required to bring into force the martial law in any particular area or not? According to M.P. Jain, "[u]sually, there is a proclamation of a state of martial law. It is not, however, such a proclamation, but the events, which make martial law. Even without such a proclamation, a state of things may exist when the military forces may be employed in executing martial law."[6] Further, in his view, "there is no need to seek any constitutional or legislative sanction for invoking martial law. The need to preserve the state is its sanction, justification and legitimacy."[7]

However, the absence of express provision in the Constitution providing for proclamation of martial law has generated some amount of debate mainly in the academic circles. Attempts have been made to suggest that such a power exists in our constitutional scheme, however, there is no unanimity as to where in the text of the Constitution such a power can be located.

Some writers have argued that it is included in the residuary legislative power.[8] However, for P.K. Tripathi such an argument appears to be apparently

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[2] XI *Constituent Assembly Debates (OR)* 577–578 (Lok-Sabha Secretariat, New Delhi, 2003).

[3] *Id.* at 468-470.

[4] M. P. Jain, *Indian Constitutional Law*, 1559 (2003).

[5] H.M. Seervai, *Constitutional Law of India*, 1876 (2008).

[6] *Supra* note 4 at 1560.

[7] *Id.* at 1562.

[8] See e.g., Ashutosh Patra, "A Critique of Hon'ble Mr. Justice Bhagwati's View of Martial Law As Expressed in *A.D.M. Jabalpur* v. *S. Shukla* (AIR 1976 SC 1207)", *AIR 1977 (Jour.)* 126; Ashutosh Patra, "A Critique of Article 359: The Sole Repository of the Power to Declare Martial Law", *AIR 1977 (Jour.)* 2.

unconvincing.[9] His point of view is that martial law involves the denial of the enforcement of fundamental right to life and liberty, whereas the legislative power is subject to fundamental rights, thus, the legislative power cannot extend to declaration of martial law. This argument equally holds good even against the view expressed by H.M. Seervai[10] suggesting that the Parliament's power to proclaim martial law is included within entries 1 and 2 of list I of the seventh schedule. What cannot be done in exercise of residuary power cannot be done even in exercise of legislative power under different entries in the seventh schedule since they are all subject to fundamental rights. One might add to it stating that on a plain reading of article 34, which authorizes the parliament to pass an Act indemnifying "any act done", suggests that the Constitution acknowledges the possibility of even executive proclaiming martial law without any legislative sanction. It clearly indicates that the acts (which are outside the authority of law) done during martial law in connection with the restoration of peace and order can be indemnified subsequently by the Parliament by enacting an Act of Indemnity. Had it been mandatory to enact a statute for proclamation of martial law, "acts done" would have been perfectly legal by virtue of such a law and there would have been no need for an *expost facto* legalization of such acts through an Act of Indemnity that can be passed under article 34 of the Constitution.

According to Tripathi, in the scheme of Indian Constitution, the declaration of martial law is essentially an executive act,[11] and not a legislative function. He located the said power in article 359 of the Constitution of India, which provides for suspension of the enforcement of rights conferred by Part-III of the Constitution during emergencies. He observed thus:[12]

> A careful examination will reveal that a declaration by the President of India under Art. 359 suspending the enforcement by courts of the right to life, liberty and legal defence guaranteed in Art. 21 and 22 will be accompanied by all the characteristics of martial law recognized in England.

[9] P.K. Tripathi, "Martial Law in India", *AIR 1963 (Jour.)* 66-67.

[10] See H.M. Seervai, *supra* note 5 at 1879. See also, P.K. Sharma, "Martial Law – A Brief Insight", *AIR 2003 (Jour.)* 71.

[11] However, P.K. Tripathi makes it categorically clear that power to declare a martial law is not a part of the executive power conferred upon the Union or upon the States by articles 73 or 162 respectively. Because, this executive power is co-extensive with the legislative power only, and the legislative power itself does not extend to declaration of martial law. Thus he opines that the executive power to declare martial law must be found in some other express provision in the Constitution.

[12] P.K. Tripathi, *supra* note 9. He elaborated that the suspension of the right to move any court for the enforcement of the rights conferred by articles 21 and 22 follows certain consequences viz., the courts do not intervene against the executive to protect the right to life, liberty and legal defence; any wrongful act of the executive depriving a person of life, liberty of legal defence does not cease to be wrongful, though the remedy is suspended; when the declaration under article 359 expires wrongful acts committed while the remedies were suspended become triable by courts of law unless duly indemnified. He reiterated this position in a subsequent article as well. See, P.K. Tripathi, "Judicial and Legislative Control Over the Executive During Martial Law", *AIR 1964 (Jour.)* 82.

This view came to be accepted and adopted by Bhagwati J. in *A.D.M. Jabalpur* v. *Shivakant Shukla*,[13] a case decided before the Constitution forty-fourth amendment, where he observed that:[14]

> There can be no two opinions that during martial law the courts cannot and should not have power to examine the legality of the action of the military authorities or the executive on any ground whatsoever, including the ground of *malafide*. But, if the courts are to be prevented from exercising such power during martial law, that situation can be brought about only by a Presidential Order issued under Article 359, clause (1) and in no other way and the Presidential Order insofar as it suspends the enforcement of the right of personal liberty conferred under Article 21 must be construed to bar challenge to the legality of detention in any court, including the Supreme Court and the High Courts, while the Presidential Order is in operation.

It is interesting to note that P.K. Tripathi, in a subsequent article published in the All India Reporter,[15] while broadly sticking to his original argument, has "slightly but significantly" modified the view expressed earlier. Expressing the same, he observed thus:[16]

> In the article under reference I had propounded that when a Presidential order under article 359 suspends the enforcement of the fundamental rights under articles 21 and 22, it amounts to a declaration of martial law without anything more. However...I have taken a slightly but significantly different position, namely that the suspension of the enforcement of these articles does not itself amount to a declaration of martial law, but, instead, *it merely satisfies the ineluctable constitutional pre-conditions for the declaration of martial law*.

His stand is that presidential order under article 359 suspending the enforcement of the fundamental rights conferred under articles 21 and 22 is a pre-condition for invocation of martial law. It is axiomatic that the presidential order under article 359 can be issued only after the proclamation of emergency under article 352 of the Constitution of India. Further, suspension of the right to enforce fundamental right is not the automatic consequence of proclamation of emergency. It is only the freedoms conferred under article 19 that stand automatically suspended immediately after the proclamation of emergency by virtue of article 358. The Constitution does not provide for suspension of other fundamental rights conferred in Part III. Article 359, in its original form, has only provided for the suspension of right to move any court for the enforcement of those fundamental rights for the period during which the Proclamation is in force or for such shorter period as may be specified. Thus, according to Tripathi's views, the President can invoke

[13] (1976) 2 SCC 521.

[14] *Id.*, para. 463.

[15] P.K. Tripathi, "Article 359: The Sole Repository of the Power to Declare Martial Law", *AIR 1976 (Jour.)* 66.

[16] *Id.*, at 67.

martial law only where the proclamation of emergency is in operation and that too after suspension of the enforcement of fundamental rights. The view expressed by P.K. Tripathi, though appears to be convincing, is not conclusive for the following reasons:

(i) If the martial law is intended to be brought into force subsequent only to the presidential order under article 359 suspending articles 21 and 22, then why it has not been expressly stated so. The argument afforded by Tripathi[17] as a possible reason for non-inclusion of the phrase 'martial law' in article 359 does not satisfactorily answer the question. Further, the positioning of article 34 in Part-III of the Constitution instead of Part-XVIII also creates reasonable doubts as to the conclusiveness of such an inference. Nowhere in Part-XVIII, the phrase 'martial law' has been used and in article 34 of the Constitution – the only provision referring to martial law, there is no reference to any of the provisions relating to emergency.

(ii) On a plain reading of article 352 (as it stood before the Constitution forty-second amendment) it is clear that the emergency could have been declared for the whole of India but not for any part of the territory thereof. Whereas expressions used in article 34 – "...in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force..." – clearly suggest that the 'martial law' could be invoked "in any area within the territory of India", where there is a war, insurrection or rebellion disturbing the peace and order. It is superfluous to mention that war, insurrection or rebellion in any part of the territory of India may not disturb the peace and order in every part of the territory, in which case there is no need to declare emergency under article 352 for the whole of India and then suspend articles 21 and 22 by a presidential order under article 359 so that the martial law can be declared in that part of the territory to restore peace and order.[18] P.K. Tripathi himself accepts the proposition that martial law can be invoked in any part of the territory of India for he observes that:[19] "it (article 34) contemplates that ordinarily, martial law will be declared only in a specified areas and not throughout the country. That is natural, because generally the army is called in to quell rebellion or to restore law and order only in a small area and for a small time when actual fighting is being resorted to by those who want to dislodge the lawfully established government."

[17] See P.K. Tripathi, "Judicial and Legislative Control Over the Executive during Martial Law", *AIR 1964 (Jour.)* 82 at 85.

[18] H.M. Seervai has endorsed this view. According to him "[i]f a rebellion or revolt in a place can be put down by the use of forces, without issuing a proclamation of emergency under Article 352, it is submitted that there is nothing in the Constitution which requires such a proclamation to be issued. One of the reasons for this submission is that before the machinery of issuing such a proclamation can be set in motion, grave and irreparable damage may be done if prompt action is not immediately taken to meet force with force." See, H.M. Seervai, *supra* note 5 at 1879.

[19] P. K. Tripathi, *supra* note 15 at 70.

(iii) It appears that the framers of the Constitution have intended 'martial law' to be invoked even when no "grave emergency exists whereby the security of India or of any part of the territory thereof is threatened". A mere situation of breakdown of peace and order, which cannot be restored, according to the subjective satisfaction of whoever concerned, by the operation of ordinary law is sufficient to invoke martial law. Owing to the differences in the language used in articles 34 and 352 of the Constitution, such an inference can be clearly drawn. The expression "maintenance or restoration of order" is very wider than "grave emergency".

(iv) In the absence of the express provision in the Constitution providing for proclamation of martial law, "the law in force in the territory of India immediately before the commencement of this Constitution" has to be followed by virtue of article 372 (1) of the Constitution. Continuance in force of such laws is, however, subjected to other provisions of the Constitution. An overview of the recorded history of martial law in India shows that the sources of proclamation of martial law before the Constitution came into force has always been statutory.[20] If an inference has to be drawn on the basis of this as to the 'law in force' on the subject of authority to proclaim martial law, the stand that under the scheme of Indian Constitution, the declaration of martial law is an executive act cannot be sustained. History shows that it has always been a legislative act. But then, the question would be whether the imposition of martial law by exercising legislative power contravenes any of the provisions of Indian Constitution?[21] As to this question, the argument advanced by learned Professor P.K. Tripathi objecting to the imposition of martial law by exercising legislative power is worth considering. According to him the legislative power under the Constitution is subjected to fundamental rights conferred in Part–III and, thus, the same cannot be exercised to impose martial law, which permits derogation of fundamental rights. Therefore, he relies on article 359 of the Constitution for the purpose.[22] It is submitted that for the reasons stated above, this view does not appear to be justified.

(v) The proposition of P.K. Tripathi inevitably leads to the conclusion that after the constitution forty-fourth amendment, which made rights guaranteed under articles 20 and 21 of the Constitution non-derogable

[20] See for details, P.K. Sharma, "Martial Law – A Brief Insight", *AIR 2003 (Jour.)* 71.

[21] By virtue of art. 372, law in force immediately before the commencement of the Constitution can continue to be in operation provided that such law is in consonance with the provisions of the Indian Constitution. Consistency of the provisions of such law with the provisions of the Constitution is a mandatory requirement for their continuation. For example, if the law in force immediately prior to the commencement of the Constitution of India is found to be inconsistent with any of the provisions in Part–III of the Constitution, such law, besides becoming void by virtue of art. 13 (1), cannot be continued to be in force even by virtue of art. 372 of the Constitution.

[22] P. K. Tripathi, *supra* note 15 at 70, 71.

> even during emergency, no martial law could be effectively imposed.[23] That renders article 34 of the Constitution completely redundant, which consequences might not have been intended either by the framers of the Constitution or those who voted in favour of the forty-fourth constitutional amendment.

In the absence of any debate in the constituent assembly on the question of power to proclaim martial law,[24] it is difficult to reach any conclusion as to the intention of the framers of Indian Constitution. Above discussion undoubtedly reveals that there exists a vacuum in the Constitution. P.K. Tripathi's proposition is an attempt to fill that vacuum. It is clear from his observation that "to say that there is no such power under the Constitution of India is to accuse the framers of a very serious omission. It is difficult to attribute to them such an omission."[25] Perhaps, by no stretch of interpretation of the constitutional provisions, one can avoid attributing to the framers of the Constitution such a very serious omission. The fact that there exists a wide gap cannot be disputed. This clearly indicates that the Indian Constitution, though considered to be one of the biggest Constitutions in the world, is not comprehensive in every respect.

III. Act of Indemnity *Vis-À-Vis* Martial Law: Implications on Fundamental Rights

As stated above, assuming the existence of power to proclaim martial law, article 34 of the Constitution straightaway authorizes the Parliament to pass a law, notwithstanding the fundamental rights guaranteed in Part–III of the Constitution, indemnifying any government servant or other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force, or validate any sentence passed, punishment inflicted or forfeiture ordered or other act done under martial law in such area.

Martial law, as H.M. Seervai pointed out, "is not law at all, but stems from the necessity of meeting force with force, and is justified by the necessity of putting down a rebellion or a state of war within the realm."[26] Invocation of martial law

[23] The High Court of Andhra Pradesh in *C. Subbarao* v. *The Supreme Commander of the Defence Forces of the Union of India*, AIR 1980 Andh. Pra. 172, has expressed the similar view. It observed thus: "Martial law in our country cannot be effectively be imposed so long as right to life and liberty guaranteed by article 21 is not taken away. ...It follows, therefore, now after the Constitution 44th Amendment Act, no effective martial law could be imposed under our Constitution."

[24] As stated earlier, article 34 – the only provision in the Constitution referring to martial law – was inserted at the time of third reading of the draft Constitution in the Constituent Assembly. The discussion over the newly inserted provision was initiated by Shibban Lal Saksena, who, in fact, moved an amendment for deletion of the said article. H. V. Kamath, though favoured the deletion of the said article, has moved three different amendments only to limit its scope in some way. However, Brajeshwar Prasad – another member of the Constituent Assembly, has favoured article 34 considering it as necessary and desirable. The question of power to proclaim martial law did not arise for consideration in the course of discussion. See, XI *Constituent Assembly Debates (OR)* 468 – 470; 577 – 578.

[25] P. K. Tripathi, *supra* note 15 at 70.

[26] H.M. Seervai, *supra* note 5 at 1877.

will automatically bring certain changes in the regular system of governance including justice delivery system. It envisages the entrusting of the task of 'maintenance of law and order' to the armed forces or military authorities. During the period when martial law is in force, the military authorities are authorized to interfere with the actions, life and liberty of the civilians, if they find it necessary. In exceptional circumstances, authorities may even condemn them to death. It is generally believed that regular courts will cease to function during the period when martial law is in force.[27] No writ of *habeas corpus* can be issued during martial law. However, once the martial law cease to exist or withdrawn, the theoretical position under the common law is that there may be *ex post facto* judicial scrutiny and the authorities would be civilly and criminally liable for their commission and omissions unless protected by an Act of Indemnity. It seems that article 34 has been envisaged in the Constitution to provide for this kind of situation. An Act of Indemnity contemplated under article 34 of the Constitution will have the effect of taking away the provision for *ex post facto* judicial scrutiny, that would indeed result in validation of the acts done even otherwise than under the authority of law. The opening words of article 34 that "notwithstanding anything in the foregoing provisions of this Part" clearly envisage that the power to indemnify conferred on Parliament is exercisable even in relation to acts done in derogation of the fundamental rights enumerated in Part–III of the Constitution including the rights conferred under articles 20 and 21 of the Constitution, which have now been made non-derogable even during the emergency by the Constitution forty-fourth amendment. It is pertinent, in this context, to refer to what B.R. Ambedkar said in the Constituent Assembly in defence of article 34 in order to understand the implications of martial law on fundamental rights. He observed thus:[28]

> I am sorry to say that Members who spoke against article 34 did not quite realise what article 20, clause (1) and article 21 of the Constitution propose to do...it is obvious that when there is a riot, insurrection or rebellion, or the overthrow of the authority of the State in any particular territory martial law is introduced. The officer in charge of martial law does two things. He declares by his order that certain acts shall be offences against his authority, and, secondly, he prescribed his own procedure for the trial of persons who offend against the acts notified by him as offence, is quite clear that any act notified by the military commander in charge of the disturbed area is not an offence enacted by law in force, because the Commander of the area is not a law-making person. He has no authority to declare that a certain act is an offence, and secondly the violation of any order made by him would not be an offence within the meaning of the phrase "law in force", because "law in force" can only mean law made by a law-making

[27] However, the functioning of the regular courts does not conclusively indicate that the martial law is not in operation. At one point in time, it was believed in England, from where the concept is borrowed, that martial law could not be declared when the king's courts are functioning. But this view was rejected in *Ex P. Marais* [(1902) AC 109]. It was followed in *R.* v. *Allen* [(1921) 2 IR 241] as well.

[28] XI *Constituent Assembly Debates (OR)* 577 – 578 (Lok-Sabha Secretariat, New Delhi, 2003).

> authority. Moreover, the procedure that the Commander-in-Chief or the military commander prescribes is also not procedure according to law, because he is not entitled to make a law. These are orders which he has made for the purpose of carrying out his functions, namely, of restoring law and order. Obviously, if article 20 clause (1) and article 21 remain as they are, without any such qualification as is mentioned in article 34, martial law would be impossible in the country, and it would be impossible for the State to restore order quickly in an area which has become rebellious.
>
> It is therefore necessary...to permit that notwithstanding anything contained in article 20 or article 21, any act proclaimed by the Commander-in-Chief as an offence against his order shall be an offence. Similarly, the procedure prescribed by him shall be procedure deemed to be established by law. I hope it will be clear that if article 34 was not in our Constitution, the administration of martial law would be quite impossible and the restoration of peace may become one of the impossibilities of the situation. I therefore submit, Sir, that article 34 is a very necessary article *in order to mitigate the severity of articles 20 (1) and 21.*

This clearly indicates that framers of the Constitution have devised article 34 particularly to pierce the protective shield of articles 20(1) and 21 of the Constitution, which are otherwise non-derogable even during national emergency. The Constitution (Forty-fourth Amendment) Act, 1976, which elevated articles 20 and 21 of the Constitution to the status of non-derogable rights, has not amended article 34 to bring about necessary changes in order to make them truly non-derogable. Thus, owing to article 34, non-derogability of these rights is only a myth in reality. Though the proclamation of emergency is not a necessary pre-condition for invoking the martial law, there is no bar for invoking martial law during emergency in our constitutional scheme. Perhaps no such formal invocation of martial law is required at all to pass an Act of Indemnity contemplated under article 34. Thus, once the proclamation of emergency has ceased to be in operation, an Act of Indemnity can be passed, by virtue of article 34, by the Parliament indemnifying acts done during emergency notwithstanding any fundamental rights including rights guaranteed under articles 20 and 21.of the Constitution. Thus, as long as article 34 exists in the present form, rights guaranteed under articles 20 and 21 of the Constitution cannot be considered as non-derogable rights in true sense.

Apart from authorizing the Parliament to retrospectively legitimise acts done even in derogation of non-derogable fundamental rights, article 34 empowers the Parliament to "validate any sentence passed, punishment inflicted, forfeiture ordered or *other act done* under martial law in such area." These provisions are wide enough to authorize the Parliament to wipe out any other constitutional or statutory rights of individuals during the period when martial law is in force.

Further, the immunity that can be accorded under article 34 is extendable to "any person". It is not just confined to those persons to whom the task of maintenance or restoration of order has been formally entrusted. The reason for this is that during martial law, it is not only the duty of the persons in the service of the state but of all citizens to help in maintaining law and order.[29] Thus, under article 34, *immunity can be extended to any person for anything done* in connection with the maintenance or restoration of order in any area where martial law was in force notwithstanding any fundamental, constitutional or legal rights of individuals.

IV. Efficacy of Safeguards

As explained above, article 34 confers very wide powers, more or less unfettered, on the highest democratic body i.e., Parliament. The question whether that will obviate the possibility of power being abused by the executive during martial law needs to be considered at the very outset.

In our *Westminster* form of government, where there is a fusion of power between the legislature and the executive and the executive is drawn out of the legislatures who enjoy majority in the house, the fact that the power is conferred on the Parliament is no guarantee against its abuse. It is more so when the Constitution provides for disqualification of members of Parliament for disobeying the whip issued by their respective political parties.[30] Executive exerts a considerable amount of influence over the legislature. One should not forget, in this context, the words of wisdom of Lord Acton that "[g]reat men are almost always bad men, even when they exercise influence and not authority..."[31] Emergency excesses of 1970's are the standing testimony to prove the ineffectiveness of parliamentary control over the executive.

Article 34 confers on the Parliament an extraordinary power to pass an Act of Indemnity subject only to two conditions, which are:

1. the act to be indemnified must have been done in connection with the maintenance or restoration of order, and
2. martial law must have been in force in the area where the act was done.

These conditions do not constitute effective safeguards against the possibility of abuse of such an extraordinary power vested in the Parliament. As regards the latter condition, since there is no provision requiring the formal proclamation to be made to bring martial law into operation, the question whether the martial law has been in force or not becomes difficult to answer. Perhaps, it is believed that no such formal proclamation is mandatory to bring the martial law into operation.[32] There is no certainty as to the presence of any particular conditions, which envisage the existence of martial law in any area. Even the fact that the regular courts are

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[29] Refer to speech by B.R. Ambedkar, XI *Constituent Assembly Debates (OR)* 577 (Lok-Sabha Secretariat, New Delhi, 2003).

[30] See para. 2 (d), Tenth schedule, Constitution of India.

[31] John Emerich Edward Dalberg-Acton, *Essays on Freedom and Power,* 364 (1949).

[32] See M.P. Jain, *supra* note 6.

functioning is not conclusive as to its non-existence.[33] This vagueness gives ample scope for the Parliament to presume the existence of martial law and to pass an Act of Indemnity under article 34.

Further, under article 34, the Parliament has authority to indemnify any person in respect of those acts, which have been done "in connection with the maintenance or restoration of order." No doubt, words in quote seem to restrict the power of Parliament only to indemnify certain acts from judicial scrutiny. On plain reading of the provision, it clearly emerges that if the acts done are not in connection with the maintenance or restoration of order, such acts cannot be protected under article 34 of the Constitution of India. Yet, it gives rise to the following two questions:

1. Does article 34 provide scope for *ex post facto* judicial review by regular courts to examine the acts done to determine whether they have been actually done in connection with the maintenance or restoration of order or not?
2. Whether the acts done, which are in connection with the maintenance or restoration of order but in excess of what is strictly required for the purpose, can also be indemnified or not.

As regards the first question, it is not clear, from the text of article 34, as to whether regular courts do have such power or the decision of the military tribunal in that regard is final. It is also not clear whether acts done in excess of what is required for the purpose of maintenance or restoration of order can also be indemnified or do they need to be subjected to the test of proportionality before granting such immunity. However, owing to the lack of authoritative pronouncement by the higher judiciary on these aspects, these questions cannot be answered definitively. On the whole, there are no effective safeguards in the scheme of Indian Constitution to prevent the possible abuse of power under article 34.

V. Conclusion

No doubt, 'martial law' is considered to be an anachronistic topic for discussion even in the academic circles. It may be because of the fact that the martial law has not been formally invoked since the commencement of the Constitution. But at the same time, its potential use cannot be overlooked. We cannot forget the fact that article 34 of the Constitution is still a living law of the land. Owing to the growing amount of insurrection or rebellion in different parts of the country and the proposals to use armed forces to deal with the problems, the possibility of invoking article 34 to indemnify the acts done by the members of armed forces or any other person cannot be ruled out in the days to come. However, fundamental issue is not the possible use of article 34, but the potential abuse of such power owing to the vagueness and lack of efficacious safeguards. Its existence in the present form is always a potential threat to the human rights. Thus, there is a need to revisit article 34 and devise necessary safeguards against its possible misuse or abuse.

[33] *Supra* note 27.

LEGAL PERSPECTIVE OF PANCHAYATI ADALATS IN JAMMU & KASHMIR: AN INNOVATIVE TRADITIONAL JUSTICE SYSTEM

Mushtaq Ahmed[*]

I. Introduction

The democratic decentralisation or '*Panchayati Raj*' as it is popularly known in our country aims at making democracy real by bringing millions of people into the functioning of their representative government at the lowest level. It thus becomes a system of 'grass-root democracy' or 'local self-government' that seeks to link the units of administration established in the remotest villages of a vast country with the units of higher government at the regional level. The village *Panchayats* which flourished as autonomous bodies in ancient India survived in the modern period, as evidenced by their prevalence at the time of British conquest. Traditionally as in the rest of the country *Panchayats* existed in the state of Jammu and Kashmir as well. Statutory recognition to *Panchayats* as an institution of local self-government dates back to 1930's when the Maharaja's Government promulgated the Jammu and Kashmir Panchayati Regulation Act in 1935. In the post-independence period various Acts were passed by the State Legislature from time to time and *Panchayati Adalats/Nyaya Panchayats* was the main feature in all the *Panchayati Raj* legislations.

Keeping in view the past experiences, it became imperative at the national level to enact Constitution 73rd (Amendment) Act, 1992 to provide constitutional status to the Institution of *Panchayati Raj* to impart continuity, certainty and strength. The *Panchayati Raj* system is a well established institution of democratic decentralization in India and is constitutionally recognized as third tier of governance. Unfortunately there is not a single provision concerning *Panchayati Adalats* (commonly known as *Nyaya Panchayats* in India) in this historic amendment. However, Jammu and Kashmir is the only State in India where at least these *Adalats* still exist in the statutes although dysfunctional. Most of the provisions of the J&K *Panchayati Raj* Act 1989 and J&K Panchayati Rules 1996 deal with *Pachayati Adalats*.

The most glaring feature of *Panchayati* Raj legislations in J&K was the establishment of *Panchayati Adalats* (peoples' court in villages) in the state to provide speedy and inexpensive justice in small disputes and petty offences. The purpose was to provide judicial service to rural people at their doorsteps through the concept of democratic decentralization. These *Adalats* are considered lowest court of subordinate judiciary and exercise both civil and criminal cases of simple nature as specified in the schedule. The rural poor could not travel to the district

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headquarters or cities to get justice, so it was the desire of the first Prime Minister of India Mr. Jawaharlal Nehru, to ensure that "the last man in the last part of the village gets justice..." Nehru's vision for India included the creation of social, economic and political institutions which would ensure justice and fullness of life to every man and woman. The common man should be rendered justice at the grassroot level was the rationale for incorporating the concept of the *Panchayati Adalats* in all the *Panchayati Raj* Acts enacted by state legislature from time to time from the inception till date. Accordingly the establishment of the *Panchayati Adalats* at the grass-root level (village level) continues to be the significant feature of the J&K *Panchayati* Raj Act, 1989 (hereinafter referred as Act).

In this paper an attempt has been made to critically analyze various provisions of the Act relating to composition of *Adalats*, competence and qualification of members, jurisdiction, procedural technicalities, institution of suit/case, jurisdictional aspects, judicial response to vesting *Panchayats* with judicial powers and find out whether these *Adalats,* if made functional could ensure speedy, fair and inexpensive justice to rural people.

II. Establishment of Panchayati Adalats or Nyaya Panchayats

This part of the paper shall be confined to the provisions of law relating to composition, jurisdiction, institution of suit/case, service of summons, contempt, power to cross-examine, ex-parte proceedings, execution, appeals and revisions governing the Panchayati Adalats in Jammu and Kashmir.

A. Constitution

The idea of *Panchayati Adalat/Nyaya Panchayats* is an innovative one, particularly at the grassroot level. As per the provisions of the Act of 1989 there shall be a *Panchayati Adalat* for every *Halqa* (group of villages). The *Adalat* shall comprise of five members to be nominated by the prescribed authority out of the penal prepared and recommended by the *Halqa Panchayat* out of its electorate.[1] The person so recommended for a term of 5 years shall be literate, have attained the age of 30 years, not be a *Sarpanch* (chairman) or a *Panch* (member) and not be in the employment of the government or local body or corporation.[2] Three members of the *Panchayati Adalat* shall form the *quorum*. The members of a *Panchayati Adalat* shall elect any member from amongst themselves as the Chairperson.[3] The Secretary of the *Panchayati Adalat* i.e., Village Level Worker (VLW) shall serve as the judicial clerk of the *Panchayati Adalat* for the purpose of recording its proceedings and decisions and such other duties as may be prescribed.[4]

[1] Sec. 48(2) of the J&K *Panchayati Raj* Act, 1989.
[2] *Id.*, proviso to s. 48(2).
[3] *Id.*, sec. 50.
[4] *Id.*, sec. 51.

There are many advantages allowing peoples participation in administration of justice at grassroots level through the institution of *Panchayati Adalats*, because the knowledge of local conditions and prestige of the members *of Panchayati Adalats* come in handy for effective dispensation of justice.

Every member of the *Adalat* including chairperson shall be deemed to be a 'public servant' within the meaning of section 21 of the *Ranbir* Penal Code *Samvat*, 1989 (*corresponding to year 1948*).[5] The chairperson and the members will be entitled to a sitting fee as may be decided by the government from time to time.[6]

The government may remove the chairperson or any member of the *Panchayati Adalat* after giving him opportunity of being heard, or after such enquiry, as the government may deem necessary if such chairman or member in the opinion of the government has been guilty of misconduct, negligence, refused to perform or is incapable of performing the functions of the *Panchayati Adalat*.[7] The provisions of the Judicial Officers Protection Act, 1971 shall apply to every *Panchayati Adalat* and to every member thereof while acting judicially.[8]

An analysis of the above discussed provisions make it clear that the constitution and composition of *Panchayati Adalats* is not in consonance with the rationale of judicial system. The chairman and members of any *Panchayati Adalat* can be appointed by Director, Department of Rural Development (prescribed authority under the Act) on the recommendation of the *Halqa Panchayat* is against the principles of judicial independence. Further regarding qualification of members the word "literate" has been mentioned under section 50 which is ambiguous, misleading, highly objectionable and unconstitutional for not having any judicial or at least legal background. Concept of giving judicial powers to electorate or political agents at the discretion of elected members of *Halqa* or prescribed authority does not find any place in constitution. The Supreme Court in *Advocates on Record Association* v. *Union of India*[9] held that judicial independence and its separation from the other organs of the state is the basic feature of our constitution.

B. Jurisdiction

The most distinguished feature of the J&K Panchayati Raj Act of 1989 is that the *Panchayati Adalats* enjoy both criminal and civil jurisdiction. 'Criminal jurisdiction' is extensive and covers a substantial range of minor offences under the Ranbir Penal Code *Samvat* 1989 (corresponding to year 1932) and other Acts, as specified in the schedule.[10] The *Panchayati Adalats* are competent to impose a

[5] *Id.*, sec. 55.
[6] *Id.*, sec. 79.
[7] *Id.*, sec. 52.
[8] *Id.*, sec. 55(2).
[9] AIR 1994 SC 268.
[10] The Schedule to J&K *Panchayati Raj* Act, 1989 includes the offences triable by a *Panchayati Adalat*.

penalty prescribed by the state upon the persons convicted for committing such offences triable by it but they are not competent to order imprisonment. They are also barred from exercising jurisdiction in respect of previous convicts, desperate and dangerous criminals, registered habitual criminals, or if the complainant or the accused is a public servant as defined in section 21 of the Ranbir Penal Code.[11] A *Panchayati Adalat* shall not be competent to impose on any person convicted of an offence triable by it, any sentence other than a sentence of fine not exceeding 1000 rupees.[12] 'Civil jurisdiction' is confined to claims of the value of Rs. 3000/- involving suits for ascertained sums, for damage for breach of contract not affecting immovable property, compensation for wrongly taking or injuring movable property.[13] However, a *Panchayati Adalat* is barred to take cognizance of any suit by or against a minor or a person of unsound mind, government and chairman or any member of *Panchayati Adalat, Sarpanch (*chairman) or any *Panch* (member) of the *Halqa*, a co-operative society or any employee or officer or servant of local authority in his official capacity.[14] The principle of res-judicata is also applicable to these *Adalats*.

For all practical purposes these *Adalats* would be the lowest courts of subordinate judiciary in J&K state and be in addition to regular civil and criminal courts. In *All India Judges Association* v. *Union of India*,[15] the Supreme Court had held that separation of judiciary from the executive as ordained by article 50, also required that even judicial appointments at the lowest rung be made in consultation with High Court.

C. Institution of a Case or Suit

The Act provides that every case[16] or suit[17] shall be instituted before the *Panchayati Adalat* within the local limits of whose jurisdiction the offence was committed; or the plaintiff or any defendant in the suit resides or carries on business at the time of the institution of the suit. A person who wishes to institute a case or a suit under this Act before a *Panchayati Adalat* shall make an application orally or in writing to the Chairman or in his absence to any member[18] and shall at the same time pay the prescribed fee.[19] Where an application under section 57 of the Act is made orally, the substance of the application will be recorded without delay and the signature or thumb impression of the applicant shall be taken thereon. Such record

[11] *Id.*, sec. 56.
[12] *Id.*, sec. 58.
[13] *Id.*, sec. 66.
[14] *Id.*, sec. 67.
[15] AIR 1993 SC 2493.
[16] Sec. 57 of the J&K *Panchayati Raj* Act, 1989 deals with 'Place of Institution of Criminal cases'.
[17] *Id.*, sec. 69 deals with 'place of institution of civil suits'.
[18] Rule 112 of the J&K *Panchayati Raj* Rules, 1996.
[19] *Id.*, rule 132(1) deals with "Court Fee'.

shall be signed by the chairman or in his absence by any member present.[20] The plaintiff or complainant has to be informed about the time and place of hearing.[21]

D. Service of Summons

The bench may issue summons to the accused or defendant through *chowkidar* of the *Panchayati* area if the case/suit has not be dismissed on the ground that it is *prima facie* untenable. If any accused or defendant resides outside the *Panchayati Adalat* circle, the summons may be forwarded by the *Adalat* to the *munsif* or sub-judge or magistrate concerned who shall cause it to be served as if it were the summons from his own court.[22] Summons shall ordinarily be caused to be served by a *chowkidar* of the *Panchayati* area provided that the *Panchayati Adalat* may cause it to be served by any other person.[23]

E. Contempt of Panchayati Adalat

The *Panchayati Adalat* does not have power to issue a warrant in case the person defies the summons, but it may exercise the power of imposing fine. If any person intentionally causes an insult to a *Panchayati Adalat* or to any member thereof, while it is sitting in any stage of judicial proceedings it can take cognizance of such an 'offence' on the same day and impose upon the offender a fine upto 200 rupees.[24] Because it shall not be competent to impose on any person convicted of an offence tried by it, any sentence other than a sentence of fine not exceeding 1000/- rupees depending upon the nature of offence.[25]

F. Power to Cross-Examine and Ex-parte Proceedings

The plaintiff is allowed to present his evidence and witnesses as who may be examined by the members or the other party. Every case should ordinarily be finally disposed of within a period of 8 weeks of its institution and if it is not decided within this period the *Panchayati Adalat* shall record reasons for its delay.[26]

Each party shall be allowed to cross- examine the other party except an accused and the witnesses produced just after the examination-in-chief. But the *Panchayati Adalat* or a bench thereof may, either of its own motion or on the request of any party, examine any person at any stage of the proceedings before passing final orders and in such a case each party shall be entitled to put questions to the person so examined. If a complainant or plaintiff after having been duly informed of the date, time and place of hearing, does not turn up for the hearing, the complaint or suit shall be dismissed. Even after the intimation of the date, time and place of

[20] Rule, 113 of J&K *Panchayati Raj* Rules, 1996.
[21] *Id.*, rule, 114.
[22] *Id.*, rule 116(2).
[23] *Id.*, rule, 127.
[24] Sec. 77 of the J&K *Panchayati Raj* Act, 1989.
[25] *Id.*, sec. 58.
[26] Rule 128 (3) of J&K *Panchayati Raj* Rules, 1996.

hearing, if the accused or defendant does not turn up, *Panchayati Adalat* can proceed ex-parte.[27]

G. Execution

A decree or order passed by *Panchayati Adalat* shall be executed by it in such manner as may be prescribed. If a *Panchayati Adalat* finds any difficulty in executing a decree or order, it may forward the same to the District *Panchayat* Officer who shall get the decree or order executed in the prescribed manner.[28]

H. Appeals and Revisions

Section 74 of the Act which deals with appeal and revision powers provides that 'unless otherwise provided under the Act, 'no appeal shall lie from any sentence or order passed by an *Adalat* in any case or suit tried by it'. However, on an application made within 60 days by any of the parties to a suit or case tried by a *Panchayati Adalat*, the District or Sessions Judge on his own motion and having jurisdiction over an *Adalat* circle may, in relation to any such suit or case call for and examine the record of proceedings of *Adalat* for the purpose of satisfying himself as to the legality or propriety of any decree, sentence or order passed or as to the regularity of the proceedings held by such *Adalat*.[29] If it appears to the District or Sessions Judge that any decree, order or sentence passed or any proceedings taken by *Adalat* should be modified, cancelled or reversed, he may pass such order as he thinks just. The order of the Sessions Judge shall be final.[30]

It is considered that *Panchayati Adalat*s should decide cases as expeditiously as possible. A right of appeal is not a natural tight, it is created by a statute and it must, therefore, be governed by the statute in conformity with which a particular offender is tried or a case is decided. An appeal is a continuation of the trial of the lower court and speedy justice to the rural poor is the main purpose of these *Adalat*s at the local level.

III. Procedural Technicalities

A close examination of the substantive and procedural laws shows that the main objective behind the efforts to establish *Nyaya Panchayats* or *Panchayati Adalats* is to ensure settlement of petty disputes cheaply and expeditiously without recourse to dilatory procedures.[31] A *Panchayati Adalat* shall sit for as many days in a month as may be necessary for the speedy disposal of work but at least two sittings should be held in a month (Rule, 128 of J&K *Panchayati Raj* Rules, 1996). Every case shall ordinarily be finally disposed of within a period of eight weeks of

[27] *Id.*, rule 123(5). See also sec. 72 of the J&K *Panchayati Raj* Act, 1989.
[28] Sec. 72 of the J&K *Panchayati Raj* Act, 1989. See also rule 152 of the J&K *Panchayati Raj* Rules, 1996.
[29] *Id.*, sec. 74.
[30] *Ibid.*
[31] R. Sahai, *Panchayati Raj in India* 443 (Sage Publications, 1963).

its institution or its transfer to *Panchayati Adalat*. If it is not decided within this period, the *Panchayati Adalat* shall record reasons for delay. *Nyaya Panchayats* should not be bound by the procedural codes or the Indian Evidence Act. *Nyaya Panchayat's* procedure should be of a simple nature but care should be taken to see that the principles of natural justice are complied with.[32] Obviously, the procedural infirmities would defeat the objective of working of *Panchayati Adalat*s.

