The Delhi Law Review is the annual publication of the Faculty of Law, University of Delhi, Delhi.

The manuscripts for publication, subscriptions, books for review and other enquiries about advertisements, etc. should be addressed to the Dean, Faculty of Law, University of Delhi, Delhi-110007, INDIA.

Rate of Subscription : Rs. 50.00 (Domestic)
US $ 20 (Overseas)
UK £ 10 (Overseas)

BACK VOLUMES OF DELHI LAW REVIEW

Vol. I	1972	Rs. 5.00	US $ 2	UK £ 1.5 Shilling
Vol. II	1973	Rs. 10.00	US $ 3	UK £ 1
Vol. III	1974	Rs. 10.00	US $ 3	UK £ 1
Vol. IV & V	1975-1976	Rs. 15.00	US $ 5	UK £ 2
Vol. VI & VII	1977-1978	Rs. 15.00	US $ 5	UK £ 2
Vol. VIII & IX	1991-1780	Rs. 25.00	US $ 10	UK £ 5
Vol. X & XI	1981-1982	Rs. 25.00	US $ 10	UK £ 5
Vol. XII	1990	Rs. 40.00	US $ 10	UK £ 5
Vol. XIII	1991	Rs. 50.00	US $ 20	UK £ 10
Vol. XIV	1992	Rs. 50.00	US $ 20	UK £ 10

Available from Dean, Faculty of Law, University of Delhi, Delhi-110007 on payment of cash, bank draft or cheque. Add Rs. 10.00 while sending outstation cheque towards bank collection charges.

DELHI LAW REVIEW

VOLUME 14
1992

Mode of Citation : 14 *Del. Law Rev.* . . . . .(1992)

Printed at the Central Electric Press, 80-D, Kamla Nagar, Delhi-110 007

DELHI LAW REVIEW

Volume 14 **1992**

CONTENTS

BOOK REVIEWS

THE FACULTY

HEAD OF DEPARTMENT AND DEAN, FACULTY OF LAW

Professor P.S. Sangal, B.Sc., LL.M., Ph. D. (Allahabad)

PROFESSOR

Baxi, Upendra, LL.M. (Bombay), LL.M., J.S.D. (Berkley)
Chand, Gyan, B.A. (Punjab), LL.M. Ph.D. (Delhi)
Errabbi, B., B.A., M.L. (Madras), Ph.D. Delhi (on leave)
Govindraj, V.C., M.A., M.L. (Madras), Ph. D. (Delhi)
Kohli, Baldev, M.A. (Punjab), LL.M. (London)
Koul, Autar Krishan, LL.M., Ph. D. (Delhi)
Mahmood, Tahir, L.L.M., Ph. D. (Aligarh), FIALS (London)
Mata Din M.A. (Panjab), LL.M., PhD. (Delhi)
Nigam, K.K., B.Sc., LL.M (Lucknow), LL M (California)
Pande, B.B., LL.M. (Lucknow) (on leave)
Ponnuswami, K., B.Sc., M.L. (Madras), LL.M. (Yale), D.C.L. (McGill)
Prasad Hoti, LL.M. Ph. D. (Delhi)
Sangal, P.S., B.Sc., LL.M., Ph.D. (Allahabad)
Singh, M.P., B.A., LL.B. (Agra), LL.M. (Columbia), LL.M., LL.D. (Lucknow) (on Leave)
Singh, Parmanand, LL.M. (Lucknow), Ph.D. (Delhi)
Srivastava, B.P., B.Sc., LL.M. (Lucknow), M.C.L. (Columbia)
Sivaramayya, B., B.S.c., M.L. (Andhra), LL.M. (Yale), D.C.L. (McGill)
Verma, Mrs. S.K., LL.M. (Banaras), LL.M. (Berkley), J.S.D. (Harvard)

READERS

Aggarwal, Mrs. Nomita, M.A. (Allahabad), LL.M. (Lucknow), Ph.D. (Delhi), Sahitya Ratna, Dip. in U.N. & Int. understanding (Geneva)
Aggarwal, S.K., B.Sc., LL.M. (Delhi)
Alakh, P.P. Singh, LL.M. (Delhi), Dip. P.I.P. (Delhi)
Bakshi, Mrs. Veena, LL.M. (Yale)
Batra, A.K., LL.M. (Delhi)
Batra, T.S., B.A. (Hons.) (Punjab), M.A., LL.M. (Delhi)
Bhalla, S.L., B.A., LL.M. (Punjab), Ph. D. (Delhi)
Chander, Harish, M.A. (Delhi), LL.M., FIALS (London), Ph. D. (Delhi)
Deshmukh, U.M., B.A. (Agra), LL.M. (Poona)
Dhar, P.M., LL.M. (Delhi)
Dixit, V.K., LL.M. (Aligarh), Ph. D. (Delhi)
Gupta, A.K., LL.M. (Panjab)
Gupta, V.K., LL.M. (Gwalior)
Jambholkar, Mrs. Lakshmi, B.S.c., M.L. (Madras)
Khare, S.C., LL.M. (Lucknow), Sahitya Ratan, Dip. Lab. Law, Cer. Int. Law (the Hague), LL.D. (Lucknow)

Kumar, Arun, M.Com. (Agra), LL.M., Ph.D. (Delhi)
Maini, S.L., B.C.L., LL.M. (Delhi)
Mishra, Govind, LL.M. (Patna), LL.M. (Columbia)
Prasad, Surendra, B.A., LL.M. (Lucknow), Ph.D. (Delhi)
Rathore, S.S., LL.M. (Lucknow)
Rekha, Mrs. Chitra, LL.M. (Aligarh), Ph.D. (Delhi)
Sahni, P.S., LL.M. (Delhi)
Sharma, M.C., LL.M. (Delhi), J.S.D. (Northwestern)
Shukla, M.S., LL.M. (Delhi)
Siddique, Ahmad, LL.M. (Aligarh)
Singh, Balbir, M.A., LL.M. (Panjab)
Singh, Gurdip, LL.M., Ph.D. (Delhi)
Singh, S.N., B.A., LL.B. (Gorakhpur), LL.M. (Banaras), Ph.D. (Delhi)
Singh, S.P., Dip. Taxation, P.G.D. Criminology (Lucknow), LL.M. (Cornell)
Vats, S.S., LL.M. (Delhi)

LECTURERS

Bawa, N.S., LL.M. (Delhi)
Bhumra, S.S., LL.M. (Delhi)
Gupta, Mrs. Suman, LL.M., Ph.D. (Delhi)
Gupta, V.K., B.Sc. (Jammu), LL.M., Ph.D. (Delhi)
Kaul, B.T., LL.M. (Delhi), Dip. Lab. Law (I.L.I.), (London)
Khadaria, O.P., LL.M. (Delhi)
Khanna, Rajiv, LL.M. (Delhi)
Khetarpal, N.K., LL.M., Ph.D. (Delhi)
Kumar, Ashwani, B.Sc., LL.M. (Delhi)
Kumari, Miss Ved, LL.M. (Delhi)
Lal, O.B., LL.M. (Delhi)
Minocha, S.K., LL.M. (Delhi)
Mirashi, S.L., M.A. (Allahabad), LL.M. (Delhi)
Paul, Solil, LL.M. (Delhi), LL.M. (Michigan) (on leave)
Rohatgi, N K , B. Com. (Hons.), LL.M. (Delhi)
Sethi, T.D., LL.M. (Delhi)
Sharma, K.R., LL.M. (Delhi)
Singh, J.N., LL.M. (Banaras), Ph.D. (Delhi)

The List of the Faculty Members is in Alphabetical order.

DEAN SPEAKS

I AM very happy to place in your hands Volume 14 of the Law Faculty Journal, *Delhi Law Review*, the 3rd issue which has appeared during my term as Head and Dean of the Faculty of Law.

During the period between Volume 13 (1991) and this issue, I am happy to report that we organised a very successful 5-day National Workshop on Teaching Intellectual Property Law (October 21-25, 1991) which was attended by 40 Law Teachers from all over the country. This workshop was sponsored by the World Intellectual Property Organisation (WIPO), a specialised agency of the United Nations, based in Geneva, and financed by the Ministry of Human Resources Development, Government of India. WIPO brought here four eminent foreign Professors from U.S.A., U.K., Australia and Thailand, to act as faculty besides six of us from Delhi Law School and two from other Law Schools of India. I am happy to report that the standard of discussions at the Workshop was so high that Professor Karl F. Jorda from U.S.A. acknowledged in his concluding statement which was recorded by us that he never attended a Workshop/Seminar where discussions were of such high order. WIPO also sent two of its Directors, Mr. Francis Gurry and Mr. N.K. Sabharwal and the Director-General of WIPO wrote to me after the Workshop admiring the Workshop in glowing terms.

The Workshop resolved as follows:

I. To recommend to all Universities in India to include:

(*i*) a foundation course (whether compulsory or elective) in intellectual property in their LL.B. Curriculum of a full academic year's duration with a view to affording their students an opportunity to acquire basic knowledge of the legal protection of creative works of the human intellect, such as copyright, patents and designs;

(*ii*) advanced courses in intellectual property in their postgraduate and doctoral programmes in law with a view to promoting specialisation and research;

and that the curriculum in these courses should place sufficient stress on the international regime and the treaties and conventions administered by the World Intellectual Property Organisation.

II. To request the World Intellectual Property Organisation to extend support for the introduction of intellectual property studies in Indian universities by providing library materials and for the training of teachers.

III. To establish a National Association for the Promotion of Intellectual Property Education with the participants in the Workshop as its Founding Members and Professor P.S. Sangal, Dean, Faculty of Law, University of Delhi, as its interim President, to take necessary steps to set up the Association.

Work on all of the aforesaid three recommendations is progressing. Our efforts to give a new look to our LL.M. syllabus continued during this year also and we were able to introduce two more optional Papers into our LL.M. syllabus. These two Papers are 'Hindu Jurisprudence' and 'Specific Torts'.

In the end, I must thank my former student and colleague Dr. (Mrs.) Nomita Aggarwal, the learned Convenor of the Editorial Committee, who worked relentlessly to make this venture a success.

June 15, 1992

PROFESSOR P.S. SANGAL
Head of the Law Department and
Dean, Faculty of Law

EDITORIAL

THE United Nations Conference on Environment and Development in Rio de Janeiro which ended on June 14, 1992 was to consider the most fundamental issue facing the world community today: *How to reconcile human activities with the laws of nature.*

While it was the United Nations itself which called this conference, its midwife was an independent Commission which set out in 1984 to formulate nothing less than a global agenda for change.

The report of the World Commission, issued in 1987, was named *Our Common Future*, to capture what they came to realize: "whether we live in affluence in an industrialized country or whether we belong to the 1.2 billion people who live in absolute poverty, we are all neighbours in an interlinked world." *They coined the concept of "sustainable development"* and were unanimous in focusing on the international economy as a force multiplier that needed major change. They found a desperate need for a more equitable distribution of wealth and opportunity, both between countries as well as within countries. *They also found the only sane policy to be one of international burdensharing between rich and poor countries in which debt relief, development assistance, transfer of environmentally sound technology as well as a general climate conducive to investment were key components.*

The World Commission on Environment and Development was convened again for three days, April 22-24, 1992 in London and formulated what they thought to be "Clear and unavoidable next steps, most of which should be taken at Rio." We give below some extracts of these steps:

As a minimum step, all countries must provide opportunities for couples to exercise freely their human right to determine the number and spacing of their children.

Necessary but not sufficient conditions for sustainable development include prices which reflect full environmental costs and *implementation of the Polluter Pays Principle.*

Trade must be open to all, particularly to developing nations.

The debt burden is retarding and distorting development; a further writing down of commercial bank debt is also unavoidable and overdue.

We appeal to governments to conclude for signature in Rio a Climate Convention which contains agreed goals, targets and timetables, funds committed to achieve those targets, and operational machinery to implement and enforce them.

As regards the convention on biodiversity, differences over access to genetic resources and relevant bio-technologies should be reconciled. The issue at stake is survival.

Unfortunately, the Rio Conference could not achieve much in this direction. But at the same time it could not be said that the Rio Conference is a failure because 153 nations have signed two framework conventions: one on committing countries to initiate methods to slow down the process of global warming and the other to preserve the diversity of the world's living organisms. Also 700-plus page blueprint on Agenda 21 for charting the course of the earth towards sustainable development in the 21st century have been agreed.

The most important failure of the Rio Conference in our opinion is the absence of decision on the "*Polluter Pays Principle*" which, we have been expecting,* would be the necessary outcome of the Rio Conference.

June 15, 1992

PROFESSOR P.S. SANGAL
Editor-in-Chief

* See P.S. Sangal, "Some Recent Developments in the Field of Environment : Prospects for the Future". p. 71, published in *Delhi Law Review*, Volume 13 (1991).

IMPLEMENTING SUSTAINABILITY*

BEN BOER**

I. INTRODUCTION

STRATEGIES FOR sustainable development have been formulated in many countries in the past several years. Their implementation through legal and administrative mechanisms is underway on a national and regional basis. The impetus for these strategies has come from documents such as the Stockholm Declaration of 1972,[1] the World Conservation Strategy,[2] the World Charter for Nature of 1982[3] and the report of the World Commission on Environmentond Development, *Our Common Future*.[4] The initiatives are part of a world wide movement for the introduction of National Conservation Strategies based on the World Conservation Strategy. Over 50 National Conservation Strategies have been introduced over the past decade, all of which incorporate concepts of sustainable development. The document *Caring for the Earth* is the chief successor to the World Conservation Strategy.[5] It includes a wide range of recommendations for legal and institutional reform.

* This article was orginally delivered as a paper to the NATIONAL ENVIRONMENTAL LAW ASSOCIATION and LAWASIA "Environmental Responsibility Across International Boundaries"; Second International Conference on Environmental Law, Bangkok, 4-7 August 1991. I am grateful to my colleagues, Donna Craig, John Connor and Benjamin Richardson for their comments on an earlier draft of this article. Any deficiencies remain my own responsibility.

** Corrs Chambers Westgarth Professor of Environmental Law, Faculty of Law, University of Sydney, New South Wales, Australia.

1. The Stockholm Declaration was part of the statement published by the United Nations Conference on Environment and Development in 1972, later adopted by the General Assembly of the United Nations (Res 2994, December 1972).
2. Prepared in 1980 by the IUCN (World Conservation Union), with advice and assistance from the United Nations Environment Programme and the World Wild Fund (now known as World Wide Fund for Nature).
3. UNGA Res 37/7.
4. Also known as the Brundtland Report, Oxford 1987; the references to the report in this article are drawn from the Australian edition of this report, Oxford (1990); hereafter cited as WCED. For an update on developments since the Brundtland Report was completed see Starke Signs of Hope, Oxford (1990).
5. *Caring for the Earth : A Strategy for Sustainable Living*, IUCN, UNEP and WWF, Gland 1991 (hereafter cited as IUCN 1991) was developed by the Second World Convervation Strategy Project, comprised of representatives of the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, with sponsorship and collaboration from a number of international aid agencies, national governments, banks and international environmental organisations.

In recent years the role of international environmental law has increased considerably, with many multilateral and bilateral instruments relating to the environment being concluded.[6] On a national level, environmental legislation has been developed in many countries. The status of national legislation is beginning to be regularly reviewed, often with the assistance of international agencies. National legislation and plans for regional action and information exchange on laws and institutions are now being collected more systematically, and the legislation is also being made available to other countries.[7] In the past two years, countries participating in the United Nations Conference on Environment and Development have also produced comprehensive national environment and development reports.[8] This Conference is intended to have six major outputs: the drafting of international conventions on issues of global importance, preparation of the "Earth Charter", (declaring the principles by which people should conduct themselves in relation to each other and their environment), "Agenda 21", which is meant to be a programme of action for the implementation of the principles of the Earth Charter, the development of financial mechanisms for lower income countries[10] for the funding of obligations arising out of conventions, opportunities for technology transfer, and the strengthening of institutions dealing with environment and development issues.[11]

Although the focus in this article is on lower income countries, references are of necessity made to higher income countries which have the

6. See Koester, "From Stockholm to Brundtland", *Environmental Policy and Law*, 20/1/2 (1990) 14.
7. This legislation has been and continues to be developed partly as a result of the technical assistance provided by the United Nations Environment Programme, the South Pacific Regional Environment Programme and international non-government organisations such as the World Conservation Union's Environmental Law Centre in Bonn; see further, *The Implementation of the Montevideo Programme for the Development and Periodic Review of Environmental Law* 1981-1991: An overview, Environmental Law and Institutions Unit, United Nations Environment Programme, Nairobi.
8. The Conference is scheduled for June 1992 in Rio de Janiero; this Conference is also referred to as the "Earth Summit": see *Network* '92, February 1991, published by the Centre for Our Common Future, Geneva at 1.
9. Framework Conventions on the Conservation of Biodiversity, for the Protection of the Atmosphere and on Environment Protection and Sustainable Development have been proposed.
10. The terms "lower income countries" and "higher income countries" are genera lly employed here, rather than the more value-laden terms such as "developing countries" and "developed countries". This is in conformity with the philosophy of the publication *Caring for the Earth supra* note 4 at 11 : "With the adoption of broader concepts of development, reflecting, social and ecological as well as economic conditions, conventional classifications of countries as 'developed' or 'developing' have become less useful". In any case, some nations that are thought of as "developed" can in reality be more correctly characterised as "overdeveloped", with regard to the exploitation of natural resources.
11. *Network* '92, March 1991 at 1.

potential, both through foreign aid and through export of technical expertise, to contribute to achieving ecological, social, cultural and economic sustainablity. Whilst lower income countries generally need to implement sustainability policies urgently, it must be recognised that the higher income countries have contributed to that urgency through inappropriate private investment, foreign aid and development activity which have not always been appropriate to the needs or environments of lower income countries.

The imperative of introducing strategies for sustainability is of course no less strong in higher income countries than in lower income countries. The rate of energy use and the consumption of non-renewable resources is much greater in most higher income countries than it is in the lower income countries. Thus although the environmental effects of population growth are a very significant factor in the sustainability debate, it is as well to remember that the effect of an increase by one human being in the population of a higher income country can be much greater than the effect in a lower income country.[12]

The use of the term "sustainable development" has been subject to much discussion and criticism. It is probaly more desirable to speak in terms of "sustainability" than in terms of "sustainable development", in order to avoid the exploitative connotation in the unexamined use of the word "development". However, because "sustainable development" is entrenched in the literature, the terms are used interchangeably here. The definition of these terms is further explored in Part II.

The introduction of sustainable development strategies should be seen in the context of a number of other major international initiatives in the environmental sphere, particularly the activities associated with the Earth Summit. Further, there are increasingly stringent protocols being introduced for the Vienna Convention on the Protection of the Ozone Layer (1985). These initiatives are all related to sustainability of the Earth in the broadest sense.

The factors involved in long-term change include a drastic reorientation and downturn of natural resource consumption, the curbing of population growth in both higher and lower income countries, the transformation of agricultural practices and forestry management, the equitable distribution of resources, and the maintenance of ecological integrity and diversity.

Strategies for sustainability, whether, through National Conservation Strategies or by more limited means, cannot be introduced overnight. Experience in many countries suggests that it can take a number of years for civil servants, politicians and the general community to get

12. For example, the average person in an industrial market economy uses more than 80 times as much energy as someone in sub-Saharan Africa: WCED *supra* note 4 at 14.

used to these new concepts, and to change policies, administrative procedures, attitudes and consumption patterns. The mere enactment of a few environmental statutes and introduction of policy changes can do little without a broad and comprehensive educational and action programme. In addition, whilst legislation and policy are the vehicles of implementation, change will not occur without political commitment and hard decisions. Political commitment to effect change involves the development of a "culture of sustainability" which recognises the inextricable relationship between ecological, cultural, social and economic elements.

At an international level, this "culture of sustainability" may eventually set standards of environmental behaviour to which governments and transnational corporations will be expected to conform. It has been said that the concept might "turn into a mandatory standard of international legal evaluation, a pre-emptory norm of international law".[13] It may also have some profound effects on the way we think about territorial sovereignty.[14] At a local level, the "culture of sustainability" may mean that the participation of local communities in environmental decision-making will assume an even more fundamental significance, both in terms of practical and ethical considerations. Without consensus at the community level, local, governments are less likely to implement basic strategies for reduction, re-use, and recycling of consumables,[15] let alone the planning of ecologically appropriate living spaces.[16]

II. THE DIMENSIONS OF SUSTAINABILITY

A. History and definitions

"Sustainable development" has become a buzz phrase of the late 80's and early 90's.[17] However, the concept of sustainable use of the earth's resources is an ancient one. Without the principle of sustainability as a way of life, humans would not have survived into the twentieth century.[18] With the advent of industrialisation and colonisation, both

13. Handl, "Environmental security and global change; the challenge to international law", 1 YBIEL at 25 (1990).
14. See eg Piddington "Sovereignty and the Environment", 31 (7) *Environment* at 18 (1989); also Handl, *supra* note 13 at 31.
15. Boer, "Sustainable Development and the Business Community: The Challenge of the 1990s", *Australian Construction Law Newsletter*, No 18 at 25.
16. Enabling local communities to care for their own environments is one of the principles for a sustainable society spelled out in *Caring for the Earth*, IUCN 1991 *supra*, note 5 at Ch 7.
17. Pearce, Barbier and Markandya, *Sustainable Development : Economics and Environment in the Third World*, Earthscan 1990, ix.
18. In ancient Greece for example, provincial governors were rewarded or punished according to the look of the land. Signs of environmental damage could lead to admonishment or even exile: see Hughes, "Gaia, an ancient view of our planet", *The Ecologist*, 13 (2, 3) (1983) and see O'Riordan, "The Politics of Sustainability"

external and internal, indigenous subsistence lifestyles have been in steep decline. In many countries, colonial powers have effectively destroyed sustainable practices and imposed regimes of land, use and agricultural management unsuitable for the culture, the climate and the ecosystem, leading to land degradation and the depletion of natural resources. The principle of sustainability remains the same today, but technology has extended the carrying capacity of local and global environments to a vast extent; however, the limits to growth seem clearly to have been reached in many countries.

Sustainable development was introduced more broadly into the environmental debate in the 1970's, by the World Conservation Strategy, although the idea was contained in the Stockholm Declaration of 1972. The concept was popularised by the Brundtland Report[19] and was further developed in *Caring for the Earth*.[20]

The Brundtland Report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[21] The Brundtland argument that sustainable development must mean an integration of economics and ecology in decision-making at all levels, rather than that those two terms be put in opposition to each other,[22] is in essence an extension of the prescription of the World Conservation Strategy of 1980 relating to the integration of conservation and development.

"Conservation" was defined by the World Conservation Strategy as "the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations". "Development" was defined to mean "the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of life".[23]

Despite the general use of the term, sustainable development is widely misunderstood and often inappropriately applied. Some groups representing development interests refer to the concept as if it means only sustainable *economic* development. Different interest groups assume different meanings according to their orientation:

> Although originally intended by the WCED as a concept that

in Turner, (ed) *Sustainable Environmental Management : Principles and Practice* Westview Press (1988) at 31 *et seq*, which includes a brief historical account of the concept of sustainability.

19. WCED *supra* note 4.
20. See *supra* note 4.
21. WCED *supra* note 4 at 87.
22. Gro Harlem Brundtland, in Pearce, Markandya and Barbier, *Blueprint for a Green Economy* (A report for the United Kingdon Department of the Environment), Earthscan Publications, London, 1989, 175; the Annex to the book incorporates a wide range of definitions of sustainable development.
23. See *supra* note 2.

would *integrate* the apparently conflicting goals of economic development and ecological integrity, sustainable development has become a convenient and attractive euphemism for a range of diverging political and economic agendas that have changed very little in the wake of the Brundtland Report.[24]

Caring for the Earth notes that the Brundtland Report's definition of sustainable development has been criticised:

as ambiguous and open to a wide range of interpretations, many of which are contradictory. The confusion has been caused because "sustainable development", "sustainable growth" and "sustainable use" have been used interchangeably as if their meanings were the same. They are not. "Sustainable growth" is a contradiction in terms: nothing physical can grow indefinitely. "Sustainable use" is applicable only to renewable resources: it means using them at rates within the capacity for renewal.[25]

"Sustainability' is defined in *Caring for the Earth* as "a characteristic or state that can be maintained indefinitely",[26] whilst "development" is defined as "increasing the capacity to meet human needs and improve the quality of human life. What this seems to mean is "to increase the efficiency of resource use in order to improve human living standards".

In *Caring for the Earth*, the term "sustainable development" is derived from a rough combination of these two definitions:

Improving the quality of human life while living within the carrying capacity of supporting ecosystems.[27]

However, this definition also seems unsatisfactory. It is anthropocentric and utilitarian, treating the environment simply as a resource for the exploitation of humans.[28] It appears to assume that supplying higher material benefits leads automatically to the satisfaction of human needs. It is not difficult to argue that many of those living in higher income countries would benefit from a decreased material standard of living, which might well lead to an increased quality of life.[29] Such a recognition might also lead to a greater transfer of material resources to countries where the material standard of living indeed needs to be raised. However, this transfer is not easy to achieve while power imbalances remain as they are in both higher and lower income countries.

24. Eckersley, "The concept of sustainable development", in Behrens and Tsamenyi, (eds), *our Common Furture*, Law School, University of Tasmania, (1991) at 46.
25. IUCN 1991 *supra* note 5 at 10.
26. *Supra* note 4 at 211.
27. *Supra* note 4 at 10.
28. See Boer, "Social Ecology and Environmental Law", (1984) *Environmental and Planning Law Journal* 233, for an explanation of some of these concepts.
29. See further , Gorz, *Ecology as Politics*, South End Press 1980, Boston.

Pearce et al., in their book *Sustainable Development*,[30] conceive of "development" in more particular terms. They take it to be a *vector* of desirable social objectives, or a list of attributes which society seeks to achieve or maximise. They state that elements of such a vector might include:

—increase in real income per capita
—improvements in health and nutritional status
—educational achievement
—access to resources
—a "fairer" distribution of income
—increases in basic freedoms.

They suggest that sustainability be defined as the general requirement that a vector of development characteristics be "non-decreasing" over time, where the elements to be included in the vector are open to ethical debate and where the relevant time horizon for *practical* decision making is indeterminate outside of agreement on intergenerational objectives. They maintain that although this level of generality may seem unsatisfactory, the essential point is that what constitutes development and the time horizon to be adopted are both ethically and practically determined.[31]

B. Australian and Canadian Concepts of Sustainable Development

(*i*) *Australia*

These various definitional dilemmas are addressed in an Australian Government discussion paper, *Ecologically Sustainable Development*, which places a gloss on the concept by prefacing it with the word "ecologically":

Ecologically sustainable development means using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained and the total quality of life, now and in the future can be increased.[32]

This definition is less specifically anthropocentric, but does not deal with the issue of how to judge when "ecological processes" can be considered to be maintained. There is also a direct implication that the total quality of (apparently) human life must necessarily be increased.

30. Pearce et al *supra* note 17.
31. Pearce et al *supra* note 17 at 2-3.
32. *Ecologically Sustainable Development* a Commonwealth Discussion Paper, Australian Government Publishing service, Canberra 1990.

The ideology of the logic of "improvement" is measured by increases in human material living standards is much the same as that in the *Caring for the Earth* definition. Fortunately, other parts of the document make it clear that there is a genuine concern for the inherent value of the environment as well.[33]

The Australian Conservation Foundation and others published a critique of the Australian Government's discussion paper in 1990, charging that the framework adopted for defining ecological sustainability was conceptually flawed.[34] It stated that the principles developed in the discussion paper were not sufficient or adequate to achieve ecological sustainability, leading to a biased analysis. In particular it argued that the paper seeks to integrated environmental concerns where these are reconcilable with economic demands, but where they were not reconcilable they were to be sacrificed to ensure present and future economic benefits. Further, the Foundation's paper stated that there was an assumption that only marginal changes were needed to economic policy to achieve ecological sustainability. In its conclusion to the critique of the Government's Discussion Paper, the Foundation stated that "there should be little serious debate over whether or not ecological sustainability is desirable. Instead, the major argument should focus on the pace and rate of adjustment which will be needed in the economy and in our lifestyles to bring our community into an ecological balance with its environment."[35]

The Australian Government's discussion paper has been the basis for the establishment of a range of working groups for each of the main economic sectors in Australia which use or have a significant impact on natural resources. These groups involved representatives of government, development interests, union and conservation groups as well as public servants representing the Australian States. The working groups covered the areas of agriculture, fisheries, forestry, manufacturing, mining, tourism, transport, energy use and energy production. The task for each working group was to "identify the most important problem areas, set some priorities for achieving the changes desired, to develop solutions that meet both environmental and economic goals, and to propose time frames for change that take account of the Government's social justice policies and Australia's role in the world economy". The process also involved addressing issues of competition for land, land management, marine problems, waste minimisation, recycling and the use of chemicals.[36]

33. See IUCN 1991 *supra* note 5, Chapter 2, "Respecting and caring for the community of life".
34. Hare (ed), Marlow, Rae, Gray, Humphries and Ledgar, *Ecologically Sustainable Development : A submission*, Australian Convservation Foundation, Greenpeace (Australia), The Wilderness Society and World Wide Fund for Nature—Australia, Australian Conservation Foundation 1990, at xiv.
35. *Supra* note 35 at 86.
36. *See Ecologically Sustainable Development Working Groups Final Report—Executive Summaries*, Australian Government Publishing Service, November 1991, at vi.

It is becoming clear in Australia at least, that conservation and industry groups are becoming more mature in their approach to environmental matters, as evidenced by the process put in place through the Ecologically Sustainable Development Working Groups generally,[37] and that the possibilities of negotiating agreements either by way of "round tables" or through various forms of environmental dispute resolution is a practical way of coming to grips with sustainability.[38]

(ii) Canada

In Canada, the federal government has established a branch within Environment Canada to deal specifically with sustainable development.[39] In addition, both federal and provincial governments have set up Round Tables on Sustainable Development, including representatives from government, industry, conservation groups and academic institutions.[40] In a 1990 workshop organised by that branch,[41] it was suggested that to be sustainable, development must meet three fundamental and equal objectives:[42]

> an economic objective: the production of goods and services. The overriding criterion in fulfilling this objective is efficiency;
>
> an environmental objective: the conservation and prudent management of natural resources. The overriding criterion here is

37. In the past decade, extremely bitter disputes have erupted in relation to environmental and resource decisions in Australia; see further, Boer "Natural Resources and the National Estate" (1989) 6 *Environmental and Planning Law Journal* 134 and Boer, 'World Heritage Disputes in Australia" (forthcoming 1992, *Journal of Environmental Law and Litigation*).
38. A specific example of this maturity is the "Salamanca Process' in Tasmania in 1989 and 1990, which saw industry, government, unions and conservation groups came together to agree on what parts of Tasmania could be logged and what parts should be protected from timber-getting. This process fell apart in late 1990; however the lesson was that there was an ability to achieve an agreement in principle in what had been a highly polarised and politicised environment. There are numerous other examples in Australia and overseas of successful environmental dispute resolution; see Boer, Craig, Handmer and Ross, *The Use of Mediation in the Resource Assessment Commission Inquiry Process*, Consultants Report to the Resource Assessment Commission, Canberra, Australian Government Publishing Service, (1991).
39. Sustainable Development and State of the Environment Reporting Branch, Environment Canada; see *Sustainable Development*, Newsletter published by the Canadian Wildlife Service, Environment Canada.
40. See for example, *Reaching Agreement: Consensus Processes in British Columbia*, Report of the Dispute Resolution Core Group of the British Columbia Round Table on the Environment and the Economy, (1991).
41. *Implementing Sustainable Development; Report of the Interdepartmental Workshop on Sustainable Development in Federal Resource Departments*, Sustainable Development and State of the Environment Reporting Branch, Corporate Policy Group, Environment Canada, June 1990.
42. Presumably "equal" here means "equally important"; however, there is still a question whether it is possible to equate economic, environmental and social objectives.

the preservation of biodiversity and maintenance of biological integrity;

a social objective: the maintenance and enhancement of the quality of life. Equity is the main consideration in meeting this objective.[43]

It was emphasised that it was necessary to translate the definition of sustainable development into operational terms for the purposes of policy and programme development, because managers and policy analysts will otherwise be reluctant to change legislation, regulations and policies or to modify management and decision making processes. In addition, practical guidance was necessary to integrate environmental considerations into economic decision making, in terms of what environmental factors were relevant, what weight they should be given, when they should be considered, what policy instruments should be applied and what evaluation criteria should be used to gauge success. Three key questions were identified in clarifying the environmental and economic "trade-offs" (assuming that they should be traded-off, in itself a questionable proposition). These were:

(1) *What* is to be sustained? (the family farm? the income generating capacity of the land? the level of soil nutrients? the biological diversity of the ecosystem?)
(2) Over *how long* is the activity to be sustainable? (a few years? several decades? in perpetuity?)
(3) Over *what area* is sustainability to be sought? (a community? a region? the country? globally?).

Although these questions were asked in the context of Canada, they are broad enough to be generalised to other countries. Similarly, the principles developed by the workshop are a useful general checklist for implementing the concept of sustainability:

(1) informed decision making that routinely integrates environmental considerations into economic policies and strategies as early as possible in the decision process
(2) the anticipation and prevention of environmental problems
(3) holistic planning and management of the environment in terms of all the functions derived from the environment
(4) full-cost accounting that incorporates environmental cost into prices
(5) living off the interest of natural assets

43. Sadler, presentation to workshop, see *supra* note 41.
44. *Supra* note 39 at 2-3.

(6) prudent management of non-renewable resources
(7) emphasis on the quality of economic "development" over the quantity or rate of "growth"
(8) the building of partnerships among "stakeholders'' (government, the private sector and consumers)
(9) the meeting of basic human needs and aspirations (recognising that poverty is a major cause of environmental degradation world-wide and an obstacle to environmentally sound economic development)
(10) planning and analysis should be conducted on an ecosystem basis
(11) the promotion of ecological, social an d economic diversity
(12) the fair sharing of costs and benefits.[45]

However, while the principles are attractive, they do not attempt to address in any fundamental way the paradigm of economic growth and the constant striving for increased material riches. The Canadian *Green Plan*,[46] the centrepiece of Canada' s federal environmental ploicy, published in 1990, does not fare much better in this respect. The *Green Plan* sets out a number of principles which attempt to address the integration of economic and environmental aspirations. These principles include the efficient use of resources, responsibilities shared between federal and provincial governments, informed decision-making through effective public participation and the adoption of an integrated approach to environmental issues. As expressed in the *Green Plan*, these do not seem to be the stuff out of which national policies can be made. The document clearly needs a great deal more substance, particularly in terms of the processes of legislative and administrative implementation.[47]

B. Economics and sustainable development

(*i*) *The meaning of economic growth*

In recent times, there has been a good deal of discussion of the meaning of economic growth in the context of sustainable development

45. *Supra* note 44 at 3-4.
46. *Canada's Green Plan*, Ministry of Supply and Services, Canada, (1990).
47. *Supra* note 46 at 153: "An Effective Legislative Framework". A recent study which looks at the practical and theoretical implications of sustainable development in a major river basin in Canada has been carried out by the Westwater Research Centre at the University of British Columbia; see Dorcey, (ed), *Perspectives on Sustainable Development in Water Management: Towards Agreement in the Fraser River Basin*, Westwater Research Centre, University of British Columbia (1990), and Dorcey (ed) and Griggs (co-ed), *Water in Sustainable Development: Exploring Our Common Future in the Fraser Basin*, Westwater Research Centre, University of British Columbia (1991); for a preliminary analysis of law reforms needed to achieve sustainability in British Coumbia, see Sandborn (ed), *Law Reform for Sustainable Development in British Columbia* Sustainable Development Committee, Canadian Bar Association, British Columbia Branch (1990).

imperatives. The Brundtland Report itself talks about changing the content of growth, in order to make it less material and energy intensive and more equitable in its impact.[48] Pearce *et al* make a clear distinction between economic growth and sustainable economic growth; they distinguish these in turn from sustainable development.[49] They maintain that economic development encompasses broader values such as the quality of (presumably human) life, whilst economic growth is related more narrowly to increases in a defined quantity, real Gross National Product per capita.

They argue that an economy experiencing economic growth over long periods of time cannot be said to be on a path of sustainable growth if there is evidence that the feedback from changes in environmental quality will induce non-sustainability. They state that sustainable development (as opposed to sustainable growth) involves at least all the things that impact on individuals' wellbeing, and, more loosely, factors such as freedom and self-respect. It also involves the question of intergenerational equity, which in turn involves the transmission from one generation to the next of a "constant natural capital". This latter concept is stated to mean "providing a bequest to the next generation of an amount and quality of wealth which is at least equal to that inherited by the current generation".[50]

With respect to non-renewable resources, it is difficult to see how a "constant" amount of capital can be transmitted from one generation to the next. Once exploited, those resources are gone forever, at least in their original form. Pearce and his colleagues answer such an argument by saying that "it is the aggregate quantity that matters, and there is considerable scope for substituting [hu]man-made wealth for the natural environmental assets".[51]

Another view on economic growth has been put in the Australian edition of *Our Common Future*, which attempts to distinguish between growth and development:

> Development is sometimes equated with growth. Although they are used interchangeably in *Our Common Future*, they are not the same. Economic growth is defined as an increase in real income per capita. Development on the other hand, simply means desirable change. Whether growth constitutes development depends on social goals. An increase in real lincome per capita may be one in a list of development objectives.[52]

48. WCED *supra* note 4.
49. Pearce et al. *supra* note 22 at 33.
50. Pearce et al. *supra* note 22 at 48.
51. *Supra* note 22 at 58.
52. WCED *supra* note 4 at 26-27; the passage goes on to note however, that sustainable development and sustainable growth, though not the same, are related, in the sense that in a market economy, development, however defined, requires that the level of real income per capita is maintained, if not increased.

The complexity of the relationship between economics and ecology has also been addressed;

> Based upon our best understanding of how economics and ecosystems operate, we must try to generate rules of behaviour which, if followed, would sustain each. We can think of economic and ecological sustainability precepts as overlapping circles. Where they overlap is found the terrain of sustainable development and the starting point of a national strategy.
>
> Economic sustainability can be defined as the way that humans must manage an economy to preserve its productiveness.[53]

The economic growth paradiam, intrinsic to most western economic theory, has come under some question in the past couple of decades.[54] A re-examination of economic growth, in particular changing the *quality* of growth is likely to be a continuing feature of the sustainability debate of the 90's. It is certainly clear that the last decade has seen a conflict between those who would characterise themselves as economic rationalists and those take a broader view of the direction of societal goals. This seems to be the case both in lower income as well as in higher income countries, although in the case of the more impoverished nations, there is an understandable drive for economic development at the expense of broader environmental considerations. Perhaps in the 1990's, the predominance of economic rationality will be overtaken by ecological rationality.[55]

(C) Sustainable Development and Environmental Ethics

(i) *Moral Considerability*

The ethical matters raised by the concept of sustainability in the modern environmental debate include the question of the proper place of humans in the world's environment, and what factors should be taken into account in determining the value to be placed on human life as opposed to other forms of life. The issue of the inherent value of non-human environments can be seen as an essential aspect of this debate.

At one end of the moral spectrum, the only thing that matters is the effect of development or conservation decisions on human beings. On the other end there is the view that every aspect of the environment,

53. Op cit, 28.
54. See Daly, *Towards a Steady-State Economy*, Freeman, 1973; Schumacher, *Small is Beautiful*, Abacus 1977; Pearce et al *supra* note 22.
55. See further, Dryzek, *Rational Ecology; Environment and Political Ecology*' at 55-56; in Australia at least, the naming of the Federal Government's initial Discussion Paper, *Ecologically Sustainable Development*, indicates that this is already happening, at least on the level of rhetoric.

down to rocks and microbes, should be taken into account as far as these effects are concerned. The first view would be characterised as including only humans in the category of items that can be "morally considerable". On the other view, all items of the ecosystem can be regarded as being within the moral framework. This debate is not new. Roderick Nash, in his book the *Rights of Nature*,[56] traces the development of the "moral consideration" argument back many centuries in Western and Eastern religion and philosophy. He uses the development of civil rights in the United States over the past couple of hundred years as an example of the extension of moral consideration to slaves and women, and argues that a recognition of the moral consideration from humans to the whole of the natural realm can be seen as a progression of the civil liberties debate. Others who would go further, to include the whole earth as being morally considerable. The idea of the earth as a living being, popularised by Lovelock and his Gaia hypothesis,[57] would seem to imply that an adequate environmental ethic demands that moral value should be assigned to the whole earth. Other thinkers would not limit moral considerability to this planet, but would view the universe itself as the "originating matrix" of the earth; the universe should thus be included in the ultimate ethical circle. By not limiting moral philosophy to the boundaries of the earth, accusations of "geocentrism" or "Earth chauvinism" ("terraism"?) would thus be avoided.[58]

The social construction of environment as something outside human beings underlies much of Western society, of which a primary characteristic is often seen as the imperative of economic development. This mode of thinking tends to "squeeze out" the soft, supposedly unquantifiable values[59] espoused by those who take a *conservative* view of the exploitation of resources:

> By definition, humankind cannot live in "the environment". The very word separates "us" from "it". But the global reality belies the myth. The truth is that human beings are now the dominant species in all the world's ecosystems and the most powerful ecological force on earth. From this perspective, we do not have environmental problems, the biosphere has a people problem. There can be no solution to our present dilemma unless we are prepared to accept this reality.[60]

56. Primavera Press/The Wilderness Society, 1990.
57. Lovelock, *Gaia : A New Look at Life on Earth*, New York 1979.
58. See Nash, *supra* note 56 at 157-158; further, Hargrove, (ed) *Beyond Spaceship Earth: Environmental Ethics and the Solar System*, San Francisco 1986.
59. See Tribe, "Ways not to Think About Plastic Trees: New Foundations for Environmental Law", (1974) 83 (7) *Yale Law Journal*, 1312.
60. Rees, "The gobal context for sustainable development", paper to symposium *Planning for Sustainable Development*, School of Community and Regional Planning, University of British Columbia, 1988 (emphasis in original, unpublished on file, Faculty of Law, University of Sydney).

The values exposed here can be characterised as the tension between an anthropocentric, or human-centred, view, and an ecocentric, or nature-centred view. The anthropocentric view was introduced by thinkers such as Descartes, who saw the world as a mechanism or machine which can be broken down into its constituent parts, analysed, and thoroughly understood. This mechanistic vision was further developed by scientists such as Newton, and has been shown to be the dominant paradigm influencing much of the industrialised world for the past 200 years.[61] To a certain extent, anthropocentricity is an inevitable result of the limitations of human perception, but a definition which expresses more clearly the responsibility of human beings to respect the intrinsic value and inherent right to continue to exist of the rest of the natural environment may well be more broadly acceptable.

Christopher Stone[62] was a significant contributor to the debate on inherent value. He argued that the inherent value perspective meant that the non-human aspects of the environment, once being regarded as morally considerable, can also be the subject of legal rights which can be translated into a demand for their continuation in existence. Just as other entities, such as corporations, could be represented in court, so can elements of the non-human natural environment bring legal actions, through human representatives, to protect their interests. The implication of this perspective is that the term "sustainability" ought not to be confined to the preservation of human life as such, but to the entire natural realm. In addition, the notions of the alleged inviolability of the use of private property, prevalent in many countries, and, at the international level, the principle of sovereignty, must be seriously questioned in the context of the introduction of strategies for sustainability.[63]

(ii) *A World Ethic of Sustainability*

These arguments seem logically to lead to the development of a world

61. See generally, Rifkin with Howard *Entropy: Into the Greenhouse World*, Bantam (1989) at 36, and De La Court, *Beyond Brundtland: Green Development in the* 1990's New Horizons Press 1990 at 132; for further analysis of the anthropocentric ecocentric dichotomy, see Tribe, *supra* note 59; O' Riordan and Turner *An Annotated Reader in Environmental Planning and Management*, Pergamon (1983), Ch 1; Boer *supra* note 28.
62. Stone, *Should Trees have Standing? Towards Legal Rights for Natural Objects*, William Kaufman 1984; *Earth and Other Ethics*, Harper and Row (1987).
63. See Sax, "The Law of a Livable Planet", paper to the LAWASIA International Conference on Environmental Law, Sydney, (1989); Ryan, "Freedom of Property An Urban Planning Perspective", (1988) 11(1) *Uni of New South Wales L J*, 48; Boer, "Some Legal and Ethical Issues", in Boer and James, (eds), *Property Rights and Environment Protection*, Environment Institute of Australia 1990. On the question of sovereignty see Piddington, *supra* note 13, where he advocates the use of expert facilitors provided by the United Nations to solve transboundary problem, see also Muldoon, "The International Law of Ecodevelopment: Emerging Norms for Development Assistance Agencies", (1986) 22(1) *Texas International Law Journal at* 51, and Handl, *supra* note 13 at 31-32.

ethic of sustainability, called for in the Brundtland Report,[64] and *Caring for the Earth* which sets out "World Ethic for Living Sustainably", summarised as follows:

> Every human being is part of the community of life, made up of all living creatures.
>
> Every human being has fundamental and equal rights, including the right to access to the resources needed for a decent standard of living.
>
> Each person and each society is entitled to respect of these rights and is responsible for the protection of these rights for all others.
>
> Every life form warrants respect independently of its worth to people.
>
> Everyone should take responsibility for his or her impacts on nature.
>
> Everyone should aim to share fairly the benefits and costs of resource use.
>
> The protection of human rights and the rights of nature is a world-wide responsibility that transcends all cultural, ideological and geographical boundaries.[65]

There is little doubt that many attitudinal changes will be needed in order for such a set of ethical principles to be broadly introduced and accepted.

(*iii*) *The Precautionary Principle and Sustainability*

The precautionary principle seems quickly to be entrenching itself as a concept in international law, and is beginning to appear in some major international documents.[66] The precautionary principle was stated

64. "...human survival and well-being could depend on success in elevating sustainable development to a global ethic", WCED *supra* note 4 at 352; see also Engel and Engel (ed) *Ethics of Environment and Development*, Belhaven Press London 1990 *passim*.
65. IUCN 1991 *supra* note 5 at 14.
66. The principle has been adopted by the United Nations Environment Programme and various international conferences on prevention of pollution of the seas, eg : the Nordic Council's International Conference on Pollution of the Seas, 1989: see generally Cameron and Abouchar, "The precautionary principle: a fundamental principle of Law and policy for the protection of the global environment", *Boston College International and Comparative Law Review*, Vol XIV, 1, (1991); this article examines in some detail the extent to which the precautionary principle has been adopted both in internatonal documents and declarations as well as in domestic law; see also Gundling, "The status in International Law of the principle of precautonary action" *International Journal of Estaurine and Coastal Law*, Vol 5, 1, 2 and 3, at 26 (1990); Third International Conference on the Protection of the North Sea, see Cameron and Werksman, "The precautionary principle: a policy for action in the face of uncertainty (draft) International Convention on Climate Change, Background Papers on International Environmental Law, Centre for International Environmental Law, London); see also Handl *supra* note 13 at 20-21.

in the Bergen Declaration as follows:

> Environmental measures must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[67]

The implication of this duty is that developers must assume from the fact of development activity that harm to the environment may occur, and that they should take the necessary action to prevent that harm; the onus of proof is thus placed on developers to show that their actions are environmentally benign.[68]

The precautionary principle can be characterised as a broadly applicable principle of ethical responsibility between human beings towards the environment and to each other as part of that environment.

Cameron and Abouchar state that the function of the principle is to ensure that:

> ...a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage.[69]

The words "substance" and "activity" imply substances and activities introduced as a result of human intervention. They allow the principle to be used in relation to all aspects of environmental degration, and to extend it to the area of sustainability. The Bergen Declaration referred to this link quite explicitly, stating that in order to achieve sustainable development, policies must be based on the precautionary principle.[70] In *Caring for the Earth*, the precautionary principleis again urged for adoption in decisions on development and environment. The principle

67. *Bergen Ministerial Declaration on Sustainable Development in the ECE Region*, May 1990, Article 7, as cited in Cameron and Abouchar, *supra* note 66 at 18; this formulation appears in a slightly modified form in a draft Convention for the Conservation and Wise Use of Forests, prepared by the Centre for International Environmental Law, London (1991): it means "the principle of establishing a duty to take such measures that anticipate, prevent and attack the causes of environmental degradation where there is sufficient evidence to identify a threat of serious or reversible harm to the environment even if there is not yet scientific proof that the environment is being harmed".
68. The Australian Conservation Foundation *et al*, *supra* note 32 at viii, stated that placing the burden of proof on proposers of technological and industrial development to demonstrate that they are ecologically sustainable should be one of the guiding principles of ecologically sustainable development; see also Cameron and Abouchar *supra* note 66 at 22.
69. See Cameron and Abouchar, *supra* note 66 at 2.
70. See Cameron and Abouchar *supra* note 66 at 18.

is invoked in relation to the basic elements of adequate national legal systems particularly when standards for pollution prevention are being set.[71]

Although it is possibly too early to assert that the precautionary principle has become a norm of international law,[72] the time when it will be accepted may not be far off. Already it has been incorporated in the draft of a convention on forestry,[73] and there is little doubt that it will appear regularly in different guises in a broad range of international documents and statements. It will no doubt surface as a prominent principle in the UNCED process. It also seems clear that more countries will absorb the concept in domestic legislation,[74] particularly as a result of its acceptance in international legal discourse.

III. SUSTAINABILITY IN LOWER INCOME COUNTRIES

(A) Transfer of concepts

It cannot be assumed that precise policy prescriptions for sustainable development are automatically transferable from one country to another. Given the vast inequalities in per capita income between countries, the concept must for this reason acquire different shades of meaning according to different economic, environmental, cultural and political circumstances. The question of intragenerational equity must be addressed as a specific economic and political problem both within countries as well as between countries. The draft of *Caring for the Earth* entitled, *Caring for the World*[75] stated:

> Greed and the maldistribution of power among people are major causes of environmental degradation and human suffering. They are the chief obstacles to achieving sustainability.[76]

Importantly, it also recognised that inequality between people within countries relates to both economic and political dimensions. It asserted:

> Unsustainable behaviour by poor people is almost always due to factors such as loss of land, growing indebtedness, or loss of access to markets, that leave them unable to support themselves

71. *Supra* note 4 at 29-30, 66 and 68.
72. See Gündling, *supra* note 66 at 30; Cameron and Abouchar are more positive; they assert that the fact that 34 countries endorsed the principe at the Bergen Conference, is an indication that the principle is emerging as a rule of customary international law: see *supra* note 66 at 20-21 and further evidence there cited.
73. Draft Convention on the Wise Use of Forests, Centre for International Environmental Law, London; see *supra* note 67.
74. See Cameron and Abouchar *supra* note 66 at 6-12 for a discussion of the extent that the principle has been adopted in domestic legislation.
75. IUCN, UNEP and WWF 1990.
76. *Supra* note 75 at 16.