To sum up it is expected that *Panchayati Adalat*s will not follow the procedural technicalities of law, but instead it should follow that procedure which ensures speedy disposal of cases. Procedural technicalities of law tend to delay administration of justice and as such defeat the very purpose of the institution of *Panchayati Adalat*s. It does not mean that these *Adalats* will not have to follow any procedure in disposing of cases, but should follow that procedure which is less technical and is not cumbersome. This view is supported by the observation of the Study Team on *Nyaya Panchayats* in the following words:[33]

> *Nyaya Panchayat's* procedure should be of a simple character but care should be taken to see that principles of natural justice are compiled with.

The Act of 1989 provides that the parties to the suit triable by a *Panchayati Adalat* may also appear by an agent[34]. The most glaring feature of the *Panchayati Adalat*s in J & K under the various *Panchayati Acts* of 1935, 1951 and 1958 (now repealed) was exclusion of lawyers. The idea behind the exclusion of lawyers was to avoid complicacies in procedures, delays and expenses.[35] There is no doubt that the system of justice which functions today is too expensive for the common man. Small disputes must necessarily be left to be decided by a system of *Panchayati* justice—call it the people's court, call it the popular court, call it anything but it would certainly be subject to such safeguards as we may devise.[36]

IV. Judicial Powers of Panchayats

Village *Panchayats* set-up under some of the state enactments were also invested with judicial powers to try petty civil and criminal cases besides their usual administrative functions. The jurisdiction and extent of judicial power of these *Panchayats*, however, varied from state to state depending upon the bulk of population of the village and its size. Table 1 shows the State- wise pattern of *Nyaya Panchayats*/*Panchayat Adalats* in 1982-83.

[32] Government of India, *Report of Study Team on Nyaya Panchayats*, Ministry of Law, Government of India, New Delhi (1962).
[33] *Ibid.*
[34] Rule 117(2), J&K *Panchayati Raj* Rules, 1996.
[35] B.K. Raina, "Panchayati Adalats in Jammu and Kashmir", *The India Journal of Pub Admn* 1084, (4)34 (1988).
[36] Raja Sabha Debate, (per A.K. Sen, the Then Law Minister of India), 388, (3)28 (1959).

Table 1

State-wise Pattern of Nyaya Panchayats (1982-83)

S. No.	State/Union Territory	No. of Nyaya Panchayats in existence	Term of Nyaya Panchayats	No. of *Gram Panchayats* per Nyaya Panchayat
1.	Bihar	11,373	5	-
2.	Jammu & Kashmir	384	5	4
3.	Manipur	37	5	3
4.	Tripura	193	5	2 to 5
5.	Uttar Pradesh	8,792	5	10
6.	A&N Islands	42	4	-
7.	Delhi	23	3	8
8.	Goa, Daman & Diu	1	4	-

Source: Panchayati Raj at a Glance, 1982-83.

The Constitution (73rd Amendment) Act, 1992 which came into force with effect from 1993 is applicable to whole of India except the State of J&K and it does not contain any provision relating to *Nyaya Panchayats* or *Panchayati Adalats*. The most important feature of *Panchayati Raj* legislations in J&K, as already discussed, was the establishment of *Panchayati Adalats* which still exist at least in statutes but not functional due to disturbance. However, in respect of other Indian States *Nyaya Panchayats* or *Panchayati Adalats* are either not established or kept in abeyance.

Prior to the Constitution (73rd Amendment) Act, 1992 certain states (as shown in table 1) have established separate *Nyaya Panchayats* for dispensing justice in civil and criminal cases. Courts have expressed different types of views both in favour of and against the vesting of judicial powers on these *Adalats*.

The first ground of criticism is that these Panchayats were manned by laymen who do not possess any specialized knowledge or training in law or public administration. This aspect of the functioning of Village *Panchayats* has invoked criticism from different quarters on the ground that it is not expedient to entrust judicial functions to laymen who are completely ignorant about the technicalities of

law and its procedure.[37] Commenting on this point Justice *Somasundram* of Madras High Court in *Venkatachala* v. *Panchayat Board, Ethanu*[38] observed:

> This case is a good instance to show that in this country the Panchayat Courts ought not to be invested with criminal jurisdiction, they seem to be carried away by the local politics and the communal feelings that they happen to entertain against persons.

The Punjab High Court also partly acknowledged this fact and held that the experience of the working of Village *Panchayats* in different parts of India has shown that they are hardly suited as instrument of justice due to lack of proper education and training of village people who are easily led away by local politics and prejudices.[39] The Punjab High Court observed:[40]

> A high sense of duty, devotion and responsibility is expected from 'Panchas' (members) to be just, fair and impartial in their judgments. The basic principle of natural justice that justice when administered by the administrative authorities, should not only be done but also seem to have been done, must not be lost sight of in the working of village Panchayats.

Another criticism too often leveled against village *Panchayats* as a unit of self-government when simultaneously performing judicial functions is that it undermines the principle of separation of powers as envisaged by article 50 of the Constitution.[41] The judicial trend has, however, been to dispel this charge on the ground that the provisions contained in article 50 are merely directory and not mandatory.[42] Thus in *Gurdayal* v. *State of Punjab*,[43] the High Court of Punjab held that the provisions of Punjab *Gram Panchayat* Act, 1953 could not be said to be in violation of article 50 because of latter's non-mandatory nature. Relying on the doctrine of harmonious construction in *Marwa Manghani* v. *Sanghram Sampat*[44] the Punjab High Court observed:

> The Village Panchayats were in existence even prior to framing of Indian Constitution, certain State Acts conferred executive, administrative as also the Judicial powers on the elected

[37] NV Paranjape, "Democratic Decentralization and Panchayati Raj" in RS Rajput and DR Meghe (eds.) *Panchayati Raj in India* 73(Deep & Deep Publishers, New Delhi 1984).
[38] AIR 1953 Mad 388.
[39] *Charan Das Dogra and others* v. *State of Punjab and others*, AIR 1966 Punj 274.
[40] *Ibid.*
[41] Art. 50—*Requires the State to take step to separate the Judiciary from Executive in the Public Service of the State, i.e., to Promote the Rule of Law.*
[42] *Supra* note 14.
[43] AIR 1957 Punj 149.
[44] AIR 1960 Punj 35.

> Panches.... While considering the question of endowing of judicial function on the Panchayats, we must not forget that in the Preamble of our Constitution social, economic and political justice is the first item in the list of various blessings which have been secured to the citizens of the Republic and thus the conferment of judicial powers on Panchayats was not inconsistent with the directive contained in article 50.

As is clear from the above decision, there are also decisions in favour of conferment of judicial powers on Panchayats. In yet another case the Punjab High Court while explaining the principle of separation of powers contained in article 50 of the Constitution of India observed:[45]

> Under article 40, the State is expected to take steps to organize Village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. But this directive is to be read with the directive contained in article 50 which lays down the principle of separation of the executive from the judiciary. The organization of Village Panchayats must be carried out in practice consistently with Article 50 so as to maintain the fundamental principle of 'rule of law'.

The *Panchayats* as units of local self-government are invested with a variety of functions including administrative, judicial and quasi-judicial. It, therefore, seems necessary to draw a distinction between administrative and quasi-judicial functions of *Panchayats*. Commenting on this point the High Court of Orissa in *Gudialabandha Grama Sasan* v. *State of Orissa and Another*[46] *inter alia* observed:

> The distinction between quasi-judicial and pure administrative function lies in the mode and manner in which the exercise of, its (Panchayats) discretion is formed. It is quasi-judicial if before reaching decision, authority is required first to ascertain certain facts by means of evidence and then take action. In such cases the authority must consider representations and objections of the parties. On the other hand decision will be purely administrative if in taking it authority is free to pass its opinion on whatever mater it thinks fit.

In its landmark judgment the Supreme Court in *State of U.P.* v. *Pradhan Sangh Kshethra Samiti*,[47] held that the Constitution does not prohibit the establishment of *Nyaya Panchayats*. The contention of the respondents was that U.P. Panchayati Raj Act, 1947 makes provision for the *Nyaya Panchayats* whereas

[45] *Jai Singh* v. *Gram Panchayat*, AIR 1965 Punj 232.
[46] AIR 1981 Orissa 40.
[47] AIR 1995 SC 1512.

the amendment provisions of the Constitution (73rd Amendment) Act, 1992 do not direct the organization of *Nyaya Panchayats* and therefore, the U.P. Panchayati Raj Act is *ultra-vires* the Constitution. The Apex Court held:[48]

> The contention is only to be stated to be rejected. Admittedly the basis of the organization of the Nyaya Panchayats under the Act is different from the basis of the organization of Gram Panchayats, and the functions of the two also differ. The Nyaya Panchayats are in addition to the Gram Panchayats and the Constitution does not prohibit the establishment of Nyaya Panchayats on the other hand, the organization of Nyaya Panchayats will be in promotion of the directive principle contained in article 39-A of the Constitution which directs the State 'to ensure that the operation of the legal system promote justice, on the basis of equal opportunities and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

In a number of cases the Supreme Court held that 'article 38 and 39 embody the jurisprudential doctrine of 'distributive justice'.[49] However, what is required is that 'a high sense of duty, devotion and responsibility is expected from '*panches/members*' to be just, fair and impartial in their judgments to uphold the principle that 'justice should not only be done but it should seem to have been done'.

V. Conclusion

It is one of the principle tasks of a state to administer justice. A state that does not provide justice cannot command the respect of its citizens and that erodes the legitimacy of the state. The *Panchayati Adalat* is an innovative feature of J&K *Panchayati* Raj Act of 1989 to provide speedy and inexpensive justice to the people. It is expected that *Panchayati Adalat*s will not follow the procedural technicalities of law, but that procedure which ensures speedy disposal of cases. Procedural technicalities of law tend to delay administration of justice and as such defeat the very purpose of the institution of *Panchayati Adalats*. The subject of *Panchayati Adalat*s, however, raises a host of pertinent questions.[50] What kind of qualifications should govern the selection /election of members of *Panchayati Adalat*? Should Panchayati *Adalat*s be bound by formal legal procedures or left to deal with cases before them through rules of fairness, natural justice and conscience? What kind of training and orientation courses be arranged for the members of

[48] *Id.*, at p. 1531.
[49] *Central Inland Water Transport Corporation* v. *B.N.Ganguly*, (1986) 3 SC 156; *L.P. Applewar* v. *State of Maharashthra*, (1985) 1 SCC 479.
[50] S.N. Mathur, *Nyaya Panchayats as Instruments of Justice* 18 (ISS and Concept Publishing Company, New Delhi, 1988).

Panchayati Adalats? Whether criminal jurisdiction to try petty offences be vested in them? These are some significant issues to be tackled.

One of the objects of establishment of *Panchayati Adalats* is that many of the disputes and petty offences which often disturb the peace and harmony of the village community, be disposed of expeditiously and economically by a local tribunal of the villager's own choice.[51] There are some states like Bihar, Himachal Pradesh, Uttar Pradesh and West Bengal which have earlier made *Nyaya Panchayats* a part of the *Panchayati Raj* system. Unfortunately, in the historic Constitution 73rd Amendment there is no mention of decentralization of justice and no state legislation in the wake of this amendment took up this subject. However, in the

J&K Act of 1989, it has received special attention with both criminal and civil jurisdiction. But mere mentioning of the institution of *Panchayati Adalat* in the new Act of 1989 is not enough. What is important is their establishment and functioning along with other *Panchayati Raj* Institutions at all levels.

Lastly the Supreme Court in *State of U.P.* v. *Pradhan Sangh Kshethra Samiti*,[52] gave some sort recognition to these *Nyaya Panchayats* when it held that these *Nyaya Panchayats* are in addition to the *Gram Panchayats* and the Constitution does not prohibit the establishment of *Nyaya Panchayats* on the other hand, the organization of *Nyaya Panchayats* will be in promotion of the directive principle contained in article 39A of the Constitution which directs the State to ensure that the operation of the legal system promote justice, on the basis of equal opportunities and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[51] KN Pillai and Shekharan, "Criminal Jurisdiction of Nyaya Panchayats", *JILI* 456 (1977).
[52] AIR 1995 SC 1512.

DYNAMICS OF CHILD MARRIAGE: A SOCIO-LEGAL STUDY

Alok Kumar[*]

> The day will come when nations will be judged not by their military or economic strength, nor by the splendor of their capital cities and public buildings but by the well being of their people; by the level of health, nutrition and education; by the opportunities to earn a fair reward for their labour; by their ability to participate in the decisions that affect their lives; by the respect that is shown for their civil and political liberties; by the provision that is made for those who are vulnerable and disadvantaged and by the protection that is afforded to the growing minds and bodies of their children.
>
> *Introduction to 'Progress of Nations', UNICEF (1997)*

I. Introduction

In the light of what has been quoted above, this article focuses on the issue of child marriage, which has been debated for more than a century in India but has never been considered as a serious threat to life of young children particularly the young girls. Child marriage has been an offence in India since 1929, but once solemnized such a marriage remained valid and legal. However, by the Act of 2006 the legislature has made such marriages voidable, and in certain specific situation void but generally they have not been declared void *ab-initio*.[1] This legal position as well as the determinants of the child marriage has been cause of a considerable concern even more whenever young children's human and natural rights, particularly their rights to dignified life are kept in mind.

This paper analyses social, legal, demographic and human rights dimensions of the issue of child marriage. This research has been an endeavor to highlight diverse reasons for the continuation of the practice of child marriage. It takes account of the legislative efforts made in the 20th and first decade of the 21st centuries and critically scans the present provisions and judicial decisions in this regard.

II. Marriage: A Key Event in One's Life

Birth, marriage and death are the standard trio of key events in most people's lives. But only one – marriage – is a matter of choice as the marriage is perceived as a formalized, binding partnership between consenting adults, which sanctions sexual relations and gives legitimacy to any offspring.[2] The right to exercise that choice was recognized and has long been established in international human rights

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[1] Prohibition of Child Marriage Act, 2006
[2] Maggie Black, *Early Marriage, Child Spouses*, UNICEF, Innocenti Research Centre, Digest No.7, 10 (2001).

instruments.[3] Yet, many girls and a smaller number of boys enter marriage without any chance of exercising their right to choose. Some are forced into marriage at a very early age. Others are simply too young to make an informed decision about their marriage partner or about the implications of marriage itself. They may have given what passes for 'consent' in the eyes of custom or law, but in reality, consent to their binding union has been made by others on their behalf.[4] While the age of marriage is generally on the rise, early marriage – marriage of children and adolescents below the age of 18 – is still widely practiced.

III. Child Marriage

Child marriage, also known as early marriage, is defined as "any marriage carried out below the age of 18 years, before the girl or boy is physiologically and psychologically ready to shoulder the responsibilities of marriage." In other words, child marriage involves either one or both spouses being children and may take place with or without formal registration, and under civil, religious or customary laws. In many societies of developing countries child marriages are used to build or strengthen alliances between families. Sometimes this may even include the betrothals of young children or babies.

For both girls and boys child marriage has profound physical, intellectual, psychological and emotional impacts, cutting off educational opportunity and chances of personal growth. For girls, in addition, it will almost certainly mean premature pregnancy and childbearing, and is likely to lead to a lifetime of domestic and sexual subservience over which they have no control.

Child marriage acquires different meaning in different countries as the minimum age of marriage is not uniform throughout the world. But the detailing of laws from different countries shows that barring a few countries, most countries have 18 as a minimum age of marriage for both boys and girls. Some countries allow marriage below the age of 18 but above the age of 16. Islamic law permits marriage after puberty, i.e. 15 years. In New Zealand a person under 20 years of age but over 16 years old can only marry with parental consent.[5] In the UK a marriage below the age of 16 years is void.[6] In Egypt the age of majority for all legal purposes except marriage is 21 years.[7] The marriageable age is 18 for males and 16 for females. In the U.S.A. different states have different laws. The legal age for marriage under most of these laws is 18 for both males and females.[8] However, in states like

[3] International Covenant on Civil and Political Rights (1966); Convention on Elimination of Discrimination Against Women, 1979; Convention on Rights of the Child, 1989.

[4] *Supra* note 2.

[5] Marriage Act, 1955, www.legislation.govt.nz (April 15, 2010).

[6] Marriage Act, 1949, Vol.29 (3) *Halsbury's Laws of England* 41 (4th ed. reissue).

[7] CEDAW, *Egypt Country Report* 14-50 (March 30, 2000).

[8] Cornell University Law School, Legal Information Institute (LII), (www.law.cornell.edu/topics/Table_Marriage.htm) (April 15, 2010).

California a person can marry below that age with the permission of parents.[9] In Pakistan under the Muslim Family Law Ordinance the girl must have attained the age of 16 years and the boy the age of 18 years and both need to consent before the marriage can take place.[10] In Indonesia the age of majority as well as marriageable age is 16 for girls and 19 for boys.[11] The age for giving a valid consent to a sexual act is also set at 16 years for a girl. Any marriage below the legal age is void.[12]

IV. Child Marriage in India

In India, child marriage means a marriage to which either of the contracting parties is a child, i.e. a male who has not completed 21 years of age or a female who has not completed 18 years of age.[13] Child marriage also involves solemnization of infant marriages. The expression 'child marriage' must be understood in its proper perspective as the two words are quite contradictory. Marriage is a formalized relationship with legal standing between an individual man and a woman, in which sexual relations are legitimized. Obviously, one would expect such a relationship only between two consenting adults. How can a child be a party to a marriage, when he or she is unable to understand the nature and consequences of it? How can he or she comply with the responsibilities that follow such marriage when he or she is unaware of them? Is it then correct to use the expression 'child marriage'?[14]

The terms 'child marriage' – that is marriage below the age of 18 years – is used here for a number of reasons, the *first* being to emphasize the paradox in the prevalent practice of marrying young girls. *Second*, Indian legislators, social workers, and law professionals refer to this practice by the expression 'child marriage.' *Third*, a girl below the age of 18 years is treated as a 'child' for the purpose of marriage according to Child Marriage Restraint Act.[15] The Indian Majority Act, 1875 also defines the age of majority as eighteen years for the purpose of civil matter.[16] Even the Constitution of India gives the right to vote to a person who is eighteen years of age.[17] So is the case while entering into a valid contract under the Indian Contract Act, 1872. Therefore, in the Indian context 'child marriage' is the proper expression. The United Nations Convention on the Right of the Child also defines 'child' as a person below the age of 18 years.

[9] Sec. 301, California Family Code, www.leginfo.ca.gov (April 20, 2010).

[10] Art. 16, CEDAW, *Pakistan Country Report* 122 (2005).

[11] Art. 16, CEDAW, *Indonesia Country Report* 57 (July 27, 2005).

[12] *Id.*, at 58.

[13] Sec. 2(b), Prohibition of Child Marriage Act, 2006.

[14] Jaya Sagade, *Child Marriage in India: Socio-Legal and Human Rights Dimensions*, XXVI (New Delhi, Oxford University Press, 2005).

[15] *Ibid.*

[16] Though the Act is not applicable in the matter of marriage, sec. 3 provides that a person domiciled in India shall be deemed to have attained his majority when he completes his age of eighteen years and not before. Sec. 2 provides that nothing in the Act shall the capacity of any person to act in the following matters: marriage, divorce, and adoption. Thus the provision is applicable to all civil matters except that of marriage, divorce, and adoption.

[17] Art. 328 of the Constitution of India.

Other terms used by the international community for child marriage are 'early marriage' or 'forced marriage'. These terms have limitations. The term 'early' could be very subjective. Early in comparison to what and for whom are the basic questions that could have different answers in different contexts. Early marriage is also being defined as marriage of a girl before or during adolescence. However, in developing countries like India, rarely is there a stage of carefree adolescence in the life of girls. They are forced to step from childhood into womanhood directly.

All child marriages are forced marriage. But all forced marriages are not necessarily child marriages. The force implies that there is a use of power against the wish of an individual and it is against the person's free consent. In the case of child marriage, there is no question of consent as the girl child is incapable of giving a valid legal consent due to her incomplete physical and mental growth, and even if she is able to express her wish, she is either not allowed to express it or is forced to act against her desires. On the other hand, even adults could be forced to enter into a marriage in a country like India where marriages are 'arranged' by parents as a norm.

V. Historical Perspective

There are some notable features of marriage in India. Culturally, marriages are universal, arranged by the parents; occur at a young age and usually with a large difference between the bride and the groom. Marriage in India is most often arranged between two families instead of between individuals.[18] Marriage is traditionally a religious ceremony and a sacred duty rather than a matter of personal convenience and preference. Modern influences have made some impact on the institution of marriage, but the basic values and norms still remain unchanged. Here parents and senior members of the family consider the marriage of their children a serious responsibility and play a very important role in arranging the marriage in a traditional manner. The custom of solemnizing the marriage of the children at an early age is an entrenched social custom that has prevailed fairly widely, particularly amongst Hindus for several centuries.[19]

The origin of the custom of child marriage remains obscure and there is uncertainty about the time period in which this social evil manifested itself initially.

A. Vedic Period

During *Vedic period*, marriage was performed only when the couple reached a mature age. The explanation to this is marked by the emphasis on progeny and procreation of strong children and child bride can't be a suitable mother.[20] Amongst

[18] A.G. Sathe, "The Adolescent in India: A Status Report", 34 *Journal of Family Welfare* 11 (1987).
[19] M.K. Jabbi , *Child Marriage In Rajasthan* 16 (1986).
[20] W.F. Menski, *Hindu Law Beyond Tradition and Modernity* 327 (Oxford, 2005).

the four Vedas only two – the *Rigveda* and *Atharvaveda* – contain the marriage hymns. Marriage is considered as sacrament in *Rigveda*. Though there are no clear-cut provisions made about age of marriage, *Atharvaveda*[21] says when a bride is fine looking and well adorned, she by herself seeks her friend from among men. That shows that girls were grown enough to select their husbands. Sharma, who wrote in 1993, argues that during the time of the great epics, the Ramayana and Mahabharata, the girls "used to be grown up at the time of marriage".[22]

B. Child Marriage from the 6th Century AD - 1400 AD

After the sixth century the marriageable age for girls went down lower and lower. The stoppage of participation of girls in Vedic education, *Upanayana* rituals and the insistence of purity in *yajna* (sacrificial) ritual contributed to the lowering of the marriage age for girls. In the *Smriti period* (500-1000 AD), 8-10 years of age, was considered appropriate for girls to enter into matrimony[23]. There was a belief that the parents of a girl who remains unmarried after attaining puberty go to hell. Later the *Manusmitri* placed stress on the suitability of the groom and made it clear that marriage of a girl before her first menstruation was permissible. Under the uncodified Hindu law, as per *Mitakshara*, the capacity to marry was attained on the completion of 16th year and as per *Dayabhaga*, on the completion of 15th year in case of girls.[24]

C. Muslim Period

Invasion of outsiders made the local population change their marriage customs to safeguard chastity. In this period the concept of progeny and the procreation of strong children were replaced by concept of protection of chastity.[25] During Muslim invasion, custom of child marriage was strengthened. Since raids and warfare became a common occurrence, the fear of insecurity was largely responsible for the emergence of the system of early marriages[26] as it was conceived that the married women were less prone to capture by the invaders.[27]

One more factor influencing the age of marriage was that the perceived notion of a woman as incapable or unworthy of independence. At every stage in her life she should be under dominion of someone, her father, her husband or her son. The idea of marriage was, therefore, also the transfer of the father's dominion over her in favour of her husband and this transference should take place before she reached the age when she might question it. There was also a fear of increasing sexual immorality if a woman did not marry at an early age. Thus, with the religious

[21] *Atharvaveda* (1-17-1) cited by P.V. Kane, *Dharmasastra*.
[22] Mani Ram Sharma, *Marriage in Ancient India* (Agam Kala Prakashan, 1993).
[23] P.V. Kane, *History of Dharmashastra* 526 (1941).
[24] Mayne's *Hindu Law and Usage*, revised by Alladi Kuppuswami 186 (14th Ed., 1996).
[25] *Supra* note 20 at 331.
[26] *Id.* at 332.
[27] Government of India, *Report of Age of Consent Committee* 92 (1929).

and social sanction, child marriage spread much faster and took deeper roots, and with the passing of time the practice became so compelling that a departure from it was a matter of strong social disapproval.

D. Modern Period

For better understanding and convenience the modern period is divided into two phases, namely: (i) Pre-independence Period and (ii) Post-independence Period.

(i) Pre-independence Period

For the first time in the early part of 19th century, the move was initiated against child marriage by social reformist – Raja Ram Mohan Roy. By considering the ill effects of early marriage, another reformist, Ishwarchandra Vidyasagar agitated for girl's marriage at a rational age. The main problem arising out of child marriage especially in case of girls was the pitiable conditions of child widows. They were compelled to remain secluded from the world and remarriage of widows was not permitted. This was not only the case of Hindus but was throughout India among Muslims, Christians, and Parsis also.

Though nothing was done directly in the matter, in 1848, the Law Commission was persuaded to make intercourse between husband and wife, below a given age, an offence. Accordingly, a provision was inserted in the Indian Penal Code, in 1860 which declared consummation when the wife was below 10 years of age[28] as rape and prescribed punishment extending to transportation for life. In 1872 the British Government came up with the first relevant legislation to control child marriage, i.e. the Special Marriage Act or the Civil Marriage Act, 1872, but as it was not availed of by many Indians child marriage was not affected by this legislation. After the notorious cases of *Dadaji Bhikaji* v. *Rukhmabai*[29] and *Queen* v. *Haree Mohan Mythee*[30] the movement against child marriage picked up its velocity. A social reformer Behramji M. Malabari led the reform movement further, and by his efforts, in 1891 the age of consent to sexual intercourse was raised from 10 years to 12 years, but such legislation was hardly expected to be successful. A Hindu female was brought up in an atmosphere where the husband was most respectfully looked as 'God', was most obediently served and was loved with the utmost devotion. Thus, she could hardly have conceived of availing herself of the protection of such legislation. Nevertheless, it did pave the way for fixing the age of marriage at a later date. It gave momentum to the reform movement. As a result, in 1884, the Mysore Government attempted to prevent the marriage of a girl before she was nine. The (Baroda) Early Marriage Prevention Act, 1904 laid down 12 as the minimum age. Similarly, enactments were passed by the State of Indore in 1917, Kota in 1927, Rajkot in 1927 and Mandi in 1928.

[28] In 1891 it was raised to 12 which was further raised in 1925 to 13.
[29] IX Indian Law Reporter (Bombay Series) 529 (1885).
[30] ILR 1891 Cal. 49.

In 1921, for the first time, the problem of child marriage was posed before the British Government with the help of census report.[31] But the government refused to make any law on the ground of prevailing social conditions and due to strong opposition made by many states.

At the end of the last century, public attention was directed against the prevalence of this social evil. As a consequence thereof, in 1927 Hari Singh Gour had introduced a Bill to rise the age of consent to 14 year. In the same year, Rai Sahib Haribilas Sarda introduced a Bill to restrain the solemnization of child marriage, by declaring such marriages invalid when either of the parties was below the prescribed age. While Hari Singh Gour's aforesaid Bill for the amendment of the Indian Penal Code and the Sarda Bill were pending in the legislative assembly, on 25 June 1928 the Government of India appointed an Age of Consent Committee to examine and report on the entire perspective of Gour's Penal Code (Amendment) Bill. Report of the Joshi Committee was submitted and published in 1929. The Sarda Bill finally culminated into Child Marriage Restraint Act, 1929 (hereafter CMRA), which came into force on 1st April, 1930.

Sarda Act or Child Marriage Restraint Act, 1929

The Act purports to restrain the solemnization of marriage between two individuals when they are below the age limit. The Act defined 'Child' as "a person, if male, under 18 years of age and, if female, below 14 years of age". Every person, male or female, below the age of 18 was described by the Act as "minor". Every marriage "to which either of the contracting party is a child" would under the Act, be deemed to be a "child marriage". The Act declared every "child marriage" to be an offence for which the following persons would be punishable:

(i) One who contracted a child marriage, if not below the age of 18;

(ii) One who, having lawful or unlawful charge of a minor person as guardian or otherwise, promoted or permitted that person's marriage or negligently failed to prevent it (such failure would be presumed unless disproved); and

(iii) One who knowingly performed, conducted or directed a child marriage.

Grooms in the age group of 18-21 were to be punished only with fine; neither any term of imprisonment was laid down for them nor could it be awarded to them in lieu of fine. The same was true of women found guilty of any offence relating to child marriage. In no case, it is notable, was the child (as defined in the Act) itself to be punished for contracting a marriage.[32]

[31] T. Mahmood, "Marriage Age in India and Abroad" 22 *JILI* 40-41 (1980).
[32] This and the other provisions referred to here were found in ss. 2-10 of the Sarda Act as originally enacted.

Nine years after its enactment the Sarda Act was amended by the Child Marriage (Amendment) Act, 1938 in order to introduce into it a preventive provision. Hitherto the Act penalized, specifically, only those responsible for a child marriage that had already taken place. Now, the courts exercising jurisdiction under the Act were specifically authorized to issue an injunction prohibiting a child marriage arranged or about to be solemnized. This they could do on information regarding the proposed marriage laid before them through a complaint or otherwise. Such an injunction could issue against any of those persons who would be liable to punishment under the Act had the marriage been already solemnized. The courts were required to give due notice and afford an opportunity to show cause before issuing an injunction. Violation of such an injunction was declared to be an offence punishable under the Act.[33]

In 1949 substantive provisions of the Sarda Act were amended by a new Child Marriage Restraint (Amendment) Act. The definition of child was modified so as to extend the "childhood" of the girls by one more year. Henceforth, a girl was to remain a "child" for the purposes of the Act till she completed the age of 15 years. The Amendment Act of 1949 also enhanced the penalties for various offenders.

After 1949, no amendment of a substantive nature was made in the Sarda Act for long. In 1968 while the population problem had become very acute – the then Union Minister for Health and Family Planning intended to amend its provisions for further raising the lowest age of marriage, but he failed to muster support. Eight years later, in August 1976, the government introduced a Bill proposing extensive modifications in the Sarda Act. Next year, following the change of government, the Bill was replaced by a fresh Bill with substantially the same provisions. It was finally enacted in March 1978 in the form of the Child Marriage Restraint (Amendment) Act, 1978. Nearly seven months later, on 1 October 1978 the Act was enforced.

After the 1978 amendment, "child" under the Sarda Act means a male below the age of 21 and a female below the age of 18 years. All other provisions of the Act that penalize persons responsible for a child marriage are now to be read subject to this change.

The Sarda Act, when initially enacted, and also after the substantial amendments of 1938 and 1949, said nothing regarding the question if offences under its provisions would be cognizable. It was left to be determined under the general principles of the Criminal Procedure Code which applied to all penal laws. Under those principles, each of the offences under the Sarda Act was to be a non-cognizable offence. Now the 1978 amendment of the Sarda Act, effected by central legislature, has made offences under the Sarda Act partly cognizable. This amendment has added to the Sarda Act a new provision to the effect that for the

[33] Sec.12, added by Act XIX of 1938.

purpose of investigation and for all matters other than (i) those referred to in section 42 of Code of Criminal Procedure, and (ii) arrest of an accused without a warrant or magisterial order, the offences under Sarda Act would henceforth be cognizable.[34]

Child Marriage Restraint Act (CMRA) does not provide either for the validity or invalidity of under age marriage. It is silent about the legal effect of the child marriage. The issue of the validity of child marriage was kept out of the scope when CMRA was drafted. CMRA merely attempted to restrain child marriage by providing penal sanction for contracting such marriage. A number of important provisions are missing from CMRA. Consent of the parties to a marriage and compulsory registration of a marriage, are some important provisions that should have been incorporated in the CMRA.

The enactment of the said Act was a welcome step to curb child marriage. Though it did not address the pathetic question pertaining to the validity of child marriage, but the penal provisions which the said Act provides, is certainly a forward step towards elimination of child marriage.

(ii) Post-independence Period

The preceding period prior to independence saw the social uproar appertaining to social evils especially the child marriage. Since the various legislative enactments proved ineffective in rooting out this social problem the government had to enact special Act, keeping in view the lacunae existing in the previous enactments.

(1) Prohibition of Child Marriage Act, 2006

Then in 2006 an improvement over the Child Marriage Restraint Act, 1929 has been introduced to prevent child marriage through the Prohibition of Child Marriage Act, 2006. The new legislation certainly has more severe punishment as it provides punishment for male adult marrying a child with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees. The parents and guardians are also liable for the same punishment where a child contracts a child marriage. The Act also makes the child marriage voidable at the option of the contracting parties, and it also makes the same void in certain circumstances. The new Prohibition of Child Marriage Act, 2006 (hereafter PCMA) brings about far reaching changes in the law as under[35]:

(a) Voidability of Marriage at the Option of Child

Section 3 of this Act, states, that "child marriages shall be voidable at the option of the contracting party who was a child at the time of the marriage." It allows for a petition to be filed declaring the marriage void within 2 years of the

[34] Sec. 7 of the Act inserted in 1978.
[35] *205th Report of Law Commission of India.*

child attaining majority. However, since a girl is supposed to attain majority at the age of 18 and a boy at the age of 21, the girl can file a petition till she becomes 20 years of age and a boy till he becomes 23 years of age.

(b) Maintenance and Residence for the Female Child

Section 4 of the Act also allows for maintenance and residence for the girl till her remarriage from the male contracting party or his parents. If the child marriage is cancelled or nullified as under section 3, then the district court may also make an interim or final order directing the male contracting party to the child marriage, and in case the male contracting party to such marriage is a minor, his parent or guardian to pay maintenance to the female contracting party to the marriage until her remarriage.

(c) Children of Child Marriage-their Custody, Legitimacy and Maintenance

It is not unknown that the methods of contraceptives and birth control are not very popular amongst the rural society, especially after marriage. Thus, young brides give birth to babies almost immediately after marriage. Section 5 also makes provision for custody and maintenance of children of child marriages. It gives the discretion to make a suitable order for the custody of such children. Undoubtedly, while making an order for the custody of a child under this section, the welfare and best interests of the child shall be the paramount consideration to be given by the district court. An order for custody of a child may also include appropriate directions for giving to the other party access to the child in such a manner as may best serve the interests of the child, and such other orders as the district court may, in the interest of the child, deem proper. The district court may also make an appropriate order for providing maintenance to the child by a party to the marriage or their parents or guardians.

To dive further into the problems and consequences of child marriage, another issue that could arise, would be the legitimacy of the children born under a child marriage where such marriage has been declared to be void. This question is answered by section 6 of this Act. It declares that every child begotten or conceived of such marriage before the decree is made, whether born before or after the commencement of this Act, shall be deemed to be a legitimate child for all purposes.

(d) Punishments

All the punishments for contracting a child marriage have been enhanced by virtue of sections 9, 10 and 11 of the Act. The punishment for a male over 18 years of age has been enhanced to rigorous imprisonment of up to two years or with a fine upto one lakh rupee or both. A similar punishment is prescribed for anyone who performs, conducts, directs or abets any child marriage. The same punishment is also prescribed for anyone who solemnizes a child marriage including by promoting such a marriage, permitting it to be solemnized or negligently failing to prevent the

marriage. No woman can, however, be punished with imprisonment. By virtue of section 15, all offences are punishable under this Act and one made cognizable and non-bailable.

(e) Marriages to be Void in Certain Cases

Section 12 further lays down the few cases in which the marriage of a minor child is to be void, i.e. where the child,

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

(f) Power of Court to Issue Injunction to Stop Conducting of Child Marriage

Section 13 of the Act further allows for injunctions to prohibit child marriages including *ex parte* interim injunctions. It states that any child marriage solemnized in contravention of an injunction order will be void.

(g) Child Marriage Prohibition Officer

The Act lays emphasis on the prohibition of child marriages by providing for the appointment of child marriage prohibition officers by the state governments and gives powers to these officers to prevent and prosecute solemnization of child marriages and to create awareness on the issue. However, without the required financial allocations these officers will probably not get appointed. The Act gives the district magistrate powers to stop and prevent solemnization of mass child marriages by employing appropriate measures and minimum police force apart from giving him all the powers of the child marriage prohibition officer.

The present law while making child marriage voidable under a gender neutral provision has also given a male child the right to get out of a forced marriage. But the Act can be criticized on the following grounds:

(i) Instead of declaring a child marriage void in all circumstances, it lays the onus of declaring such a marriage void on the child or the guardians who would have to go through the court proceedings for the same. It is relevant to mention that prior to the new Act, a Parliamentary Standing Committee had examined the government Bill on the Prevention of Child Marriage and suggested that child marriages solemnized after the introduction of the new Act should be made void *ab initio*.[36]

[36] Rajya Sabha, *13th Report on the Prevention of Child Marriage Bill*, Para 10.4 (New Delhi, 2005).

(ii) There is no provision for punishing the officials in whose areas these marriages are solemnized.

(iii) It does not make the registration of marriage compulsory.

(iv) Under the criminal law, however, section 375 IPC makes it a crime to have a sexual relationship with a child under 15 years of age. A contradiction therefore remains between the PCMA and section 375 IPC.

(2) Personal Laws of India

In addition to Child Marriage Restraint Act, 1929 and Prohibition of Child Marriage Act, 2006 there are religion-based personal laws in the matters of marriage and divorce. Hindus, Muslims, Christians, and Parsis have their different marriage laws. These laws prescribe conditions for performing a valid legal marriage.

As regards civil marriages, the former Special Marriage Act of 1872 required the parties desiring to contract a civil marriage to have completed the age prescribed by it. This was 14 for girls and 18 for men, and a civil marriage procured in contravention of these requirements, could be nullified by the court under the Indian Divorce Act, 1869.

The Special Marriage Act, 1954 makes room for two types of civil marriages–those originally solemnized under its provisions, and those initially solemnized under a personal law but later registered under it. In the case of the first type of civil marriages the girl and the boy are required to have completed, at the time of marriage, the age of 18 and 21 respectively. In regard to the later type of civil marriages both parties are required to have completed, at the time of registration, the age of 21 years (irrespective of what their age was at the time of the initial solemnization of the marriage). The consequences of the violation of the age-rule for the two types of civil marriages are not same. In the case of civil marriage originally solemnized under the Special Marriage Act, if it was found that either party was below the required age, the marriage would be regarded as null and void and may be so declared by decree of nullity to be passed by the court on petition presented by either spouse. As regards a marriage which, initially solemnized under personal law, is later registered under the Act of 1954, if it is discovered that at the time of registration either party was in fact below the age of 21, its registration under the Special Marriage Act would be nullified.

The true position of marriage-age under *classical law* of India has not been free from difficulties. Vedic evidence is said to be in favour of adult marriage, but the *smrities* of Manu, Yajnavalkya, Vishnu, and Narda are believed to enjoin marriages of girls at a tender age. Conflicting opinions have been expressed by Hindu scholars. According to one section, age of marriage coincides with age of puberty and girls should not remain unmarried after attaining that age. The age of puberty, too, is not uniformly set. It ranges from 8 to 15 years, according to different

findings. Some think that even a pre-puberty marriage is at least permissible. The other section holds an opinion that none of the rules and precedent relating to age of marriage found in the classical legal and theological literature is of binding nature. Now, however, age-rules of the classical law – whatever they may be – have no more than antiquarian value.