> properly. When wealthier people can appropriate resources for themselves or their clients at costs far below their value for production, they treat the resources as fee goods, using them up and moving on. Poor people who lose by such appropriations are powerless to hold the wealthy accountable. Having no recourse, they place greater stress on their environments, by moving deeper into the forest, occupying marginal land unsuitable for agriculture or herding, or adopting some other destructive way of staying alive.[77]

The Brundtland Report also recognised the inequities between countries, and that many problems arise from inequalities and access to resources. Inequitable land ownership structures, it asserted, can lead to over-exploitation of resources in the smallest holdings, with harmful effects on both environment and development:

> As a system approaches ecological limits, inequalities sharpen. Thus when a watershed deteriorates, poor farmers suffer more because they cannot afford the same anti-erosion measures as richer farmers. When urban air quality deteriorates, the poor, in their more vulnerable areas, suffer more health damage than the rich, who usually live in more pristine neighbourhoods. When mineral resources become depleted, late-comers to the industrialisation process lose the benefits of low-cost supplies. Globally, wealthier nations are better placed financially and technologically to cope with the effects of possible climatic change.
>
> Hence, our inability to promote the common interest in sustainabie development is often a product of the relative neglect of economic and social justice within and amongst nations.[78]

On its own terms, the Brundtland report thus implied that the future cannot be "common" in the sense of being equal, fair and just, when the economic and ecological situation of lower and higher income countries are compared.[79] The Report maintained that the reduction of poverty is a precondition for environmentally sound development in lower income countries. Economic growth was thus seen as an essential part

77. Loc cit; these two passages do not appear in the final report, *Caring for the Earth*; this does not make them less relevant.
78. WCED *supra* note 4 at 93.
79. See WCED *supra* note 4 at 72 *et seq*; further, Roseland, M, "Socal Equity and Sustainable Development: Uncommon Future", background paper for *Planning for Sustainable Development*, School of Community and Regional Planning, University of British Columbia 1988 (unpublished; on file Faculty of Law, University of Sydney); see also *North South: a Program for Survival, Report of the Independent Commission on International Development Issues*, 1980, cited in Muldoon *supra* note 63 at 20.

of strategies for sustainable development.[80] It was said that this meant that a rise in per capita income in those countries was necessary. The Report indicated that before an impact could be made on absolute poverty a growth rate of 5% per annum in the lower income economies of Asia, 5.5% in Latin America and 6% in Africa and West Asia was required.[81]

The recommendation of continued economic growth was well received by both the Third World as well as the rich nations of the First World, because it did not call for any radical change in economic direction.[82] In essence, critics argue, the Report means business as usual, with a few economic and other adjustments.[83]

Barbier puts a somewhat different view of poverty and economic growth :

> The concept of sustainable economic development as applied to the Third World... is therefore directly concerned with increasing the material standard of living of the poor at the "grassroots" level, which can be quantitatively measured in terms of increased food, real income, educational services, healthcare, sanitation and water supply, emergency stocks of food and cash, etc., and only indirectly concerned with economic growth at the aggregate, commonly national, level. In general terms, the primary objective is reducing the absolute poverty of the world's poor through providing lasting and secure livelihoods that minimise resource depletion, environmental degradation, cultural disruption and social instability.[84]

This conceptualisation of a possible solution is close to that prescribed by *Caring for the Earth*, which argued that in lower income countries, faster economic growth is needed to secure satisfoctory living standards and to finance investment in both human development and environmental conservation.[85]

(B) Women and sustainable development

Caring for the Earth acknowledges that women are important managers of natural resources, but that in most countries they have limited access to and control over income, credit, land, education, training, health care, information or time, and that they suffer the worst of poverty and

80. WCED *supra* note 4 at 92-93, and see Eckersey, *supra* note 24 at 47.
81. WCED *supra* note 4 at 94.
82. Eckersley, *supra* note 22.
83. See for example, Trainer, T, 'A rejection of the Brundtland Report", University of New South Wales, 1988 (unpublished; on file, Faculty of Law University of Sydney).
84. Barbier, "The Concept of Sustainable Economic Development", *Environmental Conservation*, 14(2), 1987, 103.
85. IUCN 1991 *supra* note 5 at 21.

environmental degradation. Whilst this is most particularly true in lower income countries, women in higher income countries suffer from the same power imbalances, relating to environmental decision making as well as other aspects of their lives, although they are affected in different ways from women who live more closely to the earth.

Any strategy for the implementation for sustainable development must include positive discrimination law and policies to ensure that women have an equal say in environmental decision making and that they have access to the political power to make the necessary changes. These changes extend to changing attitudes on family size and women's "traditional" roles, extending mandatory primary education to female children, particularly in rural areas, providing opportunities for women to become economically self-sufficient and providing health and nutrition programmes targeted at mothers.[86] Supporting women in this way can generate other benefits, including better economic performance, improved family welfare, greater alleviation of poverty and slower growth of population. The recent report by the Commonwealth Secretariat[87] maintains that one of the fundamental constraints faced by women is the inferior status accorded to them by law and custom in many countries, owing no more than one per cent of the world's land, and with many effectively remaining legal minors throughout their lives, so that they have no legal identity separate from men enabling them to act on their own behalf.[88] This report recommends that governments, agencies and communities seek to develop mechanisms to facilitate the full participation of local women in all levels of policy-making and decision-taking. It also endorses the request of the UNCED secretariat for all countries to complete an audit on the role of women in sustainable development, in order to clarify the policies and actions needed at the national and international levels to strengthen women's roles in fostering sustainable development.[89]

Another view is provided by De La Court, who maintains that the issue is not extending development aid to women as an essential 'target group' but that development itself was the problem. "Insufficient and inadequate 'participation' in 'development' was not the cause for women's increasing underdevelopment: it was, rather, their enforced but asymmetric participation in it, by which they bore the costs but were excluded from the benefits, that was responsible for their marginalisation."[90]

86. IUCN 1991 *supra* note 5 at 23.
87. See *Sustainable Development: An Imperative for Environmental Protection*, Report by a Group of Experts on Environmental Concerns and the Commonwealth, published by the Economic Affairs Division, Commonwealth Secretariat, London (1991).
88. *Supra* note 87 at 107-121.
89. *Supra* note 87 at 120-121.
90. De La Court, *supra*, note 61 at 134-135 quoting Vandana Shiva, "Let us survive: women, ecology and development", Research Foundation for Science and Ecology, Dehradun" *Saingharsh*, No. 3 (1989).

(c) Indigenous people and sustainable development

Caring for the Earth further recognises that indigenous people around the world have also been discriminated against, their lands seldom being acknowledged as being theirs, suffering colonisation, expropriation and resource exploitation.

> Some 200 million indigenous people (4% of the world's population) live in environments ranging from polar ice to tropical deserts and rain forests. The lands where they still live are usually marginal for sustainable high-energy agriculture or industrial resource production, but they are distinct cultural communities with land and other rights based on historical use and occupancy. Their cultures, economies and identities are inextricably tied to their traditional lands and resources.[91]

In many instances, indigenous people who now form minority groups living in higher income countries have similar problems to those living as minorities in lower income countries. Internal colonisation affects them in much the same way as external colonial oppression has done and continues to do in other countries. The most common manifestation of this oppression is not having their lands and laws recognised by the dominant powers. The recognition of the customary law of indigenous peoples by national legislation is urged by the World Conservation Union in its response to the Brundtland Report:

> In many countries which have gained independence during the past few decades, an understandable urge for modernisation has led to sweeping social changes, which have been reflected in legislation. Frequently, these have involved transplanting foreign models in what appears now to have been a rather doctrinaire fashion. Among the casualties of this process have frequently been counted long-established customary laws which in many cases emboided traditional wisdom about the sustainable management of land, particularly pastures and forests; examples include legislation which vests the ownership of all trees in the state or some public body, with the result, that no incentive remains for private individuals to replant.[92]

The question of cultural sustainability is not one which is squarely addressed in documents relating to sustainable development. The march

91. IUCN 1991 *supra* note 5 at 61.
92. IUCN, The World Conservation Union, *From Strategy to Action*: *The IUCN Response to the Report of the World Commission on Environment and Development*, (1989) at 94; see also at 29-31; a paradigm example of this is the attempted nationalisation of the forests in Nepal in the late 1950's, see Pearce et al *supra* note 17 at 180.

of progress, in terms of more efficient food and fuel wood production, the introduction of new technologies, the raising of per capita income to a certain minimum level, can blithely pass by the efforts of a community to keep itself going in a cultural sense.[93] The introduction of sustainable strategies, especially through outside-imposed regulation and bureaucratic domination may serve to destroy the feeling of community between people. Community-based strategies, which may generate legislation and consistent administrative structures in many countries, seems overall to be a more effective form of implementation. In the 1990's there is some recognition in a number of countries that traditional land care can be of great value in introducing sustainable management practices.[94]

IV. TRANSNATIONAL ENVIRONMENTAL LAW AND SUSTAINABILITY

(A) The growth of transnational environmental law

In the past two decades there has been a spectacular growth in the transnational law relating to the environment, both in terms of customary law as well as in the form of conventions and treaties.[95] The United Nations Conference on the Human Environment held in Stockholm in 1972 adopted a wide range of resolutions which formed an Action Plan for international cooperation on environmental matters. The Conference also produced the Stockholm Declaration, containing 26 principles relating to the future preservation and enhancement of the human environment.[96] These principles are frequently cited as the starting point of international environmental law.[97]

93. The connections between cultural sustainability, self-determination and the right to own, use and control their traditionally occupied land is clearly recognised in the draft Universal Declaration on the Rights of Indigenous Peoples; see Report of the United Nations Economic and Social Council Report of the Working Group on Indigenous Populations, Ninth Session, October 1991; see also, Martyn, "Cultural Sustainability and Overseas Development Assistance in the Third World: Is there a role for Social Impact Assessment in AIDAB Projects?", Legal Research Project, School of Law, Macquarie University, 1990 (unpublished; on file, Faculty of Law, University of Sydney).
94. In Australia the introduction of schemes of "joint management" of national parks in areas where Aboriginal people live is one example of this; in Nepal, the transfer of management of state forests back to local villages is another; see Gilmour, King and Fisher, "Management of forests for local use in the hills of Nepal; Changing forest management paradigms", Nepal-Australia Forestry Project Discussion Paper (1987), cited in Pearce et al *supra* note 17 at 188.
95. The distinction can be put in terms of "soft" law and "hard" law. Soft law can be defined in this context as rules agreed between states which have no "enforceable" component; it expresses norms of a legal character. Hard law is that international law, generally found in conventions and treaties, which normally entails legal rights and duties; see eg Muldoon *supra* note 63 at 8; Koester *supra* note 6 at 17; see also Handl *supra* note 13 at 7 and Schachter "The Emergence of International Environmental Law" 44 *Journal of International Affairs* at 457.
96. *Supra* note 1; see also Muldoon, *supra* note 63 at 14-16; Koester *supra* note 6 at 2.
97. See eg Schacter *supra* note 95 at 459.

Koester[98] states that before the Stockholm Declaration, international environmental law could hardly be considered an independent branch of international law, but that since that time, some 300 multilateral agreements and some 900 bilateral agreements have been concluded in the environmental area. Also, a substantial body of international literature on environmental law has been developed. He states that in view of this it is not surprising that the Stockholm Declaration is described as crucial to the development of international environmental law.

It is also clear that international law has become an increasingly important mechanism in the quest for sustainable development. Muldoon for example points to the formulation of duties, norms and rules directed towards states and other development actors, and that international environmental law concepts have been integrated with concepts of the law of development to create new concepts and duties to supersede earlier ones. The law of "ecodevelopment" has resulted from this integration.[99]

Koester maintains that with the development of the World Charter for Nature[100] and the legal principles generated by the Legal Experts Group on Environmental Law of the *World* Commission on Environment and Development,[101] there are now *general* principles of environmental law which have the validity of international customary law. Such a proposition is probably a little optimistic; some of these might be regarded as tentative at best. In any case, the more significant of these include:

—a general obligation to protect the environment and natural resources;

—that the right to a healthy and well-functioning environment can be considered as a human right;

—an obligation to prevent domestic activities from harming the environment in other countries to any significant degree;

—obligations of States to use resources in such a way as to allow other States to use them in the same way;

—an obligation to inform other countries of projects which might affect the environment in those countries;

—an obligation to cooperate with other States to solve at least transboundary environmental problems and corresponding problems in

98. *Supra* note 95 at 15.
99. Muldoon, *supra* note 63 at 7; see also Richardson, "A study of the response of transnational law and policy to the environmental problems of East Asia and the South Pacific" (1990) 7 *Environmental and Planning Law Journal* at 210-215.
100. *Supra* note 3; see also Kiss and Sheldon *supra* note ..... at 46-48.
101. See Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recomendations*, Graham and Trotman/Martinus Nijhoff, (1986); see also WCED *supra* note 4, Annex one at 392.

extra-territorial areas, and to warn other States in the event of an environmental disaster.[102]

As noted above, there are now quite a number of multilateral and bilateral conventions and agreements relating to the protection of the environment. However, the 1980's has seen a demand for at least three new conventions. They are the proposed biodiversity convention, a framework convention on the law of the atmosphere[103] and a convention on sustainable development and environment protection, planned to be ready for the Earth Summit in Brazil in 1992.

(B) "Green conditionality" and sustainable development

Strategies on the part of international donors to introduce ecologically sustainable development by placing what are sometimes referred to as "green conditions" on aid are one way of achieving better environmental and economic conditions in many countries. Some aid agencies, including the World Bank, the Asian Development Bank and the United Nations Development Programme have seen the need to consider the environmental consequences of their development work.[104] The Australian International Development Assistance Bureau (AIDAB), has specifically addressed the question of "green conditions". It has developed a policy of supporting ecologically sustainable development, which is intended to encompass all delivery mechanisms in aided countries.[105] The AIDAB strategy emphasises the fact that the Australian Government will pursue a policy of supporting actively projects and programs of multi-lateral banks that promote ecologically sustainable development. It states that when projects which are inconsistent with that policy are submitted for approval, Australian representatives will be directed to state Australian opposition to them and to vote against them. In addition, AIDAB contributions to the United Nations and other multilateral organisations will be directed to specific activities consistent with the policy.[106] Whilst this policy is generally laudable, there may well be some countries which will find it a little patronising.

102. Koester *supra* note 6.
103. See e.g. Horn, "The Greenhouse Effect and International Law", (1990) 7 *Environmental and Planning Law Journal* at 294.
104. A detailed analysis of integrating environmental management into development policies can be found in Muldoon, *supra* note 63 at 30-38; for a critical review of the policies of some of the agencies, see Richardson, *supra* note 99 at 213-215.
105. *Ecologically Sustainable Development in International Deveopment Co-operation*, An AIDAB discusson paper Nov. 1990; this paper followed from the Australian Government's discussion paper *Ecologically Sustainable Development*, *supra* note 32.
106. *Supra* note 105 at 27; AIDAB's policy extends to ensuring the environmental soundness of imported goods, activity proposals for the World Food Program, and giving preference to sponsored students who wish to study disciplines relevant to the implementation of ecologically sustainable development strategies. AIDAB also intends

V. IMPLEMENTING SUSTAINABILITY THE NATIONAL LEVEL

(A) The role of legal and administrative mechanisms

The implementation of sustainability at national level has taken a variety of paths. Many of these paths will eventually lead to the framing of appropriate legislation and administrative policies which are intended to encourage, if not enforce, sustainability strategies. The World Conservation Strategy of 1980,[107] an important document at the time, which changed attitudes around the world, can now be characterised as one beginning in a very long process of change. The weakest section of that Strategy was the detail of implementation. Nevertheless, a great number of countries have now initiated National Conservation Strategies on the basis of the World Conservation Strategy.

The need for integrated, comprehensive environmental laws at a national level has been identified by UNEP and other agencies since the 1970's.[108] New environmental laws now represent the fastest growing body of legislation in virtually every nation; in their basic elements they are often similar in content. However, as with concepts of sustainability, aspects of environmental laws appropriate to one cultural context may be inappropriate to that of another. Differences in income, attitudes to punishment, and vastly different ways of conceiving the place of humans in the environment are bound to throw up alternative ways of dealing with similar problems.[110] For example, the imposition of large fines in low income countries for pollution offences simply would not work, but locally imposed community service orders may well be a better solution in some instances. Lawyers and policy analysts, particularly those who come from outside the country concerned, who are employed to draft legislation and administrative guidelines must be careful

to conduct an annual environmental audit to assess projects and their conformity to the policy of ecologically sustainable development. The other side of "green conditioning" is the issue of "tied", aid, which relates the provision of aid to trade and procurement requirements of the donor country; such requirements may well inhibit sustainability strategies that a country may have in train; see Fernanado, "Development Assistance and Sustainable Development', (1986, unpublished, cited in Muldoon, *supra* note 63).

107. *Supra* note 2.

108. See *The Implementation of the Montevideo Programme for the development and Periodic review of Evironmental law* 1981-1991: *An overview supra* note 7 at 36.

109. Robinson, "A Legal Perspective on Sustainable Development", in Saunders (ed), *The Legal Challenge of Sustainable Development*, Canadian Institute of Resources Law, Calgary (1990) at 17.

110. For example, the Islamic view of environmental matters reflect a rather more integrated view of humans and the universe in comparison to the Western view; see Kader, Sabbagh, Glenid and Izzidien, *Basic Paper on the Islamic Principles for the Conservation of the Natural Environment*, IUCN, with Metrology and Environmental Protection Admnistration, Kingdom of Saudi Arabia, 1983; see also Kiss and Sheldon, *International Environmental Law*, Graham and Trotman 1991 at 21-13,

to ensure that any preconceived notions they may have of how to proceed fits in with the people and communities they are endeavouring to assist.

It is significant to note that the Brundtland Report devoted a whole chapter to legal and administrative strategies for sustainable development.[111] It is becoming more broadly recognised that without a legal basis for implementation, a governmental policy of sustainable development across all industrial sectors will not be effective in many cases. *Caring for the Earth stated:*

> Environmental law, in its broadest sense, is an essential tool for achieving sustainability. It requires standards of social behaviour and gives a measure of permanency to policies. Environmental law, based in turn on scientific understanding and a clear analysis of social goals, should set out rules for human conduct which, if followed, should lead to communities living within the carrying capacity of the Earth.[112]

B. *National Conservation Strategies*

Many countries have now carried out reviews of their government policies in the light of the Brundtland Report,[113] and various aid agencies In the Pacific region, the South Pacific Regional Environment Programme (SPREP) has been instrumental in organising regional initiatives for the introduction of National Environmental Management Strategies in five countries.[114] These Strategies, which are in essence the same as National Conservation Strategies, involve the development National Environment Management Strategies in tandem with a review and revision of national and provincial environmental legislation and administrative mechanisms.[115]

Nepal is used here as an illustration of some of the factors involved in the implementation of a National Conservation Strategy.

C. *Implementing sustainable development in Nepal*

Nepal is ecologically and socially a very diverse country, which faces a broad range of environmental difficulties. These include a diminishing resource base coupled with a population explosion which has created

111. WCED, *supra* note 4, Ch 12.

112. IUCN 1991 *supra* note 5 at 67.

113. For example, in the Asian region Indonesia, South Korea, Malaysia, Nepal, Pakistan, the Philippiness and Sri Lanka have done such reviews. Four of these countries, Malaysia, Nepal, Pakistan and Sri Lanka, have adopted, or are in the process of adopting National Conservation Strategies with the assistance of the World Conservation Union "Brundtand follow-up in Asia", (1990) 21 (4) *IUCN Bulletin*, 9.

114. Cook Islands, Federated States of Micronesia, Solmon Islands, Tonga and the Republic of the Marshall Islands.

115. The legal reviews of the five countries will be published by SPREP in 1992.

increasing rural poverty, leading to increased deforestation, soil erosion, degradation of watersheds and contamination of ground water, soil and air. Increasing urbanisation through a process of migration of rural population has been aggravating environmental and planning problems in the towns.[116]

The National Conservation Strategy for Nepal was developed over some years by the Government of Nepal in collaboration with the local project office of the World Conservation Union (IUCN). The Strategy was published in 1988, and covers a very broad range of environmental matters.[117] The objectives of the Strategy are to help :

1. satisfy the basic material, spiritual and cultural needs of the people of Nepal of both present and future generations;
2. ensure the sustainable use of Nepal's land and renewable resources;
3. preserve the biological diversity of Nepal in order to maintain and improve the variety of yields and the quality of crops and livestock, and to maintain the variety of wild species, both plant and animal;
4. Maintain essential ecological and life-support systems, such as soil regeneration, nutrient recycling and the protection and cleansing of water and air.

The process of implementation of the Strategy is now underway. This involves a broad range of initiatives, including field work, extensive training courses for local experts, research into pollution sources, heritage surveys, the development of an environmental impact assessment programme and the review of environmental law and administrative mechanisms.

Partly as a result of the completion of the National Conservation Strategy, and partly because of the direct pressures of environmental degradation, there has been a growing awareness of the need to modernise existing laws, administrative processes and institutional arrangements relating to environmental matters. Another factor has been the democratisation of the Nepalese political system in the past two years, which has resulted in the redrafting of the Nepal Constitution. A number of groups and individuals pressed for the introduction of an environment protection provision. The new Constitution approved in the latter part of 1990 includes the following provision in relation to the environment:

116. The causes and effects of environmental degradation in Nepal have been the subject of many studies. See e.g. Ives and Messerli, *The Himalayan Dilemma: Reconciling Development and Conservation*, Routledge, London, 1989; see also a review essay which questions some of the conclusions reached in the book: Fisher, "The Himalayan Dilemma: Finding the Human Face", 1990 31(1) *Pacific Viewpoint*, 69-76.
117. *Building on Success: The National Conservation Strategy for Nepal*, His Majesty's Government of Nepal, and International Union for Conservation of Nature and Natural Resources 1988.

> The State shall give priority attention to the protection of the environment and the reduction of impacts on the environment due to the implementation of physical development activities through public awareness on environmental quality, and shall give special attention to the protection of rare animal species, the the forests and the vegetation of the country.[118]

This provision could not be regarded as the strongest possible. As it is contained in the Directive Principles rather than the body of the Constitution, it is legally unenforceable. However, it does represent a significant advance in terms of the public debate over the environment in Nepal, and may properly form the basis of wide-ranging administrative and legislative reforms over the next few years.

The Environmental Law and Institutional Development Programme carried out as part of the implementation of the Nepal National Conservation Strategy looked at the existing legislative and administrative arrangements relating to environmental protection, land use and resource management in Nepal.[119] The Review found that while there is a good deal of administrative infrastructure and legislation in Nepal relating to the environment which could be used in the implementation process, little of it could be regarded as being effective. Much of the legislation relates to land use, in particular forestry, mining and other resource exploitation. As in most other countries, the existing law has not been drafted with any particular philosophy of environmental conservation in mind. There is little effective pollution control legislation, no environmental impact assessment legislation, minimal planning legislation and no effective scheme for cultural heritage protection. The natural heritage is protedcted only insofar as it is covered by national parks legislation. The Review indicated that much of the existing environmental, resource management and land use planning regime needs a good deal of attention in order to bring it up to modern international standards. The Review suggested that a comprehensive environmental protection statute should be introduced and that existing environmental legislation should be substantially upgraded. New planning legislation for both urban and rural areas was also suggested.

The second stage of the World Conservation Union study concentrates on writing drafting instructions for a new environmental management regime, to be embodied in a statute, with the possible establishment

118. In translation, from Hassan, "Legal Aspects of Conserving Biodiversity in South Asia", paper to Workshop on Designing and implementing the Bodiversity Conservation Strategy, IUCN General Assemby, Perth, December 1990.
119. *Review of Existing Legislation, Administrative Procedures and Institutional Arrangements relating to Land Use, Environment Protection and Resource Development*. His Majesty's Government of Nepal and the World Conservation Union (IUCN) Nepal 1991; the Review and its recommendations are presently being considered by the Government of Nepal.

of a comprehensive environment protection agency. The model being developed could set up cooperative, flexible arrangements for planning throughout the country, guaranteeing participation from local groups and individuals, whilst also setting nationally consistent standards for environmental impact assessment and pollution control.

D. Institution building

Bureaucracies relating to resource management, build up over a period of years, are often loath to incorporate new functions such as mandatory environmental assessment, or the addition of Environment Units. Nevertheless, it is clear that the setting up of new institutions and the reorientation of existing bodies are an integral part of the process of change occurring in many countries. In lower income countries in particular, there seems also to be an acceptance that existing structures may take a long time to change, for reasons of lack of resources, lack of political will and the pressure for resource development, particularly from external investors. In commenting on the rewriting of constitutions in the South Asian region to import environment protection provisions, it has been stated :

> In the ultimate analysis, however, whether a state follows and implements conservation measures would depend on political will. The development of such political will has followed a familiar pattern in the region. First, each country in the region faces or reaches intense environmental degradation. From such degradation emerges consciousness among the prople to meet environmental challenges with long-term societal objectives. This awareness next sensitises the Government and the decision makers and results at this stage in the announcement of an Environmental Code or legislation and a plethora of conservation-oriented measures. These measures, however, are first not implemented because the institutions and the necessary infrastructure have not developed to keep pace with the policy and legal regime. The next stage in the development of the political will is the allocation of resources for institution-building, [hu]man power development, technical data and laboratories. Institutions develop from the embryonic department on the National Planning Ministry that routinely handles environment and conservation measures to the ultimate blossoming of a fully-fledged Ministry of the Environment duly reinforced by a full-time Environmental Protection Agency in the country.[120]

The point at which an individual country is ready to establish a Ministry for the Environment and/or an Environment Protection Agency

120. Hassan, P, *supra* note 116 at 9.

(assuming that these are litmus tests for the highest level of institutional response in this area) is difficult to determine. The timing depends on the stage of economic development, the degree of expertise within government departments, the pressure from electorates and the effect of the latter on politicians.

Even in Australia, where environmental bureaucracies have been in existence in most States and at federal level since the 1970's and where there is generally a high level of environmental awareness, there is only in recent times a push to introduce a federal Environment Protection Agency.[121]

E. Drafting appropriate legislation

Each country and in federal systems, each jurisdiction within a country, is likely to have somewhat different requirements and emphases in relation to the importation of sustainable development principles into its legislation and administrative practices. No one model will be sufficient.

Nevertheless, *Caring for the Earth*[122] states that governments should ensure that their nations are provided with comprehensive systems of environmental law, covering as a minimum :

* land use and development control
* sustainable use of renewable resources, and non-wasteful use of non-renewable resources
* prevention of pollution through imposition of emission, environmental quality, process and product standards designed to safeguard human health and ecosystems
* efficient use of energy, through the establishment of energy efficiency standards for processes, buildings, vehicles and other energy consuming products
* control of hazardous substances, including measures to prevent accidents during transportation
* waste disposal, including standards for minimisation of waste and measures to promote recycling
* conservation of species and ecosystems, through land-use management, specific measures to safeguard vulnerable species and the establishment of a comprehensive framework of protected areas.

121. See *Proposed Commonwealth Environment Protection Agency: Position Paper for Public Comment*, July 1991; in New South Wales, which has what is considered to one of the more advanced environmental statutes in Australia, (the *Environmental Planning and Assessment Act* 1979) legislation to establish an Environment Protection Authority was only passed in 1991; see *Protection of the Environment Administration* Act 1991.

122. IUCN 1991 *supra* note 5 at 68.

One recent example of an attempt to import sustainable development concepts into legislation is the *Resource Management Act*, which was passed in the New Zealand Parliament in 1991. The legislation covers a very broad area, including environment protection, planning, heritage, resource allocation and Maori rights. It specifically sets out the purpose of the legislation as promoting the sustainable management of natural and physical resources and defines sustainable management as :

> managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while
>
> (*a*) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (*b*) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
>
> (*c*) Avoiding, remedying, or mitigating any adverse effects of activities on the environment (s 5(1)).

While the Act was somewhat watered down from the original Bill,[123] the Act nevertheless has the potential to be a significant precedent for other countries. It will be interesting to monitor its implementation, and whether its high ideals will be able to be achieved in practice. Fisher's comment on the then draft legislation was :

> The enactment of the Bill will fundamentally change the direction of decision making in resource management in New Zealand. Sustainable management is the pivot around which all decision making and policy formulation revolves. All other provisions are in a sense incidental to this concept. The mineral industry in particular will face major challenges in implementing the new system. This industry, like every other element within the community, will be able to influence policy formation in a way that has not been possible under the existing legislation. The whole scope of policy formulation and decision making will change.[124]

123. See Resource Management Bill 1990; see also background documents: *Implementing the Sustainability Objective in Resource Management Law*, Working paper No 25, Resource Management Law Reform, Ministry for the Environment, New Zealand 1988; Cronin, *Ecological Principles for Resource Management*, Ministry for the Environment, New Zealand 1988.

124. Fisher, "The sustainable management of resources in New Zealand", paper to Australian Law Teachers Association Conference, Canberra 1990 (unpublished).

VI. CONCLUSION

The introduction of sustainable strategies on a worldwide basis will take a great deal of effort and time. At an international level, the drafting of international conventions and declarations, will provide the necessary stimulus and legal obligation to begin the slow process of implementation of sustainability. The signatories to the mooted environmental conventions will not all respond equally or uniformly to the obligations which will be contained in such documents, and many will require considerable assistance from the international community to comply.

The integration of economic and ecological aspirations is one of the greatest challenges facing international institutions and national governments around the world today. The reorientation of national economies, changing the ethos of transnational and national corporations and establishing the culture of sustainability throughout the community of nations as well as domestically will not be easy to achieve. The Earth Summit of 1992 will be a major step towards these objectives. In many countries it will be the role of the environmental lawyer to supply the mechanisms for their attainment.

LEGAL PROTECTION OF COMPUTER SOFTWARE: ISSUES AND CONTROVERSIES

PROFESSOR P.S. SANGAL* AND DR. SUDHIR K. DIXIT**

IT IS said that the first digital computer, as opposed to advanced calculating machine, was invented about five decades ago in 1939 by the American Physicist Atasanoff. The vurgeoning of the related software industry did not occur however, until much more recent times, with the introduction of the ultrasophisticated electronics of the last two decades.[1] Computers and computing form the basis of information technology. Developments in this field have raised questions as to the adequacy of the legal protection not only of the products of the technology, such as software, but also for the protection of information or data which is converted for use in computers and is accessed, manipulated and transmitted in this medium. This raises fundamental questions about subsistence, authorship and ownership, and what constitutes infringement of the programs.[2]

In this paper, we intend to look at these problems and how the law has responded to the challenges posed by the high speed of development in the field of computer software.

I COMPUTER

Computer is an electronic machine capable of storing and processing data. Computers serve as memories for all kinds of data and as data-pro cessors. In the computer language, the machines are called 'hardware' and the explanations, instructions and systems which have been developed in order to run the machine are called 'Computer Software'.[3]

II COMPUTER SOFTWARE

There is no universally agreed definition of a software. It is generally understood to mean computer programs and other materials prepared in connection with the use of computers. The WIPO Model Provisions on the Protection of Computer Software,[4] however, offer the definition which

* B.Sc., LL.M., Ph. D., Head & Dean, Faculty of Law, University of Delhi, Delhi 110 007.

** B.A., LL.M., Ph.D., Research Associate, Faculty of Law, University of Delhi, Delhi 110 007.

1. See Mr. Justice Paul de Jersey, "Protection of Computer Programs : The Current Position", 22 *Intellectual Property in Asia and the Pacific*, p. 25 (1988).
2. See generally T. Black, *Intellectual Property in Industry*, p. 192 (1989).
3. See *Background Reading Material on Intellectual Property*, p. 363 (WIPO Publication No. 659 (E), 1988).
4. *Wipo Model Provisions on the Protection of Computer Software*, 1978. See also 'Protection of Computer Software", memorandum prepared by the International Bureau of WIPO for Seminar on *Intellectual Property and High Technology*, held in New Delhi from March 2-4, 1987.
5. See Millard, *Legal Protection of Computer Programs and Data*, p. 4 (1985).
6. See *Background...op.cit*, p. 364-365.
7. See article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works, 1886 administered by WIPO and Article 4 bis (1) of the Universal Copyright Convention, 1952 as revised in 1971, administered by UNESCO.

could be considered useful for our purpose. It defines a computer program as "a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information processing capabilities to indicate, perform or achieve a particular function, task or result.

III DESIRABILITY OF ADEQUATE LEGAL PROTECTION

There is great incentive for countries to ensure legal protection for such technology. Computer software is particularly vulnerable, and that necessitates specially designed protection. The cost of developing programs constitutes a large part of total production costs in the software industry. But software packages, once produced, may often be copied at nominal expense, and wide-spread illicit copying and distribution will erode the original author's own market.[5]

The computer technology in relation to intellectual property laws gives rise to some questions. For last two decades these questions have been the subject of debate at national and international level as well. Except the computer software, a general consensus on these questions were recorded in the Report of the Second Committee of Governmental Experts on Copyright Problems arising from the use of computers for access to or the creation of works. This Committee was convened by World Intellectual Property Organisation (WIPO) and UNESCO in Paris in June 1982. The Committee with one or two modifications, substantially endorsed a set of draft recommendations. The salient conclusions may be summarized as follows:[6]

(*i*) The input of a protected work into a computer system includes the reproduction of the work on a machine-readable material support, and also the fixation of work in the memory of computer system and both these acts (i.e. reproduction and fixation) are governed by the International Conventions[7].

(*ii*) The output of the protected work from a computer system should be protected under copyright law, irrespective of the form of the output.

(*iii*) In amending or modifying national legislation to take account of computer use of protected works, care should be taken to ensure that author's moral rights should continue to be exercisable in relation to computer use and that the exemption and limitations on the copyright owner's right of control which computer technology

might render desirable, do not exceed the limits on such exemptions permitted by the conventions.

(*iv*) Non-voluntary licences in relation to the computer use of protected works should only be adopted when voluntary licensing is impracticable, and should, in any case, be in accordance with Convention principles; and

(*v*) Where a non-voluntary licence is adopted by a national law, its effect should be confined to the territory of that law.

In many countries the existing law appears to be implementing these general conclusions.

IV VARIOUS WAYS OF LEGAL PROTECTION

Apart from the Copyright Protection, three types of legal protection of computer program may be considered. Firstly the protection by patent, secondly by Trademarks and thirdly by the law relating to trade secrets and confidentiality.

(*i*) *Protection by Patent*

With regard to the patent protection, the question arises whether a computer program can constitute an invention, because so called 'instructions to the human mind' are not generally considered to be inventions. Yet patents could be granted where software forms an integral part of a process, provided that the usual conditions of patentability (novelty, inventive step, and industrial application) are fulfilled.

Generally, the patent protection is not attractive even in relation to those few programs which satisfy the requirements of novelty and inventiveness.[8] It is because the obtaining of patent protection can be a very slow process, so that most programs could become obsolete before receiving protection. There is always possibility of succeeding in the challenge to a patent. Further disadvantage in the patent protection is that patent litigation is expensive and the patent specifications are published.

(*ii*) *Protection by Trademarks*

The law of trademark has also been viewed as one of the means of legal protection of computer programs. It is said that, normally, registration of a mark for the protection of computer software takes place under one or two categories, which covers electrical and scientific equipment or paper goods and printed matter.

As there is no specific use class provided for computer software, protection could be found by the use of these two classes of trademark protection. A trademark could be used on scientific equipment, paper articles e.g. the wrappings in which the discs are inserted or on promotional or advertising literature. This means that applications for both classes of protection are always necessary in whatever jurisdiction it is decided to sell or manufacture. It is important to remember that service marks are now available to protect the services which computer software manufacturers provide in addition to the hardware and software itself.[9]

8. See Report of the International Bureau of WIPO and Advisory Group of Governmental on the Protection of Computer Software : "Model Provisions on the Protection Exports of Computer Software", p. 2, January 1978.

(*iii*) *Protection by Trade Secrets*

Protection for the "Trade Secrets" contained within computer software may be available. If information about such matters is imparted to employees then a court may in an appropriate case restrain a breach of the confidentiality. Contractual provisions in contracts of employment may strengthen any such obligation of confidence.[10]

In this connection, it may be pointed out that as far as the protection against violation of trade secrets are concerned, the question arises how far such protection is available under the national laws. In respect of India, it is not possible to protect computer software by the law relating to the trade secrets because we donot have law relating to the trade sectets. Moreover, it is clear that this form of protection is limited to programs which are communicated with an obligation of confidentiality. Finally, it is worth mentioning that the user of the computer program may be bound to use the program only for specific purposes and not to communicate it to third party.

(*iv*) *Protection by Copyright*

With regard to the protection of computer software by copyright, the question arises that whether computer programs are protectable 'works' in the sense of copyright laws. In this connection it may be said that though the computer programs do not readily fall into the categories of writings, books or scientific works, yet most of the national laws have overcome any doubts by expressly stipulating that computer programs are to be considered as works protected by copyright.

V PROTECTION OF COMPUTER SOFTWARE IN INDIA

In India, Copyright Act, 1957 was amended in 1984 to expressly extend protection to computer program. This has been done by redefining the 'Literary Work' under section 2(0) of the Copyright Act, 1957. Now the term 'lierary work' includes tables, compilations and computer programs, that is to say, program recorded on any disc, tape, perforated media or

9. See T. Black, *op. cit.*, p. 217.
10. See Mr. Justice Paul de Jersey, *loc. cit.*, p. 27.

other information storage device, which, if fed into or located in a computer or computer based equipment is capable of reproducing any information.[11]

As in India, the international trend is strongly towards the use of copy right law as the favoured mode of protection, and adapting its traditional form as necessary to cover programs. Now we will discuss the protection of computer software in some other countries.

VI PROTECTION OF COMPUTER SOFTWARE IN SOME OTHER COUNTRIES

In the United States of America, the Copyright Act, as amended in 1980, defines a 'computer program' as a set of statements or instructions to be used directly or indirectly in a machine in order to bring about a certain result[12]. Copyright protection extends to the literary or textual expression contained in the computer program. Copyright protection is not available for ideas, program logic, algorithms, systems, methods, concepts, or layouts.[13]

In U.K. Copyright, Designs and Patents Act, 1988 extends protection to the computer program. It includes the computer program under the definition of 'literary work'. It provides that 'literary work' means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes a table or compilation, and a computer program.[14]

The United Kingdom Parliament has also enacted the Copyright (Computer Software) Amendment Act, 1985. The Act confirms that copyright protection is available for computer programs under the Copyright Act. The issue of Copyright in computer programs had not been authoritatively determined in the United Kingdom prior to the amending legislation. Such judicial analysis as had occurred, mainly in the course of interlocutory proceedings, suggested a trend towards the existence of copy right in such technology.[15]

In the Federal Republic of Germany, the Computer programs are protected by an Act dealing with Copyright and Related Rights amended in 1985. Computer programs are protected for a period of 25 years from the date of publication.[16]

In Australia, the traditional copyright model having been found in appropriate to confer protection on advanced computer software, the Australian legislature responded promptly. The Copyright Amendment Act came into force on June 15, 1984. Its object is to ensure protection for

11. Section 2(0) of the (Indian) Copyright Act, 1957.
12. Section 101 of the U.S. Copyright Act, 1976.
13. See generally, R.H. Stern, "The Legal Protection of Computer Software and Computer-Related Innovations n the United States, "*Industrial Property*' April-May, 1982.
14. Section 3(1) of the U.K. Copyright, Designs and Patents Act, 1988.
15. Mr. Justice Paul de Jersey, *loc cit.*
16. See Conferences and Meetings/Text in 4 *World Intellectual Property Report*, p. 25 (1990).

computer programs, including those expressed in object code. Computer programs are now included within the definition of 'literary work'. It requires "an expression, in any language, code or notation of a set of instructions (whether with or without related information) intended, either directly or after either or both (*a*) conversion to another language, code or notation; (*b*) reproduction in a different material form, to cause a device having digital information processing capabilities to perform a particular function."[17]

Japan has also amended its Copyright Law in 1986 to add the definition of the term 'program' to the other definitions. The amendments expressly identify a "program" to mean "an expression of combined instructions given to a computer so as to make it Function and obtain a certain result".[18]

It is not widely known that Philippines was one of the first few countries to provide legal protection to the computer software. In Philippines, "computer programs" are expressly protected by the Intellectual Property Decree, 1972. Intellectual Property Decree protects the work produced through new technologies and techniques. "Computer Programs" are expressly protected, under the Intellectual Property Decree, in recognition of the considerable amount of costs as well as technical knowledge and expertise that go into their preparation. The Intellectual Property Decree, 1972 does not provide a definition of 'Computer Programs' or 'Computer Software[19]'.

The first copyright law in the history of Peoples' Republic of China was enacted on September 7, 1990 and came into force on June 1, 1991. Chinese Copyright Law extends protection to the computer programs[20]. The Chinese Copyright law does little to define the scope of protection for computer software. According to Chinese officials, most questions on software protection will be addressed in implementing regulations. Official have indicated that the software will be protected for a period of 25 years[21].

VII INTERNATIONAL PROTECTION OF COMPUTER SOFTWARE

In view of the problems existing with the protection of computer programs at the national level, the question of international protection of computer program has also arisen. International protection means the protection of programs in a country in respect of which the owner of the

17. Section 10 (1) of the Australian Copyright Act, 1968. See Mr. Justice Paul de Jersey *loc. cit.* see also, A Liberman, "The Legal Protection of Computer Programs in Australia", *Industrial Property*, (Nov. 1983).
18. Section 10 of the Japanese Copyright Act, 1970 as amended in June 1985.
19. Section 2(n) of the Philippnes Intellectual Property Decree, 1972. See also Carlo A. Carag, Rodriguez & Somera, "Philippines : Protecting Computer Software" *IP ASIA*, p. 2 (Jan. 4, 1990).
20. Article 3(8) of the Chinese Copyright Law, 1990.
21. See Joseph Simone, "Analysis of PRC's First Copyright Law", 4 *World Intellectual, Property Report*, p. 282 (1990).

program is not a citizen or resident. In this connection, it is generally believed that the existing international conventions i.e. Berne Convention For the Protection of Literary and Artistic Works, 1886 as amended on July 14, 1967 and the Universal Copyright Convention, 1952 as revised in 1971, may provide the required protection to the computer programs.

Here it may be pointed out that membership of these Conventions provides protection abroad to the creative work of the citizens of the member countries to the same extent, as a member state protects the works of its own citizens. Therefore, it is desirable that the laws of different countries giving protection to the computer programs should be consistent among themselves to minimise the problems where works are used outside the author's home country.

CONCLUSION

The problem of protection of computer software basically arises due to the modern technology which has made the reproduction or copying of computer programs possible at a fraction of the cost of actually producing the original program. Detection of its use is difficult largely because of its technical nature. It can be made possible but it requires considerable determination to chase as infringer successfully.

Keeping in view the preceding discussion, it may be said that the Copyright Law seems to be the most favoured medium adopted internationally to protect the computer software. But there remains need for making the copyright law more efficient to cope with this fast changing technology. Copyright law is required to be so tailored as to make it perfect to deal with the problem of copying and other infringements more quickly. At the same time, the owners of the computer software should also examine alternative ways for protecting their software.

INTELLECTUAL PROPERTY IN INTERNATIONAL TRADE AND THE URUGUAY ROUND

AUTAR KRISHAN KOUL*

INTELLECTUAL PROPERTY rights are sets of rights usually divided into two branches, namely "industrial property" and "copyright" and include rights relating to: (*a*) Literary, artistic and scientific works; (*b*) Performances of artists, phonograms and broadcasts, designated as neighbouring rights; (*c*) Inventions in all fields of human endeavour; (*d*) Scientific discoveries; (*e*) Industrial designs; (*f*) Trade marks, service marks and commercial names and designations and (*g*) Protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[1] Intellectual property rights have a direct bearing and symbiosis with invention and technology. Technology has been defined as a systematic knowledge for the manufacture of a product or of rendering of a service in industry, agriculture or commerce whether that knowledge be reflected in an invention, a utility model, an industrial design, a plant variety, or in technical information in the form of documentation or in skills or experiences of experts for the design, installation, operation or maintenance of an industrial plant or its equipment or for the management of an industrial or commercial enterprise or its activities.[2]

Today's world is a world of science and technology, rather science and technology is the key to the progress of mankind. The role of science and technology in the economic growth, prosperity and development of any country needs hardly any explanation and the intellectual capital formed by scientific resources and the aptitude for the technological innovations as expressed in proprietory knowledge constitutes the major assets of any country.

The international cooperation in recognising, protecting and enforcing intellectual property rights dates back to 1883—the International Convention for the Protection of Industrial Property commonly known as the Paris Convention;[3] the Berne Convention for the Protection of Literary

* Professor of Law, University of Delhi.

1. Article 2 (viii) of the Convention Establishing the World Intellectual Property Organisation (WIPO) concluded in Stockholmn, July 14, 1967. See WIPO , *Background Reading Materials on Intellectual Property* 3 (1988).
2. *Ibid* at 2.
3. For the text of the Convention, see G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention*, WIPO (1968). The Paris Convention has been revised from time to time after its signature in 1883, the last revision being Stockholmon revison of 1967. See also, A.K. Koul, in P.S. Sangal and Kishore Singh (eds.), *Indian Patent System and Paris Convention : Legal Perspectives* 50 (1987).

and Artistic Works 1886 as revised at Paris, 1971 and there are number of conventions and treaties dealing with specific categories of intellectual property.[4] These include, for Patents—the Patent Cooperation. Treaty 1970—a multilateral treaty to simplify and make more economical the work connected with the obtaining of protection and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the purpose of Patent Procedures 1980—a special agreement under the Paris Convention for protection of micro-organisms; for Trade marks—the Madrid Agreement for the Repression of False or Deceptive Indications of Sources on Goods 1891, the Madrid Agreement concerning the Internatonal Registration of Marks 1891, the Trade Marks Registration Treaty adopted by the Vienna Diplomatic Conference 1973, the Lisbon Agreement for the Protection of Appellations of Origin 1966, the Nairobi Treaty on the Protection of the Olympic Symbols 1981, the Nice Agreement concerning the International Classification of Goods and Services for the purpose of Registration of Marks 1957, and the Vienna Agreement Establishing an International Classification of Figurative Elements of Marks 1973[5];—all these conventions protect and facilitate cooperation in the industrial property and trading of goods across the international frontiers; for Designs—the Paris Convention for the Protection of Industrial Property as industrial designs receive the same general protection under the Paris Convention as patents and trade marks, the Hague Agreement concerning the Deposit of Industrial Designs that falls within the framework of Paris Convention, the Locarno Agreement establishing an International Classification for Industrial Designs 1971; for Copyright—Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organisations 1961, the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms 1971, and the Convention relating to the Distribution of Programme—Carrying Signals Transmitted by Satellites 1974.[6]

In the last two decades intellectual property rights have entered into a new and complex phase wherein computers, semiconductors[7], integrated circuits, reprography including photocopying, audio and video-recoroing, broadcasting innovations such as satellites and cable distribution and biotechnology have started becoming the objects of intellectual property rights. Amid such myraid multilateral recognition and protection of intellectual property rights, intellectual property rights in relation to trade or trade related intellectual property rights (TRIPS) is a phenomena newly discovered and rather has taken the centre stage of the latest and most

4. For the text of these Conventions, see WIPO and UNESCO, Copyright Laws and Treaties of the World (1987).
5. For the text of these Conventions, see *ibid.*
6. For the text of these Conventions, see *ibd.*
7. Semi-conductors have already been subjected to intellectual rights protection in United States : Semi-conductor Chip Protection Act, 1985 (SCPA), Pub. L. No. 98-620, 98 Stat. 3347 (Suppl.) IV (1987).

modern and complex international trade negotiations commonly referred to as Uruguay Round of Multilateral Trade Negotiations (URMTN).[8]

The URMTN included negotiations on both trade in goods and trade in services and separate negotiating groups were established for each. The Goods Negotiating Group was further divided into fourteen negotiating sub-groups such as Tariffs; Non-Tariff Measures; Natural Resource Based Products; Textiles and Clothing; Agriculture, Tropical Products, GATT Articles; Safeguards; MTN Agreements and Arrangements; Subsides and Countervailing Measures, Dispute Settlement; Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods; Trade Related Investment Measures; and functioning of the GATT system.[9]

TRIPS is providing to be the most contentious agenda of URMTN in the acrimony of the North-South dialogue and in the backdrop of the already existing multilateral legal framework in this field as well as in the light of on-going debate for the revision of the Paris Convention within the framework of the New international economic order (NIEO) deliberations.[10]

As the negotiations on TRIPS have opened serious questions of interpretation and jurisdiction of GATT as well as conceptual understanding of the problem of TRIPS, the scope of this paper is restricted to (*a*) explaining the relationship of intellectual property rights with international trade; (*b*) whether GATT constitution warrants a connection between intellectual property and GATT articles; (*c*) what exactly have been the responses of the less-developing countries including India to such a debate? and (*d*) what are the opportunities and risks of intellectual property and GATT connection?

The TRIPS problem requires a relatively inclusive solution and is not suited to the code making process used to conclude the GATT Tokyo Round.

Trade Related Aspects of Intellectual Property Rights

Science, technology and its innovation after the second world war, has revolutionised the world beyond recognition and the industrial, material and trade growth of the industrial countries especially of the OECD coun-

8. Uruguay Round of Multilateral Trade Negotiations (URMTN) is the seventh multilateral trade negotiation officially launched in September, 1986 at the special session of GATT Contracting Parties at Punta-del-E'ste, Uruguay which were to be concluded by the end of 1990. For Ministerial Declaration on the Uruguay Round, see 21 *JWTL* 583 (1987); In true GATT fashion, the URMTN was hailed as a great victory by all... to head off, or at least postpone, a complete breakdown in international trade relations... and has even been described as a 'kiss of life' for GATT, J. Murray Gibbs, "The Uruguay Round and the International Trading System", 21 *JWTL* 5 (1987).
9. For details, see Ministerial Declaration, *supra note* 8 at 585-589.
10. For a brief account of the revision of Paris Convention, see, AK. Koul, *supra note* 3.

tries can largely be ascribed to science, technology and research and development (R&D). Science and technology in the form of computers, aerospace products, chemicals, pharmaceuticals, video recorders, telecommunications equipment, weapons, software, fax machines and special effects laden movies have assumed a pivotal role and has equally dramatically contributed to the international trade of the world gross domestic product.[11] The two major scientific marvels of the twentieth century transportation and communication have led to the intensification of international economic interdependence as a consequence of which the world has been reduced to a global village.[12] The emergence of radar, radio field communication, and rockets have acted both as economic and military weapons in shaping the international relations amongst the countries.

The wealth created by and in the form of science and technology is largely protected by intellectual property rights regime—copyright, patents and trade marks and are essentially intangible in character, whose marginal costs of production and reproduction are often near Zero once these rights are created.