The Hindu Marriage Act, 1955 (applicable to those who are Hindu, Buddhist, Sikh or Jain or are not Muslim, Christian, Parsi or Jew) initially laid down 15 and 18 as the lowest age of marriage for girls and boys respectively. It further required girls in the age-group of 15 to 18 to obtain the guardians' consent for their marriage. As regards the violation of the aforesaid rules relating to marriage-age, the Act prescribed the following penalties:

(i) simple imprisonment upto 15 days or fine upto Rs. 1000 or both – for one who, being under-age, procured solemnization of his or her marriage;

(ii) fine upto Rs. 1000 – violating the requirement of consent where applicable.

The Act said nothing about the validity or invalidity either of an under-age marriage or of a marriage without parental consent where it was required. The Act did not specify non-age as a ground that could make the marriage void or voidable. During the course of the drastic changes made in 1976 in the Hindu Marriage Act, a new ground for divorce was made available to Hindu girls. Those girls who were given in marriage while they were below the age of 15 were enabled to seek divorce on the ground of non-age. This they could do at any time during three years following completion of the 15 year of age, even if the marriage stood consummated. Later, the Child Marriage Restraint (Amendment) Act, 1978 modified the provisions of the Hindu Marriage Act in respect of marriage age. It raised the lowest age of marriage thereunder to 18 and 21 for girls and boys respectively and abolished the requirement of parental consent for girls. The penal clause of the Act relating to marriage-age remains unamended.

The Muslims of India are still governed by the uncodified Islamic law of marriage as laid down by its various schools; four of which, namely Hanafi, Shafei, Ithna, Ashari and Ismaili, prevail in this country. For the purposes of contracting a marriage Muslim law classifies persons into two groups, viz.,

(i) Those who are competent to marry freely, and

(ii) Those who are incompetent to marry freely.

Under the Hanafi and Ithna school of Muslim law, those girls who have attained the age of puberty are competent to marry freely. As regards a boy who has attained puberty, all schools of Muslim law permits him to marry freely. Boys and girls who are below the age of puberty (as also girls above the age of puberty

according to Shafei and Ismaili laws) are incompetent to contract their own marriage, but all of them can be lawfully contracted into marriage by their marriage guardians. A pre-puberty marriage, whether with or without consent, is not invalid; but voidable at the option of the minor which the minor can exercise on attaining on puberty. This is called 'option of puberty' and is available unconditionally, if the marriage was contracted by the guardian other than the father or father's father; if the latter had arranged it, the marriage can be avoided only if it is a mis-alliance. The option when available is to be exercised soon after attaining puberty, and before consummation of marriage. In India, while the traditional Muslim law relating to 'option of puberty' remains applicable to men in its original form, as regards girls an amended version of it now forms part of the Dissolution of Muslim Marriage Act, 1939 – which applies throughout India except the state of Jammu and Kashmir. Under this Act, option of puberty is available in each and every case and can be exercised by the girl at any time during three years following completion of the 15th year of age, provided that the marriage has not been consummated, and is to be confirmed by the decree of the court.

The first law to lay down an age of marriage for the Indian Christians was Act V of 1865. It set 13 and 16 as the lowest age of marriage for girls and boys respectively. Its provisions were later incorporated into the Christian Marriage Act of 1872. The new Act retained the age-rules of the former law but added that where either party was below the age of 18, parent's consent would be essential.

However, the Act was not amended in that respect until 1952. Act XLVIII of 1952 raised the age of marriage under the Christian Marriage Act of 1872 to 15 for girls and 18 for boys. The Child Marriage Restraint (Amendment) Act, 1978 has further amended the Christian Marriage Act. Now the age of marriage under the Act is 18 for girls and 21 for boys and the requirement of parental consent has been wholly abolished.

Until 1865 there was no statutory marriage law for the Parsis of India and they were, therefore, governed by their customs and usage. Customary law permitted infant marriages and the courts did not interfere with it. The first statutory marriage law of Parsis, namely, the Parsi Marriage and Divorce Act, 1865, did not fix up any marriage age. It, however, required persons of either sex below the age of 21 to marry only with parental consent, without it their marriage will be invalid. In 1936 the Act of 1865 was replaced by a new Parsi Marriage and Divorce Act which is still in force. Its provision regarding marriage age is the same as was in the under former Act of 1865.

The Jews in India have no statutory law of marriage and, so they are governed by their religion based personal law. In the Jewish personal law, as under the Muslim law, age of puberty is regarded as the lowest age of marriage. The lowest age of puberty is 12 for girls and 13 for boys, pre-puberty marriages are prohibited. The Sarda Act of 1929 does not apply to Indian Jews.

Neither any of the statutes governing civil, Hindu, Muslim, Christian and Parsi marriages, surveyed above, nor the Sarda Act applies to the 'Renoncants' in the Union Territory of Pondicherry. These are those inhabitants of the territory who have, according to legally prescribed procedure, opted to remain subject to the French law as applicable in Pondicherry before its merger with the Indian Union. Under the marriage law that remains applicable to the Renoncants, the age of marriage for men and women is 18 and 15 years respectively, but a man below 25 and a girl below 21, have to obtain parental consent for marriage.

An Indian citizen in a foreign country can marry – whether the other party is or is not an Indian – under the Foreign Marriage Act, 1969. Also, if an Indian citizen in a foreign country has already married, the marriage may later be registered under the Foreign Marriage Act. When a marriage is to be initially solemnized under the Act of 1969, it is required that the bridegroom and the bride must not be below the age of 21 and 18 respectively. A marriage solemnized in violation of this requirement will be void and can be annulled by the court on the application of either spouse.

VI. Child Marriage: A Demographic Context

The problem of child marriage is very complex in nature. Its complexity lies in the historical moorings, traditional religious practices and some other social problems like dowry and child-widowhood. Over and above, it is not only a health hazard for young mothers but it has very adversely affected the national population policy of the government. History has witnessed several movements against child marriage. But none of them succeeded in its total abolition. It is still prevalent but in a sporadic form. In modern society, it is considered as an evil and its solution is yet to be evolved.

The problem of child marriage has traversed almost the whole galaxies of countries among which, undoubtedly, India is at the forefront and the problem is present in its worst form as compared to the other countries. In India, the processes of urbanization and industrialization have accelerated the rate of social change but without any significant reduction in child marriages, however, due to the social reforms in the first part of the 20th century, and influence of the Universal Declaration of Human Rights (UDHR) and other human rights conventions of the 1950s and 1960s, the practice of child marriage is giving way to marriage at a later age.[37]

But, the child marriage is still not uncommon in India and continues to be a fairly widespread social evil. In a study carried out between the years 1998 to 1999 on women aged 15-19, it was found that 33.8% were currently married or in a union.[38] In 2000 the UN Population Division recorded that 9.5% of boys and

[37] Mahendra K Premi, *Population of India in the New Millenium: Census 2001* 147 (NBT, 2006).

[38] The Demographic and Health Survey (DHS) figures retrieved from UNICEF based website, (www.childinfo.org/areas/childmarriage/) (March 17, 2008).

35.7% of girls aged between 15 to19 were married.[39] This showed that child marriage was far more prevalent amongst girls and this highlighted the gender dimension. Before going into the magnitude of the problem of child marriage, the distribution by age at marriage by sex and age-group wise, religion and caste wise should be taken into account. The census of India provides that about 43 percent of females are married before the legal age of 18 years. Of these, 10 percent are married before the age of 14 years, and 34 percent are married between 14 and 17 years of age. The largest segment of women, 41 percent, is married in the three years just after reaching maturity, between ages 18 and 21 years. About 25 percent of males are married below the age of 20 years, and a further 25 percent between 20 and 21 years. 3 percent of males are married before the age of 14 years, another 8 percent between 14 and 18 years, and a further 14 percent are married before the age of 20 years.[40]

Incidence of child marriage differs among religious groups with Christians and Sikhs having the lowest percentage of females married before 18 years of age. The highest incidence of child marriage among females takes place among Hindus, Muslims and Buddhists, at 45, 43 and 41 percent, respectively.[41] The percentage of females married before 18 years of age among Scheduled Castes is 51 percent, 8 percentage points over the all India average. Among the Scheduled Tribes, 41 percent of females marry below the age of 18 years.[42] The National Family Health Survey of 2005-2006 (NFHS-3) carried out in 29 states confirmed that 45 percent of women currently aged 20-24 years were married before the age of 18 years. The percentage was much higher in rural areas (58.5 percent) than in urban areas (27.9 percent) and exceeded 50 percent in eight states.[43] The percentage of women aged 20-24, married by the time they are 18, stood at 61.2 percent in Jharkhand followed by 60.3 percent in Bihar, 57.1 percent in Rajasthan, 54.7 percent in AP, and 53 percent in MP, UP and West Bengal. The NFHS-3 findings further revealed that 16 percent of women aged 15-19 were already mothers or pregnant at the time of the survey. It was also found that more than half of Indian women were married before the legal minimum age of 18 compared to 16 percent of men aged 20-49 who were married by age 18. Though NFHS-3 did not compile data on girls who were married below the age of 15, the 2001 Census of India[44] had revealed that 300,000 girls under 15 had given birth to at least one child. Further in a survey conducted by the Government

[39] UN Population Division (2000). World Marriage Patterns, Department of Economic and Social Affairs, Washington, (www.un.org/esa/population/publications/worldmarriage/worldmarriage.htm) (March 23, 2008).

[40] Distribution by age at marriage calculated by PRS based on 2001 Census figure retrieved from PRS Legislative Research website, (www.prsindia.org/age at marriage) (May 12, 2010).

[41] *Ibid.*

[42] *Ibid.*

[43] National Family Health Survey of 2005-2006 (NFHS-3), <http://www.nfhsindia.org/> (The NFHS-3 facts and figures mentioned hereafter have all been retrieved from this website) (March 13, 2010).

[44] 2001 Census of India, (www.censusindia.gov.in/) (March 12, 2008).

of Rajasthan in 1993 it was found that 56 percent girls had been forced into marriage before the age of 15 and of these 7 percent were married before they were 10.[45] A second survey conducted in 1998 in the State of MP found that 14 percent girls were married between the ages of 10 and 14.[46] In states like Rajasthan, mass marriages of very young children take place on occasions like the *Akha Teej*. The NFHS-3 findings show a slight rise in the median age of marriage for women aged 20-49 from 16.7[47] in NFHS-2 to 17.2. However this data does not reveal how many marriages are taking place even below the age of 15. Furthermore, with about 315 million people in India being in the age group of 10–24 years (RGI 2001)[48], and 44.5 percent of women aged 20-24 still getting married by the time they are 18, and 29.3 percent of men aged 25-29 getting married by the time they are 21, the improvement seems trivial. In 2006 the *Hindustan Times* reported that 57 percent of girls in India are married off before they are 18 as per the International Centre for Research on Women.[49].

The above mentioned facts and figures show that even after 60 years of independence, the instances of child marriage in India is quite rampant.[50] Child marriage manifests itself as a grave social evil which not only infringes upon the rights of the child cherished and provided for in the various UN instruments[51] but also violates the constitutional commitment contained in the Directive Principle embodied in article 39 (f) that the state shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.

Child marriage has deep impact on the well being of the child and development of his or her personality. The negative consequences of the said marriage are more severe in the case of girls, as child marriage leads to a vicious circle of early pregnancy, malnutrition, and maternal mortality. At the national level, it contributes to a major extent in population.[52]

[45] UNICEF's website on Married Adolescents. Cited in UNFPA. 2004. Child Marriage Advocacy Programme: Fact Sheet on Child Marriage and Early Union.

[46] *Ibid.*

[47] National Family Health Survey of 1998-99 (NFHS-2), <www.nfhsindia.org/data/india/indfctsm.pdf> (March 17, 2010).

[48] Census-2001, Registrar General of India (RGI) figure as taken from K.G. Santhya and Shireen J. Jejeebhoy, "Young People's Sexual and Reproductive Health in India: Policies, Programmes and Realities", *Population Council Regional Working Papers* No.19 (New Delhi, 2007).

[49] *The Hindustan Times* (August 29, 2006).

[50] NFHS III 2005-2006.

[51] Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), Convention on Elimination of Discrimination Against Women, 1979, Convention on Rights of the Child, 1989.

[52] S.N. Agarwala, *Population* 147-50 (McGraw-Hill, 1977).

VII. Causes of Child Marriage

The child marriage can be attributed to a variety of reasons and the main amongst these is poverty, lack of education and culture, tradition and values based on patriarchal norms and lack of awareness of law prohibiting child marriage.

A. Economic Reasons

The economic background of the people determines the quantity of resources available for the marriage ceremony, influences marital values and attitudes, affects the cultural milieu in which the need for early and late marriage is felt, and provides the social networks in which spouses are sought. These factors in turn contribute to determine the age at marriage for boys and girls.[53] The marriage of a minor girl often takes place because of the poverty and indebtedness of her family. Dowry becomes an additional reason, which weighs even more heavily on poorer families. The general demand for younger brides also creates an incentive for these families to marry the girl child as early as possible to avoid high dowry payments for older girls.

The institution of marriage in communities or societies can be used to serve or strengthen economic and social ties between different families and even communities. Also a young girl may be offered to a family in order to improve the financial and social standing of the girl's family.[54]

B. Patriarchal System

The girl in our patriarchal set up is believed to be somebody's property and a burden. These beliefs lead parents to marry the girl child early. In doing so, they are of course relieving themselves of the 'burden' of looking after the child. The girls are considered to be a liability as they are not seen as individuals who can contribute productively to the family. Unfortunately, the patriarchal mindset is so strong that the girl has no say in decision making. Texts like Manu Smirti which state that the father or the brother, who has not married his daughter or the sister who has attained puberty will go to hell are sometimes quoted to justify child marriage. Child marriages are also an easy way out for parents who want their daughters to obey and accept their choice of a husband for them. There is also a belief that child marriage is a protection for the girls against unwanted masculine attention or promiscuity. In a society which puts a high premium on the patriarchal values of virginity and chastity of girls, girls are married off as soon as possible. Furthermore securing the girl economically and socially for the future has been put forth as a reason for early marriage.[55]

[53] *Supra* note 14 at 10.

[54] International Center for Research on Women (ICRW) Policy Advisory on Child Marriage, (www.icrw.org/docs/childmarriage0803.pdf) (November 24, 2007).

[55] Jyotsna Chatterji, "Child Marriage" (paper presented at India Social Forum, November 2006, New Delhi).

C. Lack of Education and Knowledge

Lack of education remains an important cause of child marriage as the parents are not in a position to segregate the concepts of puberty and preparedness to have sex; they are also unable to realize the dire health consequences of early reproduction. About 33 percent of literate females marry below the age of 18 years, while 51 percent of illiterate females are married below the legal age.[56] NFHS-3 figures show that 71.6 percent, of Indian women currently aged 20-24 years, who had been married before the age of 18 years, did not have any education at all. This shows that education is a vital factor to prohibit the practice of child marriage.

D. Lack of Urbanization

Child marriage is also correlated to urbanization and literacy. Families which are exposed to urban environment have low incidence of child marriage compared to those which are not exposed to urban environments. Whereas 33 percent of females living in urban areas are married below the legal age, 47 percent of those living in rural areas are married by that age.[57] It shows that there is a lot of difference between urban and rural environments and the rural folk strongly feel that child marriages are less in urban areas as compared to rural areas.

E. Lack of Awareness of Law and its Ineffective Implementation

Other reasons that have been listed for the high prevalence of child marriages in India are lack of lack of awareness of law which prohibit child marriage, shortcomings in the law, and the lack of will and action on part of the administration.[58] One of the reasons for child marriage is that people to a large extent are not aware of the provisions of the law. The finding of NFHS 1992-3, India, is that the Child Marriage Restraint Act is not widely known among women in India.[59] Not only this but figures pertaining to incidence of child marriage committed against children also pointed that there are least reporting of case of child marriage. National Crime Record Bureau of India provided in its yearly report that only 122, 99, 96 and 104 cases relating to child marriage had been registered before police in 2005, 2006, 2007 and 2008 respectively.[60] This shows that awareness of the law which prohibits child marriage is lesser in India.

VIII. Consequences of Child Marriage

Child Marriage is a violation of human rights, compromising with the development of girls and often resulting in early pregnancy and social isolation, with little education. Young married girls are required to perform heavy amounts of

[56] *Supra* note 40.

[57] *Ibid.*

[58] Jyotsna Chatterji, *supra* note 55.

[59] *Supra* note 14, at 12.

[60] National Crime Record Bureau of India.

domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity."[61]

As stated above, child marriage is a grave violation of the rights of the child depriving her of opportunities and facilities to develop in a healthy manner to obtain education and to lead a life of freedom and dignity. It deprives the young girl of capabilities, opportunities and decision-making powers and stands in the way of her social and personal development. Young brides face the risk of sexual and reproductive ill health because of their exposure to early sexual activity and pregnancy. The NFHS-2 had recorded that only 4 percent of married girls practiced *gauna*. It had further been recorded that the period between marriage and *gauna* had been reduced to about one year in most cases. The NFHS-3 figures show that the practice has been further restricted to 0.7 percent married girls. Complications and mortality are common during childbirth for young pregnant girls. Girls who come from poor backgrounds and who are often married at an early age have little or no access to health care services. Risks associated with young pregnancy and childbearing include "an increased risk of premature labour, complications during delivery, low birth-weight, and a higher chance that the newborn will not survive."[62] Young mothers under age 15 are five times more likely to die than women in their 20's due to complications including haemorrhage, sepsis, preeclampsia/ eclampsia and obstructed labour.[63] Maternal mortality amongst adolescent girls is estimated to be two to five times higher than in adult women.[64] Maternal mortality amongst girls aged 15-19 years is about three times higher. Young women also suffer from a high risk of maternal morbidity. It has been found that for "every woman who dies in childbirth, thirty more suffer injuries, infections[65] and disabilities, which usually go untreated and some of which are lifelong".[66] Research further indicates that the babies of mothers below the age of 18 tend to have higher rates of child morbidity and mortality. "Infants of mothers aged younger than 18 years have a 60 per cent greater chance of dying in the first year of life than those of mothers aged 19 years or older."[67] Babies are born premature or underweight or young mothers simply lack parenting skills and decision-making powers.[68]

[61] Taken from UNICEF based website, <www.childinfo.org/areas/childmarriage/> (November 13, 2007).
[62] *Supra* note 2.
[63] Barbara S., Mensch, Judith Bruce and Margaret S. Greene, "The Uncharted Passage: Girls' Adolescence in the Developing World ", *The Population Council* (New York, 1998).
[64] Kavita Sethuraman, and Nata Duvvury, "The Nexus of Gender Discrimination with Malnutrition: An Introduction", Vol XLII No. 44 *Economic and Political Weekly* 49 (November 3-9, 2007).
[65] A. Barua, Heman Apte and Pradeep Kumar, "Care and Support of Unmarried Adolescent Girls in Rajasthan", Vol XLII No. 44 *Economic and Political Weekly*, 54 (November 3-9, 2007).
[66] *Supra* note 2 at 11.
[67] A. Barua, *supra* note 65 at 54.
[68] Otoo-Oyortey, Naana and Sonita Pobi, "Early Marriage and Poverty: Exploring Links for Policy and Programme Development", *The Forum on Marriage and the Rights of Women and Girls* 19 (London, 2003).

Young girls face the risk of infection with sexually transmitted diseases including HIV. It has also been found that young girl is physiologically more prone to contracting HIV/AIDS, as her vagina is not well lined with protective cells and her cervix may be more easily eroded. An analysis of the HIV epidemic shows that "the prevalence of HIV infection is highest in women aged 15–24 and peaks in men between five to ten years later."[69]

Women experience domestic violence from their spouses and their relatives for a variety of reasons. These reasons include dowry and the wife not behaving according to norms set by the husband and his family which are often patriarchal in nature. A study has shown that India has the highest rate of "domestic violence among women married by 18 with a rate of 67 per cent, compared to 45 per cent of women who had not experienced violence."[70] Since an age gap between men and their wives generally exists and quite often men are much older, the power dynamics between them can be extremely unequal. The girl becomes socially isolated and does not have any decision-making powers and consistently faces harassment from her husband and in-laws. NFHS-3 indicates that decision-making power is extremely limited for married women in general as only 52.5 percent of currently married women participate in household decisions.

Women also undergo sexual violence in marriage and young girls are particularly vulnerable. In a study carried out in Calcutta in 1997 where half the women interviewed were married at or below the age of 15, with the youngest being married at seven years old, findings revealed that this age group had "one of the highest rates of vulnerability to sexual violence in marriage, second only to those whose dowry had not been paid."[71] The women interviewed said they had sexual intercourse before menstruation had started, that sex was early and very painful, and "many still continued to be forced into sexual activity by their husbands."[72]Additionally the young girls "had made their husbands aware of their unwillingness to have sex or of pain during sex, but in 80 per cent of these cases the rapes continued."[73]

As husbands are often much older than their brides, girl brides are likely to be widowed at an early age. A child bride who is widowed can suffer discrimination including loss of status and they are often denied property rights, and other rights. Young girls who are married early usually stop going to school. Giving education

[69] A. Barua, *supra* note 66 at 26.
[70] U.N. Children's Fund (UNICEF), *Early Marriage: A Harmful Traditional Practice* 22 (UNICEF: Florence, 2005).
[71] Carron Somerset, "Early Marriage: Whose Right to Choose?" *Forum on Marriage and the Rights of Women and Children* 21 (London, 2000).
[72] Otoo-Oyortey and Naana, *supra* note 68 at 21.
[73] M. Ouattara, P. Sen, and M. Thomson, "*Forced Marriage, Forced Sex: The Perils of Childhood for Girls*" 31 (1998), (http://www.nepalsathi.ws/birendra/writings/bhutanrefugees/bt_1998ouattara.pdf) (November 7, 2007).

to a girl is perceived by both the girl's and boy's families unnecessary for becoming a good wife or a mother, if not a deterrent. Those who have a choice are eventually forced to drop out of school because they are compelled to assume the responsibility of doing domestic chores and starting a family etc. Early marriage is often linked to low levels of schooling for girls. NFHS-3 figures show that 71.6 percent of Indian women currently aged 20-24 years, who had been married before the age of 18 years, did not have any education at all. Furthermore, by not going to school, young brides are denied the opportunity to make friendships with peers or acquire critical life skills.

It has been said that "educated women are more likely to have a say in decision-making regarding the size of their families and the spacing of their children. They are also likely to be more informed and knowledgeable about contraception and the health care needs of their children."[74] Since married girls leave their homes and often villages, towns, cities etc. they "tend to lose the close friendships they had formed in their parental homes, and often become quiet and subdued. This means that even where girls have developed social networks they are unable to access them."[75]

The loss of adolescence, the forced sexual relations, and the denial of freedom and personal development attendant on early marriage have profound psychosocial and emotional consequences. Researchers on child marriage in Rajasthan and Madhya Pradesh state that young married girls suffered more than boys due to the abovementioned consequences of child marriage.[76]

IX. Judicial Response Towards Validity of Child Marriage

The judicial approach towards the prevention of child marriage has not been very favourable. The Indian judiciary, which is otherwise very active, has not interpreted the law on this topic so as to do real justice to the victim of the child marriage. There are many reasons for the court's ineffective role to date. So far, the judiciary has interpreted the words of the statute very technically without focusing on the purpose behind it. It has expressed little concern about the serious repercussions of child marriage. It seems that the judiciary has ignored the repercussions of child marriage in the wider context affecting the whole of the society and not only the young girls who are victims of such marriages. Equally responsible is the legal community that has brought the severe consequences of child marriage on a girl child's reproductive health and development to the notice of the judiciary. The combined result is the denial of justice to the young child brides.

[74] Otoo-Oyortey and Naana, *supra* note 68 at 13.
[75] *Id.* at 21.
[76] *Supra* note 2 at 9.

With regard to the question of validity of marriages performed in violation of the age requirement prescribed by the Child Marriage (Restraint) Act, the judiciary has taken a well settled stand. Starting from the earliest case that came up in 1885[77] to a recent judgment[78] of 2006, the pronouncements of various high courts and the Supreme Court have approved the validity of such marriages. A recent judgment of the Delhi High Court reiterated that marriages solemnized in contravention of age prescribed under section 5(iii) of the Hindu Marriage Act, 1955 are neither void nor voidable.[79] The court held that the judgment was based on public policy and the legislature was conscious of the fact that if marriages, performed in contravention of the age restriction, are made void or voidable, it could lead to serious consequences and exploitation of women.

The first judicial pronouncement on this aspect of the validity of the child marriage was made by the Allahabad High Court[80] in 1936 which was later confirmed later in many cases. The view that child marriages were valid was upheld in many other judgments like *Durga Bai* v. *Kedarmal Sharma*[81], *Shankerappa* v. *Sushilabai*[82], *Smt. Lila Gupta* v. *Laxmi Narain and others*[83], *Rabindra Prasad* v. *Sita Dass*[84], *William Rebello* v. *Angelo Vaz*[85], *Neetu Singh* v. *State & others*[86] and *Ravi Kumar* v.*The State & Anr.* [87] However, in 1975[88] the Andhra Pradesh High Court held a child marriage void. The court held that if child marriage was not to be treated either as void or voidable 'it will throw open once again the floodgate of child marriages. The court said that the object of the Act is to prevent and eradicate the evil of child marriages. But the full bench of the same high court in 1977 overruled the earlier decision[89] with severe criticism on the ground that it was erroneous to regard an under-age marriage as void or invalid, since parliament did not intend to do so. Though, the high courts, in pursuance of the object of the Act, refrained from declaring child marriage invalid, the Allahabad High Court in one case went so far as to not allow a husband to take possession of his minor wife.[90]

The Supreme Court, in *Smt. Lila Gupta* v. *Laxmi Narayan*[91] has made a reference to child marriage. Taking example of child marriage, the court remarked

[77] *Dadaji Bhikaji* v. *Rukhmabi*, IX Indian Law Reporter (Bombay Series) 529 (1885).
[78] *Manish Singh* v. *State Govt. of NCT. and Ors.*, 2006(1) HLR 303.
[79] *Ibid.*
[80] *Munshi Ram* v. *Emperor*, AIR 1936 All. 11.
[81] *Durga Bai* v. *Kedarmal Sharma*, 1980 (4) HLR 166.
[82] *Shankerappa* v. *Sushilabai*, AIR 1984 Kar 112.
[83] *Smt. Lila Gupta* v. *Laxmi Narain and Others*, 1978 SCC (3) 258.
[84] *Rabindra Prasad* v. *Sita Dass*, AIR 1986 Pat 128.
[85] *William Rebello* v. *Angelo Vaz*, AIR 1996 Bom 204.
[86] *Neetu Singh* v. *State Others*, 1999 (39) HLR 466.
[87] *Ravi Kumar* v. *The State & Anr.*, MANU/DE/1497/2005.
[88] *Suramma* v. *Godelon*, AIR 1975 AP 193.
[89] *Pinninty Venkataramanna* v. *State*, AIR 1977 AP 43.
[90] AIR 1935 All 916.
[91] AIR 1978 SC 1351.

on the scheme of the Act that certain instances of marriage though punishable are not void and later on the apex court affirmed this position in various cases.[92] Various High Courts have adhered to this position in their judgments subsequently.[93]

Another important issue brought before the judiciary was to decide the guilt of those individuals who were responsible for the offences under the CMRA. The courts have examined the responsibility of persons involved in child marriages, namely, parents, guardians, priests, mediators, creditors, etc. The approach of the courts appeared to be very compassionate towards the parents. Negotiating, preparing, or doing any other preliminary acts in connection with the child marriages by parents were not treated as an offence by the court.[94]

It is submitted that the judiciary has rightly refrained from considering under-age marriages as void or voidable. Majority of the people live in villages and even today most of them marry their children at a tender age. It would be very difficult to change overnight their social practice of marrying the girl before she attains puberty. Thus, keeping in view the social beliefs, psychology and conditions of the society, it would have become not only futile but dangerous to hold child marriages as void or voidable. Such a rule would have created more confusion and tragedy. Even today, in rural areas child marriage is the rule of life. If such marriage would have been declared void, then the amount of insecurity in the society would have become unimaginable. Hence, the above mentioned problem is basically the problem of rural areas. Though attempts are made to control this evil through legislation, it is still the way of life as a rule in most part of the rural part of India. The reasons may be illiteracy, unawareness, poverty, backwardness and traditional attitude of the people. But then, it is necessary that attempts should be made at all levels with the help of all available sources to eradicate this evil.

X. Conclusion

The research reveals that one of the methods for controlling the child marriage is making the people aware, both of the law and the baneful consequences. Like the panacea of many a social evil, education is also an indispensable remedy to control, contain and finally eliminate child marriage from our society, to build a society where children live like children only and are not saddled with the weight which rightly belongs to some other stage of life. It is suggested that some laws reforms and legal strategies need to be carried out to make various actors more responsive and responsible role could be played by and agencies at local, regional and national levels more effectively and efficiently.

[92] *Muzaffar Ali Sajid* v. *State of A.P.*, AIR 2005 SC 1393; see also *R.D. Upadhyay* v. *State of A.P. & Ors* [2006] INSC 204 (13 April 2006).
[93] *Phoola Devi* v. *The State*, 2005 Vol. 8 AD (Del.) 256.
[94] AIR 1938 Nagpur 235.

TERRITORIAL INTEGRITY, SELF DETERMINATION AND KOSOVO OPINION: A CRITIQUE

*Meena S. Panickar**

I. Introduction

The UN General Assembly on 8 October 2008 passed a resolution seeking advisory opinion from the International Court of Justice (ICJ). The question was whether the unilateral declaration of independence by the provisional institutions of self-government in Kosovo was in accordance with international law. On 22 July 2010, the ICJ delivered its opinion[1]. By ten votes to four the court held that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law. The decision of the court though an advisory one is significant in terms of raising a pertinent issue, whether territorial integrity shall prevail upon the right to self determination of the people, and vice versa. The opinion reflects the need to think beyond the classical approach to international law. While it emphasizes newer ways in which public international law shall be understood, the states with disturbed regions may need to evaluate the opinion with caution.[2]

The Socialist Federal Republic of Yugoslavia (SFRY) had a constitutional structure comprising six republics[3] and two autonomous provinces[4]. The 1974 Constitution of SFRY gave ample, broad powers to Kosovo which made its status almost equivalent to the republics. However, in 1989, a change in the Serbian Constitution removed the autonomous status of Kosovo. The sudden change created a sharp adverse reaction in that province. Serbian forces used massive violent measures against the Albanian population in Kosovo. From 1989 to 1999, grave violations of human rights and international humanitarian law were reported including ethnic cleansing from Kosovo. These culminated in the adoption of the Security Council Resolution 1244 of 1999. The Resolution placed Kosovo under international administration with UN supervision, thus taking it away from the domestic jurisdiction of Serbia.

II. Territorial integrity and the Right to Self Determination

In its judgment, the court stated that in the 18th, 19th and early twentieth century, states did not consider declarations of independence as contrary to international law. In its opinion, state practice during this period clearly points to

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[1] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, www.icj-cij.org.
[2] Richard Falk, "The Kosovo Advisory Opinion: Conflict Resolution and Precedent", 105(1) *American Journal of International Law* 50-9 (2011).
[3] These were the Socialist Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.
[4] These were Kosovo and Vojvodina within Serbia.

the conclusion that international law contained no prohibition of declarations of independence. In the second half of the twentieth century, international law of self determination developed substantially, recognizing the people's right to independence in the non-self governing territories and those under alien subjugation, domination and exploitation. The contentions raised by some of the participating states that there is a prohibition on such declarations in international law were based on the wording of article 2, para 4 of the UN Charter[5]. The court countered these contentions by stating that the argument for territorial integrity has relevance only in the relations among states and thereby made it clear that the impugned declaration by non-state actors will not fall within the ambit of the UN Charter provisions. The court also stated that the practice of the Security Council does not indicate anything to the contrary.

Many of the participating states, as a secondary argument pleaded the right of the Kosovars to declare their independence as a manifestation of their right to self determination or in pursuance of their right of remedial secession taking into account the prevailing situation in Kosovo. The court did not consider it necessary to resolve these issues and found them as beyond the scope of the question put forth by the General Assembly for advisory opinion.

In the words of Judge Bruno Simma, the court's restrictive understanding of the question foreclosed all discussions on self determination and remedial secession. The treatment – or, rather non-treatment- of these submissions (on right to self determination and remedial secession) by the court does not seem to be judicially sound, given the fact that the court has not refused to give the opinion that the General Assembly requested from it.[6]

However, Judge Koroma in his dissent[7] suggests the other side of the territorial integrity argument, which goes in line with the version given by some of the participating states. To him, territorial integrity enshrined in the UN Charter and in the resolution of the General Assembly does not recognize secession by the constituent units, which would lead to disintegration of the states. Therefore, he contends that territorial integrity prevails over the right to self determination.

Judge Koroma is skeptical about the reformulation of the question by the ICJ. He points out that in the earlier three instances when such reformulation took place, the effort was to make the question closely correspond with the intent of the institution seeking the advisory opinion. To him, the same exercise results here in the formation of a new question inconsistent with the intent of the body requesting the advice. In this reformulation the court concluded that the declaration was the

[5] Art. 2 para. 4 states: All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

[6] *Supra* note 1, Declaration of Judge Simma, para. 6.

[7] *Id.*, dissenting opinion of Judge Koroma, para. 9.

handiwork of those who were distinct from the provisional institutions of self government in Kosovo and the answer shall be on the basis of the presumption which totally goes against the statement by the General Assembly that it views the declaration as having been made by the provisional institution. This type of reformulation and answer that the declaration did not violate international law are not tenable legally. Judge Koroma expresses this as follows:[8]

> International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State's consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms. The Court's opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.

Judge Koroma further adds that Kosovo was not a legal vacuum at the time of the declaration, as evident from the court's words that the Security Council Resolution 1244 of 1999 and the UNMIK regulation of 1999 are testimonies to the legal force there. His analysis of the resolution and the UNMIK regulations makes it evident that it does not provide for a unilateral secession without the consent of Federal Republic of Yugoslavia. On the contrary, they assert the sovereignty and territorial integrity of Federal Republic of Yugoslavia.

In his assessment, he says the court has used a judicial sleight-of-hand to reach a conclusion that the authors of the Declaration were not representatives of the provisional institution but of the Kosovars. Otherwise the court would have had to declare the act of declaration as *ultra vires* for transgressing the powers given to the provisional institutions by the Security Council.

III. The Decision of the Canadian Supreme Court on Self Determination and Secession

The Supreme Court of Canada was faced with the question on the right to self- determination and unilateral secession of Quebec province, which finds a space in the advisory opinion. This was in the matter of a *Reference by the Governor in Council Concerning Certain Questions relating to the Secession of Quebec from Canada*.[9] One of the questions specifically addressed international law as follows:

[8] *Id.*, para. 4.

[9] *In re Secession of Quebec* [1998] 2 S.C.R. 217.

Does international law give the National Assembly, Legislature or Government of Quebec the right to effect secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, Legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

The other two issues before the court concerned the Constitution of Canada.[10] The Supreme Court of Canada stated that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their parent state. The court further stated that the proponents of the existence of the right, in the absence of specific authorization for unilateral secession, might like to base their arguments on two propositions as follows:

(i) Unilateral secession is not specifically prohibited, and, what is not specifically prohibited is inferentially permitted; or

(ii) On the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of people's right to self determination.

It pointed out that international law neither recognizes a right of unilateral secession nor explicitly denies such a right. It relies greatly on the territorial integrity of states and leaves the secession issue to be dealt with in accordance with the domestic law of the existing state.

As per the court, the right to self-determination of the people has become a general principle of international law.[11] However, this right shall be exercised consistent with the territorial integrity of the state. Following *A. Cassese*,[12] the court acknowledges external self-determination, which recognizes the right in defined contexts like colonial rule or foreign occupation. In these situations, exercising the right could mean restoration of the territorial integrity. External self-determination outside the colonial context, as in alien subjugation, domination and exploitation find mention in the Friendly Relations Declaration, 1970. The third situation where people's right is discussed is with respect to internal self-determination where people do not enjoy equal rights and are subject to discrimination. The court reproduces paras 15 and 16 of the *amicus curiae* and refutes any scope for internal self-determination through unilateral secession by Quebec. Paras 15 and 16 are as follows:[13]

[10] These were whether under the Constitution of Canada, the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally; and in the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada.

[11] Art. 1 and 55 of the UN Charter; Art. 1 of both ICCPR and ICESCR, 1966; Declaration on Friendly Relations, 1970; Vienna Declaration and Program of Action, 1993; Helsinki Final Act, 1975.

[12] A. Cassese, *Self- Determination of Peoples: A Legal Reappraisal* (1995).

[13] *Supra* note 9, para. 135.

15. The Quebec people is not the victims of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people.

16. For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and Leader of the Official Opposition in the House of Commons were Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian Ambassador to the United States, not to mention the Deputy Secretary General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed towards the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

For these reasons, the court did not find any scope for Quebec to exercise unilateral secession under external or internal self-determination. The court did not rule out an unconstitutional *de facto* secession which eventually will be subject to recognition by the international community.

Judge Koroma distinguishes the Canadian Supreme Court decision on general declarations of independence from the present unilateral declaration. He observes that the court's opinion of the latter being not authorized or prohibited by international law is a misconception. He characterizes the present declaration as secession without the consent of the existing state and therefore a violation of international law. According to him, even equal rights and self determination as precepts of international law do not allow the dismemberment of an existing state without its consent.[14]

In the present case, the question is about accordance with international law. Judge Koroma points out that the ICJ should have completed the picture partially drawn by the Canadian Court. In his dissent, Judge Skotnikov objects to the court's interpretation of general international law. The advisory opinion referred to general international law as consisting of no prohibition of declarations of independence. The revered judge considers this a misleading statement. According to him, it is so because declarations do not constitute or create states. These declarations may be

[14] *Supra* note 6, para. 22.

relevant only when considered together with the issue of statehood and independence. The General Assembly does not ask whether Kosovo achieved statehood or not. The only applicable law to answer the question posed by the General Assembly is the *lex specialis* created by the Security Council Resolution 1244.[15]

Judge A.A. Cancado Trindade details out the reasons, which are distinct from that of the majority in reaching the same conclusion. He maps out the humanitarian considerations in the treatment of people in international law and calls it the humanist vision of an international legal order. After surveying the various initiatives by UN in Kosovo and the living conditions of the population there since 1989, he analyses the written and oral submissions by a number of states before the court. His separate opinion reproduces some of the landmark judicial decisions in cases of massacres.[16] He mentions that ICJ in its present advisory opinion should not have eluded the atrocities undergone by the Kosovars during 1989-1999 which led to the adoption of the Security Council Resolution 1244 of 1999. He felt that it is of great importance to keep the grave humanitarian tragedy of Kosovo in mind to avoid its repetition.