The *raison detre*, of protecting intellectual property rights is the natural law theory that persons exerting and creating the right owns the right and any appropriation of his ideas, exertions, and investments must not be stolen as he has the exclusive right and the society must respect his exclusivity in the use of his intellectual rights.[13] The intellectual property rights have been recognised in most of the countries of the world in differing and varied shape depending upon the balancing of the immediate public welfare against the long term investments in private capital formulations and its cost-benefit advantages, rather it is the primacy of public welfare which has shaped the grant of intellectual property rights in the majority of the countries respecting the intellectual property rights. Some of the legal systems would grant patents to the general categories as well as specific products taking into account socio-economic, developmental, technological and public interest needs.[14]

The developed countries in general and the industrialised countries of the OECD region in particular have monopolised science and technology to the extent that it is not only a major component of their wealth but is

11. World merchandise trade in 1988 reached an estimated $ 2.84 trillion, reflecting a 14 per cent increase over 1987 and substantially exceeding the increase in world gross economic product. 1988 World Trade Growth Up Sharply, Strong 1989, Possible, GATT Report Says 6 International Trade Rep. (BNA) 272 (March 1 1989).
12. Macdowell, Laswell and Reisman, "Theories about Internatonal Law; Prologue to a Configurative Jurisprudence", 8 *Va J Int L*, 188-194 (1968).
13. A.K. Koul, *supra note* 3.
14. See generally, The International Patent System : The Revision of the Paris Convention for the Protection of Industrial Property, UNCTAD TD B/c. 6/AC. 3/2; The Role of Patents in the Transfer of Technology to Developing Countries. Report of the Secretary General of United Nations UN DOC. E/3861, Rev. 1 March 1964.

also a major traded international commodity. As the less-developing countries are net importers of science and technology, the international market is imperfect in which the less-developing countries are unequal partners and technologically dependent on the industrialised countries.[15]

Industrialised countries especially United States of America[16] as well as its business interests[17] were keen to bring intellectual property rights on the agenda of the URMTN for the reasons that trade and intellectual property rights are a part of a common set of policies that must be integrated in the GATT in the interest of maintaining industrialised countries competitiveness.[18] Many producers in Europe and America complained that their patents, trade marks and other intellecutual property rights are not only infringed but extensively pirated in foreign markets, especially in the LDCs[19] and these producers stressed the need to eliminate the distortion to international trade said to result from these practices.[20]

The negotiating objectives of the United States are amply demonstrated in the various provisions of its Omnibus Trade and Competitiveness Act of 1988 more specifically in Section 301 of the Act. While section 303

15. It is observed that out of some million odd patents registered all over the world, only some 20,000 that is about 0.7 per cent are owned by enterprises or persons in less-developing countries — S.J. Patel, The Technological Dependence and the Less-Developing Countres, 12 J. of Mod. Af. Studes 12 (1974). The technological dependence of the less-developng countries is the single most important reason for their poverty. It is estimated that only 2 per cent of the world research and development is carried out in less-developing countries, A.K. Koul, UNCTAD Code on Transfer of Technology, 20 Foreign Trade Review 141-162 (1985).
16. The United States Omnibus Trade and Competitiveness Act of 1988 has inscribed the protection of intellectual property rights as one of the principal priorities of Unite States Trade Policy. The mandate to negotiate improved protection in other countries is supported by the statutory authority of Section 301. Pub. L. No. 100-418, 102 Stat. 1107 (1988).
17. See, for instance, Intellectual Property Committee (IPC), Keidanren, UNICE Basic Framework of GATT Provisions on Intellectual Property : Statement of Views of the European, Japanese and United States Business Committee (1988), hereinafter as Basic Framework. For the role of other business organisations, see Turnbull, Intellectual Property and GATT : TRIPs at the Mid-term, I.J. Properietary Rights 9, 11 (1989).
18. The US International Trade Commission estimates of worldwide loss to 193 firms "due to inadequate intellectual property protection in 1986 at $ 43 to $ 61 billion". A proliferation of regional arrangements in the field of intellectual property rights thus appears not to have slowed the unprecedented growth of unauthorised and unregulated use on an international scale of the very intellectual property rights that are increasingly recognised at the regional level. See, Basic Framework, *supra note* 17 at 13.
19. See, Basic Framework, *supra note* 17 at 8. Companies in industralised countries often imply that all such disputes over intellectual property are a straight forward matter of piracy or theft. Counterfeit Rolex watches and Gucci handbags do fall into that category ; see also World Trade Survey, The Economist, 6-40 (September 22, 1990).
20. See generally, J. Murray Gibbs, "The URTMN and International Trading System", 21 *JWYL* 5 (1987).

of the Act outlines procedures for identification of countries that deny adequate protection of, or market access for, intellectual property rights; section 301 of the Trade Act of 1974 as amended by the 1988 Trade Act, provides that if United States rights or benefits under a trade agreement are violated or an action, policy or practice of a foreign country is forced to unjustifiably burden or restrict United States commerce, the United Stats Trade Representative (USTR) may (*a*) suspend, withdraw or prevent, the application of, benefit of trade agreement concessions..., (*b*) impose duties or other import restrictions on the goods,... and fees or restrictions on the services of, such foreign country ..., or (*c*) enter into binding agreements with such foreign country ... (to) (*i*) eliminate ... the (unfair) act, policy or practice ... (or) (*iii*) provide the United States with compensatory trade benefits. The 1988 Trade Act's amendments to section 302 of the Trade Act of 1974 provide special expedited procedures for investigations under section 301 that involve countries identified as denying adequate and effective protection of, or market access for, intellectual property.

The economists[21] of the industrialised countries argue, of course, without sound empirical data[22] that increased levels of intellectual protection will produce much desired and long-term benefits for LDCs. They suggest that increased levels of developing country patent protection will: (*a*) encourage technology transfers and investment from the industrialised economics to the LDCs economies by providing a hospitable climate; (*b*) stimulate local innovation and technology infrastructure by providing an environment in which local innovators are encouraged to create and share their creations; (*c*) encourage domestic investment in local-technology-based industry; and (*d*) promote exports by opening markets otherwise closed to those manufacturing without authorisation. In the trade mark area, they suggest that LDCs protection will increase the local introduction of new foreign discoveries and the diffusion of information necessary to make consumer markets function efficiently by permitting consumers to make educated choices about goods of varying costs and quality. In the copyright area, they suggest that enhanced intellectual property protection stimulates local innovation and flow of ideas from abroad. The industrialised countries economists realise that there is a short term loss from enhanced protection that will be absorbed by LDCs in the form of lost pirate revenues and the reallocation of resources, but those losses will be compensated by the long term benefits enumerated above.[23]

21. R.M. Gadbaw and T. Richards, Intellectual Property Rights : Global Consensus or Global Conflict ., R.M. Gadbaw and T. Richards ed., 20-21 (1988).
22. So far not a single empirical study has been made of the alleged benefits of intellectual property rights to developed and LDCs, although Burnstein believes that benefits accrue to the LDCs; Burnstein, Diffusion of Knowledge- Based Products : Application to Developing Economies 22 Econ. Inquiry 612, 615-18 (1984).
23. Klaus Pfanner, The Usefulness of National and International Protection of Inventions, WIPO, The Use of Patent System by Industrialised Enterprises in Developing Countries ; 43, 51-54 (1982).

Studies suggest that the prospects for the industrialised countries to retain a major share in the global market in the 21st century depend not only on their ability to stimulate technological innovation but also on efforts to ensure an orderly diffusion of that technology through appropriate international legal machinery.[24] In the integrated world market, the ability of the industrialised countries to maintain healthy trade balance, in the face of cheap and non-traditional exports from the LDCs threatening the industrial countries monopoly export sectors, depend in large measure on exports of intellectual goods, in the production of which the industrialised countries retain significant comparative advantage.[25]

An international market for "counterfeit and pirated goods" has emerged from the lackadiasical attitude of the LDCs towards the intellectual property system to protect the proprietory rights of creators, inventors and trade-mark owners[26] and deficiencies in this system, real or perceived has not only reduced the share of the industrialised countries in the total quantum of intellectual goods traded across the countries, but has also established a parallel market in competition with the legitimate market for products distributed in conformity with national and international intellectual property laws.[27] LDCs have become the principle beneficiaries of this parallel market to an extent that it exacts a form of private foreign aid from investors in OECD countries who defray the underlying costs of science, technology and its innovations.[28]

While pressing for the inclusion of TRIPS on the GATT agenda, the United States argues, *interalia* that intellectual property rights regime including the Paris Convention are no longer instruments sufficiently responsive to modern protective needs of intellectual property owners, and consequently to the interests of the national economy of states party to these conventions. Old conventions do not include sufficient enforcement provisions and lack effective dispute settlement mechanisms, neither do these conventions oblige member states to effectively comply with their obligations and implement the related treaty provisions.[29] The United States proposal refers to the earlier GATT of negotiating an international anticounterfeiting code and seeks to broaden the GATT competence to

24. Gadbaw, Intellectual Property and International Trade : Merger or Marriage of Convenience, 22 Van. J. Transnational L. 223-232 (1989). 27 per cent of United States export contained an intellectual property component, Id. at p. 232.
25. See generally, R. Hudec, Developing Countries in the GATT Legal System (1987); see also, UNCTAD, Multilateral Trade Negotiations : Evaluation and Further Recommendations Arising Therefrom, 12-13, U.N. DOCTD/227 (1979).
26. See Basic Framework, *supra note* 17 at 15.
27. See Piatti, Measures to Combat International Piracy, 11 European Intl. Prop. Rev. 239 (1989); Levin, What is the Meaning of Counterfeting ? 18 Int'L Rev. Indus. Prop. and Copyright L 435 (1987).
28. See, *supra note* 21 at 2-3.
29. U.S. Proposal for Negotiations on Trade Related Aspects of Intellectual Property Rights, 34 Pat. Trade Mark and Copyright J. (BNA) 667 (1987).

include "trade related aspects of intellectual property rights". The United States suggested the conclusion of a new international treaty the GATT Arrangement on Intellectual Property which should establish high standards for the protection and enforcement of intellectual property rights of all kinds—including patents for bio-technology processes and products, patents for micro-organisms, copyrights for computer programmes, and the protection of trade secrets and integrated layout designs. The parties to such GATT arrangement should undertake to adapt their national laws and enforcement mechanisms accordingly and they are to agree on a dispute settlement mechanism that will provide for member states the possibility of resorting to retaliation, including withdrawal of other GATT concessions or obligations, against a state that fails to carry out effectively its obligations under the GATT arrangement.[30]

The United States has sought to demonstrate its resolve to protect intellectual property rights unilaterally also. The Omnibus Trade and Competitiveness Act of 1988 gives ample latitude to the United States administration to impose its own standards on other countries in protecting intellectual property rights and makes the intellectual property rights as principal priorities of United States trade policy.[31] Using the special powers conferred by super and special 301 of the Omnibus Trade Act, the United States Administration named the countries that are particularly in their protection of intellectual property rights or that have imposed barriers to market access and sought expeditious improvements in the protection of intellectual property rights and the prevention of piracy in those countries.[32] It appears that the goal of the United States is essentially to harmonize international intellectual property law with United States laws and practice and to introduce reciprocity into the international protection of intellectual property.[33]

The other industrialised countries have not logged far behind to United

30. Another reason for the United States interest in this area was, of course, the connection of intellectual property rights with the trade in services which United States wants to bring under the Umbrella of GATT. See Burg, Trade in Services : Towards a Development Round of GATT Negotiations Benefiting Both—Developing and Industrialised States, 28 Harv. Int'L, J. 1 (1987).
31. Section 301 of the Omnibus Trade and Competitiveness Act of 1988. The central theme of the Act is the need to promote U.S. exports to reduce the U.S. trade deficit, which was $ 710 billion in 1987 and will be in the $ 135-140 billion range for 1988; see introductory note by John H. Barton and Bart S. Fisher to US.: Omnibus Trade and Competitiveness Act of 1988, 281 ILM 15 (1989).
32. The USTR placed India, Brazil, the Republic of Korea, Mexico, the Peoples Republic of China, Saudi Arabia, Taiwan and Thailand on the priority watch list and Seventeen other countries were put on watch list : Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, Phillipines, Portugal, Spain, Turkey, Venezuela and Yogoslavia; 6 Int'l Trade Rep. (BNA) No. 22 at 719 (May. 13, 1989).
33. Hart, The Mercantilist's Lament : National Treatment and Modern Trade Negotiations, 21 J. World Trade L. 37, 59 (1987).

States and have shown equal determination and vehemence in enforcing intellectual property rights.[34]

The GATT Syndrome

The GATT syndrome in intellectual property rights is not only reflected in the constitution of the GATT but is equally evident from the manoeuvring of the industrialised countries to bring TRIPS on the GATT agenda, although essentially there are few articles in GATT which refer to TRIPS directly or indirectly.[35] GATT—a hybrid and the stop gap in regulating international trading relationships—having a membership of one hundred countries is still a slender reed round which the fabric of international trade has been so assidously woven.[36] After negotiating seven international tariff and trade rounds,[37] and especially after the conclusion of Tokyo Round GATT found itself concerned with intellectual property rights when Ministerial Declaration of the GATT contracting Parties called for an examination of the counterfeiting goods in the world trade.[38] The Declaration sought to determine whether GATT should take multilateral action on the trade aspects of commercial counterfeiting and by 1985 although general consensus developed that trade in counterfeit goods was a reality yet there was no agreement as to whether GATT should take any action in providing a multilateral framework in that respect.[39] However by 1986 the United States in collaboration with other OECD countries had pursuaded the full GATT membership to include in URMTN a mandate for negotiations on trade-related aspects of intellectual property rights. The mandate provided;

"In order to reduce the distortions and impediments to international trade and taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines."[40]

Initially this mandate was challenged by a significant number of LDCs such as India[41] and Brazil who contended that GATT is not qualified for

34. See, *supra note* 21 at 2.
35. *Ibid.*, 21-26.
36. John H. Jackson, World Trade and the Law of GATT (1969); A.K. Koul, The Legal Framework of UNCTAD in World Trade (1977).
37. Geneva 1947, Annecy 1949, Torquay 1950, Geneva 1955, Dillon, 1960-61, Kennedy 1962-67, Tokyo 1973-1979. For these rounds, see John H. Jackson and William J. Davey, Legal Problems of International Economic Relations (1986).
38. See Thirty-Eighth session at Ministerial Level : Ministerial Declaration Adopted on 29 November, 1982, GATT BISD 29th Suppl. (1983).
39. See Turnbull, Intellectual Property amd GATT : TRIPS at the *Mid-term*, IJI Properietory Rights 9 (1989).
40. For the text of the URMTN, see *supra note* 8 at 583.
41. India submitted quite a few papers to URMTN in this area, such as Enforcement

negotiating TRIPS, rather it is WIPO which is the appropriate forum for negotiating intellectual property standards and not until 1989 did the LDCs agree to let negotiations on substantive standards proceed, reserving the issue of the GATT's competence to promulgate new rules.[42] The industrialised countries draft proposals to the Negotiation Group on TRIPS stressed that intellectual property is a new negotiating area for the GATT and "must evolve with changing economic conditions and confront new trade policy"[43], and suggested specific recommendations on substantive standards in the area of patents, trade marks, copyright, trade secret, and semiconductor layout. These proposals further contemplated the mandatory adoption of minimum national enforcement standards, including provisions for border measures (*e.g.*, import blocking and seizure), provisional remedies, and the expeditious resolution of disputes possibly a independent GATT dispute settlement mechanism to resolve intellectual property disputes.[44] By Midterm Review of the URMTN in Montreal in December 1988[45], no worthwhile consensus on intellectual property framework was reached and by 14th May, 1990 Trade Negotiating Committee (TNC) had adopted a draft text that merely restated the fundamental disparity between industrialised the LDCs[46] reflected in four approaches. The four approaches were:

(*a*) The Chairman's approach which conceives specification of reference

of Trade-Related Intellectual Property Rights—DOC, No. MTN. GNG/NG11/W/41; (1989). Applicability of the Basic Principles of the GATT and the Relevant International Intellectual Property Agreements or Conventions, DOC. No. MTN. GNC/NH11/W/39, (5th September, 1989). Multilateral Framework for International Trade in Counterfeit Goods-Doc. No. MTN. GNG 11/W41. (1989).

42. Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, GATT TNC DOC. MTN TN/7C (December 9, 1988) hereinafter referred as Montreal Text.
43. For US proposals, see Basic Framework, *supra note* 17 at 1347; For EEC proposals, see GATT DOC MTN. GNG/NG11/W/26 (July 1988); for Mapenese proposal; see *supra note* 17; For Swiss proposal, see GATT TRIPs DOC. MTN. GNG/NG11/W/25 (June 29, 1988).
44. The GATT Codes after the Tokyo Round are using a number of independent settlement mechanisms including the codes on anti-dumping and subsidies; see Agreement on Implementation of Article VI of the GATT (Antidumping) GATT, BISD : Twenty sixth Suppl. Art. 15, 171 (1980) : Agreement on Interpretation and Application of Articles VI, XVI and XXIII (Subsidies) Id. Art. 13, 18 at 56.
45. The URMTN Mid-term Ministerial Review took place in Montreal in December 1988. The purpose of the high-level review session was to reach agreement on broad framework texts in the fifteen areas that are the subject of negotiations; these text would provide the basis for subsequent and more specific negotiations on final agreements; see GATT Focus 59 (1988); USTR, GATT Uruguay Round Mid-term Agreements Activised (April 8, 1989).
46. See, 5 In't Trade Rep. (BNA) 1554 (No. 30, 1988); For the draft text, see Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, GATT TNC DOC. MTN. TNC/7 (MIN) 21 (Dec. 9, 1988) hereinafter referred as Montreal text; see also communications from Argentina, Brazil, India and other LDCs : MTN. GNG/NG11/W/71 (14 May, 1990).

points regarding the availability, scope and use of intellectual property rights, in the light of the need to reduce trade problems arising from excessive, discriminatory or inadequate protection of intellectual property.[47]

(*b*) The LDCs approach that strongly reiterated opposition to the negotiation of substantive standards.[48]

(*c*) The United States approach for negotiating norms of substance and enforcement that reserved, however, the eventual format for institutional implementation.[49]

(*d*) The proposal that appeared to reflect the European Community and Swiss Viewpoints that provided for negotiation of norms of substance and enforcement without reference to a particular institutional arrangement.[50]

Although, agreement was announced in Geneva on a so called framework text reconciling the above stated diverse approaches, yet there is no clear indication of a fundamental shift in LDCs opposition to the industrialised country intellectual property protection programme.

GATT Articles and Intellectual Property Rights

The generally recognised basic principles of GATT are most-favoured-nation treatment (m.f.n), national treatment, protection through tariffs, stable and predictable basis for trade, transparency, and differential and more favourable treatment of LDCs. The m.f.n commitment under GATT imposes obligation on contracting parties.

Customs duties and charge of any kind imposed on importation, exportation and international transfer of payments for imports or exports: the method of levying such duties and charges; all rules and formalities connected with imporation and exporation, all matters referred to in Article 111, paragraph 2 and Article 111, paragraph 4 (which cover internal taxes and regulatory laws); and all of these apply only to products. Any advantage, favour, privilege or immunity granted by any Contracting Party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating or destined for the territories of all other contracting parties. This principle of non-discrimination as between countries applies to international trade in product while in the case of intellectual property regime, it is the rights of persons which are protected. The former is also concerned with border measures pertaining to physical objects, the latter is concerned with the protection of intangible rights within national territories. It may, therefore, be

47. See, Montreal text, *supra note* 46 at 21.
48. *Ibid.*, at 22.
49. *Ibid.*, at 22-23.
50. *Ibid.*, at 23-24.

concluded that these articles are clearly inapplicable to intellectual property rights. However, the industrial countries while introducing TRIPS in the GATT seem to suggest that m.f.n treatment and obligations thereunder should apply to intellectual property rights also.[51]

Article III of the GATT (National Treatment) concerns with, that once products have been imported into a country (that is to say, once they have crossed the border and entered the domestic market), the imported products will be accorded the same treatment as "like" products of national origin with respect to matters under government control, such as taxation and other regulations. Whether it is tax or non-tax aspects, the national treatment obligation in GATT pertain to international trade in like products, and not to persons. The Contracting Parties have recognised that "the national treatment obligations of Article III of the GATT do not apply to foreign persons or firms but to imported products."[52] The principle of national treatment is therefore equally inapplicable to intellectual property rights. The industrialised countries want that this article should apply to intellectual property in the same way as it is applying to importation and exportation of products across the countries.

Article IX—Marks of Origin—attempts in its first five paragraphs to ensure that marking requirements are not used to hamper international trade unnecessarily or do discriminate between Contracting Parties. However, paragraph 6 of Article IX refers to preventing the use of trade names in such manner as to misrepresent the true origin of a product to the detriment of such distinctive regional or geographical names of products or the territory of a Contracting Party as are protected by its legislation. This article broadly suggests its application to promote the protection of intellectual property rights.

Article XI of the GATT—General elimination of Quantitative Restriction—deals with the basic proposition that where protection is to be given to domestic industry, it should be extended essentially through customs tariffs and not through other commercial measures. Inherent in this principle is the recognition of the superiority of tariffs as a commercial policy instrument in comparison to quotas, imports or exports licences or other measures that prohibit or restrict imports and exports. This important principle of the GATT has no relevance for intellectual property rights.

Article XII—Restrictions to Safeguard Balance of Payments—in clause (3) refers to expansion of international trade and Contracting Parties are obliged to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding uneconomic employment of productive resources.

51. See, GATT Activities : US Submission to the Neogotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, 2 World Intell. Prop. Rep. (BNA) 209 (November 1988).
52. GATT, BISD 30th Supplement 140 (1977).

However, Article XII (3) (111), read with XVIII (10) requires that import restrictions employed to safeguard the balance of payments should not be applied so as to "prevent compliance with patent, trade mark copyright or similar procedures."

Article XX—General Exceptions—conceive of certain measures which can be excepted from the GATT operation and allows Contracting Parties to take measures for the enforcement of intellectual property rights that normally would be inconsistent with the GATT. These measures must be necessary to secure compliance with intellectual property laws and regulations and may not be applied in a discriminatory manner or as disguised restrictions on international trade. The substantive intellectual property law being enforced must be GATT consistent.

Article XX(d) does not oblige Contracting Parties to adopt any enforcement measures; it only ensures that GATT obligations do not stand in the way of effective enforcement of intellectual property legislation.

Articles XXII and XXIII — Consutation, Nullification or Impairment of Benefits—could be related to intellectual property rights. Under the rule of consultation, all Contracting Parties have a right to be heard and consulted in respect of any matter affecting the operation of GATT as well as any other matter for which it has not been possible to find a satisfactory solution. Therefore, the presumption is that GATT under the consultation provision could take up the intellectual property questions. Article XXIII can be invoked in any case in which a Contracting Party believes that its GATT rights have been nullified or impaired by another Contracting Party's action or that the attainment of any objective of the Agreement is being impeded as a result of the failure of another Contracting Party to carry out its obligations under GATT; or the application by another Contracting Party of any measure, whether or not it conflicts with the provisions of this Agreement, or the existence of any other situation. If so satisfactory adjustment is effected between the Contracting Parties, the matter may be referred to the Contracting Parties and the Contracting Parties may consult the Economic and Social Council of the United Nations for finding out a proper solution. Whether or not intellectual property rights could be invoked under these articles is debatable, yet intellectual property rights disputes have been decided by the GATT under these articles. These disputes concerned the United States Manufacturing Clause[53], Section 337 of the United States Tariff Act of 1930 (in two instances)[54] and Japanese labelling practices on 55 imported wines and alcoholic beverages.[55]

In a recent case of a different kind, the GATT Council agreed to set up a panel to consider Brazils' copplaint against measures taken by the United

53. See, United States Manufacturing Clause : Report of the Penal Adopted on 16 May, 1984; Reprinted in GATT, BISD, Thirty First Suppl. 74 (1983-84).
54. See, Conciliation : United States—Imports of Certain Automative Spring Assemblies : Report of the Panel Adopted on 25 May, 1983; GATT, BISD Thirtieth Suppl. 107, 126-127 (1984).
55. *Ibid.*

States in retaliation for alleged inadequate protection of United States patent rights in Brazil.[56]

The principle of according special and differential treatment to LDCs in order to promote their economic development is clearly recognised in GATT.[57] Article XVIII of GATT, accordingly gives flexibility to LDCs for introducing and maintaining restrictions for safeguarding the external financial position and for promoting the establishment of particular industries. Part IV of the GATT embodies certain commitments by the industrialised developed countries for stimulating expansion of the export earnings of the LDCs. In the Enabling clause, it has been provided that notwithstanding to provisions of Article I of the GATT, Conctracting Parties may accord differential and more favourable treatment to LDCs, without according such treatment to other Contracting Parties. These provisions may be interpreted to the extent that LDCs should not be obligated to correspond to the high standards of intellectual property rights of the industrialised countries.

From these provisions it can be inferred that generally recognised principles of GATT excepting transparency and differential and more favourable treatment for LDCs, which have their own validity even otherwise are clearly inapplicable to intellectual property rights. Also, no GATT provision obliges Contracting Parties to accord any particular level of protection to intellectual property rights or to enforce them to any particular degree of effectiveness. The only GATT provision referring to intellectual property rights, Article IX(6) as described above is limited in scope and the amount of protection guaranteed by Article IX(6) requires that the substantive law and the related enforcement measures be non-discriminatory as between the products of different Contracting Parties and not operate so as to protect or favour domestic products, except where enforcement measures can be justified under Article XX(d).