He revisits the discussion on statehood to examine its essential requirements. He refers to the Montevideo Convention of 1933 and its preparatory work and brings out some interesting findings. The convention gives priority to population over other elements. He quotes the text of the convention:

> The state as a person of international law should possess the following qualifications: (a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.

Taking cue from the above provision, in his conclusion he states:[17]

> ...States exist for human beings and not *vice versa*. Contemporary international law is no longer indifferent to the fate of the population, the most precious constituent element of statehood. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to the reversal of the ends of the State. This distortion led to States to regard themselves as repositories of human freedom, and to treat individuals as means rather than ends in themselves, with all the disastrous consequences which ensued there from. The expansion of international legal personality entailed the expansion of international accountability.

[15] *Supra* note 1, dissenting opinion of Judge Skotnikov, para.17.

[16] *Id.*, Separate Opinion of Judge A. A. Cancado Trindade cites cases like ICTFY (Trial Chamber) decision in the *Milutinovic et al* (2009); and *Moiwana Community* v. *Suriname* decision by the Inter-American Court of Human Rights (2005).

[17] *Supra* note 13, para. 239.

IV. Advisory Opinion in Retrospect

The ICJ has used the Lotus approach for its opinion, which states: there is no prohibition on unilateral declarations of independence under international law, which means that, whatever is not prohibited is permitted (though the court does not explicitly say so). Between prohibition and permission, there may be the possibility of a range of options, which could mean neither prohibition nor permission. However, qualifying the permission or prohibition with the facts and circumstances is necessary since the issue is about the plight of the suffering population.

The opinion, though having some legal shortcomings lays down postulates, which may provide useful indicators in future. Firstly, by indicating no violation of international law, it conferred sanctity to the unilateral declaration of independence. This may eventually benefit conflict resolution in the disputed territory. This is despite the fact that the court reformulated the question and concluded that the authors of the declaration were not from the provisional institutions in Kosovo.

Secondly, the opinion could benefit the discussion on the expanding horizons of international law particularly in the formation of a state. Traditionally, statehood had been examined in accordance with the Montevideo Convention. The discussions did not extend to the preferential treatment to population. Although this view is reflected in the separate opinion, the majority opinion also does not negate it. It rather validates the declaration by the authors.

As Richard Falk and Judge Koroma pointed out, it could be exploited by various dissident voices across the globe for meeting their demand through declarations of independence. Of course, it could be a dangerous precedent at least in certain contexts since it dismantles the stability of the existing state. The court should have expressed its opinion with a more cautious approach. An advice laying down the parameters within which the declarations of independence shall be considered valid or otherwise, is highly relevant, as observed by Judge Simma. The opinion brought out the sharp differences among the judges, reflected by the dissent of Judge Koroma, the separate opinion of Judge and Trindade and the declaration by Judge Simma. The advisory opinion as a whole generated scope for further discussion on self-determination in international law.

LEGAL CONTROL OF OBSCENITY: WITH SPECIAL REFERENCE TO CYBER PORNOGRAPHY

Vageshwari Deswal[*]

I. Introduction

'Obscene' is filthy, foul, indecent or disgusting. The law of obscenity tries to prevent a behaviour which is contrary to moral and aesthetic sense of society. What is moral and what is contrary to it remains difficult to specify because what may be unaesthetic in a given situation may not be so in a different situation. What is meant by obscene or indecent? This question came before the Supreme Court in connection with the right of freedom of speech and expression guaranteed by the Constitution in *Ranjeet D. Udeshi* v. *State of Maharashtra*.[1] This case pertained to an obscene passage in the book, "Lady Chatterley's Lover". The Supreme Court said that the word 'obscenity' denotes something which is offensive to modesty or decency, which is filthy and repulsive. Pornography is obscenity in an aggravated form. Treating sex and nudity in art and literature cannot *per se* be regarded as a fundamental right under article 19 (1) (a). Freedom of speech and expression is subject to reasonable restrictions in the interest of decency and morality. In the words of Hidayatulla J. "treating with sex in a manner offensive to public decency and morality, judged by our national standard and considered likely to pander to lascivious[2], prurient[3] or sexually precocious minds must determine the result". The judge added that "we need not attempt to bowdlerize all literature and thus rob speech and expression of freedom: a balance must be maintained between freedom of speech and expression and public decency and morality but when the when the latter is substantially transgressed, the former must give way."

II. Obscenity in Cyber Space

The nature of Internet has made its regulation difficult. On internet everybody has easy access to all sorts of materials. At the click of a mouse any kind of material can be uploaded, downloaded and sent to millions of internet users all across the world. The existence of pornographic material on the internet has been the topic of many a discussions and even the most stringent restrictions on the publication and dissemination of pornographic materials on the internet has not been able to control it. New and less detectable measures of distribution of pornographic stuff are evolved everyday which pose a grave threat to the privacy and sensibilities of the users especially belonging to the younger segment i.e. children

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[1] AIR 1965 SC 881.

[2] A material is 'lascivious' if its lustful, inciting or evoking lust, i.e., creating a desire for sexual activity.

[3] 'Prurient' means shameful or morbid interest in sex. A material which portrays sexual conduct in potently offensive way is to be appealing to the prurient interest in sex. It is creating or encouraging unhealthy obsession with sexual matters.

and teenagers who are more vulnerable and susceptible. Their impressionable minds can carry impression for years which might hinder their normal development. Obscene matter posted or transmitted through internet can traverse many jurisdictions and can be accessed in any part of the globe. The Indian Supreme Court adopted "national standard" to determine obscenity. But the American Supreme Court reaffirmed in *Miller* v. *California*[4] the test propounded in *Roth* v. *United States*[5] that local community standard should be taken into account for determining obscenity because a national standard is hypothetical and difficult to ask. The question arises, whose community standard or national standard will determine the nature of the matter? Is it the standard of the place of origin or the place of destination, or any place through which the material traversed? Or is there need to create a new definition of community for an online obscenity case?

III. Test of Obscenity

Obscene is offensively or repulsively indecent. To determine the obscene matter, the Supreme Court of U.S. issued the following tests in *Miller* v. *California*[6]:

(i) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest:

(ii) Whether the work depicts or describes, in a potently offensive way, sexual conduct:

(iii) Whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value.

The test of obscenity under the Indian law has been borrowed from English Law. Obscenity should be such as has tendency to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this type may fall.[7] The Supreme Court in *Ranjit D. Udeshi* v. *State of Maharashtra*,[8] was of the view that the test of obscenity as laid down *In re Hicklin* should not be discarded. It makes the court the judge of obscenity in relation to an impugned book etc., and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to be decided in each case, and it does not compel an adverse decision in all cases. In this case, it was argued that in light of article 19 (1) (a) of the Constitution of India which guarantees freedom of speech and expression, the *Hicklin* test should be discarded. Hidayatulla J. said that the Indian Penal Code does not define the word obscene and

[4] 413 US 15 (1973).

[5] 354 US 476,489-493 (1957).

[6] *Ibid.*

[7] *In re Hicklin* (1868) L.R. 3 QB 360. This observation has been repeated in Indian cases from the earliest times. See *Jhakar Dutt* (1917) PR 35, *Ghuban Hussain* (1916) PR 5, *Shankaram*, ILR (1940) 1 Cal. 581 and *Ranjit Udeshi*, (1962) 64 Bom. L.R. 356.

[8] AIR 1965 SC 881.

this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by the Supreme Court. The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, stated that treating sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the court to reach a decision on a constitutional issue of a most far reaching character and it must be careful not to lean too far away from the guaranteed freedom.

In *United States* v. *Thomas*,[9] it was laid down that the manner in which the images move does not affect their ability to be viewed on a computer screen or their ability to be printed out in hard copy in the distant location. The court further held that it is the community standard of the place where the material is accessed and not the place of origin which would determine obscenity. The community standard varies from place to place and country to country. To avoid stricter community standard, the defendant must deny access of material to the person of the community. The court also asserted that there is no need to carve out new definition of community for online obscenity cases.

IV. The Journey So Far

Sections 292 and 293 of the original Indian Penal Code, 1860, which deal with sale etc., of obscene books and obscene objects to young persons, respectively are in accordance with the resolution passed by the International Convention for the Suppression and Circulation and Traffic in Obscene Publications, signed at Geneva on behalf of the Governor General in Council on the 12.04.1923. The Select Committee in their reports dated 10.02.1925 intended to exclude religious, artistic and scientific writings etc, but they did not think it necessary to enlarge the exception, which they left to be supplemented by a substantial body of case law which they added, made it clear that *bonafide* religious, artistic and scientific writings, etc. are not obscene within the meaning of the Indian Penal Code. Sections 292 and 293 of IPC were amended in 1969. While liberalizing the law of 'obscenity' in favour of works of science, literature and art, care was taken to prevent obscene publication and objects masquerading under the name and the guise of works of science, literature and art. Therefore, with a view to make the existing law more definite, clause (1) to sec. 292 explains specifically the connotation of the expression obscenity. Clause (2) punishes a person who sells or in any manner conveys publicly the obscene

[9] 74 F 3 d 701(6th cir., 1996).

books or any other material of the same effect. The section makes exception in respect of any representation sculptured, engraved or painted on or in any ancient monument. Where a person is charged for having been in the possession of an offending book, an offence under sec. 292 would be fastened if possession of the book was for the purposes of its sale. But if such a book is sold to a customer, the seller would be liable for an offence under sec. 292(2).

In considering the question of obscenity of a publication, the court has to see whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds.[10]

A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. A novel written with a view to expose the evils prevailing in society by laying emphasis on sex and use of slangs and unconventional language did not make it obscene.[11]

In *B. Rosaioh* v. *State of A.P.*[12] it was held where accused was a mere spectator of a pornographic film and it was not alleged that he had intentionally exhibited or arranged exhibition of the film so as to reflect complicity of the accused in the exhibition of the same, this interposition as a mere spectator to the exhibition of a blue film without any further complicity cannot be taken to be amounting to abetment of the main offence.

The exception to the original sec. 292 was re-drafted after the 1969 amendment. The court has power to call for expert opinion under sec. 45 of the Indian Evidence Act, 1872, when it has to form an opinion on any such matter. sec. 293 provides for enhanced punishment to those who sell, distribute, exhibit or circulate any obscene object to persons under the age of twenty years.

Sec. 294 provides that whoever, to the annoyance of others (a) does any obscene act in public place; or (b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine or with both. For an act to be punished under sec. 294, it must cause annoyance either to a particular person or persons in general. The words to the annoyance of others do not limit it to mean the person who is the intended victim of the obscene act of the accused.[13]

In *Patel H.M. Mallagowda* v. *State of Mysore*,[14] the accused had used abusive and obscene words against a medical doctor in public place. The accused

[10] *Chander Kant* v. *Kalyan Das*, AIR 1970 SC 1390.
[11] *Samresh Bose and Another* v. *Amal Mitra and anr.*, 1986 Cr LJ 24 (SC).
[12] 1991 Cr LJ 189 (AP).
[13] *Zara Ahmed Khan* v. *State*, AIR 1963 All 105.
[14] 1973 Mad LJ (Cr) 115.

was found guilty under sec. 294 because of the fact that the doctor and some other members of the public were impelled to complain about the abusive or obscene words uttered by the accused which was sufficient indication of the fact that they were all annoyed by the use of such words in a public place. But if the abusive language is not used in a public place, there would be no liability under this section.

Indecent exposure of one's person or sexual intercourse in a public place will be punished under sec. 294. In *Zara Ahmed Khan* v. *State,*[15] the accused, a rikshawala stopped his riksha near two young girls previously unknown to him and while addressing the girls uttered the following words to the hearing of other persons "*Ae merijann mere rikshey par baithjao. Main tumko pahuncha doonga. Main tumhara intzar kar raha hun.*" These words were held to be clearly offensive to the modesty of the girls and were likely to personate the mind of hearers including the girls. Further this section requires that the obscene acts mentioned under clause (b) must be done in or near a public place. Indecent exposure of one's person in an omnibus,[16] in a public urinal[17] or in a place where the public go[18] falls under this section.

In *K.P. Moharnrnad* v. *State of Kerala,*[19] an important question relating to obscenity was raised. The question was whether the cabaret dance is covered by the expression obscene and if it is so, can its exhibition in hotels and restaurants be stopped? The Kerala High Court, while throwing light on the history of cabaret dance, observed that if exhibition of cabaret dance in public places such as hotels, restaurants, is in accordance with the standards of our country then its exhibition may be permitted and no restriction can be imposed on it.

In *Deepa* v. *S.I. of Police*,[20] in response to an advertisement about performance of cabaret dance in a posh hotel, some persons purchased highly priced tickets and after witnessing the dance made a complaint under sec. 294 of the IPC as the dance was so obscene that it caused annoyance to them. It was held that persons attending a cabaret show in a hotel can complain that annoyance was caused by the obscenity of the performance thereby attracting sec. 293 of the IPC. An enclosed area in a posh hotel where cabaret dance is performed, restricting entry to persons purchasing highly priced tickets is a public place. Otherwise, any public place could be made a private place by enclosing the same and restricting the entry to persons *who* can afford payment of huge amount. Entry to a hotel just like a cinema house, is not restricted to anybody into who is ready to pay for it. Only because the area is enclosed and entry is restricted to those who opt to pay, it does not cease to be a public place. So also previous advertisement of what is going to be

[15] AIR 1963 All 105.
[16] *Holmes* (1853) Dears Cr C 207.
[17] *Harris* (1871) LRICCR 282.
[18] *Wellard* (1884) 14 QBD 63.
[19] 1984 Cr LJ 745 (Ker).
[20] 1986 Cr LJ 1120 (Ker).

performed can not have the effect of converting a public place into a private place and obscenity into something which is not obscene. No crime can be obviated by consent. So also considerations of the interest of those who are running the show for profit or those who conduct the performance for livelihood and the enjoyment and satisfaction of those who derive pleasure by seeing the performance willingly cannot outweigh the interest of the society which should be of paramount consideration.

It is very often that one finds derogatory depiction of women in media. To achieve their commercial and publicity objects, the business, trade and other media often transgress the limits of decency and propriety by exposing and depicting the woman and exposing her body in an objectionable and obscene manner. As this position was not fully covered by the provisions of the Indian Penal Code regarding obscenity, Parliament passed the Indecent Representation of Women (Prohibition) Act, 1986. The object of the Act was to prevent the depiction of the figure of a woman in a manner which is derogatory or denigrating to a woman or which is likely to corrupt public morality. "Indecent representation of women" has been defined in the Act to mean the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating to women, or is likely to deprave, corrupt or injure the public morality or morals.

Sec. 3 of the Act lays down that no person shall publish or cause to be published, or arrange to take part in the publication or exhibition of any advertisement which contains indecent representation of women in any form. Sec. 4 further lays down that no person shall produce or cause to be produced sell, let or hire, distribute, photograph, representation of figure which contains indecent representation of women in any form. But this prohibition does not apply to:

(a) any book, pamphlet, paper slide, film, writing, drawing, paintings photograph, representation on figure:

  (i) the publication of which proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

  (ii) which is kept or used *bonafide* for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in:

  (i) any ancient monument within the meaning of the "Ancient Monument and Archaeological Sites and Remains Act, 1958"; or

(ii) any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose;

(c) any film in respect of which the provisions of Part II of the Cinematography Act, 1952 will be applicable.

V. Necessity for A New Law in Cyber Age

The advancements in technology have made it easier for pornographers to access obscene material. Huge amounts of pornographic material can be reproduced more quickly and cheaply on new media like hard disks, floppy disks and CD-ROMs. The new technology is not merely an extension of the existing forms like text, photographs and images apart from still pictures and images; full motion video clips with sound and complete movies are also available.

The trafficking, distribution, posting and dissemination of obscene material including pornography, indecent exposure and child pornography, constitute one of the most important cyber crimes. This is one cyber crime which threatens to undermine the growth of the younger generation as also leave irreparable scars and injury on the younger generation, if not controlled. With increasing exposure to new technology, children will naturally like to experiment and explore everything they learn. This includes cyber space and even cyber pornography.

The Information Technology Act, 2000 (IT Act) as amended in 2008 aims to facilitate the development of a secure regulatory environment for electronic commerce. While it is mainly a statute leaning towards regulation of commercial activities, it has several provisions, which refer to penalties and offences. The legislators very clearly intend this to be the fundamental umbrella legislation to govern computer related activity in India. The Information Technology (Amendment) Act, 2008 added new provisions to deal with newer forms of cyber crimes like publicizing sexually explicit material in electronic form, video voyeurism, breach of confidentiality etc.

Sec. 66E of the IT Act provides punishment for violation of privacy. Under this section if anyone intentionally or knowingly captures i.e. videotapes, records, photographs or films in any way or transmits the image of the private area, i.e. the naked or undergarment clad areas of human anatomy of any person without his or her consent under circumstances violating the privacy of that person, then such an offence would be punishable with imprisonment upto three years or with fine up to two lakh rupees or with both.

Such a provision was needed to counter the menace of installing hidden cameras in changing rooms in shops, in public urinals, in hotels, rest houses, rented houses and even paying guest accommodations. There are frequent cases involving girls whose pornographic pictures are taken by their boyfriends and then circulated via MMS or uploaded on the net bringing great disrepute to them and their families.

The issue was highlighted in the Delhi Public School MMS scandal eventually leading to the arrest of the CEO of Bazee.com. This new provision will help in prosecuting such offenders too.

Sec. 67 of the IT Act makes it an offence to publish, transmit or cause to be published in electronic form any material which (i) is lascivious; or (ii) appeals to the prurient interest; or tends to deprave and corrupt persons who are likely to read, see or hear the matter contained or embodied in it. The punishment provided is imprisonment and fine. On the first conviction, it is imprisonment up to three years and fine up to five lakh rupees; on the second conviction it is imprisonment up to five years and fine up to ten lakh rupees.

The section applies to the publishing and transmission of obscene material and covers a website, e-mail distribution and also a digital rendition on a CD. To prove that there was an offence under sec. 67, the first thing would be to prove that there was an electronic publication. It should be proven to be on existence at the alleged site on the alleged date. A copy of the same has to be preserved to be produced before the court. The next step would be to find the person who either himself published or caused the material to be published i.e. who finances and directs the publication. Thereafter the most important aspect that needs to be satisfied is whether the matter contained in the publication was such as "to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to see or hear it".

From the above, it can be observed that the *Hicklin* test has been adopted from the Indian Penal Code and given a mere face-lift so that it becomes applicable to internet pornography. Mere possession of obscene material in the privacy of one's home is not an offence under the Act. An offence is committed when the material is disseminated through the mode of publishing or transmission, even if it is done for private use only. The U.S. Supreme Court in *United States* v. *Thomas*[21] held that, "the right to possess obscene materials in the privacy of one's home does not create a correlative right to receive it, transport it, or distribute it in interstate commerce even if it is for private use only". Thus, the offence is the transmission or publishing of the obscene material having the said likely effect, irrespective of the fact that transmission is meant for private use of the person to whom it is addressed. What is prohibited is the dissemination of the obscene material through mode of transmission or publishing in electronic form when such mode carries with it a significant danger of offending the sensibilities of unwilling recipient or of exposures to juveniles[22]. That the audience of the transmission is intended to the selected few is immaterial, if others are likely to have access to it. Electronic transmission of readable material or visual images that are obscene through use of an on line computer service constitutes offence under sec. 67 of the Information Technology Act, 2000.

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[21] 1996 US App Lexis 1069 (6th Cir 1996).

[22] *Miller* v. *California* 413 US 15 (1973).

The first conviction in India under sec. 67 of the IT Act came in *State of Tamil Nadu* v. *Suhaskutty* in November 2004. This case was with regard to the posting of obscene, defamatory and annoying message about a divorcee woman in the yahoo message group.

E-Mails were also forwarded to the victim for information by the accused through a false e-mail account opened by him in the name of the victim. The posting of the message resulted in annoying phone calls to the lady in the belief that she was soliciting. The accused engaged in all this from a cyber café. The accused was finally convicted under sections 469 and 509 of the IPC and sec. 67 of IT Act.

Sec. 67A of IT Act inserted vide Information Technology (Amendment) Act 2008 prescribes punishment for imprisonment up to five years and in cases of subsequent conviction imprisonment up to seven years and also with fine up to ten lakhs rupees for persons who publish, transmit or cause to be published or transmitted in electronic form any material which contains sexually explicit act or conduct.

Child pornography is another problem threatening to raise its ugly head in monstrous proportions if not tackled early. There are provisions under the Constitution of India,[23] The Immoral Traffic Prevention Act, Indian Penal Code,[24] The Juvenile Justice Act, 2000[25] and some other legislations to protect children against illegal trafficking, assault, cruelty and various other kinds of abuses but only one statute[26] which specifically deals with the problem of child pornography. This is the Goa Children's Act, 2003 but this being limited in operation to only the territory of Goa, need was felt for a provision which would be more comprehensive in its coverage of this problem and would extend to the entire country. Therefore in accordance with article 3.1 of the Optional Protocol to the Convention on the Rights of the Child (2002) relating to the Sale of Children, Child Prostitution, and Child Pornography,[27] sec. 67B was inserted in the IT Act vide the Information Technology

[23] Art. 23 (1) provides that traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

[24] S. 366 B, Indian Penal Code, 1860.

[25] S. 23 and 26 of the Juvenile Justice (Care and Protection of Children) Act, 2000, provides punishments for cruelty against and exploitation of child employees or juveniles.

[26] The Goa Children's Act, 2003, not only defines "child trafficking" but also provides punishment for abuse and assault of children through child trafficking for different purposes such as labour, sale of organs, sexual offences of pedophilia, child prostitution, child pornography and child sex tourism and illegal adoption. Airport authorities, border police, railway police, traffic police, hotel owners, have all been made responsible under the law for protection of children and for reporting offences against children.

[27] The Protocol insists on the criminalization of child prostitution and pornography.
Art. 3.1 of the protocol states that, "Each State party shall ensure that, as a minimum, the sale of children, the "use" of a child for prostitution and pornography are fully covered under its criminal or penal law, whether such offense are committed domestically or transnationally or on an individual or organized basis." India, being a signatory to this protocol and having ratified it in 2005 was bound to incorporate its provisions in our domestic laws and remodel the existing laws on the basis of directions given therein.

Amendment Act of 2008 which lays down punishment for publishing or transmitting of material depicting children in sexually explicit acts etc, in electronic form.[28]

This provision seeks to keep a check on pedophile activities. In law enforcement the term "pedophile" is generally used to describe those accused or convicted of the sexual abuse of a minor.[29] Sec. 67-B of the IT Act seeks to criminalize production, distribution, transmission, collection or advertising of any material that depicts children in obscene or indecent manner. Under this provision even browsing through pornographic material has been made punishable. This section although potent in tackling child pornography presents some problems in areas where children below 18 years of age may be involved in sexting or transmitting sexually explicit pictures of themselves or their friends over mobile phones or posting such obscene material on social networking sites. This section could lead to problems of excessive punishments for children. The language of this provision which is too broad and non specific needs to be revised suitably. Moreover, legislations alone cannot succeed in curbing this menace so the Government needs to float schemes for raising public awareness so that the demand itself for pornographic material goes down. Such measures would strike at the very roots of child pornography.

VI. Liability of Internet Service Provider

Internet service providers (ISP) provide internet access service to customers in exchange for a fee. ISPs also store data for their customers' use, such as on a Usenet newsgroup server or a World Wide Web server. ISP liability for the activities of its customers is generally based on knowledge of the customer's activity. If the ISP is unaware of the behaviour of its customer, most courts seem reluctant to hold the ISP liable for that behaviour. However, once the ISP becomes aware of the customer's activity, or should have become aware of the activity with reasonable diligence, courts are much more likely to hold the ISP liable for its customer's actions.

As per sec. 79 of the IT Act, a network service provider, which means an intermediary cannot be held liable, as such service provider, under the Act or

[28] Sec. 67B reads as follows: Whoever-
(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or
(b) creates text or digital images, collects, seeks, browses, downloads ,advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or;
(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or
(d) facilitates abusing children online or
(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children shall be punished on first conviction with imprisonment upto five years and fine upto ten lakh rupees and in the event of subsequent conviction with imprisonment upto seven years and fine upto ten lakh rupees.

[29] See http://en.Wikipedia.org/wiki/pedophile.

rules or regulations made there under, for any third party information or data made available by him if he is able to prove that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such an offence or contravention.

Obviously, where one directly and intentionally, in violation of any law, circulates prohibited content, he would be liable, whether the circulation is through electronic or other means. It could be a matter for argument only where his participation in the communication is not direct, but he provides only the access to communication and the question of his facilitation of the communication arises for determination. Usually, between law enforcers and the access providers, they have always taken extreme positions. Governments tend to hold the access providers responsible for prohibited communications as they provide the means of communication and also on the theory that they are to be held to know the nature of the traffic. One further reason for pursuing access providers is that they are available and are credited to have deep pockets, whereas their customers can make themselves inaccessible, by closing the web sites when investigation is afoot. Access providers, on the other hand advance the defense that they are only communication agents, much like the postman and do not know the contents of the message they help transmit nor is it practicable for them to search every communication for lawfulness.

Sec. 79 may be considered to represent the middle ground as far as the liability of an intermediary access provider is concerned. He would not be liable for any third party information or data transmitted through him if he can prove that the offence, or contravention was committed without his knowledge or he had exercised all due diligence to prevent the commission of such offence or contravention. What is due diligence however remains a very subjective concept to be determined on the basis of facts and circumstances of each and every case. In any case, sec. 79 of the IT Act, dealing with the liability of network service provider does not cover all aspects of the issue.[30]

[30] S. 79: Exemption from liability of intermediary in certain cases:
(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data or communication link hosted by him.
(2) The provisions of sub-section (1) shall apply if
(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or
(b) the intermediary does not- initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission
(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
(3) The provisions of sub-section (1) shall not apply if-
(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act

One would be an intermediary within the definition of the IT Act, if he, with respect to any particular electronic records, on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, on-line payment sites, online auction sites, online market places and cyber cafes.[31]

In the first place it should be noted that, under the IT Act, the question of the liability of any service provider would be considered only where an offence or contravention of any of the provisions of this Act, rules or regulations made there under is alleged. For example, this section would not help an owner of a copyright complaining of infringing material being distributed through the intermediary, towards prosecuting him, under this Act, the question of the knowledge or absence of knowledge of the intermediary of the claimed infringement taking place in its system, being a different matter as transmission or circulation of material infringing a copyright, is not an offence under this Act.

VII. Obscenity Versus Art

Works of art, however obscene they may appear to an ordinary person, have not been considered obscene.[32] Whether the book "Indian Call Girls" was obscene, came for consideration before the Delhi High Court in *Promila Kapoor* v. *Yash Pal Bhasin*.[33] The book was written by an eminent sociologist being a condensed version of the original work by the title of 'The Life and World of Call Girls in India." It was held that there was nothing wrong if a sociologist made a research on call girls in order to find out as to why and how the young girls fall in this profession and what society could do in order to eradicate or at least minimize the possibility of young girls joining the flesh trade. The book was held obscene by the magistrate on the basis of a description of their encounter with unscrupulous males including a description by some girls of their first sexual experience. The Delhi High Court, not agreeing with this view, felt that since bulk of the book dealt with the ways and means of running a profession and method of encountering them, it was not obscene.

Art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is captured, not by the general artistic appeal or message which he can not comprehend but by

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.
Explanation:- For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

[31] S. 2 (W), ITA, 2000 substituted vide ITAA, 2008.

[32] In the motion picture Bandit Queen, some of the scenes were considered obscene by the Delhi High Court but the Supreme Court did not agree and the film was exhibited in several cinema houses.

[33] 1989 Cr LJ 1241.

what he can see. The intellectual sees beauty and art but nothing gross. To determine obscenity, an overall view of the entire work is to be taken to see whether the obscene passages are so likely to deprave and corrupt those, whose minds are open to such influences and in whose hands the material is likely to fall. In doing so, one must take into consideration the influence of the material on the social morality of contemporary society.

Sections 67, 67A, and 67B of the IT Act specifically exempt from prosecution any person for cyber pornography, any book, pamphlet, paper, drawing, writing, painting, representation or figure in electronic form-

(i) the publication of which is proved to be justified as being for public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used bonafide for religious purposes.

Where obscenity and art are mixed, art must be so preponderate so as to throw the obscenity in a shadow or make the obscenity appear so trivial and insignificant that it can have no effect and may be overlooked[34]. Such an exemption clause will help in protecting the freedom of expression within limits of decency and morality.

VIII. Conclusion

The laws to tackle obscenity though appear good enough on paper but still there are some loopholes in their application which need to be plugged. Although sending, publishing and transmitting of obscene material has been made punishable,[35] receiving, viewing or mere downloading for personal use has been conveniently overlooked. The law takes cognizance of contraventions committed within as well as outside India by a person of any nationality if it involves a computer, computer system or network located in India[36] but then there are extradition difficulties. The network service provider can also easily escape liability by denying the knowledge of the material transmitted and just saying that he was otherwise vigilant and took proper precautions.[37]Presently, the powers of police officers to enter and search have been restricted to only public places,[38] then what about offenders engaged in spreading obscenity from the privacy of their homes?

Some kind of censorship is urgently required against pornographic information on the web. For this we require suitable administrative guidelines

[34] *Supra* note 1, at 889.
[35] S. 67, I T Act, 2000.
[36] S. 75, IT Act, 2000.
[37] S. 79, IT Act, 2000
[38] S. 80, IT Act, 2000.

whereby the state or central law enforcement authorities may, after a due process of verification order the ISPs manning the Internet Gateways to block "objectionable sites" which contain pornographic content. A thorough study of the IT Act also reveals that sections 69 and 69A enable any officer of the central government to intercept, monitor or decrypt any information from any computer source including websites and can ban the websites for reasons of obscenity. The Government of India has constituted an Indian Computer Emergency Response Team (CERT-In)— the only agency that has the authority to block a website. CERT-In instructs the Department of Telecommunications in the Ministry of Communication and Information Technology to block a website after verifying the authenticity of the complaint and only after collecting enough evidence which suggests that blocking the website is absolutely essential. The reasons for blocking of website must be convincing enough to warrant such a stringent action.

A provision to this effect is also available in the Communication Convergence Bill which is pending before Parliament. There should also be laws similar to the "Deleting Online Predators Act" (DOPA) in the U.S.A., which bars certain websites from being accessed from schools and public libraries receiving government funding with the main objective of protecting children from exposure to pornographic content.

It is hoped that the existing laws as well as the recent amendments are implemented in their true spirit so as to curb the menace of obscenity on- line as well as in other forms. It is to be remembered that pleasure of some cannot outweigh the interests of society which is of paramount consideration in any civilized country.

LAW OF DISHONOUR OF CHEQUES: CONTEMPORARY DEVELOPMENTS

Gunjan Gupta[*]

I. Introduction

By introducing Chapter XVII[1] to the Negotiable Instruments Act, 1881 vide statutory amendment in 1988, another parallel system of adjudication of disputes relating to dishonour of cheques was articulated.[2] The specificity of this piece of statute was to inculcate confidence in the system of receiving payments by way of cheques by making dishonour of cheques an offence, on the other hand, to provide for an effective, inexpensive, simple and speedy disposal of cases pertaining to dishonour of cheques.[3] On being convicted, the drawer is liable to suffer imprisonment to the extent of two years and also to pay fine to the extent of double the amount of dishonoured cheque which proves to be of deterrent effect to the erring and delinquent drawer of cheques. Section 138 of the Negotiable Instruments Act, 1881 was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. The working of the provisions of Chapter XVII for a period of more than a decade had brought to the forefront various lacunae and shortcomings from which it suffered particularly in the nature of enormous delays in the disposal of the cases filed under section 138 of the Negotiable Instruments Act, 1881 and the drawer of the cheque, by taking shield of various technicalities and procedures were frustrating the very object with which Chapter XVII of the Act was inserted in the year 1988. With a view of avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer of the cheque to make the payment, notice in writing giving 15 days time is stipulated. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided that the drawer of the cheque after notice makes, amends and pays the amount within the prescribed period. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheque issued

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1 This Chapter of the Negotiable Instruments Act, 1881 as inserted in 1988 initially contained sections 138 to 142, which have further been amended in 2002 to institute within this Chapter sections upto 147.

2 The basic law is that for a same cause of action or transaction two criminal cases cannot be filed. So also two parallel civil cases, if filed, would be outside the jurisdiction of the civil court. Principle against double jeopardy is enshrined under article 20(2) of Constitution of India, 1950. Supreme Court clarified that on the basis of cause of action arising out of dishonored cheque, civil and criminal complaint under section 138 of the Negotiable Instruments Act, 1881 shall both be permissible. See *State of Rajasthan* v. *Kalyan Sundaram Cement Industries Ltd.* 1996 (3) SCC 87: 1996 (3) JT 162: 1996 (2) Scale 403; Srinivasan, K., "Bouncing of Cheques Issued in Companies", *Corporate Law Adviser* 1999 Oct. 35 (1). However, there is some dissatisfaction also at some corners against the very articulation of section 138 of the Act particularly for the reason that when the civil suits were maintainable on the basis of dishonour of cheques there was no use of these special provisions making the drawer to suffer twice. Karim, S.A., "Drawer's Misery", *Crl LJ* J 160(2004) May (110).

3 *Goaplast (P) Ltd.* v. *Chico Ursula* D'Souza (2003) 3 SCC 232: AIR 2003 SC 2035.

by them, it being a part of their *modus operandi* to cheat unsuspecting persons.[4] Dishonour of a cheque causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Remedy available in civil law is a long drawn process and an unscrupulous drawer normally takes various pleas to defeat genuine claim of the payee. To tackle this problem, section 138 of the Negotiable Instruments Act, 1881 was articulated.[5] Under this new set of provisions starting from section 138 of the Negotiable Instruments Act, 1881 a new system has been articulated whereby on non-payment of cheque amount within 15 days from the date of issuance of notice after dishonour of cheque, the drawer of cheque is liable to be prosecuted for a criminal offence on the conviction of which the drawer can be held liable to be put to imprisonment to the extent of two years and payment of fine to the extent of double the amount of cheque.

Recent amendments vide Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002[6] as a curtain raiser lifts the veil between the Negotiable Instruments Act, 1881 and the Information Technology Act, 2000. To put it in different words, now with this afore-stated statutory amendment, the law relating to dishonour of cheques has been made 'computer friendly' and has adopted within it the recent developments in the field of cyber law. This new Amendment has lifted the ban against the applicability of nascent cyber law to an age old and well matured law relating of negotiable instruments in general with a particular reference to cheques. Though cyber law has been made applicable to the law relating to cheques; at the same time, other negotiable instruments like promissory notes and bills of exchange have been kept out of its perview. In yet another simple words, it is submitted that though cyber law has been made applicable to the 'cheques' but so far as 'promissory notes' and 'bills of exchange' are concerned, they have still been kept out of this new domain.

Thus, wherever the word 'cheque' occurs throughout the entire Negotiable Instruments Act, the same has been made to include 'electronic cheques' also and this result has been achieved by amendment of definition of 'cheque' itself to cover 'electronic cheques' or 'truncated cheques' to make the law relating to cheques 'computer and internet friendly'. Thus, the definition of cheques as contained in section 6 of the Negotiable Instruments Act, 1881 has now been amended by amendment of 2002 as stated above to include 'a cheque in electronic form'.

In addition to the above, in this recent amendment of Chapter XVII of the Act, some more provisions have been introduced to make the offence more stringent by increase in the sentence prescribed by way of imprisonment and some other

4 *D. Vinod Chivappa* v. *Nanda Belliappa* (2006) 6 SCC 456: AIR 2006 SC 2179.

5 *Mosaraf Hossain Khan* v. *Bhagheeratha Engg. Ltd.* (2006) 3 SCC 658: AIR 2006 SC 1288.

6 Act No. 55 of 2002, dated 17-12-2002, implementation with effect from 06-02-2003 vide Gazette of India, Extraordinary, Pt. II, Section 3(ii) dated 6th February, 2003.

provisions have also been made with regard to evidence and procedure to make the trial under the Act short and speedy.[7]

In a judicial system where backlog of un-disposed civil matters is the end result, the articulation of these provisions was necessary particularly at the time when the country was planning to go for economic reforms with an object to create an environment where payments can be made with confidence and foreign investor does not doubt the encashment of banking cheques.[8]

After the expiry of about a decade and a half, legislators felt it to update these new provisions in tune with the present day time of electronic governance and e-commerce on the one hand and on the other it was thought appropriate to plug loopholes that led to unnecessary delay in the disposal of cases and denial of rights of the complainants in criminal cases pertaining to dishonour of cheques.

With this above view in mind the Act has now been further amended by another amendment Act in 2002 and the amended provisions have been put to force in 2003. By this recent amendment definition of 'cheque' as stood under section 6 of the Act has been amended to make it computer friendly on the one hand and on the other some other provisions have been instituted particularly in the form of sections 143 to 147 of the Act.

So far as the amendment of definition of cheque is concerned, it is now made to include 'electronic cheques' also. This purpose of bringing on pace the law of dishonour of cheques with the nascent cyber law has been achieved by

[7] Section 143 of the Act confers the power on the court to try cases summarily together with a mandate of conducting the trial on day-to-day basis and to conclude the same within 6 months; Section 144 prescribes new modes of service of summons and contains new provisions for constructive service; Section 145 permits adducing of evidence now by way of affidavits and once it an affidavit is filed the same may be read in evidence during the entire trial; Section 146 of the Act prescribes that Bank's slip to constitute now forth as *prima facie* evidence which earlier required summoning and oral examination of bank officials resulting into wastage of time and resources; and lastly Section 147 has made the offence under Section 138 to be compoundable, which explicitly was not so before. See Sahelwalla, Gajanand and Senapati, Debojit, "Bouncing of Cheque: A Criminal Offence", *Guahati Law Times* 26(2005) Mar. 1(3).