Less Developed Countries Responses

The LDCs responses to the GATT negotiations has been either hostile or at best lukewarm. LDCs initial reaction was that the industrialised countries should not be allowed to change the existing international regime of intellectual property protection to their detriment as it was beyond the legal mandate of TRIPS negotiations in URMTN. The LDCs accepted the existence of a clear mandate to negotiate trade in counterfeit goods, but these negotiations should be restricted to the examination of the trade effects of counterfeiting without entering into the discussion of "what constitutes counterfeiting".[58] LDCs opposed the attempt to transform the TRIPS

56. See, Bliss, The Amendment to Section 301: An Overview and Suggested Strategies for Foreign Response, 20 Law and Poly Int'l Bus. 0501, 516-517 (189).
57. See, A.K. Koul, *supra note* 36, Chapter 11.
58. Statement of Brazil to the Negotiating Group on TRIPS, including Trade in Counterfeit Goods, (March 25, 1987). Gadbaw and Gwynn, Intellectual Property Rights

negotiations into "an exercise to set standards of protection of intellectual property rights or to attempt to raise the levels of such protection under existing multilateral agreements through the strengthening of enforcement procedures....."[59] LDCs emphasised their strong support for the existing international agreements administered by WIPO—the Paris Convention, the Berne Convention, the Madrid and Lisbon Agreements and the Universal Copyright Convention.[60]

The LDCs perceive that to bring TRIPS on the GATT agenda is an attempt by the industrialised countries to control the diffusion of new technologies of which they have a monopoly, as a weapon to establish both economic and political leadership of the industrialised countries on the LDCs.[61] The next goal of the industrialised countries would be to freeze the existing international division of labour by way of the control of technology transfers to the LDCs and as the Transnational Corporations (TNCs) are the monopolisers of intellectual property rights, these TNCs would automatically be major beneficiaries.[62]

The LDCs reject the industrial countries philosophical claim and the natural law theory of providing a firm basis to intellectual property on the ground that it is "economic expediency" which has usually dominated the philosophical and natural law considerations.[63] The prosperity and the wealth of the industrialised countries arose and developed in absence of a fully protected intellectual property rights in earlier periods of their economic growth and the present debate is an attempt by the industrialised countries to protect their assets and national wealth in the LDCs markets.[64]

The political economy of LDCs does not warrant a complete ban on pirated works as these might be supporting the critical sectors of their economy and exclusion of pharmaceuticals products from patent protection may have resulted from conscious policy choice of lower drug prices.[65] This has been best stated in the words of Indira Gandhi, late Prime Minister of

in the New GATT Round, in Intellectual Property Rights : Global Consensus, Global Conflict ? 41 (R. Gadbaw and T. Richards eds. 1988).
59. See, Carlos Alberto Primo Braga, The Economics of Intellectual Property Rights and the GATT : A View from the South, 22 Van'd J. of Tr. 'Law 243 at 250 (1989).
60. These Conventions have briefly been discussed in the beginning of this article. According to India, WIPO is the appropriate forum for the negoiation of TRIPS; For Indian Proposal, see GATT, 6 Int'l Trade Rep. (BNA) 953 (July 19, 1989).
61. Rostow, is there need for Economic Leadership ? Japanese or U.S.? 75(2) Am Econ. Rev. 285 (1985).
62. See A.K. Koul, UNCTAD Code on Transfer of Technology : An Analysis in Legal Perspectives, 20 Foreign Trade Review 141-162 (1985); see also A.K. Koul, The MNCs : Bonanza or Sources of Illusions for the Economies of the Developing Countries ? 2 Review of Contemporary Law 11-30 (1981).
63. See, *supra note* 59 at 253.
64. See Federick M. Abbot : Protecting First World Assets in the Third World : Intellectual Property Negotiations in GATT Multilateral Framework, 22, Va. J. of Transnational Law 689-745 (1989).
65. *Id.* at 713.

India as "(T)he idea of a better-ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and dealth."[66]

The LDCs assert that the assumed losses by the industrialised countries is highly uncertain and several attempts to quantify the intellectual property losses are highly extrapolated, rather it is the margin of profit which has increased so much that the industrialised countries TNCs want more protection especially in sectors such as chemicals, pharmaceutical, computer software and entertainment (audio-viedeo).[67] Evidence shows that foeign patents become vehicles of import monopolies in the LDCs, while locally worked foreign patents seldom produce diffusion of technology much needed in LDCs, and thus recognition of foreign intellectual property rights inhibits rather than stimulates local innovation.[68]

The LDCs as a group prefer to maximise opportunities afforded by their present freedom of action under a loosely regulated international intellectual regime to adjust their intellectual property laws to their own developmental needs as the industrialised countries have done at their earlier stages of development.

The LDCs should argue that intellectual property rights are the common heritage of mankind and international minimum standards could be negotiated only within the existing framework of WIPO wherein the demands of the LDCs as New International Economic Order (NIEO) paradigm are adjusted. More specifically, the demands of the LDCs in reshaping the international economic order should be met ensuring a balancing of interests between the recipient states and foreign patent owners; promoting actual working inventions in the recipient countries and improving the conditions for the transfer of technologe of fair terms, and for avoidance of restrictive business practices.[69]

India's Position in URMTN

At the beginning of URMTN India[70] strongly resisted the move of bringing TRIPS on the agenda of URMTN. India argued that it is only the restrictive and anti-competitive practices of the owners of intellectual property rights that can be considered to be trade related because they alone distort or impede international trade. As the intellectual property system

66. See *supra note* 59 at 253, n. 46.
67. See generally, *supra note* 64, 689-745.
68. See, A.K. Koul, UNCTAD Code on Transfer of Technology, *supra note* 62 at 141-142.
69. *Ibid.*
70. India's position in URMTN has been depicted in the papers submitted by India to URMTN such as Enforcement of Trade-Related Intellectual Property, DOC. No. MTN. GNC/NG11/W/40 (1989) and the paper, Standards and Principles Concerning the Availability, Scope and Use of Trade Related Intellectual Property Agreements or Conventions. DOC. N. MTN. GNG/NG11/W/39 (1989).

has wide ranging implications for social economic, technological and developmental aspects of LDCs, any principle or standard relating to intellectual property should be carefully tested against such aspects.[71] In essence, the intellectual property system is monopolistic and restrictive conferring exclusive rights on their owners, patent protection is a mechanism for advancing certain industrial policies and thus the countries at different stages of development must retain the flexibility in their patent system to take into account disparities in their economic development.[72] Even assuming that patent system plays a part in promoting inventive activity and diffusion of technical knowledge, the protection of the exclusive rights of the patent owner is only one side of the coin. Experience of LDCs clearly shows that a patent system can have serious adverse effects in sectors of critical importance to them, such as food productions, poverty alleviation, nutrition, health care and disease prevention. The patent system can also have a dampening affect on the promotion of domestic research and development and the building up of domestic technological capabilities. It is, therefore, imperative that the protection of the monopolistic rights of the patent holder is adequately balanced by the socio-economic and technological needs of the country.[73]

India argued that exemptions from patent protection in areas such as pharmaceuticals, food products, chemicals, microorganisms, and agriculture machinery and methods must be permitted. Every country should...be free to determine both the general categories as well as the specfic products sectors that it wishes to exclude from patentablity under its national law taking into consideration its own socio-economic, developmental, technological and public interest needs. It would not be rational to stipulate any uniform criteria for non-patentable inventions applicable alike to industrialised and developing countries or to restrict the freedom of developing countries to exclude any specific sector or product from patentability.[74]

India argued for permissive compulsory licensing, particularly in cases of non-work, and argued especially for "licences of right" in areas such as food, pharmaceuticals, and chemicals, where the conduct of the patent owner will not be in issue i.e. licences will be automatically granted without judicial review. The law of the host country would be used with references to licences of right to determine fair compensation and there should not be a uniform patent term on grounds of developmental disparities.[75]

With respect to trade marks, India argued that foreign trade marks may adversely affect the allocation of resources in LDCs and should be subject to regulation in accordance with national developmental objectives. Whether a trade mark is "well known" should be determined on a country

71. *Ibid.* Standards and Principles, Paras, 3, 7, 8 and 17.
72. *Id.* para 19 at 9.
73. *Id.* para 19 at 9.
74. *Id.* para 38 at 14.
75. *Id.* para 43 at 16.

by country basis. Trade secrets cannot be regarded as intellectual property and should be dealt with by civil and contract law. Berne Convention is "more than adequate to deal with copyright protection". Based on the adoption of the Integrated Circuit Treaty, India concluded that the issue of protection of layout has been already provided for and it is now left for implementation by the signatories.[76]

Thus, in view of the foregoing points raised, India argued: "It would... not be appropriate to establish within the framework of GATT any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights".[77]

India, on account of pressures applied by United States and being named under section 301 of the Omnibus and Trade and Tariffs Act of 1988, accepted the principle of policing trade-related aspects of intellectual property within the GATT.[78] However, India made clear that it was referring to measures that might be implemented at national borders, and not to the negotiations of uniform intellectual property norms. Outwardly this appears to be a concession on the part of India, yet it does not appear to represent a basic modification of India's objection to the negotiation of host country substantive norms.[79]

The Negotiating Issues and the Future

As already discussed how GATT Constitution was turned and twisted to accommodate TRIPS at the behest of the industrialised countries and the draft text adopted by the TNC, basically four approaches got reflected with four major substantive negotiating issues carrying the fundamental disparity and conflictual situations between industrialised and LDCs. These issues are:

(1) Substantive standards or norms of intellectual property protection;
(2) Procedures under national law for the enforcement of intellectual property protection;
(3) Dispute settlement procedures between parties to any eventual agreement on TRIPS; and
(4) The relationship between GATT and other relevant international organisations including WIPO, concerning TRIPS and the relationship between an eventual agreement in the URMTN and the existing intellectual property rights.

As regards substantive standards the LDCs are pitted completely against the industrialised countries and some of the proposals to the TNC and

76. *Id.* para 44 at 16.
77. *Id.* para 47 at 18.
78. GATT, India Accepts Policing of Trade Related Intellectual Property Rights in MTN Talks, 6 In't Trade Rep. (BNA) 1176 (September 28, 1989).
79. *Ibid.*

detailed above envisage negotiation of commitments for a wide range of intellectual property rights such as patents, copyrihgt and related neighbouring rights, trade marks, industrial designs, trade secrets, the layout design of semiconductor integrated circuits, and geographical indications, including appellation of origin. Since trade policy is only a minor consideration to the LDCs, this author does not know the appropriateness of negotiating on standards in the GATT context and how far these issues are really trade-related. It is also a fact that negotiating standards would prejudice other complementary initiatives taken in WIPO or elsewhere. The basic framework of GATT is to manage orderly trade across the boundaries and reduce distortions to international trade, the raising of intellectual property standards may put obstacles to trade discrimination amongst the countries. At best the URMTN should have addressed to trade distortions or impediments arising from the abusive or loose use of intellectual property regime. It is difficult to concede that higher levels of intellectual rights would yield benefits to both—industrialised and LDCs.

So far as procedures for the enforcement of intellectual property under national law are concerned, this author is not sure as to what shape the enforcement of intellectual property rights in national legislation will take place. In case a treaty is worked out under the auspices of GATT or as its appendage, the problem of territoriality under international law would definitely arise. In cae GATT Constitution is amended to incorporate enforcement mechanism the settlement of disputes would equally be contentious in addition to the problem of how to amend GATT. This author believes that there is a need to create a multilateral framework of rules and disciplines on international trade in counterfeit goods which may take care of most of the trade problems that have been identified in TRIPS negotiations. Enforcement measures should not be allowed to amount to as disguised restrictions on legitimate trade and there is a real need to look into this matter in more detail and intensively.

The issue of the procedures for settlement of disputes between governments over their respective international legal obligations in connection with intellectual property rights is two dimensional. The first dimension concerns with the wide spread belief that public international law does not provide an effective method of settling disputes between the governments which is reflected more in international intellectual property regime. The second dimension is the functional efficacy of GATT settlement of disputes procedure and practice. This author does not believes that in the event GATT settlement of disputes procedure is applied to TRIPS that may develop a linkage between obligations on the standard of intellectual property protection and rights to market access, through the possibility of authorised retaliation which may ultimately not suit TRIPs.

The roles of WIPO, GATT and other international institutions dealing with intellectual property rights are important issues both in terms of jurisdictional congruities as well as in building a future multilateral framework.

WIPO needs to be further strengthened whereas GATT's involvement should be restricted to the minimum in the totality of the outcome of negotiations.

At best, one can conclude that these are complex issues which need to be explored further in the complex international economic, social and cultural phenomena, wherein the United States is trying to translate its domestic provisions into international standards. The future should take care of enhanced intellectual property protection within or without the GATT keeping in view the industrialised countries interests as well as accommodating the LDCs needs in an objective and realistic manner.

IMPLICATIONS OF THE LINKAGES BETWEEN JUVENILE DESTITUTION, LABOUR AND DELINQUENCY FOR 'JUVENILE JUSTICE' IN THE CONTEMPORARY INDIAN SOCIETY

B.B. PANDE*

JUVENILE DESTITUTION, labour and delinquency are interrelated phenomena. But so far there has been little scientific exploration of the linkages between one phenomenon and another. The main reason for the lack of such critical examination of the linkages has been the dominant ideology and the associated methodology that perceives each phenomenon in isolation and organises around each one of them formal as well as non-formal regimes designed to tackle the 'problems' in a piecemeal manner. The present paper aims at establishing that there exists a strong linkage between juvenile destitution, labour and delinquency, that the linkage has both positive as well as negative implications, and that the formal approach of dealing with each phenomenon in isolation substantially limits the success of the measures within each regime.

I. THE MAGNITUDE OF JUVENILE DESTITUTION, LABOUR AND DELINQUENCY

Juvenile Destitution

With approximately 40 per cent of population below the age of 15 years, India is one of the few countries with a large child population. According to an expert estimate by the end of 1990 the child population would be somewhat near 280 million or 36.77 per cent of the total population of 800 million.[1]

Out of the 280 million children approximately 40 per cent would fall within below poverty line population (the percentage could be larger, because poor people tend to have larger families). Thus, approximately 125 million children drawn from poor families, lower caste groups could be estimated to be in different levels of destitution. In addition to these physically and mentally handicapped children could also be identified as destitutes. These juvenile destitutes may be located in rural areas, where they might constitute seasonal labourforce, partially self employed in cattle grazing and wood and grass gathering activities or be a part of the urban, marginal population that remains perpetually unemployed or underemployed. However, in

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

1. J.P. Ambannawar, *Population*, Second India Studies (1975).

view of existing socio-economic realities, particularly near total absenee of any kind of social security, every juvenile destitute is compelled to indulge in some kind of paid (in cash or kind) work in order to avoid starvation. That makes juvenile destitution and juvenile labour almost overlapping phenomena. Furthermore, in view of the introduction of the capitalist mode of production in the agricultural sector, followed by mechanization, there is bound to be a significant inflow of rural juvenile destitutes to urban areas, which in turn is likely to increase the number of destitutes substantially.

Juvenile Labour

Juvenile labour phenomenon is an invariable outcome of destitution and poverty, because "child labour exists in inverse relation to the degree of economic advancement of a society, country or region".[2] The factor of poverty leading to child labour may be associated with indebtedness of the family, unemployment of parents, low wages etc.[3] In addition to this in certain situations child labour could also be an outcome of agrarian pattern, caste system[4] norms of social obligation, parental attitudes etc. Referring to the magnitude of child labour according to the 1981 Census of India the child labour population was estimated to be 11.20 million. But the National Sample Survey (32nd Round) estimated the child labour population in March 1983 to be 17.36 million. The Operations Research Group, Baroda (in 1983) estimated child labour to be 44 million and the Concerned for Working Children, Bangalore in 1985 estimated the child labour population to be 100 million. The vast difference in the child labour estimates can be explained by the variation in the definition of child labour. The Census of India 1981 relates only to main child worker (those who have worked during the major part of the year) and excludes marginal workers (those who have not worked during the major part of the year).

A significant fact about child labour phenomenon is that in the post-independence development period the incidence of child labour has increased in almost all occupations, as the Table 1 indicates.

Though the statistics reveals a decline in child labour in factories and other industrial establishments, subjected to the child labour exclusion laws, more suited to adult labour force, but in the same period a much larger number of child labour has entered the unorganised sector where he faces much worst conditions of work and economic returns.[5]

2. Elias Mendelievich, *Children at Work*, ILO, Geneva, 1979.
3. National Institute of Public Cooperation and Child Development, *Study of Working Children in Bombay* (1978).
4. D.A. Naidu, "Micro-determinants of Child labour : An Evidence from Rural South India", *Seminar on Child Labour and Health, (mimeo,* 1982).
5. B.N. Juyal, *et al, Child Labour and Exploitation in Carpet Industry : A Mirzapur-Bhadohi Case Study*, Indian Social Institute, New Delhi, (1987).

Table 1 Child Labous in Various Occupations (In thousands)

Occupations	*Year*	
	1971	1981
Cultivation and Agriculture	8458	8786
Livestock, Fisheries, Livestock	885	704
Mining, Quarrying and Construction	83	1056
Manufacturing, Processing, Servicing and Repairs	253	278
Other services	406	326

Source : Census of India 1971 and 1981.

Juvenile Delinquency

Unlike juvenile destitution and labour, juvenile-delinquency is mainly an urban phenomenon closely associated with industrialization and urbanization. A significant feature of juvenile delinquency phenomenon is its markedly low incidence, both in absolute terms and also in comparison with the total crime picture. Also there has been no appreciable increase in delinquency rate in the last decade or two (see table 2). The official statistics relating to delinquency and the overall tolerant public attitude towards the maladjusted juveniles (United Nations Social Defence Research Institute, 1984) confirms the finding that "delinquency is (at least relatively speaking) not a social problem in India, either in a behavioural or societal-reaction sense".[6] However, a notable feature of Indian juvenile delinquency is its close relationship with low economic status families. According to official statistics relating to socio-economic background of juvenile delinquents, out of 1,65,451 juveniles apprehended in 1986, 50.6 per cent belonged to families whose monthly income was less than Rs. 150/- (approximately 9 U.S. dollars). Similarly 41.4 per cent of the juveniles apprehended were illiterate.[7] Such evidence regarding the low-income family background of a majority of delinquents establishes a clear link between delinquency and destitution among juveniles.

II. BI-POLAR INFLUENCE OF THE LINKAGES

(*a*) *Juvenile destitution:* A cause and effect of juvenile labour. As a phenomenon associated with underdevelopment and backward economy, juvenile destitution is a notable cause of juvenile labour, both in the rural as

6. Clayton A. Hartgen, *et al., Deliquency in India* (1984).
7. *Crime in India* 1986, National Crime Records Bureau, Ministry of Home Affairs, Government of India, 1989 at p. 89.

Table 2. Total Cognizable crime under IPC, Juvenile Crime under IPC, Proportion of Juvenile Crime to total crime and volume of Juvenile Crime per one lakh Population

Year	*Population in millions (Estimated mid-year)*	*Total cognizable crime cases under IPC*	*Total Juvenile crime cases under IPC*	*% of Juvenile crime to total cognizable crime*	*Volume of Juvenile crime per lakh of population*
1976	613.3	10,93,897	37,015	3.4	6.0
1980	663.6	13,68,529	55,129	4.0	8.3
1981	690.1	13,85,757	61,019	4.4	8.8
1982	705.2	13,53,904	59,345	4.4	8.4
1983	720.4	13,49,866	55,473	4.1	7.7
1984	737.6	13,58,660	42,803	3.2	5.8
1985	750.9	13,84,731	49,317	3.6	6.6
1986	766.1	14,05,835	55,887	4.0	7.3

Source : *Crime in India*, 1986, National Crime Records Bureau, Ministry of Home Affairs, Government of India, at p. 66.

well as urban set-up. Ordinarily childhood is a life stage for learning, education and full mental and physical growth. But for the children drawn from lower socio-economic strata, the starke survival reality is very different. They must sell their labour power at an early age to ensure physical survival for themselves and their families. This aspect of the linkage between destitution and labour has become particularly crucial in the post-independence period, which has witnessed large scale increase in total child labour population, particularly in the unorganised sector. This trend is also indicative of the continued impoverishment of the child population. There is yet another aspect of the relation between the two phenomenona, and that is child labour being a cause of destitution. The second aspect of the linkage is indicated by child labour statistics in different states, particularly its relationship with literacy rate. The state of Kerala had the lowest child labour population of 1.3 per cent of total child population in the state, which also had the highest literacy rate amongst the Indian states. This means the rate of literacy (an anti-thesis of destitution) and the incidence of child labour are inversely related to each other.

(*b*) *Child labour exerting a positive as well as negative influence on delinquency:* Little scientific exploration has undergone to examine the linkage between child labour and juvenile delinquency. The two phenomenon can have positive, negative or neutral type of relationship with each other. A traditional line of thinking holds that premature freedom associated with child labour leads the child into delinquent ways.[8] It is true that certain

8. S. Banerjee, *Child Labour in India*, Anti slavery Society London.

pre-delinquent behaviours such as smoking, drinking and other vices might be directly attributed to child labour in a large majority of cases, but there is yet no conclusive research to indicate that child labour encourages all forms of delinquencies. On the contracy the official reporting of almost uniformly low incidence of delinquency during a period of steep rise in child labour indicates a negative influence on delinquency rate. In the same vein a limited empirical study of the inmates of a juvenile institution in Delhi has established a negative correlationship.[9]

III SUBJECTING THE PROBLEM JUVENILES TO ISOLATED FORMAL REGIMES

From the beginning of this century there emerged a trend of identifying the respective problems of juvenile destitution, labour and delinquency as independent social problems and develop around each formal regimes comprising of policies, administrative measures and schemes, legal frameworks, institutional structures and agencies. Each of these formal regimes in turn reflected the ideas of the ruling class and the values and attitudes of the society.

The destitute juveniles were, at least in theory, subject to a wide and diverse variety of measures concerned with their welfare, health and nutrition, education and training, special measures for off-setting physical and mental handicaps, maintenance, guardianship and adoption etc. However, till the 1970's, when the National Policy on Children, 1974 was formulated, the formal regime concerning the destitute juvenile had no integrated common approach in respect of the various destitution combating measures. Even in respect of measure like education and training, which vitally influences destitution as well as child labour, the formal policy and performance was, at best, half-hearted. Though in the three decades after 1950 the number of enrolment in primary education considerably increased, from 42.6 per cent in 1950-51 to 85.5 per cent in 1878-79, but the total enrolment of 90.3 million in 1978-79 was far below the expected target of 170 million by 1991. Furthermore, even the limited success of this destitution combating measure was considerably undermined by high drop-out rates of the majority of low caste, low income family children, of whom 63.1 per cent dropped out before primary school level and 85 per cent before the middle school level.

On account of its intimate relationship with the system of production, child labour has been for a long time subjected to direct or indirect formal measures. The earliest measure in this area was the Apprentice Act, 1950, that authorised the training and apprenticeship of destitute and orphan children under court orders. Obviously this measure indirectly legitimised the child labour practice, which hitherto had remained confined to family labour or debt obligation labour, in the plantations and other industries.

9. Davinder Bagga, *Juvenile Delinquents in Delhi—An Empirical Analysis*, (unpublished LL.M. Dissertation, Faculty of Law, University of Delhi (1986).

The vulnerability of the child labour and the systemic compulsions of upholding certain humanitarian values led to the introduction of a variety of measures relating to conditions of child labour, exclusion of child labour from specific industrial enterprises and subjecting child labour to certain minimum standards. Despite all those measures child labour, by and large, continued to remain at the mercy of market forces. That is why in the post independence developmental phase the incidence of child labour phenomenon registered a steep rise. However, the formal regime continued to assess the success of its measures on the official statistics registering a decline, either on the basis of a newly coined main child labour definition or on the basis of decline in the organised sector only. For instance, as indicated by Table 3, according to 1961 Census for children of 6-14 years there were 17 million workers, 47 million educants and 37 million idlers. In comparison in 1971 for the same categories, the numbers changed to 11 million, 46 million and 43 million respectively. This means that from 1961 to 1971 the number of child labour in organised sector registered a sharp decline from 17 million to 11 million, but during the same period the number of idlers rose from 37 million to 43 million. The statistics give no idea of the reciprocal rise in the number of child labour in the unorganised sector.

The juvenile delinquents are subjected to most comprehensive and elaborate formal regime, which is inspired by the dual considerations, often contradictory, of controlling the troublesome sections of the child population and securing justice to them (the recently enacted Juvenile Justice Act, 1986 appears to have tilted the balance in favour of the 'Justice' consideration). Since the main emphasis of the earlier Children Acts, and now the Juvenile Justice Act, is to provide a comprehensive and exclusive juvenile justice system not only for the delinquent juveniles but also for many other categories of pre-delinquent (designated as neglected juveniles under the Act) children, the problem of delivering 'justice' in isolation has created new dilemmas. The first level dilemma relates to operationalizing the 'Juvenile Justice' notion itself. One view in this regard is to think of juvenile justice strictly in terms of the limited section of child population that comes within the ambit of the Act (which according to 1986 statistics comes to

TABLE 3 Number (in millions) of children aged 6-14 by activity in India 1961-71

Census Year	*Workers*		*Educants*		*Idlers*	
	M	*F*	*M*	*F*	*M*	*F*
1961	16.9	12.2	45.9	23.2	37.2	64.6
1971	11.3	4.5	46.0	27.5	42.8	68.1

Sources : 1. All India Tables (One per cent sample data)
2. Census of India, 1961 part II-A and II-B.

1,65,451). But doing justice to this section in disregard of the existential realities faced by the other sections of juveniles, who are compelled to remain idle or driven to join the ranks of child labour, is neither desirable nor logical, unless 'Juvenile Justice' is understood in very technical sense. Furthermore, the recent trend of extending the operational scope of the juvenile justice law by giving a wider meaning to neglected juvenile and resorting to positive state action in regard to him, has further accentuated the dilemma of 'Juvenile Justice'. The recent police action in respect of juveniles living in and around brothels in Delhi would illustrate the point. The police justification for arresting 112 male and female juveniles was that the Juvenile Justice Act, 1986 contemplates positive state intervention in order to save the juveniles from the pernicious and morally debasing environment, even though some of the juveniles were living with their prostitute mothers. Such a view of juvenile justice' advocates institu-'tionalized approach to juvenile justice. But findings of significant studies such as "what has been demonstrated is the persisting and enduring positive influence of the family and culture in providing the cohesion and solidarity necessary for the prevention, control and treatment of juvenile social maladjustment inspite of the negative influence of poverty, overcrowding, unemployment and urbanization"[10] favour a clear and decisive movement for a non-institutionalised approach to the problems.

10. *United Nations Social Defence Research Institute*, "Juvenile Social Maladjustment and Human Rights in the Context of Urban Development", Publication No. 22, Case Study No. 4, Rome, 1984 at p. 225.

CAUSING DEATH UNDER THE INDIAN PENAL CODE : A COMPARATIVE ANALYSIS

STANLEY YEO*

SUMMARY

THE PRINCIPLES governing causal responsibility for the death of a human being remain obscure and poorly developed by the courts. Clearly thought out principles are required to achieve just and consistent results. This article extracts these principles from case authorities and commentaries from India, and other jurisdictions including England and Australia. It advocates the use of the foresight test for causation alongside the substantial factor test to resolve difficult cases involving intervening causes. The proposal is also made for these tests to be expressed in the Indian Penal Code for the guidance of the courts.