[8] Anand, Abhishek, "Supreme Court Shaping Jurisprudence of Criminal Liability in Dishonour of Cheque – A Judicial Trend", *Corporate Law Adviser* 53(2004) (Vol. 10); Ramasamy, T., "Chequered History of Cheque Dishonour, Section 138 of the Negotiable Instruments Act, 1881 – An Analysis", *Crl LJ* J 13(2003) Jan. (109); Sahai, R.N., "Dishonour of Cheque – Offence and Prosecution", *Corporate Law Adviser* 92(1994) Nov. (15); Santhanam, R., "Offence of Dishonour of Cheques", *Company Law Journal*, J 1(1998); Sarpal, Ashwani, "Offence under Section 138 of Negotiable Instruments Act, 1881 – Cheque Presentation and its Dishonour", *DJA Journal* 79(2003); Sood, Vivek, "Bouncing of Cheques: Legal Principles and Need for Reforms", *Company Law Journal* J 79(1999) (4).
Mohd. Abdullah, in his write-up has depicted how the justice system in this area has resulted in its gross failure. Through a case cited by Abdullah it has lucidly been shown as to how a cheque of Rs. 40 thousand culminated into compensation of Rs. 4 thousand only to the victim after many years in result of a prosecution under section 138 of the Negotiable Instruments Act. The Ld. author has shown as to how the complainant has been punished as against the accused who lost money, peace of mind and active man-hours in getting only 10% of the cheque amount ["The Myth and Reality of Cheque Bouncing", (6)*Kar.* LJ 33(2005)]. In yet another article, Moin Qazi calls on banks to promote cheque guarantee cards service to curb cheque bouncing, as the legal system in this area is not efficient. Cheque guarantee card service is similar to endorsement of the banker on cheque with respect to its 'good for payment' [Qazi, Moin, Legal Sanctions Not Helpful, Lex et Juris 52(1989) Jun (4)].

amendment of definition of 'cheque' as under section 6 of the Act. Now it includes electronic image of a truncated cheque and a cheque in the electronic form. Bankers themselves are not sure of having introduced the system of 'e-cheques' and they often say yes they have done which on deeper probe is found to be case of ECS (Electronic Clearing System) which is a simple form of making payment electronically with the elimination of papers and the same in any case be not confused with the 'electronic cheques'.[9]

II. Negotiable Instruments (Amendments) of 2002 : Justification and Analysis

So far as recent amendments made in the year 2002 in Chapter XVII of the Negotiable Instruments Act, 1881 are concerned,[10] they are either reproduction of the existing laws or an eye-wash or camouflage and therefore the legislators are successful in befooling the common man under the guise of manufacturing the produce in their legislative factory knowing fully well that the same is self-sufficient and the question is only of its quick implementation. The same shall be discussed in detail right here one by one with necessary references.[11]

A. Definition of 'Cheque'

The definition of cheque stands amended by the Amendment of 2002 whereby cheque is made to include within it 'electronic cheques'. Practicability of this part of the amendment of Negotiable Instruments Act, 1881 by Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 looses its significance inasmuch as the said amendment is not put to use by the banking system in the country on the one hand and on the other hand, even if it be so put to implementation on ground, the basic law relating to dishonour of cheques shall remain the same, irrespective of the cheque be in its paper form or electronic form.

B. Sentence

The ground reality is that in almost all the cases, or in any case most of them, culminate due to compromise and payment been made of the dues to the

[9] Now in India, some effort is made to introduce the system of e-cheques for which 'Cheque Truncation System – A manual of Systems and Procedures (Draft)' has been issued by the New Delhi Bankers Clearing House, RBI. The Reserve Bank of India constituted an industry Working Group on Cheque Truncation under the Chairmanship of its Executive Director, Dr. R.B. Barman, to *inter-alia* suggest an appropriate model for cheque truncation in India. The Working Group submitted its recommendations in July 2003 and suggested a presenting bank based truncation model. As a follow up of its recommendations, RBI initiated steps for implementation of cheque truncation project on a pilot basis in the National Capital Region, New Delhi (NCR).

[10] *Vide* Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002.

[11] For a critical evaluation on the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, see Giridharan and Kumar, "Update on Amendments Relating to Cheques", *Corporate Law Adviser*, 26 (2003) Oct. 9 (Suppl); Goswami, Delep, "Recent Amendments in Negotiable Instruments Act Aim at Speeding Up Trial of Bounced Cheque Offences and Prescribes Enhanced Jail Term, *Chartered Secretary* A37 (2003) Feb. (33); Venugopal, S., "Recent Changes in Law Relating to Criminal Complaint for Dishonour of Cheques" *Company Law Journal*, J 69 (2003) (2).

payee. It is also not in dispute that this criminal offence as adumbrated under sec. 138 of the Act is not criminal in nature *stricto sensu* but is in fact quasi criminal in nature as the offenders in such cases are civilians as against the hard core criminals. Increase in quantum of prescribed sentence from one year to two years does not affect the actual working under the Act. It would not be correct to say that if a person accused under section 138 of the Act has capacity to pay would not pay the amount if the prescribed imprisonment is one year but would pay only when the punishment is more. It is submitted that maximum prescribed sentence of imprisonment does seem to have any direct or indirect significance so far as deciding of the cases under these provisions are concerned. Most of the cases are decided by compromise, that is, by payment of the amount due and the only question is of bargain which takes place between the parties during the proceedings before the trial court. Some parties make the payment on their very first appearance and some other waits till they find themselves fully trapped. Remaining gets into trails of trial, followed by delay on account of never ending appeals and revisions and ultimately, they also pay when they fail to get acquittal orders.[12]

In view of the present author, the amendment of this piece of legislation is practically useless, though at the same time the same cannot be said to be damaging any existing legal position to the detriment of either of the parties. In other words, practically it matters not whether such piece of legislation is allowed to be kept on the legislative book or not.

C. Notice

Prescription of limitation for issuance of notice by the payee within '15 days' from the date of receipt of information by the payee from his banker regarding return of the cheque unpaid has also been revised by the recent amendment to '30 days'.

It is submitted that this piece of amendment of the statute is meaningless inasmuch as according to the well settled principles of law, even if the period for issuance of notice is expired and no notice is issued, the payee shall be well within his rights to represent the cheque and revive limitation and issue notice accordingly.[13] Moreover, why would somebody intending to prosecute the drawer of cheque be unable to get a notice issued within 15 days and by increasing the limitation to 30 days what is the guarantee that the payee would not be in the same position even after the expiry of 30 days as he would have been after the expiry of 15 days had the limitation been 15 days only. Thus in view of the present author this particular

[12] For a lucid and detailed examination and in support of the above proposition, reference may be made to the 'non-doctrinal part' of the original thesis authored by the present author titled as "Law Relating to Dishonour of Cheques including Electronic Cheques – a Socio-legal Study" copy of which is available at the Central Library of Faculty of Law, University of Delhi and the abstract of the same shall soon be made available on the web-site of Delhi University in due course.

[13] Reference for this established proposition of law may be made to judgments of the Apex Court in *Sadanandan Bhadaran* v. *Madhavan Sunil Kumar* 1998 (4) Scale 708: 1998 IV AD SC 357: 1998 (7) Supreme 20; *R.S. Traders* v. *Rita Khanna* (1998) 93 Comp Cas 665 (SC); and *C.C. Alvi Haji* v. *Palapatty Muhammed* 2007(7) SCALE 380.

amendment is superfluous, though not causing any damage to existing law nor is prejudicial to the interest of either of the parties.

D. Ex-officio Govt. Directors

The institution of the proviso to section 141 of the Act to the effect that if a person is director of a drawer company, only because of his Government employment and his position by virtue of the office he holds, he shall not be prosecuted as long as he is directly otherwise is not responsible for either issuance of the cheque or its dishonour. It is submitted that even prior to this recent amendment such director were not liable to be prosecuted least punished because they are not supposed to be in-charge or responsible for the affairs of the company, but having made the above stated clarificatory proviso, not even *prima facie* case can be said to be made out against such person. Thus, prior to the amendment, if such person were arrayed as an accused in the case of dishonour of cheque, though such person would ultimately succeed in getting acquittal but that would be possible only after getting through the mill of the trial, which by itself is nothing short of punishment. However, in view of the present amendment which is of clarificatory nature, not even *prima facie* case been made out against such person, he will not be harassed by putting such person to trial.

It is submitted that cases, which involve such kind of persons as accused, are very rare. In view of rare applicability of this provision, it loses its significance and is theoretical in nature more so when otherwise also such person could not be ultimately convicted. Still however, introduction of this piece of statute is neither prejudicial to any of the parties nor amounts to damaging the basic scheme of this piece of statute, is therefore free from attributing any mischief.

E. Limitation

Clause (b) of section 142 of the Act stipulates filing of complaint within one month of the date on which the cause of action arises. Now with this amendment on the point of limitation in filing of complaint, court has been empowered to condone the delay when the same is explained to the satisfaction of the court taking cognizance of the offence under these provisions. There being no provision for condonation of delay, if a complainant somehow failed to file a complaint within prescribed limitation, cause of action for filing of complaint would come to end and would cause irreparable loss. Even the judicial courts stood divided on the point to take any lenient view in favour of the complainant by giving him a chance to explain for what reasons he got late.[14]

[14] Firstly, it needs explicit clarification that this newly instituted proviso is in respect of condonation of delay in 'filing of complaint' and the same does not apply to 'issuance of notice under section 138 of the Act' or for 'making payment within the notice period by the drawer of the cheque'. See *Muthye* v. *State*, 2002 (3) Crimes 91 (Del.); 2002 IV AD Delhi 381.
So far as contradictory precedents are concerned on the point of power of Court to condone delay in filing of complaint for satisfactory reasons, see *Janardana Mohapatra* v. *Saroj Kumar* I (1994) BC 113 (Ori.): 1993 Crl.LJ 1751; *Satish Kumar* v. *Mohan* 2000 (4) Crimes 253 (Ori.); wherein reliance is place on *SIL Imports* v. *Exim Aides Silk Exports*, JT 1999 (3) SC 325: 1999 (3) Scale 90: 1999 (4) Supreme 400: (1999) 4 SCC 567: AIR 1999 SC 1609 wherein it was observed that criminal complaint under section 138 of the Negotiable Instruments Act, 1881 is

In this unsettled legal position, it seems to be wise to have made the provision explicit and the same seems to be in tune with natural justice principles that no body be condemned unheard, which again is implicitly a part of art. 14 of the Constitution of India, 1950.

F. Summary Trial on Day-to-Day Basis

Section 143 of the Act[15] has been instituted by the recent legislative amendment whereby it has been laid down that trial under these provisions is to be conducted on 'day-to-day' basis and the some is to be concluded within 'six months'. It is submitted that various courts of India have already been giving directions to the trial courts to conduct speedy trials in peculiar facts and circumstances of each case.[16]

Still however, the ground reality reveals that each adjournment is still made of an average of 6 months and there is no certain basis to hold how many years on an average it would take to complete the trial.[17] This position continues even after the amendment. We therefore have no other option but to say that the legislators are successful in befooling the people of India and in deceptively managing their Acts, i.e. Acts of Parliament, as undoubtedly such Acts are flouted with impunity by the other organ of the same Government, *i.e.,* the Judiciary. It is further submitted that 'speedy trial' has for long been standing and is implicitly read within art. 21 of the Constitution.

In any case, the above provision is salutary, which however is practically not been applied at all by the Courts of Law. A law which is not practical or which the authorities do not or are unable to accept either be put off the statute book to safeguard the honour of the Legislature or the same be ensured to be implemented at least in the Courts of Law. If this is not done, would it not be called a situation of outright chaos, legal as well as constitutional!

G. Service of Summons

This provision is again instituted by the same amendment[18] which though recognizes other modes of service, but in the absence of no other provisions been made to affect 'constructive service' or 'deemed service', such provisions seems

* either a 'petition' or an 'application' as under Section 2(b) and Section 29(2) of the Limitation Act, 1963 and therefore section 5 of the Limitation Act would apply with full force thereby conferring power to trial court to condone delay, if any, for sufficient reasons, in filing of complaint. For contrary view, also see *Kalegouda* v. *Sadashivappa* (1998) 93 Comp Cas 423(Karn.); *Mandhadi Ramachandra Reddy* v. *Gopumareddy Ram Reddy* (1998) 93 Comp Cas 571 (AP); *Kunhimuhammed* v. *Khadeeja* (1998) 92 Comp Cas 610 (Ker.): III (1995) CCR 317 wherein it has been opined that a criminal complaint cannot in any way be equated with an application or a petition and therefore said provisions of Limitation Act would not apply.

[15] Instituted by Negotiable Instruments (Amendment and Miscellaneous Provisions)Act, 2002.

[16] See *Dutt Enterprises Ltd* v. *State* 1996 IV AD Delhi 393 wherein a clear direction was given to each of the sub-ordinate courts to conclude their trial within 2 months from the date of filing of complaint. Still however, Courts of Metropolitan Magistrates can be openly heard to reject the dictum of the High Court, may be due to administrative reasons or otherwise.

[17] *Supra* note 13.

[18] Ref. Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 whereby section 144 has been instituted.

to serve no practical purpose and the same in the opinion of the present author are superfluous and meaningless.

H. Evidence on Affidavit

The newly inserted section 145[19] to Chapter XVII of the Negotiable Instruments Act, 1881 though makes a sensible departure from the general way of adducing evidence in the criminal trial when it permits adducing of evidence by way of affidavit, on a deeper probe and enquiry, it reveals that the same is again a repetition of the provisions that already stood engrafted in the statutory code.[20] It is submitted that the judicial courts in India were found to be taking evidence by way of affidavit of complainant even before this amendment taking queue from section 296 of the Code of Criminal Procedure, 1973.

The legislators once again successfully inserted the provision, no matter the same was repetition of the existing provision of law, like giving a lollypop to the litigants without caring to pin point the exact intricacies and difficulties of the litigants. Had the provision been made to expressly make section 296 of the Code of Criminal Procedure, 1973 applicable to proceedings under section 138 of the Act, the position would have been different.

I. Bank's Slip Prima Facie Evidence of Certain Facts

This newly instituted section 146 in the Negotiable Instruments Act, 1881[21] again seems to be repetition of the provisions which in a better way stood engrafted in the year 1891 by way of Banker's Book Evidence Act, 1891. In sum and substance, section 146 of the Act is virtually bare repetition of section 4 of the Bankers' Books Evidence Act, 1891.[22]

It is submitted that mere nomenclature of a document as 'certificate' will not make it one if contents of it does not reveal any certification. Similar would be the position *vice versa.* Thus, merely because a bankers memo does not carry with it formal title of 'bankers' certificate', it would not cease it to be so because it contains all the essential requirements of a certification with regard to not only

[19] Vide Negotiable Instruments (Amendment and Miscellaneous Provisions)Act, 2002

[20] Reference in this connection may be made to a similar provision contained in Section 296 of the Code of Criminal Procedure, 1973 which in almost similar words reads as:
"**Evidence of formal character on affidavit**.- (1) the evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under the Code.
(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

[21] Negotiable Instruments (Amendment and Miscellaneous Provisions)Act, 2002.

[22] Section 146 of the Negotiable Instruments Act, 1881 reads "146. Bank's slip *prima facie* evidence of certain facts. The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.
Whereas section 4 of the Bankers Books Evidence Act, 1891 reads "4. Mode of proof of entries in bankers books.- Subject to the provisions of this Act, a certified copy of any entry in a bankers book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

dishonour of a particular cheque but with regard to the reason for its dishonour as well.

Perusal of both above referred provisions reveal that what the legislature in this 21st century has put on statute book stood engrafted in the 19th century itself. This is done without any acknowledgement of the earlier provision by the present legislators. Would it not be cheating on the part of Indian legislators *vis-à-vis* their predecessors, the English Legislators. It is submitted that though the provisions of Bankers Books Evidence Act, 1891 applies with full force to the proceedings under Section 138 of the Negotiable Instruments Act, 1881, still if any need was felt, the provisions of the Act of 1891 could have been expressly made applicable to section 138 of the 1881 Act without repetition and without befooling the subjects.

J. Offences to be Compoundable

Section 147 of the Negotiable Instruments Act, 1881 is simply redundant for the reason that what can be done by litigants without there being any expressed provisions, the articulation of provisions to such effect would reveal unnecessary painstaking efforts on the part of the legislature. It is submitted that while studying the decided cases during the non-doctrinal research by the present author,[23] where almost all cases were decided on the basis of compromise, nothing was found to have stopped either of the parties to litigation or even the Court from summing up the matter on settlement of claim to the satisfaction of both the parties. And the compounding of offence also is permissible only on the settlement of claim to the satisfaction of both the parties. If that be so, what specialty this provision has been put with on the statute book is not understandable.

III. Conclusion

In sum and substance, careful perusal of the articulation and insertion of new provisions in this recent amendment[24] reveals that they all are eye-wash as some are not practical or in alternative they are not practically accepted by the Courts, and other provisions are meaninglessly repetition of the already engrafted and very well established canons of law.

Further, in view of the non-doctrinal research made by the present author[25] the ground reality proves to be otherwise, that is, that in spite of these recent amendments, delay is the culprit and the cheques remains only victim of delay. To say the least, it has been brought to the notice of the present author that Courts of Judicial Magistrates at District Courts in Delhi in November, 2008 gave dates of Mid-2010 that too in the private matters with respect to dishonour of cheques involving hafty amount.[26]

[23] *Supra* note. 13.
[24] Vide Act No. 55 of 2002.
[25] *Supra* note. 13.
[26] Ref. Cause List dated 19-11-08 of the Court of Shri Vishal Singh, Metropolitan Magistrate, posted at Rohini District Courts, Delhi.

VISHAKA AND THEREAFTER: A CRITIQUE OF THE FOLLOW UP ACTION

*Ritu Gupta**

I. Introduction

> "[I]t is the Executive's failure to perform its duty and the notorious tardiness of legislatures that impels judicial activism and provides its motivation and legitimacy. When gross violations of human rights are brought to its notice, the judiciary cannot procrastinate. It must respond."[1]
>
> *Soli J. Sorabjee*

The above quoted extract aptly applies to the nightmarish and infamous Bhanwari Devi case that made the Supreme Court (hereinafter referred as the Court) to come forward and deliver the *Vishaka*[2] judgment (hereinafter referred to as Vishaka) in 1997 on the issue of sexual harassment of women at workplace. Until then, the issue was fraught with unending complexities mainly due to lack of a precise definition and jugglery of a bucketful of outdated laws *sans* any specific provision or legislation to deal with it. Understanding about the problem was blurred to the extent that harassment of this nature was never interpreted as gender discrimination or a violation of the human rights of women.

II. Historical Importance

Though there had been few notable judgments[3] earlier that pinned down and brought to the fore the existence of this problem, for the first time in the Indian judicial history, the Court in *Vishaka,* recognized sexual harassment at work place as a 'recurring' phenomenon. It is the first ever judicial recognition of a woman's reality where by virtue of her gender, she becomes more vulnerable to sexually offensive behavior. By viewing sexual harassment as a gender specific discrimination in *Vishaka*, the Court creatively expanded the scope and understanding of human rights traversing the existing interpretation limited to political prisoners, prisoners of war or torture victims, by stating that such violations should be brought within the purview of human rights law. The Court also referred to articles 51(c), 73, 253 and entry 14 of the Union List in the Seventh Schedule of the Constitution along with the definition of human rights in section 2(d) of the Protection of Human Rights Act, 1993 and certain provisions of CEDAW.[4] In view of the appalling paucity of

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[1] Cited in Katju, Markandey J., *Law in the Scientific Era: The Theory of Dynamic Positivism* 104 (Universal, 2000).
[2] *Vishaka* v. *State of Rajasthan,* (1997) 6 SCC 241.
[3] See *Radha Bai* v.*Union Territory of Pondicherry,* AIR 1995 SC 1476; *Rupan Deol Bajaj* v. *KPS Gill,* AIR 1996 SC 309.
[4] Convention on the Elimination of all Forms of Discrimination Against Women, 1979 (adopted by General Assembly on 18 December 1979).

legislative references to counteract sexual harassment at work places and considering that enactment of such legislations may take time, the Court acting under article 142 of the Constitution[5], provided certain guidelines and an enforceable set of rules as a 'stop-gap arrangement.'

Vishaka is, indeed, unique in many ways. Such judicial articulation paves the path not only by bringing sexual harassment within the framework of human rights but also by shifting the focus of gender violence from a criminal wrong to a discriminatory conduct that violates a woman's basic human rights. The Court not only acted as the active guardian of fundamental rights but also provided temporary respite to working women. The guidelines extended the responsibility to eliminate discriminatory sexual conduct to a larger society, in this case, the workplace and obligated the employer to ensure a safe and healthy environment for women employees. The main aim of the Court, while evolving these guidelines, was to ensure a fair, secure and comfortable work environment to the extent possible, and also, to eliminate situations where the protector could abuse his position and turn predator.

Vishaka was a quantum leap in expanding the '*principle of fairness in procedure*' after *Maneka Gandhi*[6] where the Court, for the first time, had observed that the right to equality would also include the right not to be treated in an arbitrary manner. After 1978, probably it was for the first time in 1997, in *Vishaka,* the 'principle of fair and just procedure' was expanded further to include a 'gender just' procedure in furtherance of the constitutional goals of equality.

In its quest to doubly ensure a safe and protective work environment, the Court went a step ahead in *Apparel Export Promotion Council* v. *A. K. Chopra*[7], when it held that even an attempt to molest would amount to sexual harassment[8]. The Court stated that the behavior of the accused did not cease to be outrageous for want of an actual assault or touch by the superior officer. Referring to the definition of sexual harassment provided in the guidelines laid down in *Vishaka*, it observed that in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities and not get swayed by insignificant discrepancies or narrow technicalities or by dictionary meaning of the expression molestation. The Court went on to say that such cases are required to be dealt with greater sensitivity. It noticed that the High Court in this case had not considered the fact that the actions of the accused were not only against moral sanctions and decency but were also offensive to the modesty of the victim. In view

[5] Art. 142(1) of the Constitution provides that the SC in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

[6] *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597.

[7] *Apparel Export Promotion Council* v. *A.K. Chopra*, AIR 1999 SC 625.

[8] *Id.*, at 634, para. 29

of the above considerations the Court held that the act of the perpetrator was unbecoming of good conduct and undoubtedly amounted to sexual harassment. [9]

III. Follow Up of Vishaka by Various High Courts

It was in *Saudi Arabia Airlines,*[10] probably for the first time, that any High Court applied the Court's guidelines with regard to sexual harassment at workplace.

B.N. Srikrishna J. of the Bombay High Court (as he then was) observed that the alleged conduct[11] would squarely fit in with the concept of sexual harassment as defined by the Court. Shehnaz became the first employee to win a legal battle in a Labour Court against her employers on the grounds of sexual harassment[12]. This judgment aptly illustrates that a typical case of sexual harassment may include both '*quid pro quo*' and 'hostile work environment' elements.

The Court's decision in *Vishaka* and *A.K.Chopra*[13] were followed by various High Courts in a number of cases on this sensitive issue. A Division Bench of the Allahabad High Court in one such case held that the conduct of the petitioner, including disgusting immoral remarks, was deplorable and could not be condoned and therefore, the sexual harassment committee had acted leniently by merely ordering compulsory retirement instead of dismissal, which he deserved.[14] The Madras High Court upheld the punishment of dismissal awarded in a case of misbehaviour, with a superior lady officer by the petitioner.[15] The Calcutta High Court dismissed the appeal of Albert Davit Ltd, the employer in this case, for allowing it to proceed with the departmental enquiry against Ms Anuradha Chaudhary during the pendency of criminal proceedings in the court.[16]

In yet another recent case of sexual harassment, the *doctrine of proportionality* was applied in a converse manner.[17] In this case, the departmental enquiry committee had imposed a penalty of dismissal upon L.R.Saxena, Dairy Supervisor for sexually harassing a female employee since, in its opinion, such an act was unbecoming of good behavior expected from a superior officer and any lenient action would have a demoralizing effect on the working of women in the

[9] *Ibid.*

[10] *Saudi Arabian Airlines, Mumbai* v. *Shehnaz Mudbhalkal,* (1999) 2 LLJ 109 (Bom.).

[11] Shehnaz Mudbhatkal was employed with the Saudi Arabia Airlines (SAA) as Secretary to the Station Manager who made repeated attempts to transgress the limits of healthy working relationship. He made indecent and objectionable personal remarks against her. Her polite rebuff offended her boss and he started harassing her systematically. She was advised by higher authorities not to make an issue of the incident as it would harm her job and reputation as well as prestige of the SAA. She fought a long legal battle against her employer and finally won the case.

[12] *Shehnaz Mudbhalkal* v. *Saudi Arabian Airlines, Mumbai First Labour Court, Mumbai,* dated 16th April, 1996, made in Reference (IDA) No. 439 of 1986.

[13] *Supra* note 7

[14] *R.B.S. Chauhan* v. *Reserve Bank of India,* (2003) 2 LLJ 634 (per Katju J.).

[15] *Jawahar Khalifulla* v. *Deputy Commissioner of Labour* (2002) 3 L.L.N. 1090 (per Y. Venkatachalam, J.).

[16] *Albert Davit Ltd.* v. *Anuradha Chaudhary and ors.*, (2004) III LLJ 608 (Cal) (per Asit Kumar Bisi and S. Banerjea, JJ.). In this case Ms. Anuradha Chaudhary secured a temporary injunction from the lower court restraining the defendants from proceeding with the departmental enquiry that were initiated against her after she complained of sexual harassment and the criminal proceedings were pending in the court.

[17] *Samridhi Devi* v. *Union of India,* (2005) 125 DLT 284 (per S. Ravindra Bhat, J.).

organization. The appellate authority converted the penalty of dismissal to compulsory retirement from service. The petitioner under article 226, called into question the order of appellate authority being inadequate and not proportionate to the gravity of the proved misconduct involving attempted sexual assault upon her and outraging her modesty.

The Delhi High Court refused to confine the application of the proportionality doctrine only to the cases of excessive penalties. In the words of Bhat J., "the discourse of rights and obligations of employers and co-workers sans *Vishaka* and *A. K. Chopra*[18] could conceivably have confined the proportionality doctrine in its application to excessive penalties. Those two decisions, and the ensuing legal obligations, have injected a radical shift or change in law. Just as a complainant employee might claim no response to her representations, allege illegality in not initiating action as per the decisions and approach the court for appropriate directions, there could possibly be situations where the course of proceedings, or the propriety of orders passed in such proceedings, can be the subject matter of judicial review. If in such cases, proceedings under article 226 would be an appropriate remedy, the changed circumstances warranting a fresh interpretation, nay, application of the proportionality doctrine, cannot be ruled out."[19] Bhat J. referred to few U.S. cases[20] wherein, it has been ruled that appropriate remedial and corrective action includes measures reasonably calculated to end current harassment and to deter future harassment from the same or other offenders. Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment. Employers have a duty to express strong disapproval of sexual harassment and to impose appropriate punishment. The adequacy of the employer's response would depend on the seriousness of the sexual harassment.[21] Concluding that the impugned order was disproportionate, it was held that "it is also important to display sensitivity while considering appropriate penalty for a proved misconduct of sexual harassment. The measure adopted by the employer has to not merely be subjective unlike other instances of misconduct; it serves a wider purpose of assuring a safe workplace, and signals the willingness of the employer to address such issues with seriousness and promptitude. This consideration can not be overlooked in such cases."[22]

In yet another case, a letter written by Medha Kotwal of Aalochana (an NGO) on sexual harassment of a student by a professor, was considered sympathetically and converted into a writ petition by the Court.[23] In this case, the Court took cognizance and undertook to monitor the implementation of *Vishaka* guidelines across the country. All state governments were directed to file respective affidavits stating the steps taken by them to implement those guidelines. The Court then asked the petitioners and other organizations to file a rejoinder detailing the

[18] *Supra* note 7.
[19] *Supra* note 17.
[20] *Ellison* v. *Brady*, 924 F. 2d 872 (1991); *Fuller* v. *City of Oakland*, 47 F. 3d 1522 (1995); *Yamaguchi* v. *Widnall*, 109F. 3d 1475 (1997).
[21] *Supra* note 17.
[22] *Ibid.*
[23] *Medha Kotwal Lele and ors.* v. *Union of India*, 2004 (5) SCALE 573.

changes/additions that they want in the guidelines. Expressing grave concern over non-implementation of its judgment relating to sexual harassment at workplace, the Court directed the chief secretaries of all the states to inform it whether they have set up committees in all the departments and institutions, having over fifty staff members to deal with such complaints.

A series of consultations were organized by various NGO's working in this area to ensure national participation so as to create awareness amongst masses and further strengthen implementation of the guidelines. It was in the wake of these efforts that the Court passed two very significant interim orders in the matter. In the first, the Court issued notices to various professional bodies, asking them to produce detailed reports about the steps taken by them towards the implementation of *Vishaka* guidelines. In the second order, which came in May 2004, the Court said that the complaints committee under *Vishaka* were to be the disciplinary body in cases of sexual harassment and that the enquiry as conducted by the complaints committee would be final. The Solicitor General of India made a statement on behalf of the Central Government before the Court that they were extremely serious in getting a law passed on the subject and sought time for the same. Pursuant to the guidelines in *Vishaka*, the Central Civil Services (Conduct) Rules, 1964 were amended in 1998 to incorporate rule 3C[24] which prohibits sexual harassment of working women.

IV. Scope of 'Workplace' Expanded

In *Vishaka*, the Court did not attempt to define the term 'work place' and neither did the National Commission for Women explain its meaning in its Conduct Rules drafted by it in the wake of *Vishaka* guidelines.

As per the dictionary meaning, "Workplace is a person's place of employment of work setting in general."[25] Place of employment is further defined as the location at which work done in connection with a business is carried out; the place where some process or operation related to the business is conducted[26].

The Delhi High Court held that having regard to the objective with which *Vishaka* was decided, a definition of 'work place' should not have to be narrowed down but should be construed liberally in its applicability. It was to be interpreted for achievement of the objects sought to be fulfilled, namely, to protect working women from sexual harassment. The prevention of sexual harassment of working women in all workplaces was with a purpose that by sexual harassment no reasonable apprehension should be borne in the mind of the victim in relation to the victim's employment or work and that "an employment and work when connected with a conjunction 'or' gives it a wider scope and has to be liberally construed for

[24] Central Civil Services (Conduct) Rules 1964, Rule 3C reads: (1) No government servant shall indulge in any act of sexual harassment of any woman at her work place. (2) Every government servant who is in-charge of a work place shall take appropriate steps to prevent sexual harassment to any woman at such work place.
Though not mentioned categorically, this rule invariably applies to all women, whether working in a government set up or coming in contact with government office/officials.
[25] Black's Law Dictionary, 1638 (Thomsan West, 8th Ed., 2004).
[26] *Id.*, at 1187.

achieving the object, i.e. to prevent sexual harassment of working women.[27] The Delhi High Court approved the test laid down by Comptroller and Auditor General of India, that proximity from the place of work and control of the management over such residence with further rider that such residence has to be an extension or a contiguous part of the working place, to come within the ambit of workplace. Any incident of sexual harassment would *ipso facto* bring it within the definition as if the misconduct of sexual harassment has taken place in the workplace. Any extension of place of work or any institution whether a hostel or a mess where the employer has control over management would be treated as workplace by giving a wider connotation to the expression.[28]

The definition of workplace cannot be generalized to include all residences within the meaning and ambit of workplace, at it may lead to absurdity but parameters to determine a particular place is workplace may include the following:

(a) Proximity from the place of work;

(b) Control of management over such place/residence where working woman is residing; and

(c) Such a 'residence' has to be an extension or contiguous part of working place.

As mentioned above, it is quite difficult to define the term 'workplace' in straight jacket, and that it would be determined in the facts and circumstances of each and every case, as to whether a particular place where the alleged incident happened can be treated as workplace or not.[29]

The High Court approved the test laid down by the Comptroller and Auditor General of India that proximity from the place of work and controls of the management over such residence and such residence has to be an extension or a contiguous part of the working place to come within the ambit of workplace.

V. Implementation of The Guidelines : An Unfinished Agenda

Despite the immense contributions of the various High Courts in carrying the baton forward, there still remains a wide gap between *de jure* and *de facto* situations as far as the implementation of the guidelines is concerned. To begin with, only a few institutions have taken the directions of the Court seriously and acted accordingly. Majority of the organisations, be it public or private, have failed to set up complaints committee as contemplated in *Visakha*. Employers at the workplaces are required to publicize the *Visakha* judgment or any policy of their organization and create awareness about it, which is either not done or only lip

[27] *Saurabh Kumar Mullick* v. *The Comptroller and Auditor General of India*, (2008) 151 DLT 261 (per Arjun Sikri and Vipin Sanghi, JJ.).

[28] *Ibid.*

[29] *Supra* note 26.

service is provided. Reason may be because they themselves are hardly aware of any law or judgment on the issue. Those who are aware and courageous had to take up cudgels for the constitution of the committee. Invariably, the first battle for any woman complaining of sexual harassment is to get the institution to constitute a complaints committee as stipulated.

VI. Proposed Legislation : A Critique

The Protection of Women Against Sexual Harassment at Work Place Bill, 2010 is brought with further improvements, modifications and more lucid and effective objectives[30]. Unlike previous Bills,[31] this Bill defines 'sexual harassment' in a more wholesome and comprehensive manner. The improved definitions in the Bill symbolize how constant toil, relentless efforts by activist organizations, NGO's and government departments, suggestions and comments of public spirited persons along with the precedents of Apex Court can impact in drafting a meaningful legislation.

This model draft appears to be in tandem with the needs of the present day society and the changed workplace equations. Moreover, the Bill symbolizes India's commitments under CEDAW and its acceptance, if made, of the recognition of women's basic rights as human rights that was included in the Vienna Accord, 1994 and the Beijing Women's Conference, 1995. This Bill is, unlike its predecessors, objective, comprehensive and precise. It is divided into four chapters that comprise of a total of 22 sections. The objective of the Bill is to provide redress to those women who may face any kind of sexual harassment at their workplace and related matters. Certain grey areas of the Bill are:

(i) Though the Bill includes students in educational and research institutions, patients in hospitals, and customers in banks it does so in a peripheral manner and does not focus on them. Thus, there is scope to amend the definition further, so encompass these crucial segments that do not get adequate coverage.

(ii) The Bill mentions establishing an Internal Complaints Committee (ICC)[32] at the workplace, with a senior level woman to be appointed as the chairperson, from amongst employees and in case such a person is not available, the chairperson will be appointed from a sister organization or a

[30] It was introduced in the Lok Sabha on 7/12/2010, see www.wcd.nic.in (February 22, 2011).

[31] After the *Vishaka* judgment, The National Human Rights Commission along with various women activist groups came up with their report that still many organizations did not have a complaint committees to embark upon the tackling the problem of sexual harassment. To consider and clarify these issues, the Commission convened meetings with various departments of the Government like the Department of Personnel and Training (DOPT), Educational Departments/institutions like the Department of Secondary and Higher of India besides meetings with the legal fraternity guidelines. The National Commission for women drafted Code of Conduct at Workplace. The Department of Women and Child Development, through an order dated 08 June 2001, constituted a Committee to monitor the implementation of the guidelines laid down by the Court in the *Vishaka* judgment. In 2003, the National Commission for women drafted *'Sexual Harassment of Women at their Work Place (Prevention) Bill, 2003'* and then modified it in 2005. After various consultations the 'Sexual Harassment at Work Place Bill 2010' came in its present form.

[32] S. 4.

NGO. This is an objectionable and debatable provision since it conveys the impression that only women are capable of arbitrating complaints of sexual harassment and that men are inherently incapable, insensitive and biased to the cause of women. The provision must be amended and an impartial person of integrity must be the criteria for heading such a committee irrespective of the gender.

(iii) Clause 2(l)(iv) of the Bill appears quite ambiguous as it includes the phrase 'any place' which is of such wide amplitude and may bring market, third party's residence / work place or corridors of metro, airport, bus stop or railway station into its sweep[33]. This renders it rather impossible to establish or measure the extent of relationship and confuses the distinction between the harassment by employer or by any visitor at work place or any other place visited by the employee in the course of employment. To deal with such a sensitive issue, irrespective of the sex, persons with the right attitude and a rational approach are required to be in the complaints committee and probably that makes the difference between justice and injustice. Apart from this, those who are part of such complaints mechanisms should be put through attitudinal tests and gender orientation. The employer may circulate the names of the members of the committee and call for objections, if any, from the victim. The complainant should also be permitted to have someone whom she trusts on the committee.

(iv) The Bill mandates setting up of an ICC in all organizations under sec. 4 from within the organization. It is submitted that any committee or cell formed or headed by the member of the same organization may work towards suppressing the complaint. The person heading may never be free of prejudices. Further, the Bill makes no mention of what the committee's agenda is to be, how often it must meet. If there are no women in senior decision-making positions, then alternate option is not recommended.

(v) Sec. 4 (3) provides that the term of the chairperson must be for three years. This can be reduced to either one or two years so as to ensure transparency in the system. Chairpersons may be appointed by rotation from amongst various organizations in that area or any other criteria may be chosen. The said appointment may be subjected to the restriction that one may not enjoy two consecutive terms.

(vi) The Bill stipulates the constitution of a Local Complaints Committee (LCC)[34] in a block wherever 'at a workplace, constitution of the committee is not possible or practicable'.

(vii) The role of 'third party' has also not been clearly mentioned in the Bill. Third party harassment, ramifications of widening the definition on the phenomenon of third party harassment and extent of control of the employer

[33] S. 2(l)(iv) includes any place visited by the employee arising out of, or during and in the course of, employment.

[34] S. 6.

on such harassment should be analyzed. If during the discharge of duties of an employee, harassment from the third party is meted out, employers may be approached and they may issue possibly a warning.

(viii) The Bill, under section 8, provides for conciliation. This clause may provide an opportunity to the offender to pressurize the woman to withdraw or settle the issue. The conciliation to settle the matter between the woman and the respondent must not include monetary settlements. Ideally, only the judge, after due process, may impose a monetary settlement in the form of a fine or penalty. It has provisions to deduct from the salary or wages of respondent such sum of compensation to be paid to the aggrieved woman or to her legal heirs, or to direct the respondent to pay such compensation to the aggrieved woman.

(ix) To fight false allegations, a man may choose to press defamation charges. Verma J, the architect of the *Vishakha* guidelines, feels that these provisions in sec. 12 may render women even more vulnerable.[35]

(x) There is a lot of ambiguity between the civil and criminal procedure in the Bill in its present form. The nature and impact of the criminal penalties require further discussion, while the Bill also needs to explore civil law to mandate the participation of employers, organizations and trade unions. The Bill does not talk about the initiation of criminal proceedings by the employer against the guilty. The Bill also does not embolden the aggrieved woman to file a complaint as was envisaged initially.

(xi) Further the direct witnesses, if any, who saw the alleged odious conduct and persons with whom the victim may have spoken about the events at the time they occurred, must be told at the outset that they must keep the matter confidential.

(xii) The Bill must be revised to state clearly that, its violation will upshot a 'disciplinary action'.

(xiii) In many companies (workplace), the committees are a charade. Women hesitate to complain and even if they do, resolution takes so long that they eventually drop the proceedings.

(xiv) The legislation should incorporate provisions to form a sectoral tripartite board, where every employer and employee in the unorganised and the organised sector must register, so that if employees are unjustly treated, action may be taken against the employer.[36] Each board may have a separate complaints committee that may receive such complaints. The committee should be empowered to *suo motu* register the case.

[35] See J.S.Verma, second annual convention of Women Power Connect, http://www.indianexpress.com/news/harassment-Bill-loopholes-have-experts-upin/211038/ (February 22, 2011).

[36] In Tamil Nadu, several sectoral tripartite boards exist. However, they cover only some sections of unorganized labour.

(xv) In addition to the substantive aspects, certain procedural matters must also be considered. For example, absence of eyewitnesses or delay in filing the complaint or other technical hurdles should not be allowed to stand in the path of justice. Rather, the complaint must be viewed in the light of the culture of denial that shrouds the issue. Expanding the applicability and scope of coverage from a few illustrations to a whole possible range of incidents of harassment is needed.[37]

(xvi) The Bill proceeds on the footing that as soon as a complaint of sexual harassment is made, a full-fledged enquiry must follow. In most of the cases women may not want this and they may only want counseling services. The committee should sort out cases at times simply by sternly talking to the man or giving him a warning.

(xvii) The involvement of NGOs in the working of these committees is also not very clear. Nowhere any checks or balances, minimum criteria, background or regulatory mechanism of any kind is provided.

(xviii) The Bill only protects women against harassment by men. As women may also sexually harass men, and same sex harassment is also possible. It would be better to make the legislation gender-neutral.

A comprehensive legislation on this issue, if implemented and executed with true spirit and force, may prove to be a social welfare legislation as this would not be just like any other women related legislation but would facilitate the progress of the whole society. Moreover, this would not only blow a whistle for a long-term battle against sexual harassment but would help in fulfilling India's commitments under CEDAW. Also, care should be taken regarding the important elements identified by ILO that remain unaddressed in the proposed legislation such as burden of proof, protection against victimization or retaliation, deterrent provisions and supplemental guidelines.[38]

The increase in workload of the courts in implementing the new legislation and providing financial support to the judiciary are additional parameters that should be taken care of. Following three factors are required to be considered:[39]

(i) Requirement of additional money
(ii) Creation of more courts
(iii) Appointment of additional judges

[37] According to Women Power Connect (WPC), (an NGO, that is part of the core committee formed for making suggestions in the draft Bill). The Bill in its current form does not clearly state under what circumstances a woman may bring a charge of harassment. It describes a number of scenarios in which sexual harassment must not take place but fails to mention several others. An inclusive list is lacking. available at http://womenpowerconnect.org/focus_sexual_harassment.php (last accessed on 22.2.2011)

[38] Action against Sexual Harassment at Work in Asia and the Pacific-Technical Report for discussion at the ILO/ Japan Regional Tripartite Seminar, Panang, Malaysia, 2-4 October, 2001.

[39] This is part of the recommendations made by the taskforce on Judicial Impact Assessment (JIA) set up in 2007 as per the Supreme Court's order in *Salem Advocate*. The taskforce that submitted its report on June 15,2008 was headed by Justice M. Jagannath with Prof. Madhava Menon, Prof. Mohan Gopal and Prof. T.C.A. Anant serving as its members.

VII. The United States Experience

Section 703 of the Civil Rights Act, 1964 dealt with discrimination cases but many a time women victims of discrimination couldn't use it as a tool until the US Supreme Court in *Meritor Savings Bank*[40] formally recognised sexual harassment negatively impacting employment as sex discrimination. The Supreme Court elaborated further that the conduct must not be judged in isolation and should be analyzed by considering all relevant surrounding circumstances to determine whether the conduct is sufficiently "severe or pervasive". Further, the harassment must be viewed in the context of whether a reasonable person would find that the conduct created a hostile or abusive work environment. The Court of Appeals, relying upon the US Supreme Court's decision in *Haris*[41] stated that the frequency of the discriminatory conduct is simply one factor in the analysis, and not the only factor. Thus, the court held that a single incident of physically threatening conduct can never be sufficient to create an abusive environment. It should be seen whether the workplace is permeated with 'discriminatory intimidation, ridicule, and insult.'[42]

In the 1990s, the United States witnessed an increase in sexual harassment complaints. As the number of cases increased, in order to counter the situation more laws were created in order to set new precedents and protect individuals against sexual predators. A series of guidelines and judgments led to the legal recognition of equal employment opportunities for women at workplace by proscribing *quid pro quo* and a hostile work environment. Many cases, where high-profile public figures were involved, helped set new precedents for future sexual harassment cases in the U.S.

In *Burlington Industries*,[43] Kimberly Ellerth described the harassment as leaving her completely humiliated and embarrassed for no fault of hers. A victim of emotional and mental sexual harassment by her supervisor, Ellerth never experienced a professional setback or reported the incidents to anyone at work. The U.S. Supreme Court ruled "that workers can still bring sexual harassment cases against employers even if the harassment is not reported and the employee's career is never hurt."

In another incident, Justice Clarence Thomas, while he was nominated for the post of Judge in U.S. Supreme Court, was charged of sexual harassment by Anita Hill (who had once worked for him at the Equal Employment Opportunities Commission). Despite the allegations and investigation, Thomas got elected, to the U.S. Supreme Court.[44] *Oncale*[45] concerned a male oil-rig worker who spent periods of time on an oil platform in the Gulf of Mexico. In this case, Joseph Oncale was sodomized, threatened and humiliated by members of his crew. He

[40] *Meritor Savings Bank* v. *Vinson* 47 U.S. 57 (1986).

[41] *Haris* v. *Forklift Sys. Inc.*, 510 U.S. 17(1993).

[42] *Lockard* v. *Pizza Hut Inc.*, 1998 10th Cir. 1472; 162 F. 3d 1062.

[43] *Burlington Industries Inc.* v. *Ellerth*, 524 U.S. 742 (1998).

[44] A news report on the controversy is available at: www.cbsnews.com/storics/2010/10/20/national/main6975679.shtml (February 22, 2011).

[45] *Oncale* v. *Sundowner Offshore Services*, 523 U.S. 75 (1998).

reported the incidents, but no action was taken against the offenders, and Oncale "eventually quit - asking that his pink slip reflect that he 'voluntarily left due to sexual harassment and verbal abuse.'" Oncale filed a sexual harassment suit against his crew, but the District Court of Eastern Louisiana held that as a male, Oncale was not protected against the 1964 legislation that prohibits sexual harassment. After the decision was appealed to the U.S. Supreme Court, however, it was reversed by a 1998 ruling that declared that sexual harassment also "applied to harassment in the workplace between members of the same sex."

VIII. Attitudinal Change Required: Lessons From U.S. Experience

The above assessments reflect the sympathetic attitude of the United States judiciary towards the issue of sexual harassment and are comparable to the progressive steps taken by the judiciary in India. Since the workplace equations globally remains the same, strategy to resolve certain issues may be adopted taking into consideration the indigent constraints.

It may invariably transpire that though technically it is the man who is the accused, it is the woman who is actually put on trial if the complaint is addressed sympathetically. The Court in a large number of rape trials has recognized this, where it has held that it is necessary to depart from the established criminal justice system practices to ensure that justice is done to both, the victim and the accused. The departure from the traditional criminal jurisprudence may be with respect to discrediting the character of the victim or the prosecutrix (as she is commonly called in legal parlance). Earlier, courts always looked for corroboration of her testimony. However, of late, the Apex Court, in a series of judgments, held that corroboration was not a *sine qua non* for conviction in rape.[46] Expanding this logic further, it also held that even if a woman was a prostitute, it did not discredit her complaint of rape, because a prostitute too is entitled to her right to privacy.

In *Delhi Working Women's Forum,*[47] the Court pointed out the defects in the criminal justice system observing that court proceedings added to and prolonged the psychological stress on the rape victim. The Court agreed that a radical change in the attitude of defense counsel and judges is required. Continuing education programmes for judges should include re-education about sexual assault. It was pointed out that the changes that are required to make the justice system more victim-friendly are not structural but attitudinal. She is often treated as just another witness of the prosecution with no say in the proceedings. While this attitude would be accepted in regular criminal cases, it is not appropriate in cases of sexual assault.[48]

[46] *Bharwada Bhoginbhai Harijibhai* v. *State of Gujrat,* AIR 1983 SC 753; *State of Himachal Pradesh* v. *Raghubir Singh,* 1993(2) Crimes 887(SC).

[47] *Delhi Domestic Working Women's Forum* v. *Union of India,* (1995) 1 SCC 14.

[48] *State of Punjab* v. *Gurmit Singh* (1998) 2 SCC 384.

The purpose behind drawing an analogy with the US experience is that the complaints committees dealing with cases of sexual harassment should adopt similar approach. The victim should be given emotional support and legal as well as psychological assistance, to the extent possible. This will not, in any manner, hinder the path of the accused of getting a fair hearing as a gender just approach is in accordance with the constitutional mandate of equality and fair procedure. Unless all these measures are adopted to change the attitudes of members of complaints committees, justice in cases of sexual harassment will be a farce and not a reality.

IX. Conclusion

A strong policy level thrust must be made to make the implementation of the guidelines to prevent sexual harassment at workplace mandatory. The workplace must be supportive to women. Training sessions at workplaces will help in providing information to employers not only of their legal obligations to deal with sexual harassment.

The ministry should collect information from various corporate associations such as CII, and FICCI and other business associations to ensure that the guidelines are being implemented. Reports in the media show that sexual harassment within schools is also on the rise and that affects female students and teachers. Till legislation is enacted, the *Vishaka* guidelines should be implemented in such institutions as well. Education and other departments dealing with schools including teacher's union must ensure that such committees are set up in schools. Supervisors and other cadres must be sensitized. Ministry of Women and Child Development should coordinate with the Education Department on this issue.

As the old saying goes, "Prevention is better than cure"—preventive mechanisms at the work place always have an advantage over legislation, since measures that help to change behaviour and attitudes can help in preventing sexual harassment. Legislative measures, if accompanied by work place policies, would prove the most effective tool. Just like any other professional, occupational or workplace hazard, the employer should strive strategically to protect their employees against the hazards entailed by this multi- faceted work place syndrome. Every one at the work place should own the policy and the law should act as a background and framework.

To prevent sexual harassment at the work place, a more positive approach should be sought by developing departmental policies in every organization regarding review procedures for complaints. Conducting workshops, organizing seminars and conferences will go a long way in generating awareness about this problem and the same would act as a preventive measure in combating the problem. The focus should be on raising the consciousness and sensitivity towards the problem and the same should be executed by the managers and top officials.

Law alone is not enough to root out this social evil. A holistic approach towards the whole issue is the need of the hour. A multi-pronged strategy should be adopted to mitigate and gender sensitisation should take precedence and primacy over the complaint and punishment mechanism. Social movements and campaigns are necessary to solve this problem in the long run. Society has to change its attitude and extend a warm and hearty welcome to the women so that they can come out and participate in public life without any fear. The persons engaged at every step in the administration of criminal justice should be trained about various aspects and ramifications of such offences.

Moreover, adaptability is truly a condition *sine qua non* for the continued existence of a legal system.[49] When the behaviour of people has moved away from the law, with a degree of permanence, tensions arise with varying results. In such cases, the law itself may be stretched to take account of the development and "[I]n these ways, evolution gives direction to future development because the purpose of law is to secure justice and not merely to grapple with semantics."[50]

[49] R.M.W. Dias, *Jurisprudence* 305 (Butterworths, 4th Ed., 1994).

[50] J.S.Verma, "Foreword" in Markandey Katju, *Law in the Scientific Era: Theory of Dynamic Positivism* (Universal, 2000).

TRIAL BY MEDIA, CONTEMPT LAW AND THE RIGHT TO A FAIR TRIAL

Nina R. Nariman[*]

"Media is just a word that has come to mean bad journalism."

Graham Greene[1]

I. Introduction

A trial by media indicates a situation where in the media adopts an adjudicatory stance in the endeavour to determine a verdict on an issue which is *sub judice*. Certain quarters, however, have been critical towards a trial by media on the point that a case receiving high publicity must not result in the law being rendered in a manner unjust to the persons involved.[2] Although this is a fair observation, the term *trial by media* has lately been confused with *sting operations* conducted by the media on public functionaries. In this backdrop, this article goes to show that the negative association that lies with trial by media should not be confused with its more positive counterpart, the sting operation. Further exploration of this is done through examining two infamous cases – a case of trial by media rendering the trial court decision against one Mr. Sanjeev Nanda in the *BMW* case[3] unjust, and the famous exposé of his lawyer, Mr. R.K. Anand, through a sting operation.[4]

II. Liberty of the Press and the Constitution

Article 19(1)(a) of the Constitution of India, 1950 confers on citizens the fundamental right of freedom of speech and expression[5] and includes within it, the right to express one's convictions and opinions freely, by word of mouth, writing, printing or in any other manner, allowing thereby for the freedom of ideas, their publication and circulation.[6] However, this freedom is subject to certain reasonable restrictions enumerated in article 19(2), one of them being contempt of court.[7] The use of the word 'reasonable', it is submitted, indicates that unless there be a compelling need for curtailing this freedom, it should not be restricted. Further, as article 19(2) is an exception to article 19(1)(a), it follows by necessity that the latter is the more essential of the two, which implies that since freedom of the press

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[1] Graham Greene, *Ways of Escape* 201 (Penguin Books, 1st Ed., 1981).

[2] *A.K. Gopalan* v. *Noordeen*, (1970) 2 SCR 410 at 414; *Court On Its Own Motion* v. *State*, 151 (2008) DLT 695. See also, Law Commission of India, 200th *Report on Trial by Media* (August 2006)

[3] See *Sanjeev Nanda* v. *State*, 160 (2009) DLT 775.

[4] See *R. K. Anand* v. *Registrar, Delhi High Court*, (2009) 8 SCC 106.

[5] See also, Art. 19, Universal Declaration of Human Rights, 1948; Art. 1, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; Basic Principle 1, Madrid Principles on the Relationship Between the Media and Judicial Independence, 1994.

[6] *Life Insurance Corporation of India* v. *Manubhai D. Shah*, (1992) 3 SCR 595 at 609; *Secretary, Ministry of Information & Broadcasting* v. *Cricket Association of West Bengal*, (1995) 2 SCC 161; *Romesh Thapar* v. *State of Madras*, 1950 SCR 594; *Hamdard Dawakhana* v. *Union of India*, (1960) 2 SCR 671.

[7] A right to freedom of speech and expression is rarely absolute. See Jan R. Hakemulder, Fay Ac De Jonge and P. P. Singh, *Media, Ethics and Law* 254 (Anmol Publications, 1st Ed., 1998).

is an integral part of article 19(1)(a)[8], then this freedom cannot, and should not, be easily restricted.

III. Advantages of A Free Press

In 1994, the Supreme Court of India (SC) noted that 'there is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.'[9] It further emphasised that a free and healthy press is indispensable to the functioning of a true democracy.[10] In international jurisprudence, Justice Cooke of the New Zealand Court of Appeals[11] had posited that the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a *real likelihood* that the publication of material will seriously prejudice the fairness of the trial before contempt proceedings can take place.

A free press is indispensible to a democracy as large and vibrant as ours so that 'ideas might be developed freely, culture may be refined, and the ignorance or abuse of power may be controlled.'[12] The SC has shown that in cases of public scandals involving companies and the like, it is the duty of a free press to comment on such topics and draw the attention of the public. This would also hold true of attempts by the media to expose corruption in all walks of life. In the case of *Court on its Own Motion* v. *State*[13] recently affirmed by the SC[14], the lawyer R.K. Anand was found guilty of contempt of court for attempting to influence the outcome of a case relating to a motor accident of one Mr. Sanjeev Nanda. The press, by conducting a 'sting operation', caught him in the act of offering a bribe to the main witness in the case of *Sanjeev Nanda* v. *State*[15] which led to his conviction for contempt. While this sting operation was pilloried by the accused, the public at large celebrated this development as the heralding in of a new era of transparency in the legal system. Another instance showcasing the power of the media is the Campaign for Judicial Accountability and Reform[16], spearheaded by the press, which culminated in the disclosure of assets by judges of the SC.[17] This shows that the power of public opinion moulded by the press is formidable and should not be underestimated.[18]

[8] *Bennett Coleman & Co.* v. *Union of India*, AIR 1973 SC 106; *Express Newspapers* v. *Union of India*, 1959 SCR 12.

[9] *R. Rajagopal* v. *State of Tamil Nadu*, (1994) 6 SCC 632 at 651. See also, The Madrid Principles on the Relationship between the Media and Judicial Independence, 1994.

[10] *Indian Express Newspapers* v. *Union of India*, (1985) 1 SCC 641. See also, *In re Harijai Singh*, AIR 1997 SC 73.

[11] *Solicitor General* v. *Television New Zealand*, (1989) 1 NZ LR 1 (CA). See also, *Attorney General* v. *Sports Newspapers Ltd.*, (1992) 1 NZ LR 503.

[12] Mahoney, J. in *Ballina Shire* v. *Ringcarol*, (1994) 33 NSW LR 680 at 720. See also, *Hinch* v. *Attorney General*, (1987) 164 CLR 15 and the New South Wales Law Commission Discussion Paper, Number 43 on 'Contempt by Publication', 2000.

[13] 151 (2008) DLT 695.

[14] *Supra* note 4.

[15] 160 (2009) DLT 775.

[16] See http://judicialreforms.org/ (August 22, 2010).

[17] J. Venkatesan, "Supreme Court Judges Agree to Make Their Assets Public", The Hindu, 26 August 2009, http://beta.thehindu.com/news/national/article9774.ece (August 22, 2010).

[18] Similar observations were made in *D.N. Prasad* v. *Principal Secretary*, 2005 Cri LJ 1901.

The truth of Lord Atkin's oft-quoted statement, 'justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken, comments of ordinary men'[19] is seen in the laudable efforts of the press in introducing transparency into the system, showcasing the 'benefits of a free flow of information'.[20]

IV. The Law of Contempt in India: *Actio Non Datur Non Damnificato*[21]

The law of contempt is a valid restriction that can be imposed upon the freedom of speech and expression.[22] However, the freedom will prevail over contempt, unless it is substantial or committed *malafide*.[23] The question of what constitutes as an overreach of the freedom of speech by the press is a delicate one - there is a need to balance the two.[24] The freedom of the press is an integral part of article 19(1)(a). However, there have been regressive decisions which have attempted to curb this freedom under contempt law.[25]

In this regard, the test of 'compelling state interest'[26] as a means to ensure that the government does not arbitrarily encroach on citizens' fundamental rights could be utilised in the context of contempt by the press: when the right of the press under article 19(1)(a) and the restriction under article 19 (2) relating to contempt of court have to be balanced, a 'basic presumption in their (the media's) favour'[27] can be given. This was demonstrated by the SC in the *Reliance Petrochemicals* case[28] where the problem relating to pre-stoppage of newspaper articles for publication on matters of public importance which were *sub judice* was discussed. It was held that 'the people at large have a right to know in order to be able to take part in a participatory development in [...] democracy.'[29] This 'right to know' has been held to form a part of the fundamental rights in numerous cases[30], expanding the right of a free press in democratic society.

[19] See *Ambard* v. *Attorney General of Trinidad and Tobago*, AIR 1936 PC 141.

[20] Refer to Geoffrey Robertson and Andrew Nicol, *Media Law* 261 (3rd Ed., 1992).

[21] Meaning: 'An action is not given to one who is not injured'.

[22] See Art. 19(1)(a) and 19(2) of the Constitution. See also, *E.T. Sen (Brig.)* v. *E. Narayanan*, AIR 1969 Del 201 (DB).

[23] Jagadish Swarup and Vinod Swarup, *The Contempt of Courts Act, 1971* 75 (Wadhwa and Company, 1st Ed., 1990).

[24] See Samaraditya Pal, *The Law Of Contempt* 96 (Law Research Institute, Venus, 3rd Ed., 2001). See also, *EMS Namboodripad* v. *T.N. Nambiar*, AIR 1970 SC 2015 at 2019; *Subhash Chand* v. *S.M. Aggarwal*, 1984 Cr LJ 481 at 487 (Del).

[25] For instance, see *Ajit D. Padival* v. *State of Gujarat*, 1996 Lab IC 389 (tape recording of the court proceedings without its prior permission was held to amount to contempt).

[26] As discussed in *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 quoted in *People's Union for Civil Liberties* v. *Union of India*, AIR 2003 SC 2363 and *Naz Foundation* v. *Government of NCT Of Delhi*, 160 (2009) DLT 277.

[27] Preamble to the Madrid Principles on the Relationship Between the Media and Judicial Independence, 1994.

[28] *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers Bombay Ltd & Ors.*, (1988) 4 SCC 592.

[29] *Id.* at 594.

[30] For more on the 'right to know' see *State of UP* v. *Raj Narain*, (1975) 4 SCC 428; *S.P. Gupta* v. *Union of India*, (1981) Supp. SCC 87; *People's Union for Civil Liberties* v. *Union of India*, (2003) 4 SCC 399; *Union of India* v. *Association for Democratic Reforms*, (2002) 5 SCC 294.

Contempt as a restriction on the freedom of the press can be seen in the fact that not only is the writer of the offending article considered guilty of contempt, but so is the editor and publisher.[31] The rationale for this in the context of 'trial by media' is that the right of the accused to a fair trial should not be perturbed. However, it is submitted that the justification that the judge would be susceptible to a bias if the press publishes *any* material on a subject which is *sub judice*[32] is unfounded. As Justice Frankfurter of the Supreme Court of the United States of America[33] famously observed, 'no Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations.'

The argument against this school of thought was given by Justice Frankfurter himself – he went on to say that the 'pull of the unconscious' can be treacherous and must be guarded against by Judges. Another doyen of the same court, Justice Cardozo[34] had said, 'The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the Judges by', further substantiating this argument. However, this view has been implicitly rejected by our court in the *Reliance Petrochemicals case*,[35] where it was argued that the danger that a Judge is likely to be influenced by press publications is merely speculative and does not deserve to override right of freedom of the press. In fact in *Bridges* v. *California*[36], Justice Black of the United States' SC took it a step further holding that freedom of speech is not subject to the common law power to punish for contempt in the United States of America.

The courts in England and elsewhere have by and large held that judges would not be influenced by media publicity as they are to be assumed capable of resisting such temptation[37]: 'If the trial is to be by Jury, the possibility of prejudice by advance publicity directed to an issue which the Jury will have to decide is obvious. The possibility that a professional Judge will be influenced by anything is *much more remote* (*emphasis supplied*)'.[38] Thus, in systems where the jury still exists, the contempt jurisdiction is substantially relaxed when the matter goes on appeal.[39] To hold otherwise would be to undermine the confidence placed in the

[31] *In re Harijai Singh*, (1996) 6 SCC 466; *R* v. *Evening Standard*, (1924) 40 TLR 833; *R* v. *Odham's Press Ltd.*, (1957) 1 QB 73; *R* v. *Evening Standard Co. Ltd.*, (1957) 1 QB 578.

[32] As shown in *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers Bombay Ltd & Ors*, (1988) 4 SCC 592.

[33] In his dissent in *John D. Pennekamp* v. *State of Florida* (1946) 328 US 331 at 357.

[34] Justice Cardozo, *Nature of the Judicial Process*, 'Lecture IV, Adherence to Precedent. The Subconscious Element in the Judicial Process' (Yale University Press, 1st Ed., 1921).

[35] *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers Bombay Ltd & Ors*, (1988) 3 SCR Supp. 212 at 214.

[36] 314 US 252 at 262 (1941). See also, *Dagenais* v. *Canadian Broadcasting Corp* (1994) 94 CCC 3rd 289.

[37] *Attorney General* v. *British Broadcasting Company*, 1981 AC 303 (315) CA; The New South Wales Law Commission Discussion Paper, Number 43 on 'Contempt by Publication', 2000.

[38] *In Re Lonrho plc & Ors.*, (1989) 2 All ER 1100.

[39] Borris & Lowe, *The Contempt of Court* 161 (Butterworths, 3rd Ed., 1996).

judiciary as trained officers of the law. But, in a system such as ours, which has no jury system, the difficulty arises when one party acts *malafide* or attempts to subvert the judicial system by exerting public pressure on the court through the media. Thus, in a case like that of *Smt. Padmawati Debi Bhargava* v. *R.K. Karanjia*[40] where there were malicious assertions by the press with attempts to inflame communal feelings against an accused therein, the court would be justified in invoking contempt jurisdiction, but in the opinion of this author, not otherwise. The law as stated in *Leo Fray Ray's* case[41] appears to be the most satisfactory where in it was held that every theory put forward by the media should not attract the attention of the court.

A difficulty with the present contempt law in India arises in the fact that it amounts to contempt not only when a judge *will* be prejudiced, but also when actions of the alleged contemnor are such as would be *likely* to interfere in the administration of justice.[42] The doctrine of strict scrutiny, introduced by *Anuj Garg* v. *Hotel Association of India*[43] which requires that the effect of a legislation and not merely its purported objective is to be looked at in to determine whether the legislation violates a fundamental right, may be seen as a parallel to contempt law – the effect of the words of the alleged contemnor must be looked at, and not merely whether or not it would be *likely* to interfere with the administration of justice when the fundamental right to freedom of speech and expression is at stake. Further, the rationale behind the law of contempt in 'trial by media' cases is to protect the litigant from harm[44] and, therefore, it must logically follow that where there is no injury to the litigant, there should be no contempt, following the maxim *actio non datur non damnificato* (an action is not given to one who is not injured).

V. Trial By Media Versus Sting Operations

In *Re Harijai Singh*,[45] the SC emphasised that a free and healthy press is indispensable to the rule of law and observed:

> The freedom is not to be misunderstood as to be *a press free to disregard its duty* to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organized society, the rights of the press have to be recognised with its duties and responsibilities towards the society.

[40] AIR 1963 MP 61 (DB). See also, Borris & Lowe, *The Contempt of Court* 132 (Butterworths, 3rd Ed., 1996).

[41] *Leo Ray Frey* v. *R. Prasad*, AIR 1958 Punj 377. See also, *Sunday Times* v. *United Kingdom*, (1979) 2 EHRR 245 in appeal from *Attorney General* v. *Times Newspapers*, (1973) 3 All ER 54 (HL).

[42] See Sec. 2(c) (iii) of the Contempt of Courts Act, 1971.

[43] (2008) 3 SCC 1 cited in *Naz Foundation* v. *Government of NCT of Delhi*, 160 (2009) DLT 277, which is currently being appealed at the Supreme Court of India (*Suresh Kumar Kaushal* v. *Naz Foundation*, Special Leave Petition (Civil) No. 15436/2009).

[44] Geoffrey Robertson and Andrew Nicol, *Media Law* 262 (London, 3rd Ed., 1992). See also, Law Commission of India, *200th Report on Trial by Media* 120 (August 2006).

[45] AIR 1997 SC 73.

There is increasingly the idea that 'in the temptation to sell stories, what is presented is what "the public is interested in" rather than "what is in the public interest".'[46] That the press occasionally oversteps its limits is not in dispute; there have been instances where the press has been used to unfairly bias the outcome of proceedings or bring public pressure on the judiciary.[47] While the judiciary is supposed to be immune to such extraneous influences, it falls on the press to make sure that they maintain the professional standards expected of them and adhere to their code of ethics. The Press Council of India, in this regard, has the power to censure any member of the press if standards of professional ethics are not maintained.[48]

In *Sanjeev Nanda* v. *State*[49] the appellant, belonging to an affluent family, found himself in what is popularly known as a 'BMW hit and run' case. Here, the appellant in an inebriated state caused the death of 6 persons while rashly driving his BMW car. Additionally, he was accused of fleeing the scene of the crime and attempting to destroy the evidence.[50] The media, highlighting the plight of the innocent victims, raised considerable public outrage against the accused. The trial court succumbing to the public pressure created by the press, erroneously convicted him for culpable homicide not amounting to murder[51] instead of death by negligence.[52] Although the Delhi High Court corrected this error, the case goes to highlight the negative impact that a trial by media can have on the proceedings of the accused.

However, it is necessary to state that the benefits which flow from the freedom of the press often outweigh the negative impact, as shown in *R.K. Anand's* case[53] – here the media played an important role in exposing gross professional misconduct committed, ironically, in relation to the *Sanjeev Nanda case.*[54] In this case, R.K. Anand, was filmed by the media while attempting to bribe a key witness, Mr. Kulkarni, in the case of his client, Sanjeev Nanda. This 'Sting Operation' was showcased on the News channel NDTV, and bolstered the cynical view that the rich could bribe their way out of any charge in criminal prosecutions. The Delhi High Court, being shocked by this footage, issued *suo motu* criminal contempt of court proceedings against R.K. Anand. The SC upheld the judgment of the High Court holding R.K. Anand guilty, correctly refuting the defence that this was not a trial by media, and lauded the efforts of the press by saying that the sting operation 'served an important public cause.'[55]

[46] *Mother Dairy Foods & Processing Ltd* v. *Zee Telefilms*, Interim Application No. 8185/2003 in Suit No. 1543/2003, Judgment of the Delhi High Court dated 24 January 2005 in Samaraditya Pal, *The Law of Contempt* (Law Research Institute, Venus, 3rd Ed., 2001).

[47] *M.P. Lohia* v. *State of West Bengal*, (2005) 2 SCC 686; *State of Maharashtra* v. *Rajendra Jawanmal Gandhi*, (1997) 8 SCC 386; *Padmavati Debi Bhargava* v. *R.K. Karanjia*, AIR 1963 MP 61.

[48] See Sec. 14 of the Press Council Act, 1978.

[49] *Sanjeev Nanda* v. *State*, 160 (2009) DLT 775.

[50] An offence punishable under Section 201, Indian Penal Code, 1860 (IPC)

[51] Sec. 304 (II), IPC

[52] Sec. 304-A, IPC

[53] *R. K. Anand* v. *Registrar, Delhi High Court*, (2009) 8 SCC 106.

[54] *Mr. Sanjeev Nanda* v. *State*, 160 (2009) DLT 775.

[55] *R. K. Anand* v. *Registrar, Delhi High Court*, (2009) 8 SCC 106 at para. 179.

VI. Balancing the Right to a Fair Trial with the Freedom of the Press

The right that is infringed upon when journalists indulge in 'trials by media' is the right of an accused to a fair trial, which is a fundamental right guaranteed by the Constitution.[56] Thus, the right of a litigant to a fair trial[57] has to be balanced with the freedom of the press to report on subjects of public interest.[58] A number of judgments of the Supreme Court and High Courts of India have gone to show that a substantial interference with fair trial will not be tolerated.[59]

An incidental right to the right to a fair trial is that of the presumption of innocence until proven guilty.[60] International agreements further supplement this principle.[61] *M.P. Lohia* v. *State of West Bengal*[62] is a case where the presumption of innocence was violated by the media in India. In that case, bail was not granted by the lower court due to the negative publicity given in the newspapers which highlighted only one aspect of the case. Deprecating this practice of the media, the SC observed, 'these types of articles appearing in the media would certainly interfere with the course of administration of justice.'[63] The publication of information regarding witnesses is another aspect of media publicity that has come under criticism – with the disclosure of the identity of the witness, there can be a danger of the witnesses coming under pressure both from the accused or his associates as well as from the police.[64]

It is pertinent to note at this juncture that the starting point for interference with the due course of justice and the right to a fair trial has been shown to be the point at which a person is arrested.[65] Thus, after the arrest of a person, the media is permitted to report on the progress of the case, but should not *interfere* with the proceedings. In the words of Lord Reid[66], 'If ... the mass media are allowed to judge, unpopular people and unpopular causes will fare very badly.'

[56] See *Maneka Gandhi* v. *Union of India*, (1978) 2 SCR 621 at 658; *T. Nagappa* v. *Y.R. Muralidhar*, (2008) 5 SCC 633.

[57] The right to a fair trial has been reiterated in a number of international documents including Art. 10, Universal Declaration of Human Rights, 1948 and Art.10, International Covenant on Civil and Political Rights, 1966.

[58] As seen in *A. K. Gopalan* v. *Noordeen*, (1970) 2 SCR 410 at 414

[59] See for instance, *Anukul Chandra Pradhan* v. *Union of India*, (1996) 6 SCC 354; *Rev. Father Sebastian Onamkulam* v. *K. Karunakaran*, AIR 1967 Ker 177 (DB); *Saibal* v. *B.K. Sen*, AIR 1961 SC 633.

[60] See *Anukul Chandra Pradhan* v. *Union of India*, (1996) 6 SCC 354; *Chandrappa* v. *State of Karnataka*, (2007) 4 *SCC* 415. See also, *Miles* v. *U.S.*, 218 US (1881); *Davis* v. *U.S.*, 160 US 304 (1895); *Leland* v. *Oregon*, 343 US 790 (1952) for the U.S. law on the subject.

[61] See Art. 11 (1), Universal Declaration of Human Rights, 1948; Art. 14 (2), International Covenant on Civil and Political Rights, 1966; Art. 6 (2), European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; Basic Principle 1, Madrid Principles on the Relationship Between the Media and Judicial Independence, 1994.

[62] (2005) 2 SCC 686.

[63] *Id.* at para. 10.

[64] See Law Commission of India, *200th Report on Trial by Media* 16 (August 2006).

[65] The Sanyal Committee Report, 1963 at Chapter VI.

[66] In *Attorney General* v. *Times Newspapers Ltd.*, 1974 AC 273 : (1973) 3 All ER 54 (HL).

There are decisions of the courts of foreign countries which take the same view as the Indian courts – the right to a fair trial must not be subverted in the name of the freedom of the press.[67] Chief Justice Eichelbaum of the New Zealand High Court had shown[68] that 'in the event of conflict between the concept of freedom of speech and the requirements of a fair trial, all other things being equal, the latter should prevail." This appears to be the view of the Indian courts as well. However, it is necessary to sound a note of caution: prohibitions on the freedom of the press should be confined to the bare minimum necessary to eliminate substantial risk of prejudice.[69] In the words of eminent authors Robertson and Nicol[70], 'though some restrictions on a free press are called for in the interest of a fair trial, such restrictions must not be excessive or disproportionate.'

VII. Conclusion

The media has tremendous constructive and destructive potential – while it can affect the rights of the individual negatively, the positive impact of dissemination of information by the media in society cannot be ignored. These two sides of the same coin are demonstrated best by comparing the two facets of Sanjeev Nanda's trial: on the one hand the publicity of the accident which led to the arguable conviction of the accused for the offence of culpable homicide not amounting to murder under section 304, Part II, IPC, which on appeal was altered to causing death by rash and negligent act under section 304A IPC by the Delhi High Court,[71] while on the other is the expos*ition* of the corruption of R.K. Anand,[72] Sanjeev Nanda's lawyer, which led to greater transparency and an increase of professional accountability in the legal system. On balance, it seems that the benefits of a free press in democracy would outweigh the negative impact that such freedom can have, for as Bentham observed that "in the darkness of secrecy sinister interest, and evil in every shape, have full swing. [...] Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all safeguards against improbity."[73]

With this in mind it is hoped that the courts in India will not readily exercise their inherent powers of contempt where the great institution of a free press is in peril.

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[67] *Solicitor General* v. *Wellington Newspapers Ltd.*, (1995) 1 NZ LR 45; *Hinch* v. *Attorney General (Victoria)*, (1987) 164 CLR 15; *Gisborne Herald Co Ltd* v. *Solicitor-General* (1995) 3 NZLR 563, 569 CA; *Attorney-General* v. *Tonks* [1934] NZLR 141; *Solicitor-General* v. *Television New Zealand*, [1989] 1 NZLR 1. See also, Law Officers of the Crown, New Zealand, *Contempt and the Media: Constitutional Safeguard or State Censorship?*, CLO Publication, 1998, http://www.crownlaw.govt.nz/uploads/Contempt.pdf (22 August 2010).

[68] In *Solicitor General* v. *Wellington Newspapers Ltd.*, (1995) 1 NZLR 45 at 48.

[69] See The Australian Law Reform Commission, Report No. 35 on *Contempt*, (1987) at 247, http://www.austlii.edu.au/au/other/alrc/publications/reports/35/35.pdf (August 22, 2010).

[70] Geoffrey Robertson and Andrew Nicol, *Media Law* 261-2 (3rd Ed., 1992).

[71] *Sanjeev Nanda* v. *State*, 160 (2009) DLT 775.

[72] *R.K. Anand* v. *Registrar, Delhi High Court*, (2009) 8 SCC 106.

[73] Quoted in Robert Martin and Gordon Stuart Adam, *A Sourcebook of Canadian Media Law* 262 (Carleton University Press, 2nd Ed., 1994) and *Naresh Shridhar* v. *State of Maharashtra*, (1966) 3 SCR 744 at 755.

VICTIMIZATION IN GUANTANAMO - A CRITICAL ANALYSIS OF THE MILITARY TRIALS OF DETAINEES

*A. Jauhar**

I. Introduction

Guantanamo Bay, initially used to house the Cuban and Haitian refugees, captured while fleeing on the high seas, was reopened in 2002 and was brought under the direct control of the Joint Task Force Guantanamo. The facility initially reopened with three main camps in the base – Camp Delta, Camp Iguana and the now shutdown, Camp X, and housed hundreds of captured and war-hardened, alleged Taliban and *Al-Qaida* mercenaries, on the account of interrogation and investigation whom the US has categorized as 'Unlawful Enemy Combatants'. The detention facility has sparked major global altercations and heated debates with regard to the constitutional and fundamental rights being denied to the prisoners incarcerated in the facility.[1]

The issue with regards to the Guantanamo Bay controversy is one that has been alluded to in major political sections time and again from its re-inception in 2002. The major view, which now receives an almost global acknowledgment, is that the inception of this detention facility for imprisoning militant (and other progeny off-shoots') members is an abuse of the judicial and military processes. The determination of the status of the detainees, and the subsequent incarceration and interrogation, oft in furtherance of executive orders has posed a daunting threat of growing transgressions of allocated authorities.

In November 2001, in the aftermath of the 9/11 attacks, the President of the United States had in an executive order declared that certain non-citizens of the US were to be tried by special military commissions.[2] After the reopening of Guantanamo in 2002, the ambit of the said order was to extend even to the inmates at the facility.

The procedure of the military commissions established under the executive order was at variance from that followed in usual judicial and court martial trials.

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[1] A strong challenge has been posed to the categorical denial of rights such as those of filing a writ of *habeas corpus*. Even the United States Supreme Court has ruled in favor of securing this crucial right for the detainees and declaring the provision of the Military Commission Act, 2005 as unconstitutional. See, *infra* note 42.

[2] On 13.11.2001 the President announced that certain non-citizens would be subject to detention and trial by military authorities. Non citizens who are believed to be, or to have been, members of the *Al-Qaida* organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States or its citizens, or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission.

To highlight a few aberrations – under the said commissions the detainees were not provided civil attorneys of their choice, unlike in a normal trial; also they were denied access to certain evidence to be adduced in court against them; evidence extracted by use of illicit techniques was permissible if the same was procured before the passage of the Detainee Treatment Act, 2005; and acquittal of a detainee might not result in his release.

After the United States Supreme Court held these commissions, and the power of the executive to establish them, as unconstitutional, the Congress passed the Military Commissions Act of 2006[3] to circumvent this judicial impediment. The statute has attracted numerous arguments against its draconian provisions[4], primarily the denial of rights under the Geneva Convention[5] and the quashing, and prospective impermissibility, of all *habeas corpus* petitions.[6] The statute permits the establishment and use of military commissions to try 'unlawful enemy combatants'.[7] Section 948 defines an unlawful enemy combatant as it as:

> "The term 'unlawful enemy combatant' means —
>
> (i) A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, *Al-Qaida*, or associated forces); or
>
> (ii) A person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."