The definition of culpable homicide under s.299 of the Indian Penal Code includes the requirement that D (the accused) had caused the death of V (the victim).[1] This is likewise an integral element of the offence of causing death by a rash or negligent act under s.304A of the Code. In a vast majority of cases, the requirement of causation is clearly proven and is resolved sub silentio. However, there are cases where a separate issue of causation presents itself for determination. In some of these cases, this issue may be unresolved because the prosecution decides not to proceed with a charge of the most serious possible offence, such as where D assaults V who dies when the driver of the ambulance he is travelling in collapses from a heart attack. The issue of causation may also be sidestepped by a court acquitting D on the basis of lack of proof of the fault element such as intention, knowledge, rashness or negligence. Given its significance as a legal requirement, however the law should be capable of meeting problems of causation head on and resolving them in a clear, rational and consistent manner.[2]

The framers of the Indian Penal Code did consider prescribing general rules on causation but eventually decided that the infinite variety of cases made it "a matter to be considered by the tribunals when estimating the

* Senior lecturer in law, University of Sydney, Australia. This paper formed the substance of a lecture at the Law Faculty, University of Delhi in November 1991.

1. The offence of murder, which is a species of culpable homicide, is spelt out in s.300 of the *Indian Penal Code.*
2. As one distinguished commentator has asserted, "it is a confession of failure on the part of the lawyer if he is unable to give guidance on the operation of a legal rule of great importance" : Professor G. Williams, "Causation in Homicide" (1957) *Criminal Law Review* 429 at 438.

effect of the evidence in a particular case, not by the legislature in framing the general law".[3] This passing of responsibility to the courts was clearly with the expectation that, gradually, a body of case law would develop which would provide guiding general principles, as opposed to specific and rigid rules, to determine problems of causation. Regrettably, except for a handful of cases, this appears not to have been forthcoming, with the Indian courts mostly retreating into ad hoc judgments and avoiding the conceptual issues underlying causation which need to be tackled for general principles to be devised.

This article attempts to extract the general principles governing criminal responsibility for causing of death of a human being. In this exercise, Indian decision will be considered wherever possible, but given their small number, resort will be made to decisions from other jurisdications, particularly to English and Australian cases. Reliance on these foreign decisions is permissible due to the universal nature of causation. As one writer has put it:

> "Since in all forms of human society the recipient of the stimuli with which criminal law operates (to prevent crime) is the human psyche-stimulable by pains and pleasures or the expectation of either, and intent upon guiding its master's purposes would it not follow that cause-and-effect attribution, as a means for the proper application of the stimulus, must be the same all over the world?"[4]

This assertion fully accords with the thinking of the Code framers who intended the Indian Penal Code to be based on a "universal science of jurisprudence."[5]

As for textwriters, there is regrettably sparse analysis on causation to be found in the Indian commentaries on the criminal law, these being mostly taken up with a series of extracts from judgments with little more. This is perhaps understandable in view of the poor lead given by the courts themselves. The universality of the issue of causation does, however, permit us to refer to the writings of commentators from other jurisdictions.

Before we can extract any general principle governing causation, the purpose of the causal requirement must be properly appreciated. What does the law seek to achieve by requiring proof that D caused V's death? Part I of this article deals with this question. Part II proceeds to present the general principles of causation in the form of tests which determine whether causal responsibility has been established In Parts III and IV,

3. Note M accompanying the first draft of the *Indian Penal Code* (1837), p. 141.
4. G. Mueller, "Causing Criminal Harm" in *Essays in Criminal Science* (G. Mueller, ed., 1961), p. 174. Earlier on, the writer contends that the criminal law serves the one grand purpose of crime prevention.
5. Prefactory address accompanying the first draft of the *Indian Penal Code* (1837), p. viii.

these tests are applied to a series of difficult cases to assess their utility in resolving problems of causation. By way of conclusion, the proposal is made for a general principle of causation to be embodied in the Indian Penal Code.

I. THE PURPOSE OF THE CAUSAL ENQUIRY

Shortly stated, the purpose of establishing causation is to ensure that only those who are found criminally responsible for the death of a victim may be punished for such a serious consequence. Thus, the causal enquiry is bound up with the overall enterprise of the courts of determining blame or innocence for criminally prescribed harm. The courts have developed a two-step enquiry to assist with this determination. The first step considers whether the accused's conduct contributed at all to the death, that is, whether there was any physical or factual connection between D's conduct and V's death. Obviously, should such a connection be wanting, the enquiry is at an end and the accused is acquitted. If a connection was present, the enquiry moves to the second step which considers whether the connection was sufficiently strong to justify imposing criminal responsibility. In line with their respective functions, the first step may be described as factual causation and the second step as imputable causation. Throughout this causal enquiry, the primary focus is on causation by human agency, specifically, D's conduct. This accords with the phrase, "whoever causes death" appearing in the relevant sections of the Indian Penal Code.[6] The courts are therefore not concerned with physical forces or conditions except (as we shall later see) when they might be said to displace human causal responsibility.

With regard to factual causation, the enquiry does allow for V's death to be the result of a combination of causes.[7] So long as D's conduct was necessary to the production of death, factual causation is established against him. It should also be noted that no quantitative exercise is conducted at this level of enquiry. This is because when, say, two causes were necessary to produce death, it is impossible to state scientifically which cause contributed the more. Certainly, the law does endeavour to ascertain whether one cause was more significant than another, but this is done in the second stage of imputable causation and not at the initial stage of factual causation.[8]

At the level of imputable causation, the enquiry goes beyond a purely factual determination to one involving a moral judgment. In the words of

6. Sections 299, 300 and 304A. See *Raju's Commentaries on the Indian Penal Code* Vol. II (3rd. ed., 1973), p. 971 Of course, this does not exclude cases where a natural event constituted an intervening cause: see Part IV of this article.
7. For example, see s. 299 illustration (1) where death occured due to a combination of actions by A (the accused) and Z (the victim) and illustration (2) where death was due to the combined actions of A and B (a third party).
8. G. Williams, "Causation in Homicide" (1957) *Criminal Law Review* 429 at 431-432.

the American Law Institute's Model Penal Code, the death must be "not too remote and accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offence."[9] The word "just" indicates that a moral reaction is called for in terms of whether V's death can in fairness be attributed to D. Hence, not all factual causes will be ascribed with criminal responsibility; only those which attract moral blame will be so ascribed. This assertion has been challenged by some commentators who argue that the causal enquiry should be confined to factual causation, with moral blame being assessed under the fault element of the offence, namely, whether D intended, knew, was rash or negligent (as the case may be) in contributing to V's death. For example, in *Kenny's Outlines of Criminal Law*, Professor Turner says:

> "It is...reasonable to say that an event is caused by one of (the factually necessary causes) if it would not have happened without that factor... Under the modern conception of mens rea no hardship can result from any fine drawn investigation of causes, since the more remote the cause the greater the difficulty of proving that the accused person intended or realised what the effect of it would be."[10]

According to Turner, D is criminally responsible for V's death if a factual connection between his conduct and the death was established and he was found to have the mental state required for the offence.[11] However, this contention fails to properly reflect the complexity of the law on causation.[12] Consider the case of D who strikes V intending to kill him. V is killed while in hospital when a nurse intentionally administers poison to him. Under Turner's doctrine, D is liable for murder when this is not the law.[13] Something more elaborate than a simple combination of factual causation and mens rea is therefore required to establish causal responsibility in the criminal law. The secend step enquiry of imputable causation meets this need.

9. *Official Draft and Revised Comments* (1985), s. 2.03(2)(b).
10. (16th ed., 1952), pp. 20-21. Cf. the following comment by the Code framers in the prefactory address accompanying the 1837 draft of the *Indian Penal Code* at 141-142 :

    "It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely has actually csused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death; but if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide."
11. See also *Mamote-Kulang* v *R.* (1964) 111 C.L.R. 62 at 67-68 per Taylor and Owen JJ (High Court of Australia).
12. See H.L.A. Hart and T. Honore, *Causation in the Law* (2nd ed., 1985), pp. 390-391.
13. Turner's reference to mens rea is also problematic in respect of the offence of causing death by negligence under s. 304A of the *Indian Penal Code* since a subjective mental state is not an essential element of that offence.

Our discussion of Turner's contention raises a related point, namely, whether the enquiry into imputable causation should be devoid of any consideration of mental processes. It may be argued that these processes should be confined solely to the mens rea aspects of the offence.[14] It is contended that imputable causation can and does involve mental processes, at least under the rubric of such concepts as foresight and estimates or probabilities of risk. The function of imputable causation in determining moral blame is surely facilitated by an enquiry into what an ordinary petson in D's position could reasonably have anticipated to be the consequence of certain of her or his conduct. Moral blame is readily attached to D if the enquiry finds that an ordinary person could reasonably have foreseen V's death as a likely consequence of such conduct. This, of course, is not to say that these mental processes embodied in the causal enquiry serve to replace the usual mens rea requirements of the offence.[15] The mens rea element remains as essential part of the offence requiring proof, with the mental processes contained in the enquiry into imputable causation performing a separate function. That said, both the requirements of mens rea and imputable causation constitute parts of the same overall objective of determining criminal responsibility in a given case.

By way of summary of this Part, reference may be made to the case of *Nga Ba Min* v. *Emperor*, a decision of the Rangoon High Court.[16] D had delivered several blows with a stick on V's head. The wounds were not of a serious nature and under ordinary circumstances, V would have fully recovered within a fortnight. After being treated in hospital, V was discharged and returned to her village. As a result unskilful treatment she received in the village and her own failure to keep the injuries clean, V died from an abscess forming in the brain as a result of the wounds becoming septic. The High Court ruled that D had not caused V's death. Dunkley J., delivering the judgment of the court, said:

> "The learned Magistrate who tried the case has rightly held that the appellant cannot in any case be *held responsible* for causing [V]'s death. Her death was due to her own ignorance and the unskilful treatment which she received in her village, and the injuries on her head were only *the remote cause of death*. In order that a person should be guilty of culpable homicide it is indispensable that the death of deceased should be connected with the act of violence or other *primary cause*, not merely by a chain of causes and effect, but by such direct influence as is *calculated* to produce the effect without the intervention of any considerable change of circumstances."[17]

14. Indeed, this seems to be the orthodox view, with causation assigned to the actus reus or physical elements of an offence, and all mental processes assigned to the mens rea element: see *Howard's Criminal Law* (5th ed., 1990), p. 35; P. Gillies, *Criminal Law* (2nd ed., 1990), pp. 32-33.
15. G. Mueller, "Causing Criminal Harm" in *Essays in Criminal Science* (G. Mueller ed., 1961), pp. 178, 184-185; M. Marcus "Kills v. Causes Death" (1979) 85 Cri L.J. 57 at 59-60. Contra. *Public Prosecutor* v. *Suryanarayanamoorty* (1912) M.W.N. 136 at 142-143 per Sundara Aiyar J. (dissenting).
16. A.I.R. 1935 Rang. 418. The *Indian Penal Code* was then part of the law of Burma.

Some of the assertions contained in this passage require detailed discussion and will be considered in the succeeding Parts of this article. For now attention may be drawn to the judge's application of the two-step causal enquiry. First, as regards factual causation, his Honour acknowledged that a prima facie case of causation had been established since the injuries inflicted by D constituted a factual cause of V's death (albeit his description of them as "the remote cause of death"). In this regard, his Honour attributed the factual cause of V's death to a combination of causes including the injuries inflicted by D. V's own lack of care, and improper treatment. Moving on to the enquiry into imputable causation, Dunkley J.'s use of the phrase "be held responsible" is noteworthy because it reveals that he saw this aspect of the causal issue as involving not merely a purely factual enquiry but one requiring a moral judgment of the court. His Honour held that, on the facts, the injuries inflicted by D were not "a primary cause" of V's death as they were not of "such direct influence as is calculated to produce" the death. The notion of "primary cause" connotes a substantial connection between D's action and V's death while the word "calculated" implies a mental process linking D's conduct with V's death. In the next Part, these notions will be shown to be the two tests for establishing imputable causation as devised by the courts, namely, the substantial factor test and the foresight test respectively.

II. THE TESTS FOR FACTUAL AND IMPUTABLE CAUSATION

With an understanding of the purposes of the causal enquiry, we are now in a position to present the test for factual causation followed by those for imputable causation. We are also able to critically evaluate the ability of these various tests to meet the purposes of the causal enquiry.

(1) The test for factual causation

The test for establishing factual causation is a straightforward one with little controversy. If V's death would not have occurred without D's conduct, there is factual causation. This is sometimes described as the "but-for" test, the question being whether V would not have died but for D's conduct. Traditionally, D's conduct would be termed a sine qua non (a necessary or indispensable condition) of V's death. Conversely, if V's death would have occurred whatever D did or did not do, factual causation is not established and the causal enquiry is at an end.

Death being inevitable, conduct which factually causes V's death merely accelerates its arrival. To D's argument that V would eventually have

17. *Ibid*, at 419. Emphasis added for the purpose of elucidation.

died anyway comes the reply that V would not have died on that particular occasion but for D's conduct. A specific instance is covered by Explanation 1 to s. 299 of the Indian Penal Code which states:

> "A person who causes bodily injury to another who is labouring under a disorder, disease or infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death."

Under this Explanation, D cannot deny having factually caused V's death by saying that V's pre-existing illness or injury would have killed him eventually. To take an extreme example, D's administering a fatal dose of poison to V thereby killing him instantly would be conditions sine qua non of V's death even though V would have in any event died a minute later from an ailing heart.[18] A more common example would be for D's conduct to have worked in combination with V's pre-existing weakened condition to cause his death earlier than when it would otherwise have occurred. In such a case, both D's conduct and V's weakened state would be sine qua nons of V's death. As far as D's conduct alone is concerned, V would not have died at the precise moment when he did but for such conduct.

The same response may be given to unusual cases where D's conduct prolongs V's life rather than accelerates his death.[19] For example, D stabs V so that V is too ill to travel on a plane and V dies of the stab wound the day after the plane crashes with all abroad. D's act of stabbing would still be a sine qua non of V's death given that the enquiry is whether V's death would not have occurred when it did but for D's conduct.

There is an instance when the "but for" test appears inadequate. This may be described as a case of multiple sufficient causation as where A and B both simultaneously and independently inflict fatal wounds on V. For example, A might have shot V through the heart at the same moment when B blew V's brains out. In such a case, it would be inaccurate to assert that V would not have died but for A's act since V would have died as a result of B's act, and the converse applies as well. However, the prevailing view seems to be that both actors have factually caused V's death.[20]

(2) The test for imputable causation

As may be expected, the greatest problems in causation are in the realm of imputable causation with its enquiry into moral blame and responsibility. Due to the importance and complexity of the issue, the law ought to provide general guidelies or tests to enable cases be dealt with in a just and consistent fashion. Several efforts have been made by the Indian courts

18. Hence this aspect of causation provides no defence to acts of euthanasia or mercy-killing.
19. See E. Colvin, "Causation in Criminal Law" (1989) 1 *Bond Law Review* 253 at 255.
20. J.C. Smith and B. Hogan, *Criminal Law* (6th ed., 1988), p. 314; E. Colvin, "Causation in Criminal Law" (1989) 1 *Bond Law Review* 253 at 255-256.

to devise appropriate tests for imputable causation, a prime example being the following comment dealing with causing death under s. 304A of the Indian Penal Code:-

> "To impose criminal liability under s. 304A of the Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."[21]

Dealing with the tests of "direct result" and "proximate cause" together, these are misleading since there may be several stages between the so-called direct or proximate cause and V's death. Suppose D sends poisoned sweets to V who lives a great distance away and V dies upon consuming them. The law would hold D causally responsible for V's death even though his act of posting the sweets and V's eventual death were separated considerably by space and time.[22] As for the test of "efficient cause", this is unhelpful since every cause must by definition be effective—an act which is not effective in producing a result cannot be described as a cause of it. The final test in the above passage distinguishes factual causation from imputable causation by describing the former as a causa sine qua non and the latter as the causa causans. While the distinction between factual and imputable causation is laudable, the notion of causa causans is far too generous towards D in requiring his conduct to have been the immediate cause.[23] As we shall see, the courts have attributed causal responsibility to D even when some other cause came between his conduct and V's death. Are there then any viable tests for imputable causation? There appear to be two such tests, what may be described as the substantial factor test and the foresight test. To the first we now turn.

The substantial factor test:[24] The best known example of this test is contained in the English Court of Appeal case of *R. V. Smith.*[24a] D had stabbed V who was then rushed to hospital. On the way, V was dropped twice and at the hospital he was given improper treatment which could have affected his chances of recovery. It was held that imputable causation was to be determined by whether the original wound inflicted by D on V was

21. *Emperor* v. *Omkar Rampratap* 4 Bom. L.R. 679 at 682 per Lawrence Jenkins J. and cited with approval by the Indian Supreme Court in *Rangawalla* v. *State of Maharashtra* A.I.R. 1965 Supreme Court 1616 and in *Mulani* v. *State of Maharashtra* A.I.R. 1968 Supreme Court 829. See also the Supreme Court case of *Sudershan Kumar* v. *State of Delhi* (1975) 3 S.C.C. 831 which spoke of a "direct cause" of death in case of murder.
22. G. Williams, *Textbook of Criminal Law* (2nd ed., 1983), p. 381.
23. Cf. the expression "causa causael causants" which denotes a proximate but not an immediate cause. The distinction appears in *Moss* v. *Cunliffe* 2 Rettie 662 (1875).
24. Sometimes described as the substantial cause test or substantial connection rest.
24A. *R V Smith* (1959) 2 QB 35.

"still an operating cause and a substantial cause" of V's death. Many Australian courts have adopted this test, the most precise statement being made by the South Australian Court of Criminal Appeal in *Hallett v. R*:-

> "The question to be asked is whether an act or a series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event."[25]

This test seems of late to have been watered down by some case authorities to a requirement that D's conduct must simply have been more than a purely trivial cause of V's death, that is, a de minimis contribution.[26] Instances of this may also be found in Indian decision. In the Punjab High Court case of *Emperor v. Gul Shah*, four persons joined in beating V.[27] Two of them inflicted fatal blows on V's head after which the other two, ignorant of the mortal injuries already inflicted by their comrades, struck slight blows on V's body. The court held that these slight blows were insufficient to cause V's death. In *In re, Munusami*, D had throttled V to the extent of breaking V's hyoid bone.[28] Nevertheless, V had survived for another 24 hours and was able to talk and eat during that time. In the light of medical expert opinion, the Madras High Court doubted whether V had died of asphyxia through throttling. The court effectively held that even if the throttling might have been a sine qua non of V's death, it was too trivial a cause to render D causally responsible for the death.

The substantial factor test does constitute a useful general guide for determining whether D's conduct should attract moral blame. D's conduct would have to sufficiently contribute to V's death before causal responsibility will be imputed to D. Below a minimum level of contribution, D's conduct would be too insignificant to warrant exposing him to liability for V's death. The test is clearly wide enough to account for the infinite variety of homicide cases where causation is an issue. Accordingly, the test minimizes the danger of forcing results which might be regarded as overly harsh or unduly lenient according to popular perceptions about moral blame for the occurrence of results.[29]

25. (1969) S.A.S.R. 141 at 149.
26. For example, see *R.* v. *Hennigan* (1971) 3 All E.R. 133 at 135 per Lord Parker C.J.; *R.v. Cato* (1976) 1 All E.R. 260 at 265-266; *Smithers v. R.* (1977) 34 C.C.C. (2d) 427 at 435; *R.v. Malcherek* (1981) 2 All E.R. 422 at 428; *R.v. Annakin* (1987) 37 A. Crim. R. 131 at 148-149.
27. *Emperor v Gul Shah* (1914) 25 I.C. 1005.
28. *In re, Munusami* 1971 Cri. L.J. 957.
29. D. Karp, "Causation in the Model Penal Code" (1978) 78 *Columbia Law Review* 1249 at 1265-1266.

However, the test has several drawbacks. First, it is retrospective in nature involving looking backwards from V's death to determine whether D's conduct was a sufficiently substantial contribution to the death. Such an enquiry fails to account for the mental processes which could resaonably have been experienced by an ordinary person in D's position concerning the likely consequences of her or his action on V. To cater for this perspective, the test would have to be prospective in nature, looking forward from the conduct towards the result. The relevance of such mental processes to the determination of moral blame has been noted in Part I.[30] This lack in the substantial factor test means that it will not be as keen a test as one which features these mental processes. Another drawback of the test is its inability to provide clear and rational guidance in cases involving intervening causes.[31] Suppose that D injures V who dies not solely from the injury but through the intervention of V's own act, a third party's act or an event of nature. V might have refused medical treatment which was readily available and would certainly have saved her life; or a doctor might have operated unsuccessfully on V killing her in the process; or an earthquake may have buried V alive as he lay where D had left him. Other than a call for intuition to apply, the substantial factor test is not sufficiently sensitive to assist in deciding whether D's conduct remained a substantial cause of V's death or whether it had been overwhelmed by the later intervening cause. Thus we find in the pronouncement of the test in *Hallett*, cited earlier, the meagre comment that D's conduct had to have "a sufficiently substantial causal effect which subsisted up to the happening of [V's death],...without being in the eyes of the law sufficiently interrupted by some other act or event".[32] The statement does not explain how a court is to decide whether "in the eyes of the law" an intervening cause has overridden the injury inflicted by D. There is, however, another test of imputable causation which does not suffer from these drawbacks, namely, the foresight test.

The foresight test: This test has received far less recognition in England and Australia than the substantial factor test. By contrast, more Indian courts seem to have subscribed to this test than the substantial factor test, although there is still very much further to go in its refinement and use in India.[33] The test requires the court to consider the following question: when D acted in the way he did did he actually foresee or could he have reasonably foreseen V's death as a likely consequence of such conduct? Hence, the test is prospective in nature, looking forward from D's position at the time when he acted to the consequence of his action. Furthermore, as its name suggests, the foresight test takes stock of the mental processes

30. See above, 4.
31. This is sometimes described as the doctrine of novus actus interveniens.
32. (1969) S.A.S.R. 141 at 149 and fully reproduced in the main text accompanying note 25 above.
33. Several of these Indian decisions will be discussed in Parts III and IV of this article.

linking D's conduct with the result, such processes being either subjective (D's actual foresight) or objective (an ordinary person's reasonable foresight) as the case may be.

The case of *Yohanan v. State of Kerala* contains a good example of the foresight test under Indian law.[34] D had stabbed his wife in the back with a penknife which injured her spinal cord resulting in paralysis of her lower limbs and of the bladder. She died seven months later after being bedridden throughout and developing cystitis and bedsore. In finding D's act of stabbing to have been an imputable cause of V's death, the court said:—

> "There is no indication of any unexpected intervention, and as observed by Mayne at p. 469 of his *Criminal Law of India*, 4th edition, 'any act is said to cause death within the meaning of s. 299, when the death results either from the act itself or from some consequences necessarily or naturally flowing from that act, and reasonably contemplated as its result."[35]

This statement has been cited with apparent approval by several leading Indian commentaries.[36] The words "reasonably contemplated" is clearly another way of saying that the result was reasonable foreseeable. As for the phrase "consequences necessarily or naturally flowing from" D's act, reference may be made to the following comment by the Privy Council in the celebrated case of *The Wagon Mound*:—

> "If it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or a similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them."[37]

While this is a civil case involving the tort of negligence, nevertheless the pronouncement on the foresight test is equally applicable to the causal enquiry under criminal law.[38]

It is to be observed that the foresight test embodies the quality of reasonableness. Several features of the test may be gathered from this. First, the quality of reasonableness turns the test into a practical enquiry. The

34. A.I.R. 1958 Kerala 207.
35. *Ibid*, at 210 per Raman Nayar J.
36. For example, *Gour's Penal Law of India*, Vol. III (10th ed., 1983), pp. 2222-2223; *Nelson's Indian Penal Code*, Vol. II (7th ed., 1983) p. 980; *Raju's Commentaries on the Indian Penal Code*, Vol. II (3rd ed., 1973), p. 974.
37. *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* (1961) A.C. 388 at 423 per Viscount Simonds.
38. See *R.v. Knutsen* (1963) Qd. R. 157 at 173.

forseeability of harm is not to be considered in isolation but in the context of all the circumstances prevailing at the time which an ordinary person would have taken into account. As Professors Hart and Honore put it: "Reasonable foresight, in relation to culpability, is therefore a practical notion and we may term the harm, the risk of which is sufficient to influence the conduct of a prudent man, 'foreseeable in the practical sense".[39] Next, by conjoining "reasonable" with "foresight", the test means to delineate between normal and abnormal consequences with D being made causally responsible for only normal consequences. In other words, the notion of reasonable foresight enables the court to exempt D in a case where his conduct led to an unusual or unpredictable result.[40] In much the same way, the test distinguishes the intervening acts of responsible actors from those of non-responsible ones. By responsible actor is meant a person who acts independently and freely with full knowledge of the risks involved in his actions.[41] Conversely, a non-responsible actor is a person who may be ignorant of the risks involved or may be aware of such risks but performs the action under pressure from some source. The reasonable foresight test tends[42] to attiribute causal responsibility where a non-responsible actor is involved and not in the case of a responsible actor. An explanation for this is that the actions of a non-responsible actor are more reasonably foreseeable since they stem from the constraints of ignorance or pressure. On the other hand, the actions of a responsible actor are far less predictable given their free and independent character.[43] Thirdly, reasonableness denotes that the test is meant to be broad and flexible in application, as opposed to being a narrow and rigid test. Thus, the test is concerned with the foreseeability of the consequence (such as V's death) and not with the foreseeability of the manner of its occurence. In the same vein, the test would accept as a foreseeable consequence any one of an infinite number of possible consequences so long as it was the kind of outcome which would not cause surprise.[44]

Each of the above aspects of the test lend themselves to the determination of whether, in a given case, it is morally just or fair to impute causal responsibility to D for V's death. In sum, D is made causally responsible

39. H.L.A. Hart and T. Honore, *Causation in the Law* (2nd ed., 1985), p. 263.
40. G. Williams, *Textbook of Criminal Law* (2nd ed., 1983), p. 388.
41. This concept is adapted from H.L.A. Hart and T. Honore *Causation in the Law* (2nd ed., 1985), pp. 326-338; and G. Williams, *Textbook of Criminal Law* (2nd ed., 1983), pp. 393-396.
42. This word is used deliberately here to denote that this aspect of the foresight test does not always operate in the way suggested in the discussion. This will be borne out in various cases considered in Parts III and IV.
43. Professor G. Williams offers another explanation for holding that the actions of a responsible actor severs the causal connection between D's conduct and the eventual harm. What such an actor does should be regarded as his own responsibility and not as having been caused by other people: *Textbook of Criminal Law* (2nd ed., 1983), p. 391.
44. Williams, *ibid*, p. 389.

for those normal or predictable consequences of his conduct as assessed in a practical and general way. As we shall see in Parts III and IV, these qualities make the foresight test much more effective than the substantial factor test in resolving difficult problems involving intervening causes. Part III covers a selection of cases where V in some way contributed to causing her own death, while Part IV includes cases where a third party or natural event contributed to the death. In each case the question for determination is whether D, who had caused the original injury to V, should be imputed with causal responsibility for V's death.