[3] The United States Military Commissions Act (also known as HR-6166) was passed and assented by President George W. Bush on 17.10.2006. The legislation emerged in the background of the US Supreme Court decision barring the application of military commissions to try detainees in Guantanamo Bay.

[4] The statute does not permit a regular civil attorneys to argue as the defendants' representatives unless found eligible to gain access to classified information; conviction can take place with a two-third majority in lieu of the usual 'unanimous verdict'; the President can breach provisions of the Geneva Conventions (though not substantially), to impress a higher standard of administrative regulation.

[5] Sec. 948b (g) - Geneva Conventions Not Establishing Source of Rights— No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

[6] No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories. [Act sec. 5(a)]

[7] The term 'Unlawful Enemy Combatants' has been used deliberately by the United States so as to ensure that the mandate under the Third Geneva Convention, which deals with the rights of 'Prisoners of War', can be obviated with respect to Guantanamo Bay inmates. The US had set up the 'Combatant Status Review Tribunals' to determine, and to provide a forum for objecting to such determination, if a detainee can be claimed to be an 'Enemy Combatant' or not.

The procedures governing the functions of the commissions are in concurrence with general court martial provisions under the UCMJ; however, certain significant alterations have been adopted.[8]

II. The UN Declaration on Basic Principles of Justice for Victims

The 1985 General Assembly of the United Nations adopted the UN Declaration on Victims (hereinafter referred to as the Declaration)[9], is a worthy attempt to secure the ends of inclusive justice for all victims of crime and abuse of power.[10] The Declaration endeavors to persuade member nations to establish domestic institutions which, *inter alia,* observe the numerous obligations and priorities highlighted in it.

Though not of a legally binding nature, the Declaration lays down the minimum standards for victims of crime and abuse of power and has significantly forged the *Magna Carta* for international victims. It sets up an important benchmark for victim-friendly legislations and policies. The Declaration seeks to redress the plight of victims by ensuring the engineering of a just and efficacious legal system. However, a hampered efficacy emerges primarily because of cursory lip service that has been attached to the legislative implementation of these principles; nonetheless, progress appears to have finally set in motion with a few vital international instruments having come into existence.[11]

The Declaration calls upon member states of the UN to take the necessary steps to ensure efficacious and justiciable solutions for victims of crimes and abuse of power. The principles enshrined in a codified manner in the UN Draft Convention on Victims seek to fulfill these objectives.[12] The Declaration articulates provisions to victims of crimes and abuse of power, including activities of terrorism. To the same, provisions endow certain legal rights and remedies.[13] The members have

[8] Provisions regarding speedy trial in court materials, those dealing with compulsory self incrimination and pretrial investigation [Sec. 948b. (d) (1)].

[9] The United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly Res. 40/34).

[10] Even the Draft Convention framed to codify the provisions of the Declaration, categorically enlarges the scope of the provisions to all victims of crimes against state laws or abuse of power [article 2(a) of the Draft Convention].

[11] In the recent years several new international treaties have been adopted and to a certain extent guarantee the basic minimum rights as envisaged by the UN Declaration on Victims. Major instruments in these include the United Nations Convention against Transnational Organized Crime and the EU Framework Decision on the Standing Victims in Criminal Proceedings (2001/200/jHA). In respect of justice for victims of abuse of power, the UN General Assembly has through a subsequent resolution, adopted the Declaration for victims of violation of International Human Rights and Humanitarian Law; *Infra* note xv.

[12] The UN Draft Convention on Justice for Victims stipulates the fulfillment of these objectives in its preamble. The instrument emphatically acknowledges the misery of millions of people, 'including women and children', who suffer throughout as victims of crimes or abuse of power and even acts of terrorism. It exhibits the supreme importance of restorative justice with these victims and endeavors to achieve this goal.

[13] The Declaration incorporates provisions insinuating the need of member nations to domestically provide a free, fair and expeditious judicial mechanism for redressing the grievances of the victims. The Resolution of the General Assembly adopting the Declaration (GA Res. 40/34) also lays down the objective of a periodic reviewal of existing laws by member states to upkeep them in consonance with contemporary human rights.

made steady progress in implementing the provisions for victims of abuse of power distinctly from those which are meant for victims of conventional crimes. In fact, the UN General Assembly, through the subsequent adoption of another resolution has set another set of primary guidelines for victims of abuse of power.[14]

III. Guantanamo Bay – The Controversies in Question

Conceptually, abuse of power refers to effectively exercising a power with *mala fide* and ill intent.[15] The power abused can be from any of the organs of the government – be it the legislature, the executive or the judiciary. An improper treatment or use, an abuse of civil rights; or of the natural privileges and advantages, can be named as few specimens of power abuse. This part will assess how the entire detention and military trials of the 'enemy combatants'[16] in Guantanamo proceeds to be an abuse of power, thus, victimizing the incarcerated detainees.[17]

The actions of the United States government indicate a departure from principles of international law and humanitarian laws. The entire process of imprisoning detainees in the camps has sparked major global altercations and heated debates with regard to the basic human rights being denied to the prisoners held in the facility. The controversy looms over the ill-fated lifestyle and living conditions of the detainees and from the denial of decent conditions for survival to the detainees. It is mandatory under international war laws and humanitarian laws that every detaining power ensures and ascertains prohibition of any degrading and contemptuous acts that may be potentially threatening to the detainees, in most cases physically. The alleged Taliban and *Al-Qaida* mercenaries have been compelled to reside in chain-linked cages, insufficient even to protect the prisoners from rain, wind and extreme heat or cold temperatures.[18] According to accounts, the detainees are blindfolded while being moved around in the facility; they are in most cases denied any communication rights in groups greater than those of 2-3 persons; the reason forwarded for imposing such absurd constraints is that such isolation compels prisoners and improves their willingness to be interrogated.

[14] UN GA Res. 60/147: Basic Principles and guidelines on the Right to Remedy and Reparation of for Victims of Violations of International Human Rights and Humanitarian law.

[15] The term abuse of power essentially connotes the misuse of a power vested in a person (thereby distinguishing it from 'usurpation of power') in contravention to the law. See *Black's Law Dictionary* 11 (5th Ed., 1979).

[16] According to Donald Rumsfeld, the detainees, "....will be handled not as prisoners of war, because they are not, but as unlawful combatants." The US Government has perpetually and unequivocally denied the grant of a 'POW' status to the detainees, thereby breaching provisions of the Geneva Conventions 'legitimately'.

[17] The ACUL (American Congress of Union Liberties) has addressed the same as one of the top ten abuses of power by the US government since 9/11. For further information see *www.aclu.org/safefree/general/26684res20060906.html (April 25, 2011).*

[18] The Geneva Convention requires that bare minimum livable conditions be available for every detainee or prisoner as might have been captured and held by the detaining power. These conditions, among other things, include basic shelter, food, clothing and medical attention Jamie Fellner, the Director of the Human Rights' Watch U.S. Programme has even described the cage-cells as a 'scandal' 'Human Rights Watch, *U.S. Geneva Conventions Apply to Guantanamo Detainees*'.

There has also been a spate in the allegations regarding involvement of high ranking officials of the prison cells indulging in physically and psychologically virulent acts.[19] While interrogating, several degrading methods of physical torture are used – familiar amongst these being shock rooms,[20] water boarding[21] and hanging of prisoners by the walls at a stretch, sometimes for as long as 3-4 days, forced injections and degenerating and cheap antics signifying religious persecution[22] have also been alleged in certain cases.

The passage of the Detainees Treatment Act, 2005[23] has done little to mitigate the problems faced by the prisoners in Guantanamo. For instance, all interrogating organizations, excluding those under the Department of Defense, have the liberty to determine if a particular technique is violative of the standard of the legislation.[24] Also with the restraint on the detainee's capacity to institute a *habeas corpus* writ petition or any other civil remedy, the legislation fails to provide them with an alternative adequate remedy.[25] Critics say these two actions deflate the Detainee Treatment Act from having any real teeth to curb torture in the detention facilities, and these were the true reasons why President Bush and McCain 'conceded' to Congressional demands.

The imprisonment of the detainees is not the only action violative of international law. In November 2001, the then President of the United States, George W. Bush, enforced an executive order under which unlawful enemy combatants were to be tried by military commissions established under the said order.[26] The said military commissions had numerous distinctions compared to normal court

[19] IANS, "PM's Daughter Exposes Torture in US Jails Abroad", *The Times of India* (October 25, 2007).

[20] Shock rooms consist of a technique of subjecting the prisoner to rapid and extreme changes in temperature thus, causing extreme physical discomfiture. In these the prisoners are clamped together in a room. Then very hot and cold air is pumped inside periodically and without pause.

[21] The Waterboard technique is one that is practiced most frequently without any compunction. In this the prisoner is subjected to periodic experiences of drowning. A tub of water is brought and his head is pushed and kept in it for a stretch of 50-70 seconds or more. This process is repeated at regular intervals.

[22] Former Guantánamo detainee Murat Kurnaz, released on 24.08.2006, alleges mistreatment and torture. "When none of these torture methods worked, they applied psychological torture. They threw the Qur'an to the floor and kicked it around, throwing it in the toilet. They were playing Adhan along with other music and dancing to it. They made religious insults."

[23] The DTA prohibits the ill treatment of prisoners, including prisoners at Guantanamo Bay; requires military interrogations to be performed according to the U.S. Army Field Manual for Human Intelligence Collector Operations; and strips federal courts of jurisdiction to consider habeas corpus petitions filed by prisoners in Guantanamo, or other claims asserted by Guantanamo detainees against the U.S. government.

[24] This provision therefore, leaves organizations like the CIA out of the purview of the provision stipulating only the use of Field Manual techniques. When an amendment to repudiate this exception was introduced in the Congress eminent Congressmen including former Presidential candidate John McCain (Republican) insisted that the President use his veto to overrule the amendment.

[25] This was a primary reason why the US Supreme Court held this provision to be unconstitutional in negating rights of prisoners.

[26] On 13.11.2001 the President announced that certain non-citizens would be subject to detention and trial by military authorities. Non citizens who are believed to be, or to have been, members of the *Al- Qaida* organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States or its citizens, or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission.

proceedings.[27] The Military Commissions and the executive's authority to establish them were challenged in *Hamdan* v. *Rumsfeld*.[28] Pursuant to a Joint Resolution of the Congress conferring 'all powers on the President to use necessary force against all nations, organizations and individuals who planned, authorized or committed the September 11 attacks', the US and NATO initiated an offense in Afghanistan. The petitioner Salim Hamdan, a Yemeni national, was apprehended by the local militia assisting the alliance in its onslaught and handed over to the Joint Forces, from where he was transported to Guantanamo Bay in 2002. A year later the then President of the US, George W. Bush, found him eligible to be tried by a military commission as per the November 2001 executive order. The United States Supreme Court ruled against the government's decision to proceed with military commissions to try the detainees.[29]

In a historical decision, the Supreme Court observed numerous infirmities in the proceedings of these said military commissions which were in breach of the UCMJ and the Geneva Conventions.[30] Therefore, the Court held that the aforementioned commissions 'lack the power to proceed because of the structure and procedures, both of which violate the UCMJ and the Geneva Conventions.[31] The Court also declared that the executive [President] lacks the authority to constitute such commissions and the same had to be backed, if so, by a Congressional statute. This was determined by a cogent construction of *Ex-parte Quirin*[32] where in the Court agreed that Military Commissions could possess concurrent jurisdictions against offenders and war criminals, however, only if the same is provided for statutorily or under the general tenets of laws of war.

To circumvent this judicial impediment the Congress passed the Military Commissions Act of 2006.[33] To state pithily, the statute has attracted numerous arguments against its draconian provisions, primarily the denial of rights under the

[27] The two parallel justice systems are the Judicial Branch of the US Government, and a slightly streamlined justice system named the UCMJ (Uniform Code of Military Justice) for people under military jurisdiction.

[28] Hamdan, a Yemeni national, was captured and transferred to Guantanamo. The President found him eligible for trial under the military commissions established for trying unlawful enemy combatants. He challenged the said proceedings as the same were in violation of basic tenets of military and international war laws; and no common law principles on war or US legislation backed the proceedings of these 'tribunals'.

[29] *Hamdan* v. *Rumsfeld, Secretary of Defense*. 542 U.S. 547.

[30] In *Hamdan*, Justice Stevens, while delivering the majority verdict in favor of the Appellant, stated that the precedent set in *Ex Parte Quirin* (317 U.S. 1) that the Congress had preserved a general Constitutional power vested in the President to invoke military commissions when necessary, however not in violation of basic constitutional liberties and principles of law of war. He further held that the current military commissions, and also the others convened in Guantanamo, were out of line as far the Geneva Conventions and lacked any backing through a Congressional statute.

[31] Justice Stevens for the majority (5-3), quoting the judgment.

[32] 317 U.S. 1.

[33] The United States Military Commissions Act (also known as HR-6166) was passed and assented by President George W. Bush on 17.10.206. The legislation emerged in the background of the US Supreme court decision barring the application of military commissions to try detainees in Guantanamo Bay.

Geneva Convention[34] and the quashing and prospective impermissibility of all *habeas corpus* petitions.[35] In addition to this, the procedural distinctions legitimized by the statute provide little scope for an unprejudiced trial for the detainees. To name a few anomalies and aberrations from regular judicial or court martial proceedings, the military commissions:

(i) Do not permit the representation through a regular civilian attorney unless he has been determined to be eligible for access to classified information.[36] Unlike a normal trial where the accused is guaranteed a right of determining his counsel the MCA, 2006 categorically negates the same.

(ii) A detainee can be convicted by a two-thirds majority rather than a unanimous verdict which underlies an ordinary trial.[37] The rule contravenes normal trial proceedings under which anything less than a unanimous decision by the jury of peers can result in a mistrial.

(iii) No invocation of any of the rights under the Geneva Convention. The Geneva Conventions, especially the Third Geneva Convention, are considered as crucial documents underlying International war laws and International Humanitarian Laws. The rights guaranteed under the same are to be observed by all signatories in their practices.

(iv) Quashing of existing *habeas corpus petitions* and no redressal for future petitions.[38] The right to file a *habeas corpus* petition is a constitutionally secured fundamental right which sees its origins under the English common law system.[39] It essentially fetters the power of the executive to detain any individual illicitly.

[34] S. 948b(g) of Geneva Conventions Not Establishing Source of Rights—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

[35] No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories. [Act s. 5(a)].

[36] 10 U.S.C. s. 949c(b)(3)(D).

[37] 10 U.S.C. s. 949m(a).

[38] The '*habeas corpus*' provisions stipulate, "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

[39] See Justice Kennedy's majority opinion in *Boumediene* v. *Bush*, 553 U.S. 2008. The Hon'ble Justice elaborates on the origins of the *Habeas Corpus* in the due process clause of the Magna Carta of 1215.

(v) The President is empowered to breach the provisions of the Geneva Convention (subsequently breaching vital war laws) and impose higher standards and administrative regulations.[40]

The Supreme Court has ruled the provision of the statute, providing for quashing of all existing *habeas corpus* petitions, as unconstitutional.[41] The Supreme Court of the United States ruled in *Boumediene* v. *Bush* that the MCA constituted an, 'unconstitutional encroachment of *Habeas Corpus* rights, and established jurisdiction for federal courts to hear petitions for habeas corpus from Guantanamo detainees tried under the Act.' In this case, Lakhdar Boumediene, a Bosnian citizen detained in Guantanamo Bay, filed a writ petition before a civilian court challenging his incarceration and the constitutional legitimacy of the MCA, 2006. The court stated that the lack of any significant alternative solutions to *habeas corpus* and an absolute prohibition against the courts' jurisdiction to address such cases placed the MCA, 2006 on a different setting than other statutes[42] which only regulated the functioning of *habeas corpus*. In view of such distinction and legal and constitutional infirmities the Court struck down the provision barring review of *habeas corpus* petitions as unconstitutional.

IV. Interface Between Power Abuse and Victimization in Guantanamo

The situation arising in Guantanamo military trials and interrogations are stark specimens of how the power constitutionally vested in the executive and legislative organs of the government can be exploited virulently. A deeper understanding of this crisis can be appreciated when one peruses the myriad of judgments (especially from the United States Supreme Court) thwarting these vile attempts of the government. Chronologically speaking, from the very passage of the November 2001 executive order and the re-inception of the detention facility in Guanatanmo Bay, the three organs of the United States, namely, the judiciary on the one hand and the executive and legislature on the other, have locked horns. The US Supreme Court has repeatedly and emphatically stated the need and legitimacy for according constitutional and fundamental rights to all detainees in Guantanamo.[43] Also to be noted is the executive order passed in January 2009,[44] under which the current President of the United States, Barack Obama, has resolutely called for the

[40] Act sec. 6(a)(3)(A).

[41] *Boumediene* v. *Bush*, 553 U.S. 2008. The writ petition challenged the constitutionality of the Military Commissions Act, 2006 (MCA) under which the detainees in Guantanamo had no recourse to file a *habeas corpus* petition. In a majority of 5-4 the US Supreme Court, overruling the Federal Court's decision, ruled in favor of the Petitioner and held the MCA unconstitutional to the extent it denied the Constitutional Right to the detainees.

[42] The Court disagreed with the Government when it attempted to project the provision similar to the one under the Antiterrorism and Effective Death Penalty Act, 1996 wherein there existed no absolute limitation on the functioning of *Habeas Corpus* but only imposed certain procedural limitations.

[43] See *Rasul* v. *Bush* wherein the US Supreme Court while distinguishing between the *Johnson* and the present case determined that US had *de facto* jurisdiction over Guantanamo Bay in Cuba and thus, the Constitutional rights were to be accorded to the prisoners.

[44] *Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of the Detention Facilities*. A complete text of the order is availab' · for public access on http:/ /www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/.

temporary yet immediate abeyance of the military commissions. The executive order expressly stipulates the review of the disposition of the remaining detainees in the Guantanamo facility. In the follow up to this order, the United States has hailed its first trial in an open court of a detainee from Guantanamo Bay.[45]

The common argument that stems from these illustrations of legal infractions both under international and municipal (US) law, is that the power exercised by President Bush, along with the Congress' endorsement has to be viewed as an abuse of both executive and legislative powers. The office of the President is a constitutional position and hence, derives its authority and obligations under the constitution. Therefore, the foremost onus on the President is to ensure the upkeep of constitutionalism and the rule of law. Subversion or circumspection of the same which ultimately beleaguer the spirit of the Constitution, are actions which are to be admonished and undone. By passing an executive order which unequivocally denies the constitutional right of *habeas corpus*, the President has very much effectuated an act of abuse of power.

The actions of the executive are not only in breach of municipal (constitutional) provisions but even international war laws and international humanitarian laws. The ill treatment meted out to the detainees under the garb of interrogation measures severely depletes US credibility and its stance on human rights. Also the practical denial of a free trial under the Military Commissions Act, 2006 is in violation of international war laws and laws governing rights of war prisoners, especially the Geneva Convention.[46] This is in spite of the United States Constitution giving precedence to international law in situation of conflict between municipal and international law principles.[47] As one of the few countries proclaiming international law principles cardinal, the actions have patently belied the pompous claims of the US. As such, any actions, which are not in harmony with international law principles, can be considered to be violative of the constitutional mandate and therefore, tantamount to abuse of pow er. The repercussions of such power abuse can be felt directly by the detainees, whether through illicit incarceration and interrogation techniques or the proposed trial through these 'Military Commissions'. Instead of being empowered with the opportunity of compensation or restitution the prisoners are being tried by the aforementioned commissions which most certainly will deny them a fair trial. It is in light of this appalling travesty of justice that the author believes the UN Declaration can play a persuasive role.[48] The Declaration and the draft convention embody certain rights of a free and fair trial and also

[45] Ahmed K. Ghailani, a Tanzanian national held in Guantanamo, has been tried and subsequently acquitted by a federal court in New York. The defendant was charged with bombing of the US embassy in Dar es Salaam.

[46] In fact the MCA articulates the prohibition on invoking rights under the Geneva Convention.

[47] The United States is one of the few monistic nations of the world where precedence has always been accorded to international law principles.

[48] As stated above the GA Resolution 40/34 which led to the adoption of the UN Declaration on victims of crime and abuse of power, is yet to be ratified or accepted as a convention. Hence, technically the instrument remains nothing more than a persuasive text which should be incorporated in domestic and national legal systems.

guarantee compensatory and restoratory relieves to the victims, which need to be incorporated in domestic procedures. With the United States proclaiming itself to be the vanguard of democracy and the rule of law in the modern world, it is imperative that its municipal legislations affirm these solemn principles.

V. Conclusion

The question confronting us is bigger than the mere running or closure of a detention facility. The situation emerging in Guantanamo is only a specimen of a greater problem facing us. The crisis of terrorism today afflicts most of the nations and continents across the globe like a widespread pandemic. Its effects are catastrophic; its spread infinite.

With the aggressively expansive tentacles of this worldwide scourge, curtailment of its spread requires a careful understanding and progress. The entire notion of waging a global war against terrorism and its perpetuators is indeed *prima facie* a noble endeavor to upkeep the peace and security of the world. Unfortunately the global war against terrorism, in the response to an obfuscated judgment, has undone most of its benefits. The top United States military officials have repeatedly addressed Guantanamo, and other quintessential strategic debacles, as 'recruitment symbols'[49] which foster the groups and militias of *jihadists* across the globe and encourage a disturbingly higher rate of intake of volunteer *jihadis*.

However, when one observes the trend established in this war it confronts him with a stark, yet unacknowledged dilemma. Saladin, the Muslim king who won the Second Crusades (holy wars between the Christians and Muslims), on his last visit to Jerusalem before he died, had ominously told his son, 'Blood never sleeps'. The statement pithily connotes a most prudent advice; it is most unwise to wash a man's wound with his enemy's blood. To literally construe the same, the position adopted by the United States needs revisiting. It is an imperative need of the hour to ensure that the sentences or acquittals awarded to the said accused are meted out in a clear, transparent and unprejudiced manner. A major inescapable argument hovers over the fate of over 200 detainees held in the facility. The author believes, as has also been insinuated by the White House, that these prisoners may be accorded fully legitimate and acceptable trials in the United States courts and acquitted or convicted accordingly.

Perhaps an emulation of the laudable 'Nuremberg trials' can undo the severe loss of credibility that the current process faces. To construct this firm credibility over its actions undertaken in this war it needs to ensure that at least a modicum of legal and basic human rights prevail. Devoid of this humane facet the war has become more of an illegal occupation of alien land aggravating the miseries of civilians residing there and simultaneously, dangerously stoking violent passions against the alliance's actions. It is a strategic requisite that the United States must ensure.

[49] Admiral Mike Mullen, Chairman of the United States military's Joint Chiefs of Staff, has rallied behind President Obama's recent effort to close the infamous facility within one year. To read the complete article, see http://news.yahoo.com/s/nm/20090524/pl_nm/us_guantanamo_usa (April 25, 2011).

THE COMPETENCE OF INDIAN COPYRIGHT LAWS TO CONTROL AND PUNISH ONLINE COPYRIGHT INFRINGEMENT ON P2P AND BITTORRENT NETWORKS

*Abhinava Jayaswal**

I. Introduction

Evolution in spirit and shape has made man what he is today: the king of all species. Man's superior thinking and cognitive capabilities has changed the face of our planet and beyond. What gives the human an edge over other species is the ability to think and as well as create. Man not only gives birth to ideas but also express it by giving it a logical shape in the physical world. It is the creativity and innovativeness of ideas that gives thrust for achieving a better and advanced society. The originality of thought and expression is the vehicle which takes us forth on the road towards a better social, cultural, economic and political system of a country. This spirit of creativity and innovation must be respected as this is the force that leads to our evolution.

This is precisely the reason why society has an inherent habit to bestow status of property on the inventions, creations, ideas or knowledge of commercial values where it has put its efforts and labour. History reveals that creative activity has always been regarded as constituting a bond between the creator of the product and the product as created. The desire of mankind is to establish and maintain an intimate bond with its creations. This bond is sometimes preserved with a certain amount of obsession by scholars, musicians and other intellectuals who are unwilling to allow their own intellectual achievement or secret formula to pass out of the family. The reason of such obsession may be that they do not get any incentives for their creation.[1] "Intellectual property" is an intellectual work, produced by the intellect of human brain. It can be described as creations of the human mind, such as literary works produced by authors, musical work produced by the musicians, coining of trademarks used in course or trade, design of industrial products, etc. Although creations of intellect of human brain are as old as human civilisation, but the legal recognition of them as "property" is of modern origin.[2] The reason for legal recognition is logical. It is vital to reward and reinforce the brain behind the creation. A lot of effort, energy, money and time go into creating something tangible and useful for society. Therefore, it is the obligation of a sound legal system to protect the rights and interest of the creator or the holder of intellectual property rights, thus enabling him to get a return on his investment. It is important to protect the goose that lays the golden eggs.

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1 Runa M. Thakur, "Copyright in Musical and Cinematograph Works: How to Judge It", *Civil and Military Law Journal* 138 (2006).

2 Bhushan Tilak Kaul, "Copyright Protection: Some Hassles and Hurdles", *JILI* 236 (2004).

With the advancement of technology and having entered the 'digital age'[3] when we are reaping the rewards from the discovery and development of Internet, this great network of networks has posed a very serious danger to the sanctity intellectual property rights, especially the copyright[4].

Application of copyright law in cyberspace is elusive and perplexing. The World Wide Web has progressed far faster than the law and, as a result, courts are challenged to fill the evolving gap. Legislatures and courts battle in this growing area to maintain the free flow of information over the Internet, while also protecting the Intellectual property rights.[5] Infringement of copyright on cyberspace is rampant as many internet users are unaware that certain acts committed by them constitute infringement of copyright; others choose to ignore the fact that when they download photos, duplicate software, etc., and more importantly, when they download or share songs/videos using Peer to Peer (referred to as P2P) file sharing software, they are committing an illegal act.[6]

The article assesses the technology used in P2P networking, especially BitTorrents, throws light on some celebrated international cases concerning the subject of online copyright infringement, and then examines the provisions of the Copyright Act, 1957 and also the Copyright (Amendment) Bill, 2010 in the light of their competency to control and combat online infringement of copyright.

II. P2P File Sharing Technology

The P2P network is a great breakthrough in data-transfer technology. P2P network is defined as two or more computers connected by software, which enables the connected computers to transmit files or data to other connected computers. It describes applications in which users can use the Internet to exchange files with each other directly or through a mediating server. Thus, it is a type of transient Internet network that allows a group of computer users with the same networking program to connect with each other and directly access files from one another's hard drives. This means that it is a direct link; the file is being directly transferred from one computer to the other and is not going through any mediating server. P2P is a communications model in which each party has the same capabilities and either party can initiate a communication session. In some cases, P2P communications is implemented by giving each communication node both server and client capabilities. P2P was originally envisioned as a means to avoid the 'bottlenecks' that occur

[3] The term "Digital Age" is given by our economists and means the age of Internet, where any amount of data can be sent or received around the world at the speed of light. Digital age is the age of Information Technology.

[4] Sec. 14, Copyright Act, 1957 explains the meaning of 'Copyright'.

[5] See *Costar Group Inc., and Costar Realty Information, Inc.* v. *Loopnet, Inc.*, 2001 U.S. Dist. Lexis 15401 and Satvik Varma, "Beyond Napster – The Future of Online Copyright Law", *The Patents and Trade Marks Cases* 24 (2002).

[6] See John V. Pavlik, *New Media Technology* (1996), and Mohd. Fayaz Ali, "Copyright and P2P File Sharing – The Law Across Jurisdiction", *Madras Law Journal* 68 (2009)

when many users try to access a server at the same time. However, P2P technology did not become popular until Napster used it to facilitate file sharing.[7]

A user who has downloaded a P2P file-sharing software (Limewire, Kazaa, etc.) may request any file using the software (e.g. an audio album, movie), a search is then made among all the users using the same software and a list is provided to the requestor from which he can choose to download his preferred file. If the user chooses to download a copyrighted file, he commits an infringement under the copyright laws. Therefore, a P2P file sharing software which enables sharing of music online gravely endangers the economy and threatens the music industry to a great extent.[8]

The evolution of P2P technology began with a software developed by Shawn Fanning in 1999, called Napster. Napster was released as a centralized unstructured peer-to-peer system, requiring a central server for indexing and peer discovery. It is generally credited as being the first peer-to-peer file sharing system. The earliest case concerning the illegal distribution of songs through P2P networks was decided in *A&M Records* v. *Napster*.[9] Napster compiled a database of users from around the world and the music they had on their computer, which they were willing to share with others. Napster relied on a central server and was in a position to monitor copyright infringement by its users. *Thus, Napster did have knowledge of the infringing act which is a sufficient pre-requisite to constitute indirect copyright infringement*.[10] Thus, Napster was held liable for copyright infringement by U.S. Court of Appeal. Shortly after the loss in court, Napster blocked all copyright content from being downloaded. In July 2001, Napster shut down its network to comply with the injunction.

Gnutella, eDonkey 2000 and Freenet were released in 2000, as Napster was facing litigation. Gnutella was the first decentralized file sharing network. Gnutella, unlike Napster, had no central server to maintain a database of the music files available on the network. Also, Gnutella had many different client applications which could access the Gnutella network.

In March 2001, Kazaa and the FastTrack proprietary protocol are released by Niklas Zennström, Janus Friis, and Priit Kasesalu. The FastTrack protocol enables the software to detect and convert five or ten of the good quality computers sharing the file searched for from available 100 computers into *supernodes*[11], which perform the listing function. With Kazaa, users trade files through thousands of anonymous

[7] See Raman Mittal, "P2P Networks: Online Piracy of Music, Films and Computer Software", *Journal of Intellectual Property Rights* 440-46 (2004).

[8] Mohd. Fayaz Ali, "Copyright and P2P File Sharing–The Law Across Jurisdiction", *Madras Law Journal* 68-73 (2009).

[9] 239 F.3d 1004 (9th CIR. 2001).

[10] Colin Nasir, "Taming the Beast of File-sharing – Legal and Technological Solutions to the Problem of Copyright Infringement over the Internet: Part 1", *Entertainment Law Review* 1 (2005).

[11] A supernode is a modern computer with a broadband internet connection.

'supernodes.'[12] Legal action in the Netherlands forced an off shoring of the company, renamed Sharman Networks. In September 2003, the RIAA[13] filed suit against private individuals allegedly sharing files via Kazaa. In September 2005, *UMA* v. *Sharman*[14] ruled against Sharman by the Federal Court of Australia. Sharman's non-compliance prompted censorship of the program in Australia. In June 2006, the *MGM Studios, Inc.* v. *Grokster, Ltd*[15] caused Sharman to settle for $100 million and convert Kazaa to a legal-only file sharing program.

In April 2001, Morpheus was released by MusicCity (later StreamCast), after licensing the FastTrack protocol. MusicCity had previously operated OpenNap servers. Morpheus became a popular FastTrack client, with 4.5 million users, until licensing disputes and a protocol switch in February 2002. In March 2003, the Morpheus client was re-released to operate on Gnutella, using Gnucleus servant as its core. In June 2005, a redesigned Morpheus client was released. In June 2006, *M.G.M. Studios, Inc.* v. *Grokster, Ltd.* was decided against StreamCast. In June 2008, the Morpheus client became no longer available for download.[16]

The recorded music industry is currently in crisis; sales are down nearly 30% since 1999, and fell 7% in 2008 alone, after a century of nearly unstoppable growth.[17] The IFPI[18] has estimated that almost 20 billion songs were illegally downloaded in 2005.[19] Then there was another revolution in the P2P technology which changed the face of online file sharing drastically. It is called the BitTorrent protocol.

III. Bittorrent Protocol

In July 2001, Bram Cohen released the BitTorrent protocol. BitTorrent is one of the most common protocols for transferring large files. Ipoque, a German based company that specializes in developing bandwidth managing solutions for universities and ISPs has just released its 2008/2009 Internet traffic report. In total, over 1.3 petabytes of Internet traffic from several continents was analyzed. It is responsible for more than 45-78% of all P2P traffic, roughly 27-55% of all Internet traffic depending on geographical location.[20] There are numerous BitTorrent clients available for a variety of computing platforms.

[12] *Supra* note 7.
[13] RIAA stands for Recording Industry Association of America.
[14] FCA 1242 (5 September 2005).
[15] 545 US 2005.
[16] *Supra* note 11.
[17] See New York Times, "Music Industry Imitates Digital Pirates to Turn a Profit", http://www.nytimes.com/2009/01/19/business/worldbusiness/19digital.html?scp=music%20piracy&st=cse (April 25, 2011).
[18] International Federation of the Phonographic Industry.
[19] See IFPI Piracy Report (2006).
[20] See http://torrentfreak.com/bittorrent-still-king-of-p2p-traffic-090218 (April 25, 2011).

As with earlier file-sharing technology, BitTorrent is similar in that it allows users to connect directly with one another for online file-sharing purposes. However, it also differs in that each user of file (downloader) becomes a file/data supplier (uploader) himself. Thus, instead of merely requesting a download and downloading from the holder of the file, a user of BitTorrent also makes available to other users a copy of the file or part of the file the user has successfully downloaded. The technology effectively makes user a participant in the overall file-sharing load. Initiating BitTorrent requires one to create ".torrent" file. A ".torrent" file contains information such as the name of the file, its size, hashing information and the Uniform Resource Locator (URL) of the tracker. The ".torrent" file is then distributed to users via an e-mail or the file can be posted on a website or a web server. A tracker file maintains a log and coordinates information and activities of each BitTorrent user. It provides information such as the files each downloader is downloading, the contact addresses of downloaders who are downloading the same files and the pieces (packets of information) that each downloader possesses. The information provided by the tracker file enables the downloaders to track and to connect to each other. A file is made available only when a complete file known as 'the seed file', as opposed to a fragmented one, is uploaded. Downloading is by way of packet switching, where large files of music, software, films and games are broken down into smaller packets of information (fragments), which are sent from one computer to another. Where a number of computers are connected to the BitTorrent network, each downloader will receive fragments not only from the first uploader but also from other downloaders who are connected to the network. Users download missing fragments from each other and upload those fragments they already have to other users who request them. Users normally request from other users' file fragments that are the rarest and least available, thus avoiding bottlenecks. As such, the BitTorrent protocol makes each downloader of a file simultaneously an uploader. Once a downloader receives all the fragments to form the complete file, the packets are re-arranged automatically in the correct order. An important feature of BitTorrent is that a seed file is only available as long as the provider of the complete file (the seeder) remains connected to the system long enough for other users to complete the downloading of all fragments to the file. Any downloader who subsequently acquires a complete file becomes a seeder. Needless to say, as the BitTorrent protocol enables users to download files from each other rather than solely relying on the original seeder, this effectively reduces traffic and the bottleneck generated by the search/query response time, thus resulting in greater resilience and higher performance in downloading capacity.[21] Also, there exist private and independent BitTorrent networks called Darknets, which use invitation systems for limiting registrations. Private torrent sites typically record how much the registered users upload and download, and enforce a minimum upload-to-download ratio on each

[21] See Ong, R, "The war against P2P: Has it gone too far?", *International Journal of Intellectual Property Management* 26–43 (2008).

user. These ratio policies provide incentives to users to continue to seed files after downloading.[22]

IV. Legal Issues with Bittorrent

BitTorrent technology is a very clever data-transfer technology and has broken barriers. But the misuse of this technology has created a lot of controversy. The technology is being widely used to share copyrighted media/data which leads to infringement of the rights of the holder.

In an interview, Girish Kumar, managing director of Indian IT company Aiplex Software, told Australian newspaper the Sydney Morning Herald that his company was actively working for clients in the movie industry to launch attacks aimed at clobbering sites that failed to comply with take-down notices issued to companies suspected of infringing copyright. And while most of Kumar's business comes from India's Bollywood film industry, he revealed that key Hollywood players were in on the act too. "Most movies are released on Friday morning at 10am in India. The movie is released in the morning and by afternoon it's on the internet" - says Kumar.[23]

John Kennedy, Chairman and CEO of IFPI, had given evidence in the trial of The Pirate Bay, in Stockholm, outlining the "significant damage to the music industry as a whole" that the unauthorised service is causing. He said that the Pirate Bay had eroded legitimate music sales, harmed the environment for legitimate services, damaged the marketing plans of music companies and disrupted the flow of investment into new music. Kennedy said the Pirate Bay harms music copyright holders in a number of distinct ways. It deters people from buying music online, as well as new ventures and retailers wanting to enter the digital music market. There are also the wasted costs of marketing and of developing new artists, and a range of other costs, such as engineering and production.[24]

The technology itself is perfectly legal. But sharing and distribution of copyrighted material without the permission of author is illegal. A bittorent file can be seen as a link or very specific instruction of how to obtain something on the internet, sometimes illegal or copyrighted content. The degree to which this is illegal varies, but in genereal court decisions in various nations deem it illegal. Organisations like the RIAA and MPAA have waged a war against this anarchic infringement and have put tremendous legal pressure to shut down the BitTorrent trackers.

Like mushrooms after the rain, lawsuits against file-sharing users and services were initiated on a wide scale after the penetration of the file-sharing

[22] Chao Zhang, Prithula Dhungel, Di Wu, Zhengye Liu and Keith W. Ross, *BitTorrent Darknets*, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.157.7563&rep=rep1&type=pdf (April 25, 2011.)

[23] See http://www.thinq.co.uk/2010/9/9/hollywood-backs-dos-attacks-file-sharers/ (April 25, 2011).

[24] See http://www.ifpi.org/content/section_news/20090225a.html, (April 25, 2011).

phenomenon into the market. Throughout the years in which these lawsuits were carried out, scholars and activists pointed to their ineffectiveness, economic inefficiency and social harm. The lawsuits have nevertheless continued, as they were designed not to increase revenues as the critics assumed, but rather to fortify the ivory tower of the industry in the market of control.[25]

On June 19, 2008, Finland became the first European country where a judgment against the administrators of a file sharing service in a peer-to-peer (P2P) internet piracy case was handed down in a higher court, when Turku Court of Appeal affirmed the decision of the District Court of Turku which held the Finnish "Finreactor" BitTorrent-based P2P network illegal. The case dates back to December of the year 2004 when Finland's police raided the file sharing service.

The case involved more than 30 defendants and several well-known plaintiffs, such as Microsoft Corporation, Disney Enterprises Inc and Twentieth Century Fox Film Corporation. The reasons for such a high profile case may be found by studying the charges filed in the case, according to which the file sharing service under investigation had more than 10,000 registered users with the possibility to acquire copies of various copyrighted works, such as music, movies, computer games and computer programs, free of charge. The combined value of the unauthorised copies acquired by the Finreactor users was estimated to reach several million Euros.

The key question in the liability discussion was whether the administrators of a file sharing service should be held liable for the infringing use of the service while the copyrighted materials were uploaded and downloaded by the users themselves. Both instances of the courts did not hesitate with the question and concluded that the administrators had clearly been aware of the infringing uses and due to their active participation in the administration of the file sharing service by, e.g. controlling the upload ratio of the users, the administrators are to be held liable for the copyright infringements taking place within the service.

In addition to the Finreactor administrative level, a part of the users were prosecuted and sentenced in separate trials. As it would have been materially impossible to prosecute all of the 10,000 registered users, the criminal proceedings were focused on the "super users"—individual users had uploaded a large share of the infringing files made available.[26] One of the most popular early BitTorrent sites called Supernova.org was also shut down in December 2004, because of the pressure felt by Sloneck, founder and administrator of the website. The famous LokiTorrent

[25] See Lital Helman, "When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate", http://www.piercelaw.edu/assets/pdf/idea-vol50-no1-helman.pdf (April 25, 2011).

[26] Mikko Manner, "A BitTorrent P2P Network Shut Down and its Operation Deemed Illegal in Finland", *Entertainment Law Review*, 19, 21-24 (2009).

was also to follow a shut-down in February 2005 because of the legal crusade initiated by MPAA.[27] The webmaster, Edward Webber was also ordered by the court to pay a fine and supply the MPAA with the IP addresses of the visitors.

The Hong Kong case of *HKSAR* v. *Chan Nai-Ming*[28] (famously known as the 'Big Crook' case) is notable for being the first case in the world where a user of BitTorrent has been criminally prosecuted and given a custodial sentence.[29] On 17th April 2009, the District Court (*Tingsrätt*) of Stockholm, Sweden announced the verdict that the 3 owners of the infamous torrent tracking "Pirate Bay" website were all found guilty and sentenced to serve one year in prison and pay a fine of 30 million SEK (app. €2.7).The Pirate Bay trial was a joint criminal and civil prosecution.[30] The criminal charges were supported by a consortium of intellectual rights holders led by the IFPI, who filed individual civil compensation claims.[31]

V. Survey of Indian Copyright Law

The issue of online copyright infringement by P2P software providers has not yet been raised in any Judicial forum in India, but it must be noted that Indian Copyright Act,1957 does not contain any such strong provision to penalise or punish this decentralised online file sharing service provider for infringement of copyright. According to sec. 51,[32] in case any one does any thing the exclusive right to do which is by this Act conferred upon the owner of the copyright, his act amounts to infringement of copyright.

Section 14[33] deals with the exclusive rights of copyright holders which includes making copies of any work by using whatever medium, communicating the work to the public or issue copies of the work to fall within the domain of exclusive rights of a copyright owner. Therefore, issuing copies of work or communicating the same to the public amounts to infringement. So a person using a BitTorrent client to download copyrighted media or makes available to others by seeding it is violating the copyright. Downloading copyrighted content is basically reproducing the work without the consent of the copyright owner is guilty of copyright violation and one who makes the file available for download is basically issuing

[27] See MPAA closes Loki, visited at http://www.theregister.co.uk/2005/02/10/loki_down_mpaa/ (April 25, 2011).

[28] TMCC 1268/2005, http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=46722 (April 25, 2011).

[29] Michael Filby, *Big Crook in Little China: The Ramifications of the Hong Kong BitTorrent Case on the Criminal Test of Prejudicial Effect*, http://www.informaworld.com/smpp/content~db=all~content=a787639152, (April 25, 2011).

[30] Larsson, Linus, "Charges filed against the Pirate Bay four", http://www.idg.se/2.1085/1.143146 (April 25, 2011).

[31] Lindenberger, Michael A., "Internet pirates face walking the plank in Sweden", http://www.time.com/time/business/article/0,8599,1880981,00.html (April 25, 2011).

[32] Sec. 51, Copyright Act, 1957.

[33] Sec. 14, Copyright Act, 1957.

copies of copyrighted work or communicating to public[34]. Further, according to sec. 51(a) (ii),[35] in case a person permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement, he shall be liable for infringement of copyright. The expression any place could be well construed to mean virtual place as well. Thus, anyone using a P2P network to share or rather making illegal copies is guilty of copyright infringement.

Even if one takes the argument that a ".torrent" metafile doesn't contain the copyrighted content, he can be held liable for copyright infringement under sec. 63[36] which deals with criminal liability. Here, knowledge or *mens rea* is an essential ingredient of offence. The person creating a ".torrent" metafile is knowingly abetting in infringement of copyright.

Section 51 (b) (ii)[37] says that copyright is infringed if anyone distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright. Any person making available copyrighted works over a file sharing network may not be trading in the same, but he is nevertheless, distributing such work which combined, could amount to gigantic proportions affecting prejudicially the interests of copyright owner.[38] Section 58[39] deals with the recovery of possession of plates by the copyright holder utilised for the purpose of producing infringing copies of copyright material and the person in possession of the plate is punishable under sec. 65.[40] Section 58 deals with the repossession and as the infringement is committed on cyberspace, the File-sharing software cannot be physically handed over to the copyright holder.[41]

There is no provision under the Copyright Act, 1957 which deals severely with the person providing means (file-sharing software) for reproducing infringing copies of copyright material unlike the CDPA[42], 1988, which enables the Law to punish the software provider for making infringing copies under sec. 24[43] Moreover, sec. 26 could also be invoked considering that it provides that a person who had supplied an apparatus and had a reason to believe that the apparatus would be used to infringe copyright could be held liable. The file-sharing software may be construed as an apparatus used to infringe copyright and the provider may be held liable under this section.

[34] According to Sec. 51, read with Sec. 14 of Copyright Act, 1957.

[35] Sec. 51(a)(ii), Copyright Act, 1957.

[36] Sec. 63, Copyright Act, 1957.

[37] Sec. 51 (b)(ii), Copyright Act, 1957.

[38] See Raman Mittal, "P2P Networks: Online Piracy of Music, Films and Computer Software", *Journal of Intellectual Property Rights* 456-457 (2004).

[39] Sec. 58, Copyright Act, 1957.

[40] Sec. 65, Copyright Act, 1957.

[41] Mohd. Fayaz Ali, "Copyright and P2P File Sharing – The Law Across Jurisdiction", *Madras Law Journal*, 73 (2009).

[42] Copyrights Designs and Patents Act (U.K.).

[43] Sec. 24, Copyrights Designs and Patents Act, 1988 (U.K.).

The copyright law of the U.S.A. has also proven to be potent enough to counter the evils of online copyright infringement, to punish the infringers as well as the providers of software which facilitate copyright infringement. Such competence is reflected in the famous Napster and Grokster cases.

VI. Conclusion

It is critical to put checks on the misuse of this constantly developing Frankenstein of file sharing technology. This technology takes away the incentive of the copyright holder and has the potential to deter the motivation of authors, artists and copyright holders to create.

BitTorrent technology has been the mother of controversy for its unscrupulous play and the damage it has done to the music, films and publishing industry. BitTorrent has proved to be a promised land for individuals who have time in abundance to download illegally, but not the money to make a legal purchase. There are also people who believe and argue that illegal-sharing of copyrighted media has merits. It leads to a cultural and knowledge exchange like never before and has widened the scope of intellectual evolution of masses and would benefit the humanity as a whole in the end, but such credence is evil and selfish. Creativity is a gift which should be ennobled and rewarded. Illegal sharing of copyrighted media is basically stealing of the incentive which the creator gets in return for his contribution to the society.

Indian copyright law must get sharper teeth to check such online violation of copyright. On 19th April, 2010, The Copyright (Amendment) Bill 2010[44] was introduced in the Rajya Sabha. Bill proposes to enlarge the meaning of copyright[45]. Artistic works stored in electronic medium or other means too would be under the meaning of copyright. The same would be for cinematographic films and sound recordings. This amendment is with a view to include the technological developments in the form of storage of copyrighted works. It is one of the most important amendments as regards cyber piracy is concerned. The Bill also aims to protect any circumvention of technological measure[46] applied for protection of rights and makes it punishable with 2 years imprisonment and fine. But there is lacking in the Bill. The Bill does not give a clear definition as to what constitute the 'public'[47], and no distinction is drawn between commercial and non-commercial 'public communication'. Also, the criminal liability needs to be made stricter in the sense to punish non-commercial copyright infringement strictly[48]. Though the Bill hasn't seen the light of the day, it is a good effort and brings Indian law at par with international laws regarding copyrights on many fronts. But issues like piracy and online infringement of copyrights still need to be properly addressed.

[44] See http://prsindia.org/uploads/media/Copyright%20Act/Copyright%20Bill%202010.pdf (April 25, 2011).
[45] Proposed amendment of sec. 14, Copyright Act, 1957.
[46] The Amendment Bill proposes to introduce sec. 65A that relates to anti-circumvention of technical measures adopted to protect copyrighted content.
[47] 'Communication to the public' is interpreted in Sec. 2 (ff), Copyright Act, 1957.
[48] Sec. 63, Copyright Act, 1957.

UID: INDIAN STATE'S ORWELLIAN AVATAR TO SECURE INCLUSIVE GROWTH?

*Zachahariah Jacob**

I. Introduction

Even as the Indian state struggles to secure the biggest bang per buck of taxpayer's money, resolving the challenges of modern day governance and plugging the leakages in the public delivery system warrants the use of innovative technologies. The Unique Identification Authority of India (UIDAI) is an embodiment of the desire of the Indian government to bring transformative reforms in the design and nature of development intervention. Given that the issue of unique identification numbers (UID) to residents possesses the wherewithal to significantly alter the admittedly tenuous and delicate relationship between the people and the state, this paper underscores that it is imperative to resolve the trade-off between the information requirements of effective governance and the right to privacy of the individual. While the draft Bill is scrutinised for potential sources of invasion of privacy both by an activist national government and private agents, insights from the discourse on privacy laws in foreign jurisdictions are used to shed light on the seriousness of the maladies of the legal framework governing privacy in India. It is argued that addressing these lacunae in the present legislation in a manner consistent with the tenets of participatory democracy (and thereby obliterating barriers to enrolment) is of singular importance in fulfilling the mandate of the UID project as a game-changer in the sphere of public service delivery.

II. UIDAI – Features and Objectives

The UIDAI was established in February 2009 under the aegis of the Planning Commission with a mandate to issue unique, universal and ubiquitous identity numbers based on biometrics to all residents of India. This mammoth and unprecedented exercise under the leadership of Mr. Nandan Nilekani envisions issuing a unique identification number called 'Aadhaar' that can be verified and authenticated in an online cost-effective manner which is robust enough to eliminate duplicate and faking identities[1]. It is expected to serve as a great enabler to improve targeting and delivery of major government welfare programmes and public services, especially to those who are poor and marginalized[2]. The programme is designed to confirm the identity of the 1.2 billion residents of India, making it the largest not to mention incontrovertibly the most expensive identity management programme in the world. The first set of unique identity numbers is expected to be issued in the early part of 2011. Over five years, the Authority plans to issue 600 million UIDs.

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[1] Mission statement, UIDAI, http://uidai.gov.in (August 29, 2010).
[2] Shrimati Pratibha Patil, Address to Parliament on February 22, 2010, http://presidentofindia.nic.in/sp220210.html (August 30, 2010).

In order to facilitate the issuance of UID to solve the singular problem that the UIDAI seeks to address which is of 'identity', it will establish an institutional microstructure which will include a Central Identity Data Repository (CIDR) that will manage the central system and a network of Registrars, which will establish resident touch points through Enrolling Agencies for issuing UID numbers to residents. The Registrars would include both Government and Private Sector Agencies which already have the infrastructure in place to interface with the public to provide specified services, for example, Insurance companies, banking and financial institutions, LPG marketing companies, NREGA etc which will require the beneficiaries to enrol to receive continued service.[3]

The residents who have thus enrolled will be required to provide only their basic information which includes name, address and biometrics. This information will be stored in the UID database maintained by CIDR. It has been reiterated with notable consistency that the UIDAI will not be gathering information pertaining to race, religion, caste, tribe, ethnicity, language, income or health, thereby avoiding profiling of residents.[4]

The project bases its legitimacy on its benefits that will be attributed to the poor. It promises that it will give the poor an identity, with which they may become visible to the state. The UID number is expected to plug leakages in the Public Distribution System (PDS), ease payments to be made under the National Rural Employment Guarantee Scheme (NREGS), and enable achievement of targets in consonance with the right to education. Service delivery is a central theme in its promotional literature. The raising of expectations is, however, mollified by a sudden stipulation that the "UID number will only guarantee identity, not rights, benefits, or entitlements."[5]

The UIDAI maintains that the information in the database will be used only for authentication purposes. If anyone seeks to authenticate the identity of another person, they will receive response in the affirmative or negative only.[6] Consequently, retrieval of information is not ordinarily possible except under special circumstances mentioned in the legislation.

III. Civil Liberties Issues and Concerns in the Light of the National Identification Authority of India Bill, 2010

In June 2010, the UIDAI web site uploaded the National Identification Authority of India Bill, 2010 inviting comments and suggestions from the public. The Bill although *prima facie* establishes a National Identification Authority as a statutory body having the power to draft regulations with the approval from

[3] http://uidai.gov.in (August 29, 2010).
[4] Sec. 9, The National Identification Authority of India Bill, 2010, http://uidai.gov.in/legislation.html (August 29, 2010).
[5] Usha Ramnathan, "A Unique Identity Bill", *Econ. and Pol. Weekly*, July 24, 2010.
[6] *Id.*, at 3, sec. 5.

Parliament and deals with matters connected therewith or incidental thereto, it is not comprehensive enough to cover all aspects of the UID project particularly when it comes to protecting civil liberties of citizens in the light of privacy and data protection issues. In fact, the potential for invasion of privacy has emerged as the most debated legal consequence of this Bill. Inter alia, some of the concerns raised regarding this particular subject are:

(i) Dilution of the voluntariness of subscription: In pursuance of protecting right to privacy and freedom of choice of citizens, it has to be ensured that the aadhar number is strictly voluntary. Though it has been clarified repeatedly by UIDAI that there will be no compulsion, it has not been expressly mentioned in the Bill. In situations where other agencies make the UID number mandatory in their operations, it is a different matter altogether. The UIDAI has been signing memoranda of understanding (MOUs) with a range of agencies including banks, state govern-ments and the Life Insurance Corporation of India (LIC) to be "registrars", who then may insist that their customers enrol on the UID to receive continued service. Accordingly a prohibition against the denial of goods, services, entitlements and benefits (private or public) for lack of a UID number – provided that an individual furnishes equivalent ID is necessary[7]. This real possibility of the 'convergence' of different 'silos' of information held by different agencies of government (and private players) could also aid the surveillance, tracking and profiling of aadhaar number holders. Whereas the realisation of the objective of the UID project as an enabler of substantive policy reform would rely on such 'convergence', as explained above, this poses real threats to fundamental freedoms.

(ii) National Security: One of the provisions that have raised concern is clause 33[8], which reads:

> 33. Nothing contained in the sub-section (3) of section 30 shall apply in respect of – (a) any disclosure of information (including identity information or details of authenti-cation) made pursuant to an order of a com-petent court; or (b) any disclosure of information (including identity information) made in the interests of national security in pursuance of a direc-tion to that effect issued by an officer not be-low the rank of Joint Secretary or equivalent in the Central Government after obtaining approval of the Minister in charge.

Given that employing the pretext of national security for multifarious infringements upon individual liberties has been commonplace in India, just as it is with the Right to Information Act, 2005 (which precludes access to a certain range of information with public authorities on this same basis), the draft Bill

[7] Malavika Jayaram and Elonnai Hickok, *Feed back to the NIA Bill*, Centre for Internet and Society, 2010, http://www.cis-india.org/advocacy/igov/blog/cis-feedback-to-nia-bill (August 28, 2010).
[8] *Id.*, at 3.

does injustice to the citizen/resident in favour of the government and as is known to any student of law, the honesty of purpose of those in power cannot be trusted upon as a basis for freeing them from the ambit of the law.

(iii) Sharing of Information: When the Bill provides that the functions of the Authority includes "sharing, in such manner as may be specified by regulations, the information of aadhaar number holders, with their written consent, with such agencies engaged in delivery of public benefits and public services as the Authority may by direct order", what has been overlooked is an outright conflict with other provisions of this very Bill. For example, whereas the task of obtaining written consent from every potential beneficiary of a public scheme for the 'below poverty line' population might be impeded significantly by the logistics involved, dovetailing the UID database with (an agency that holds) information on BPL status (based on income/ consumption expenditure data) would come in direct conflict with a well-meaning provision in this Act that forbids collection of information on income of the aadhaar number holder. The draft Bill therefore falls short of allaying the fears of those who contend that such sharing of information must be contingent on the meaningful consent of the aadhaar number holder[9].

(iv) Surveillance, Tracking and Other Means of State Control: With the promulgation of this law, the doors would be opened for active surveillance, tracking, profiling and other modes of state control over the citizenry and would pave the way for serious violations of civil liberties. The "Awareness and Communication Report" commissioned by the UIDAI rightly pointed out that sidestepping the unease of a potential aadhaar number holder over having to give out information without being fully aware of its implications and all potential uses to which it would be put.[10] This threat is particularly strong given that the objectives of this project (read "uses to which the UID database would be put") would surely only fully evolve with time. The project with its potential for ensuing 'function creep' (a term used to describe the way in which information is collected for one limited purpose but gradually gets used for other purposes) could do what social security numbers did to the American people and much more.[11] The Bill lacks in that it does not require the Authority, registrars, enrolling agencies and service providers to delete/anonymize/obfuscate transaction data according to defined principles after appropriate periods of time in order to protect the privacy of citizens

[9] Bhushan, S., *UID Project: The 1984 of Our Times?* (December 15, 2009), http://ssrn.com/abstract=1598596 (August 28, 2010).

[10] See *supra* note 5.

[11] Sudhir Krishnaswamy, *The Unique Identity Bill: Enabler of Policy Reform?*, Centre for Advanced Study of India, University of Pennsylvania, http://casi.ssc.upenn.edu/iit/krishnaswamy (January 2, 2011).

The above account summons our attention to the inadequacies of the draft Bill in providing the *aadhaar* number hold a guarantee (i.e. appropriate legal recourse) against invasion of privacy. The scenario that this Bill would engender is clearer from a better appreciation of the implications of the Bill's provisions for the information giver.

IV. Privacy: Preliminaries and Foreign Jurisprudence

Privacy is a fundamental human right recognized in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. Nearly every country in the world includes a right of privacy in its constitution. Most recently written constitutions include specific rights to access and control one's personal information. In many of the countries where privacy is not explicitly recognized in the constitution, the courts have found that right in other provisions and international agreements that recognize privacy rights have been adopted into law.[12]

The term "privacy" has been described as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as he sees fit. It also means the individual's right to control dissemination of information about himself; it is his own personal possession."[13] In many countries, the concept has been fused with data protection, which interprets privacy in terms of management of personal information. Outside this rather strict context, privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs.[14]

Among the various aspects of privacy, the one that is pertinent in the present context is that of "information privacy"[14] which involves the establishment of rules governing the collection and handling of personal data such as credit information, and medical and government records and thereby links data protection laws with privacy. The present position on this subject in Europe and US are as briefly stated below.

In Europe, the comprehensive model of privacy protection is adopted. The Council of Europe's 1981 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (signed by nearly thirty countries) and the Organization for Economic Cooperation and Development's (OECD) Guidelines Governing the Protection of Privacy and Trans border Data

[12] Privacy International, *Overview of Privacy*, http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-559062 (August 29, 2010).

[13] Adam Carlyle Breckenridge, *The Right to Privacy* (University of Nebraska Press, 1971).

[14] Simon Davies, *Big Brother: Britain's Web of Surveillance and the New Technological Order* 23 (Pan, 1996).

Flows of Personal Data[15] enunciate specific rules covering the handling of electronic data. These rules describe personal information as data which are protected at every step from collection to storage and dissemination. The right of people to access and amend their data is a crucial element of these rules.

Further, the European Union enacted the Data Protection Directive in 1995. The Directive not only furthered the baseline, setting common standards for privacy to be followed throughout the EU but also set out new rights. It intends to create a zone of free flow of personal information without making a distinction between public and private sector, both of which have the same level of protection. The Directive has made express unambiguous provisions for data quality requirements, use and disclosure of data (the finality principles), right of the data subject, mandatory consent and so on by which comprehensive safeguards are maintained to protect the right of privacy and freedom of individuals.[12]

In US, "sectoral approach"[16] is adopted which concentrates on making multiple legislations to safeguard the right depending on the sector involved. Through various judgements and legislations which includes the Privacy Act of 1974,[17] Computer Matching and Privacy Act and US-EU Safe Harbor Agreement , sufficient safeguards in conformity with the rules established by its European Counterparts to protect personal data and individual liberties have been put in place. These safeguards guarantee the protection of personal information in federal databases and provide individuals certain rights over information contained in those databases.

V. Privacy and Data Protection in India

The discourse on Privacy laws in India has been a relentlessly changing and nebulous one having a curious ephemeral quality to its juristic life[18]. The Constitution of India does not expressly recognize the right to privacy. However, judicial activism has brought the Right to Privacy within the realm of Fundamental Rights. The Supreme Court first recognized in 1964 that there is a right of privacy implicit in the Constitution under "protection of life and personal liberty" given by article 21 of the Constitution, which states, "no person shall be deprived of his life or personal liberty except according to procedure established by law."[19]

Further in *R. Rajgopal* v. *State of Tamil Nadu,*[20] Justice Jeevan Reddy observed that in recent times the right to privacy has acquired constitutional status.

[15] OECD Recommendation Concerning and Guidelines Governing The Protection of Privacy and Trans-border Flows of Personal Data, 23rd September, 1980, O.E.C.D. Document C(80)58(Final), http://www.kantei.go.jp/jp/it/privacy/houseika/dai11/11siryou5.html (August 26, 2010).

[16] Privacy International, *Overview of Privacy*, http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-559062 (August 29, 2010).

[17] 5 US Code: S. 552a, http://codes.lp.findlaw.com/uscode/5/I/5/II/552a (August 28, 2010) .

[18] *Id.*, at 8.

[19] *Kharak Singh* v. *State of UP*, 1 SCR 332 (1964).

[20] (1994) 6 SCC 632.

The learned Judge observed that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by article 21. It is a "right to be let alone". Once the facts in a given case constitute a right to privacy, article 21 is attracted, he concluded.

Notwithstanding the above recognition of right to privacy, when it comes to data protection, we still do not have an express and unambiguous legislation. Currently there are no measures to limit government intrusion and prevent mismanagement of sensitive private data of individuals. Though the subject matter of data protection and privacy has been dealt within the Information Technology Act, 2000, it has not been covered in a comprehensive and exclusive manner. It being a generic legislation does not lay down any specific data protection or privacy principles. Accordingly, there is no an actual legal framework in the form of Data Protection Authority, data quality and proportionality, data transparency etc. which rigorously addresses and covers data protection and privacy issues in accordance with the principles of the EU Directive, OECD Guidelines or other international principles and conventions[21]. This lack of definitive safeguards in terms of appropriate legal recourse calls for an impending need to update our jurisprudence through enactment of an adequate and lucid legislation on privacy and data protection.

VI. Conclusion

The above discussion establishes the absence of safeguards against 'being let alone' by the state, giving rise immediately to a debate on just how elusive the goals of the UID exercise are. It is important to refute two key elements of this debate as it has shaped itself in the public domain in the recent past. The first relates to the fact that no serious cost-benefit analysis has been conducted whereby it could be clearly discerned that the project itself is good use of public money. Given the range of development initiatives that could be streamlined with this scheme and the gigantic scale of most of them, one cannot pronounce a negative verdict on the feasibility of this project even after accounting for the many (purely economic) costs that it would entail (as is apparent at this juncture and from the experience of foreign nations with similar ventures). Further that if one also allows additive weights in favour of the income poor in this calculus, it would overwhelmingly give an answer in the affirmative. The second deals with comparisons with the UK exercise of a similar nature which has recently been done away with. As opposed to that scheme (one of the innumerable public projects that have been scrapped or downsized by a conservative government on an austerity drive) designed exclusively for internal security reasons and thereby extremely intrusive and inefficient, ours holds enormous possibility for advancing living standards if one subscribes to the official version of the mandate of the UIDAI. Whereas a number of arguments have been advanced against the viability of the project, it is posited here that information sharing and

[21] Sharma, Vakul, "White Paper on Privacy Protection in India", http://www.iamai.in/Upload/IStandard/ White%20Paper%20on%20Privacy.%202007.pdf (August 27, 2010).

data protection concerns are probably the soundest objections that can be raised and further that there is no such problem that can more or less be eliminated with a well-thought out legal framework. As is almost always the case with employing technology in human advancement, misuse is highly probable if one contemplates on the consequences of the draft Bill. What has been asserted above is the need for a shift from the reliance on judicial activism to define the limits and extent of the right to privacy to one on an exclusive and unambiguous legislative framework. The genuine fears of the information giver could only be satisfactorily addressed through the institution of appropriate legal (and not treacherous administrative) protection. Drawing generously from the experience of foreign nations with privacy and data protection laws, building a supporting legislation to allow for the meaningful coexistence of the well-meaning UID numbers and the inalienable right to privacy of the UID number holder should not be as cumbersome as it is often made out to be. Once the right (in all its layers and dimensions) is recognised and the necessary protection guaranteed through a proper legislation, with a few pragmatic changes in the present Bill, the Indian Parliament can hope to realise its vision of enabling inclusive growth through an efficacious public service delivery mechanism based on a secure database of information on the identity of its benefactors.

Book Reviews

INTERNATIONAL LAW by Gurdip Singh. Macmillan Publishers India Ltd., Delhi, Second Edition, 2011, Pp. xiv+617, ISBN 10: 0230-32385-5; ISBN 13: 978-0230-32385-8, Rs. 395/-.

International law expanded enormously during the 20th and in the beginning of 21st Century. End of colonialism, formation of United Nations Organization and other international organizations, initiation of studies of international law by International Law Commission have provided conducive environment for the progressive development of international law. States have been working more closely to evolve international law in almost all walks of life. International organizations are also playing significant role in the process of establishing norms of international law. A significant number of treaties on different subject-matters have been entered into by the States to provide minimum common standards which have to be incorporated by all Member States in their municipal laws. The new norms of international law are evolving day by day.

The book contains 25 chapters which have been divided into two parts. Part one deals with law of the peace and contains 13 chapters. Part two deals with conflict resolution, war, neutrality and human rights and contains 12 chapters. Chapter 1 is on development of international law. The author traces the origin of international law and discusses various jurisprudential theories on the basis of international law. The codification of international law and modern system of international law have also been discussed in this chapter. Chapter 2 deals with the nature of international law, in which author deals with the most important question of whether international law is law or not. Chapter 3 is on the sources of international law. The author has discussed traditional and modern sources of international law in great detail with the help of case law.

In the fourth chapter, the author has discussed relation between international law and municipal law. Apart from various theories on the relationship between international law and municipal law, the author has discussed State practice on how international law is implemented in municipal legal system. The State practice of United Kingdom, United States and India has been discussed by the author. The Indian practice has been discussed by the author threadbare with a plethora of case law.

Chapter 5 deals with the position of individual in international law. The author has discussed rights, duties and procedural capacities of individuals under international law by referring to various conventions, treaties and agreements apart from customary international law. Latest developments in this regard have also been incorporated by the author. Chapter 6 is devoted to the study of recognition, in which the author has discussed recognition of State, Government, insurgency,

belligerency, Governments-in exile. The author has also dealt with theories of recognition, collective recognition, *de jure* and *de facto* recognition, retroactivity of recognition, legal effects of recognition and withdrawal of recognition with the help of case law. The importance of this chapter increases manifold with the inclusion of Indian policy of recognition. The author has given Indian stand on the recognition of various States and Governments.

Chapter 7 deals with one of the most important subjects of international law, i.e. State responsibility. The international law on this subject is in the development stage at the moment. The International Law Commission (ILC) is in the process of codifying the law in this regard. It has come out with several drafts. The latest draft came in the year 2001. The author has not only discussed various drafts prepared by the ILC but also constituent elements of international responsibility. Various theories discussed by the author have elucidated the concept of State responsibility. Specific cases on State responsibility and remedies for wrongful acts of the State find place in this chapter.

Chapter 8 deals with various modes of acquisition and loss of territorial sovereignty. Chapter 9, which is on individual and the State, deals in detail about the issues of nationality, extradition and asylum of individuals. The Indian position on the aforesaid issues has also been discussed in the chapter. Chapter 10 deals with the law of treaties, which is the most important source of contemporary international law. The author has discussed various aspects of law of treaties in great detail with the help of the provisions of Vienna Convention on Law of Treaties, 1969 and case law. The author has discussed the entire procedure of the conclusion of treaties, issues of reservation, rights of third party under a treaty, interpretation, etc. The concepts of *pacta sunt servanda*, *jus cogens* and *rebus sic stantibus* have also been discussed with the help of case law.

Chapter 11 discusses jurisdictional immunities of States. The author apart from discussing theories of state immunities also discussed case law and enactments of several States such as United Kingdom, United States and India. The author also discusses various exceptions to the jurisdictional immunities of States, such as consent, counterclaim, commercial activities, tortuous liability, etc. Chapter 12 deals with diplomatic and consular relations. In this chapter, author discusses the meaning of diplomacy, establishment of diplomatic relations, and functions of a diplomatic mission. The author classified diplomatic agents as ambassador, nuncio, legates, envoy, minister, internuncio, and charge d'affairs. The author discusses the law on diplomatic and consular relations in depth with the help of customary international law and Vienna Convention on Diplomatic Relations of 1961, which according to author codifies the law on the subject to certain extent.

The law of the sea is discussed in chapter 13. The author is specialized in the field of law of the sea. The chapter is very comprehensive and well researched.

The author starts with the historical background of the subject and discusses the customary international law and conventional law on various zones of the sea. The author has also discussed large number of judgments of International Court of Justice to explain various concepts under law of the sea. An analysis has been made of all the four Geneva Conventions on law of the sea, U.N. Convention on Law of the Sea and Agreement of 1994 on the Implementation of Part XI of the U.N. Convention on Law of the Sea. The author seems to have made extra efforts to write the chapter.

Chapter 14, which is a part of Part two of the book deals with diplomatic modes of conflict resolution which include negotiation, good offices, enquiry, conciliation, and mediation. Chapter 15 is devoted to the study of arbitration, in which the author discusses international law on arbitration in detail. Chapter 16 deals with International Court of Justice, which is the judicial organ of the United Nations. The author discusses the composition of the ICJ, election of members of the ICJ and their independence and impartiality, and the jurisdiction which the ICJ may exercise.

Chapter 17 deals with the most important international organization on the earth, which has successfully prevented any further World War, i.e. United Nations Organization. The author starts with discussing the purposes, principles, and membership of the United Nations. The author also discusses the functions of various organs of the United Nations. Chapter 18 is devoted to peace-keeping operations of the United Nations. The author discusses the legality of such operations with the help of various provisions of the UN Charter. Compulsive methods which are short of war, such as retorsion, reprisals, embargo, pacific blockade and intervention have been discussed in chapter 19. Chapter 20 is a comprehensive chapter on law of war, in which the author discusses the customary and conventional law on war. The efforts made by the international community on the renunciation of war have also been discussed in the chapter. The author has discussed international humanitarian law most particularly four Geneva Conventions and two Additional Protocols in great detail. The author has discussed various trials and referred the Statute of International Criminal Court.

Chapters 21, 22 and 23 deal with economic warfare, nuclear warfare and star warfare respectively. The author analyzes the Advisory Opinion of ICJ on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996, apart from various treaties and case law on the testing and use of nuclear weapons in chapter 22. Chapter 24 discusses international and national measures of implementation of human rights in great detail. The author has not only discussed the provisions of Universal Declaration of Human Rights, International Covenant of Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights with their protocols and various other international conventions, agreements and

treaties but also regional conventions, such as European Convention on Human Rights, 1950, American Convention on Human Rights, and Africa Charter on Human Peoples' Rights, 1980. An indepth study of the Indian law on human rights, particularly the Protection of Human Rights Act, 1993 and case law has been made by the author in the chapter.

The last chapter is devoted to the study of International Criminal Court (ICC). The author has discussed inter alia the structure of the ICC, its judicial division and its jurisdiction. The author has discussed the provisions of the Statute of International Criminal Court in detail to explain the law to prosecute the accused.

The book under review is a commendable work made by the author. This is the most updated second edition of the book. The book is a judicious blend of specialized international jurisprudential knowledge and perceptive understanding of the broad political and social forces that have shaped international law. The book is an endeavor to analyze and evaluate the trends of contemporary international law with a view to determine whether the interests of the developed and developing states have been balanced. The importance of the book increases manifold due to the reason that author has discussed Indian interests, policy and law in most of the chapters. The book is a treasure of knowledge and is very useful to students, teachers, researchers, judges, diplomats and all those who deal with the subject of international law. The enriched research output has been provided by Amrita Bahri, who is a research scholar and visiting faculty in the Birmingham Law School, U.K. The book is worthy of being kept in all the libraries.

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LAW OF COPYRIGHT AND NEIGHBORING RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES by V.K. Ahuja. LeuxisNexis Butterworths, New Delhi, 2007. Pp.XXII+468, ISBN: 978-81-8038-147-8, Rs. 595/-.

Copyright law is a branch of that part of the law, which deals with the rights of intellectual creators. Copyright protection is one of the means of promoting, enriching and disseminating the national cultural heritage.[1] The importance of copyright in this process is described in the preface to the Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) as follows:

> "Copyright, for its part, constitutes an essential in the development process. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works .... Encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development".

Copyright is one category of intellectual property, the others being patents, designs, trade marks, etc., each governed by a specific statute. In the wake of technological developments, the concept of copyright which was mainly restricted to the literary works, was enlarged to cover not only dramatic, musical and artistic works but also extended to cinematographic films and sound recordings.

The concept of "neighboring rights" which originated subsequently, has also been brought with in the purview of copyright system. Neighboring rights are of three kinds: the rights of performing artists in their performances, the right of producers of phonograms in their phonograms, and the rights of broadcasting organizations in their broadcasts. The book under review is a good work about some important national and international issues concerning copyright and neighboring rights.

The book consists of thirteen chapters and nine important appendices. Chapter one is an introductory, in which the author has discussed briefly the historical developments of the law of copyright starting from Gutenberg's invention of printing press to the Copyright Act, 1957. He has also thrown some light on international conventions on intellectual property rights including copyright.

Chapter two and three deal with the subject matter of copyright and ownership of copyright respectively. The subject matter of copyright is the original expression of an idea in literary, artistic and other works. The author has clearly established that copyright does not give the right holder any monopoly over ideas, but only protects expression. The author quoting from a decision of Delhi High Court in *Anil Gupta's* [2]case states that, an idea *per se* has no copyright. But if the

[1] World Intellectual Property Organization, *Background Reading Material on Intellectual Property* (1988), p. 209.

[2] *Anil Gupta* v. *Kunal Dasgupta*, 2002(25) P.T.C. 1.

idea is developed into a concept fledged with adequate details, then the same is capable of registration under the Copyright Act. Copyright protection is no more confined to books, music, paintings or films, but now extends, *inter alia*, to computer software and compilations of data[3]. The law relating to slogans and fictional characters has been touched upon by the author. Regarding ownership of the copyright in a work, sec.17 of the Indian Copyright Act, 1957 and relevant provisions of the United Kingdom's, Copyright, Designs and Patents Act, 1988 (CPDA, 1988) have been discussed.

Chapter four and five deal with the rights of the author which include economic as well as moral rights. Sec.14 of the Indian Act,[4] deals with the economic rights of the owner of copyright. The right enjoyed by the owner is a negative one, i.e. it is the right to prevent others from using his work in certain ways, and to claim compensation for the usurpation of that right[5]. Author has placed more reliance on major international conventions of copyright like, the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), the Universal Copyright Convention, 1952, TRIPs Agreement, WIPO Copyright Treaty, etc.

In addition to the protection of economic rights, the copyright Act also protects moral rights of the author[6]. Moral rights flow from the fact that a literary or artistic work reflects the personality of the creator. Moral rights or 'droit moral' originated in French law. The moral rights are of three kinds: right of publication, right of paternity and right of integrity. They remain even if the author has assigned the copyright in relation to a work. The author has summed up these rights with the help of latest case law on the subject.

Chapter six deal with the term of copyright. Chapter seven deals with assignment and licenses of copyright. The author is successful in building a proposition that the wealth can be generated not merely by exploiting the work himself but also by sharing it with other. Chapter eight deals with the role of copyright societies in the administration of copyright.

Chapter nine and ten have been devoted to analyse "the neighboring rights". Neighboring rights mainly cover three kinds of rights[7]. They are referred to as neighboring rights because they have developed in parallel with copyright, and the exercise of these rights is often linked with the exercise of copyright. This area of copyright was neglected at national as well as international level till recently. The Copyright Act, 1957 did not provide any protection to performer's rights. The protection was provided only by the Copyright (Second Amendment) Act, 1994 in India. Unlike most international conventions, which follow in the wake of national

[3] See art. 10 of the TRIPs Agreement.
[4] The Copyright Act, 1957.
[5] Hugh Laddie, et.al., *The Modern Law of Copyright* (1980), p. 45.
[6] Sec. 57 of the Copyright Act, 1957.
[7] *Id.* at p.1.

legislation and provide a synthesis of existing laws, the protection of neighboring rights was sought to be established at the international level by the international convention, which is known as Rome Convention, 1961. Now we have WIPO Performance and Phonograms Treaty, 1996 for the protection of these rights at the international level. India is yet to become a party to this Treaty.

Chapter eleven, twelve and thirteen of the book have been devoted do discuss another very important aspects of copyright. They deal with infringement of copyright, permitted acts in relation to copyright and remedies for infringement of copyright. The owner of the work has the exclusive right to do certain acts in respect of the work. If any person does any of these acts without authority, he will be committing an infringement of the copyright in the work. The nature of right depends upon the nature of the work. The nature of right depends upon the nature of the work. Sec.51 of the Copyright Act, 1957 defines "infringement" in general terms. The United States Supreme Court in *Eisen Enimi* v. *Fran CETT Publication*[8] rightly observed:

> An infringement is not confined to literal and exact repetition or reproduction... Paraphrasing is copying and an infringement is carried to a sufficient extent ..... the question of infringement of copyright is not one of quantity but of quality and value.

In United Kingdom according to Professor W.R. Cornish,[9] copyright infringements gives rise to range of remedies, civil, criminal and administrative as well as of self help. In India, the Copyright Act, 1957 provides three types of remedies against infringement of copyright; namely civil, criminal and administrative. All of them have been discussed by the author skillfully in his book. This has been further substantiated with case law and international conventions on the subject.

The book indeed is an admirable work in the presentation of issues relating to copyright and neighboring rights. It has been published with care and caution and written by the author in a precise and a systematic manner. It is a praiseworthy work. Keeping in view the amount of information contained in it, the book is very reasonably priced. The book is a useful literature for student community in general and lawyers and other legal luminaries in particular. The publishers have also maintained the quality of paper, the print and the get up. This is strongly recommended for all law libraries being a good reference work in the field of copyright.

*O.P. Sharma**

[8] (1958) 335 US.907.
[9] W.R.Cornish, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights* (London: weet and Maxwell, 3rd edn. 1997).

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