III. WHERE THE VICTIM CONTRIBUTED TO HER OWN DEATH

Unlike in the law of torts, V's contributory negligence in causing her own death is immaterial as a defence in criminal law. However V's contributory negligence could in certain circumstances break the causal connection between D's conduct and V's death. Besides being negligent, V might have contributed to her own death by having a special sensitivity which rendered her more prone to death than usual. We shall consider four cases where V contributed to her own death:

(1) where V was ignorant of the danger created by D when she took the action causing her own death;

(2) where V knew of the danger created by D but took the action causing her own death under pressure from D;

(3) where V knew of the danger created by D and freely or voluntarily took the action causing her own death;

(4) where V dies from the danger created by D due to a special or unusual sensitivity she suffers from.

(1) *V's ignorance in causing her own death:* The Madras High Court case of *Public Prosecutor v. Suryanarayanamurty* provides an example of such an occurrence.[45] D met N in a house and gave some poisoned sweetmeat to N with the intention of killing him. Not liking its taste, N threw the remainder of the sweetmeat on the spot. V, a 9 year old child who lived in the house where the meeting occurred, retrieved the sweetmeat, ate it and died of the effects of the poison. The court held D causally responsible for V's death by relying on the following illustration :

> "For instance, if A mixes poison in the food of B, with the intention of killing B, and B eats the food and is killed thereby, A would be guilty of murder, even though the eating of the poisoned food, which was a voluntary act of B, intervened between the act of A and B's death. So, here the throwing aside of the sweetmeat by [N] and the picking and the eating of it by [V] cannot absolve the accused from responsibility for his act."[46]

45, (1912) M.W.N. 136.
46. *Ibid*, at 149.

The court then explored several other hypothetical cases to illustrate the point that the issue of casation very much depends on the particular facts. One such was as follows:

> "[S]uppose N, either suspecting that the sweetmeat was poisond or merely thinking that it was not fit to be eaten, threw it away in some unfrequented place so as to put it out of harm's way and [V] happening afterwards to pass that way picked it up and ate it and was killed, the act of the accused in mixing the poison in the sweetmeat could in that case hardly be said to have caused her death."[47]

The conclusions reached by the court in respect of these various fact situations are intuitively correct. But more than mere intuition is required if the important issue of imputable causation is to be justly and consistently worked out by the courts. This is where the tests for imputable causation come into play. Dealing first with the case where B partook of the food which A had poisoned, the substantial factor test would conclude that A's act of poisoning the food significantly contributed to B's death and, accordingly, A is causally responsible for the death. Applying the foresight test, the same conclusion is reached but via a different route. A would be held either to have actually or reasonably foreseen that B might die as a consequence of his action. B's death by poisoning would, in the circumstances, be regarded as a normal outcome of A's conduct. Furthermore A's awareness that B was ignorant of his food being poisoned, would add his reasonable expectation that B would eat it. The two tests apply in the same way to the actual facts in *Suryanarayanamurty*. D's poisoning of the sweetmeat would be regarded as a substantial contribution to V's death, and the death would be a reasonably foreseeable result of D's action given that he had applied it to an appetising sweetmeat and that V was a child living in the house where D had given the sweetmeat to N.

We consider next the case of N who has thrown the sweetmeat in an unfrequented place which is chanced upon by V who eats it and dies.[48] Invoking the substantial factor test, it is by no means certain whether D's poisoning of the sweetmeat still constitutes a significant contribution to V's death. The only fact supporting the conclusion that D's conduct was no longer a substantial causal factor is N's action of throwing the sweetmeat away in an unfrequented spot. But the test fails to articulate precisely the reason why N's conduct should be regarded as so substantial as to overwhelm the causal contribtion by D. By contrast, the foresight test provides a ready explanation by noting that D could not have reasonably foreseen that V might find the sweetmeat in the unfrequented place.[49] V's act of finding

47. *Ibid.* at 150.
48. Such a case has been described as involving "an unexpected twist" : see G. Williams, *Textbook of Criminal Law* (2nd ed., 1983), pp. 386-387.
49. Of course, D might reasonably have foreseen that N might reject the sweetmeat

and eating the sweetmeat would, in the particular circumstances, be an abnormal or unexpected occurrence which D should not be made causally responsible for.[50] Thus we find the foresight test possessing a sharper capacity than the substantial factor test for analysing and arriving at a morally just result.

(2) *V under pressure to take action causing her own death:* There is a cluster of cases from various jurisdictions, including India, in which V dies as a result of taking steps to escape from an vicious attack by D.[51] For instance, V may have jumped from a high spot, or from a fast-moving vehicle and died on impact with the ground. The principal ruling from these cases is succintly stated in *Halsbury's Laws of England*:-

> "Where a person attacks or threatens to attack another and compels the person attacked by bodily force, or induces him by a well-grounded apprehension of immediate serious violence, to do some act which directly results in his death, the person attacking or threatening to attack is guilty of murder."[52]

The point which attaches causal responsibility on D for V's death is clearly because V's act was motivated by a "well-grounded apprehension of immediate serious violence" from D. This is really an inelegant way of expressing the foresight test since the focus is on the reasonableness of V's apprehension of violence when it should properly be on D's reasonable anticipation of V's efforts to escape.

The right focus was made by the Mysore High Court in the case of *Basappa v. State of Mysore*.[53] V had jumped from the roof of a house after the two accused inflicted axe wounds on him. The court was prepared to hold the accused causally responsible for V's death even assuming that V had died from the fall rather than the axe-wounds. The courts' basis for this holding was that the "deceased jumped from the roof as a direct result of the cuts given to him. It was a normal and necessary consequence of the

and dispose of it in a particular way. But this involves a separate question concerning the acts of third parties which will be discussed in Part IV.

50. The fact that V was a non-responsible actor in that she was ignorant of the poison in the sweetmeat does not make it any more foreseeable that she might find it in the unfrequented spot. Here then is an instance when the difference between the conduct of a responsible actor and that of a non-responsible actor is of no consequence. Cf. see Part IV for N as a responsible or non-responsible intervenor.

51. For example, see *R.v. Pitts* (1842) C.& M. 248, 174 E.R. 509; *R.v. Grimes* (1894) 15 L.R. (N.S.W.) 209; *R.v. Hickman* (1831) 5 C. & P. 151, 172 E.R. 917; *R.v. Halliday* (1889) 61 L.T. 701; *R.v. Martin* (1882) Q.B.D.; *R.v. Curley* (1909) 2 Cr. App. R. 109; *Basappa v. State of Mysore* AIR 1960 Mysore 228; *R.v. Roberts* (1971) 56 Cr. App. R. 95; *R.v. Mackie* (1973) 57 Cr. App. R. 453; *Joginder Singh v. State of Punjab* 1979 Cri. L.J. 1406; *D.P.P. v. Daley* [1980] A.C. 237; *R.v. Royall* (1989) 41 A. Crim. R. 447.

52. Vol. 13 (3rd ed.) p. 572.

53. AIR 1960 Mysore 230.

acts of the appellants."[54] Applying the pronouncement in *The Wagon Mound* cited earlier, since V's jumping to his death was a natural, necessary or probable consequence of D's conduct, D ought to have reasonably foreseen it.[55] The proper focus on D's foresight rather than V's conduct also appears in *Raju's Commentaries on the Indian Penal Code* where, immediately following the citation of the earlier mentioned passage from *Halsbury*, the learned commentator felt the need to add the rider that "the act which resulted in death must be the natural consequence of the acts or conduct of the prisoner".[56]

The clearest statement of the foresight test in this cluster of cases is, however, to be found in the English Court of Appeal decision in *R. v. Roberts*.[57] D was driving V from a party when he made sexual advances towards her and said that he had beaten up girls who had refused him. V jumped out of the moving car and was injured. The court held that D had caused her injury stating that:

> "The test is: Was [the injury] the natural result of what the alleged assailant said and did in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing?"[58]

Due to the quality of reasonableness embodied in the foresight test D will be held liable for V's harmful action to herself so long it fell within a range of possible actions which would not have surprised an ordinary person in D's position. This, in the English case of *R. v. Pitts*, V had drowned when he slipped into a river in an endeavour to escape from D's murderous assault.[59] The court instructed to jury to regard D as having caused V's death if they were satisfied, not that B's method of escape was the only means open to him, but that it was such a method as a reasonable person might take. This may be contrasted with the Indian Supreme Court decision in *Jaginder Singh and other v. State of Punjab*.[60] V had jujped into a well in order to escape from the close pursuit of the two appellants who were intent on assaulting him. V's head hit a hard substance in the well and drowned. The court

54. *Ibid.* at 229.

55. The full pronouncement appears in the main text accompanying note 37 above.

56. Vol. II (3rd ed., 1973), p. 976.

57. (1971) 56 Cr. App. R. 95.

58. *Ibid.*, at 102 per Stephenson, L.J. See also the New South Wales case of *R.v. Annakin* (1987) 37 A. Crim. R. 131 at 148, where the following direction was upheld on appeal: "When there is some intervening factor, that is something which happened between the act of the accused and the death, such as jumping out of the window (to escape D's assault)...the question is whether that intervening factor, as it is called, is something which could have reasonably been foreseen, and which might accordingly be regarded as a natural consequence of the accused's act."

59. (1842) C. & M. 284, 174 E.R. 509.

60. 1979 Cri. L.J. 1406.

acquitted the appellants of the murder charges even though it was conscious of the fact that what induced V's action was the circumstance that the appellants were following him closely. In its concluding remarks, the court said:

> "If we were satisfied that [the appellants] drove [V] to jump into the well without the option of pursuing any other course, the result might have been different. As the evidence stands we are unable to hold that the death of [V] was caused by the doing of an act by [the appellants] with the intention or knowledge specified in s. 299, Indian Penal Code."[61]

It is submitted that, standing on its own, the first sentence in the above passage is too restrictive an application of the foresight test. However, as the second sentence reveals, it might well be that the Supreme Court was discussing the issue of mens rea rather than causation. When the sentence are read together, the court seems to be holding that it might have found the appellants having the intention or knowledge required under s. 299 if the facts showed that they had driven V to jump into the well fully aware that he had no other means of escape.

A slight variation of the type of cases we are discussing here may be briefly mentioned. In the Australian case of *R. v. Butcher*, D tried to rob V by presenting a knife towards V's stomach while standing a few feet from him.[62] According to D's story, V had rushed at D and into the knife. The Victorian Full Court held D causally responsible for V's death, approving the follwoing direction of the trial judge to the jury:

> "The fact that the deceased moved forward...does not necessarily mean that the accused's act in holding out the knife was not the cause of the stabbing. The reaction of men to threats upon them are known to vary widely. The man who threatens his victim...must realise that the consequential reaction cannot be predicted with certainty. Some victims may retreat; some may advance...[I]t would be open to you to find that, as a matter of common sense, in the light of all the circumstances, the accused's act in holding out the knife caused the stabbing and, therefore the death, notwithstanding the fact that some movement of the deceased contributed to it as one of the causes."[63]

Several points of interest may be gathered from this direction. In *Butcher*, V's action which caused his own death was not for the purpose of escaping from his assailant but by way of self-defence. Nevertheless, the case shares in common with the flight cases the fact that V was operating

61. *Ibid.* at 1409 per Chinnappa Reddy J.
62. [1986] V.R. 43.
63. *Ibid.* at 55-56.

under pressure exerted by D. Also, the court was clearly applying the foresight test when inviting the jury to consider what a threatener might have realised were the possible consequential reactions of his victim to the threat. So long as the reaction of the victim was a kind which could reasonably have been contemplated by the threatener, he will be held casually responsible for the injury suffered by the victim. This is in line with our earlier discussion of *Pitts* and *Joginder Singh*.

The foresight test has been resorted to in all the above cases because it provides the courts with the best guide in determining whether D should be made criminally responsible for V's death when it was partly contributed by V's own action. The test emphasises the pressure which D had brought to bear on V thereby making V a non-responsible actor. Being so constrained, V's choice of action was that much more predictable. The test also involves a practical enquiry, requiring the courts to consider all the circumstances surrounding the conduct of D and V and to explore the range of possible reactions of V to D's conduct. Ultimately, D is made criminally responsible for V's death if it was a normal consequence of D's conduct. Conversely, no such responsibility would lie on D if the death was abnormal in the sense of being unexpected in the particular circumstances—in short, not reasonably foreseeable.

The substantial factor test is rudimentary by comparison in providing guidelines for resolving the causal issue in these types of cases. The test does not assist much by asserting that D's conduct could have remained a significant contribution to V's death despite the steps taken by V which led to her own death. This requires a weighing up of the contributing causes of D's conduct on the one hand and V's action on the other with the objective of determining whether the latter was so dominant as to have overwhelmed the former as a cause of death. The test, however, does not do much more than present this quantitative exercise, leaving the enquirer in the dark as to precisely how the exercise is to be performed.

(3) *V's voluntary contribution to her own death*: In this next set of cases, V's decision to take the action which leads to her death is entirely on her own accord and uninfluenced by D's conduct. V is therefore a responsible actor whose free and independent actions will generally be far less predictable than the Vs considered in the immediately preceding sub-section. Consequently, V's death would in many instances be regarded as abnormal from the viewpoint of an ordinary person in D's position. Applying the foresight test to these cases, we would expect more of the Ds here to escape criminal responsibility for V's death. Different results may however be reached for the same fact situation if the substantial factor test were applied instead. This is because the substantial factor test lacks the same capacity as the foresight test to consider factors which are significant in determining moral blame. This criticism of the substantial factor test will be borne out in the ensuing discussion.

There are several cases where V has been grossly wanting in caring for

her own safety after D's conduct has created a potentially dangerous situation. For example, in the New Zealand case of *R. v. Storey*, after a car collison for which D was responsible, V had deliberately driven across the road to reach and open space where, the soil being loose, resulted in V's death when his car fell down the bank.[64] The court held that D would not be imputed with causing V's death if two conditions were met, namely, (*i*) V had driven across the road voluntarily rather than being forced across it by the impact and (*ii*) if crossing the road was not the reasonable and natural action to take in the circumstances.[65] We see here the foresight test being applied with the first condition enquiring whether V was a responsible actor whose independent action was accordingly unpredictable; and with the second condition concerned with the normality or otherwise of V's action. A similar approach was taken in an American case, *Hubbard v. Commonwealth*, where D was resisting his arrest with some force when V, of his own accord, decided to assist in restraining him.[66] D did not strike V who died shortly afterwards from a heart failure accelerated by the physical exertion and excitement when participating in the arrest. V knew of his own heart condition and had complained of being ill a few hours before the incident.[67] The court held that his action of assisting with the arrest rather than lying quiet and still negatived any causal connection which D's conduct may have had in creating the initial excitement. Again, the foresight test was evidently at work in this ruling with V regarded as a responsible actor whose action was abnormal or unforeseeable in the circumstances.[68]

Then there are cases where V has been grossly wanting in caring for herself after D had physically injured her. A good example is the Rangoon High Court case of *Nga Moe v. The King*.[69] D had inflicted minor head injuries on V which had healed after a week in hospital. As V had a fever, he was advised by his doctor to remain in hospital until it had subsided. V discharged himself from hospital against this advice. He died a few weeks later from a brain abscess which had developed below one of the injuries inflicted by D. Medical evidence revealed that V suffered from chronic malaria which lowered his sower of resistance and contributed to the formation of the abscess. It was also medically opined that had V remained

64. [1931] N.Z.L.R. 417.
65. *Ibid.* at 443 per Myers C.J.
66. (1947) 304 Ky. 818, 202 SW 2d 634.
67. Another way of analysing *Hubbard* is to regard V as having a special sensitivity which, unknown to D, increases the likelihood of death. In *Hubbard*, D was unaware of V's weak heart so that he could not have reasonably foreseen V's death. Cases of special sensitivity are considered in greater detail in the next sub-section.
68. For another case, see *R.v. Stripp* 1940 EDL 29, where D was acquitted of culpable homicide despite taking a bend in his car on the wrong side of the road and colliding into V, a cyclist. This was because V had at the last moment swerved into the path of D's car. The case is discussed in H.L.A. Hart and T. Honore, *Causation in the Law* (2nd ed., 1985), p. 350.
69. AIR 1941 Rangoon 141.
70. The role of such special sensitivity in the causal enquiry is fleetingly presented here and will be considered in detail in the next sub-section.

in the hospital as advised, the abscess would not have formed and he would have fully recovered. In acquitting D of the charge of murder, Roberts C.J. dealt with the facts in the following way:-

> "It turns out here, though there is no evidence that the appellant knew it at the time he struck the blow, that the deceased was in such bad health as to lower his power of resistance to a septic condition; and when, owing to his state of health, this supervened, he was unwilling to exercise common prudence or to abide by proper remedies and skilful treatment available to him. These circumstances, in my opinion, explain the cause of death, which was due to a number of factors of which the appellant's wrongful act was only one...[The appellant] cannot be said to have caused the death of the deceased... for he did nothing which was likely to cause it, or which would have done so except in conjunction with other circumstances which no reasonable man could foresee."[71]

The application of the foresight test is obvious in this passage. Notably, there is the stress made of V's decision as a responsible actor to leave the hospital against medical advice;[72] and to D's ignorance of V's antecedent weakened condition. These factors led the court to conclude that D could not have reasonably foreseen that V might die from the injuries inflicted by him.

Another case which bears strong similarities with *Nga Moe* but where a different result was reached is the English Court of Appeal case of *R. v. Blaue*.[73] D stabbed V who, unknown to him, was a Jehovah Witness. She refused a blood transfusion on grounds of her religious beliefs despite being told that it was needed to save her life. The medical opinion was that V would have recovered had she permitted the transfusion. D argued that the causal chain between his stabbing V and her death had been broken by V's unreasonable refusal to have the transfusion, in effect, advocating the foresight test. The test would require the court to take account of V's refusal being a free and independent decision;[74] that it was highly unusual for such a decision to be made in the face of medical advice that the transfusion was essential to preserve life;[75] and the fact that the medical treatment needed to save her was readily available to V.[76] These factors would most probably

71. *Ibid.* at 144-145.
72. For other cases where V likewise discharged herself from hospital or further medical attention, see *Nga Ba Min* AIR 1935 Rangoon 418; *Levy v. R.* (1949) 51 W.A.L.R. 29; *R.v. Bingapore* (1975) 11 S.A.S.R. 469.
73. [1975] 3 All E R 446.
74. Contra. the argument by H.L.A. Hart and T. Honore in *Causation in the Law* (2nd ed., 1985), p. 361, that V was under pressure from her strong religious beliefs to refuse the transfusion.
75. See D. Galloway, "Causation in Criminal Law: Interventions, Thin Skulls and Lost Chances" (1989) 14 *Queen's Law Journal* 71 at 78.
76. Indeed, it appears that in *Blaue*, the court failed to take into account the great progress in medical science which had occurred after the ancient case authorities cited

have worked together towards the conclusion that D could not, in the circumstances, have reasonably foreseen V's death. However, the court emphatically rejected the foresight test in the following words:-

> "It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that this victim's religious beliefs which inhibited him from accepting certain kinds of treatment, were unreasonable."[77]

Regrettably, the court did not consider how its pronouncement squared with its own decision in *Roberts*, the case involving V who had jumped from a moving car to escape D's sexual advances.[78] The court had there, it will be recalled, clearly subscribed to the foresight test. The court in *Blaue* apparently applied the substantial factor test, noting simply that the stab wound inflicted by D was still operating at the time of V's death and significantly contributed to it. It becomes immediately obvious how superficial the test is when compared with the foresight test, with no account whatsoever being taken of the various factors which have a bearing on the moral blame worthiness or otherwise of D.[79] As far as the position in India is concerned it can be confidently asserted, in the light of the case of *Nga Moe* discussed earlier, that the Indian courts would have reached a different conclusion to the one made by the English Court of Appeal in *Blaue*.

The ruling by Roberts C.J. in *Nga Moe* may be contentious in one respect. His Honoured had given some emphasis to the fact that V had died because he "was unwilling to exercise common prudence and to abide by the proper remedies and skilful treatment available to him". This seems at first glance to run counter to Explanation 2 to s. 299 of the Indian Penal Code which reads:-

> "where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilling treatment the death might have been prevented."

However, it may well be that the ruling in *Nga Moe* was correct if the Explanation was accorded a restrictive interpretation. Under this interpretation, the Explanation would cover cases where V died because proper remedies and skilful treatment were unavailable to save her, for instance,

in its judgment: see G. Williams, *Textbook of Criminal Law* (2nd ed., 1983) p. 397; H.L.A. Hart and T. Honore, *Causation in the Law* (2nd ed., 1985), p. 360.

77. (1975) 3 All E.R. 446 at 450 per Lawton L.J.
78. (1971) 56 Cr. App. R. 95 and discussed in the main text accompanying notes 57 and 58 above.
79. These factors appear in the main text accompanying notes 74, 75 and 76 above.

due to the remoteness of the region,[80] or the lack of medical services or facilities at the time when it was needed.[81] But the Explanation would not extend to cases where the right remedies and skilful treatment were both available and known to the medical staff but V had refused treatment.[82] This is precisely what occurred in *Nga Moe*. To extend the Explanation to such a case would deny the operation of the foresight test and consequently create an unjust result. Surely, it would be unduly harsh to blame D for V's death when V had voluntary refused the medical skill which the medical staff possessed and knew would definitely cure him. Further support for restricting the Explanation in the manner suggested comes from the Code framers themselves, who made the following comment on the relevance of medical remedies and skill to the causal enquiry:-

> "whereas in countries in which good medical treatment is common, it is difficult to suppose that a person inflicting a slight wound on another could contemplate his death as a probable result, such a result may be supposed to enter into his contemplation in a country where bad medical treatment is far more common than good, and, therefore, the definition of homicide ought not to exclude death resulting from a slight wound as the primary or original cause."[83]

Thus the concern of the Code framers was to deny D the claim that V would not have died had proper medical treatment been available to her. It is quite a different claim altogether (and certainly one which the framers did not have in mind) for D to say that he should not be made criminally responsible for the death of V who had died because she refused to receive the proper medical treatment readily available to her. In passing, it may be observed that the Code framers were subscribing to the foresight test when they spoke of how an accused "could contemplate" his victim's death "as a probable result".

(4) *V having unusual sensitivity which contributes to her own death:* In this set of cases, D has injured V who, unknown to him, has a pre-existing condition which renders her more vulnerable to death. The condition of haemophilia is an instance.[84] We have already seen other instances in the immediately preceding sub-section such as a weak heart condition[85] and poor physical resistance resulting from chronic malaria.[86] In the last sub-section,

80. See *Bicchu v. State of Uttar Pradesh* AIR 1958 Allahabad 719 where V died because better medical treatment was not available at the local dispensary.
81. See *Salebhai Kadarali v. Emperor* AIR 1949 Nagpur 19 where if an operation had taken place within an hour after the injury, V would have survived.
82. Contra, P.S. A. Pillai, *Criminal Law* (7th ed., 1988), p. 415 citing an old English authority, *R. v. Holland* (1841) 2 Moo, and R. 351 for support.
83. *First Report on the Penal Code* (1846), p. 249.
84. *State v Frazier* 339 Mo. 966, 98 S.W. 2nd 707 (1936).
85. *Hubbard v. Commonwealth* (1947) 304 Ky. 818, 202 SW 2d 634.
86. *Nga Moe v. The King* AIR 1941 Rangoon 141.

however, the focus was on V's entirely voluntary decision to take a course of action which resulted in her own death. Here the focus is on V's pre-existing condition.[87] Since the condition is predetermined, there is no question of any decision-making or voluntary action on the part of V. Accordingly, V is neither a responsible actor nor a non-responsible one so we need not be concerned with such a line of enquiry here.[88] What is of concern is whether V's pre-existing condition could be regarded as unusual or abnormal, a significant consideration in the application of the foresight test for causation.

In many jurisidictions, a rule known as the "thin skull" principle has been developed to deal with cases of pre-existing conditions.[89] The principle eliminates these conditions from the assessment of causal responsibility. It dictates that D takes V as he finds her so that it is immaterial whether D foresaw or could have reasonably foreseen the antecedent condition of V. The principle adheres closely to the substantial factor test for D's conduct must inevitably be regarded as a significant contribution of V's death, having set into motion the fatal effects of the pre-existing condition. The foresight test, on the other hand, has no place whatsoever in the principle.

The "thin skull" principle is unduly harsh in imposing causal responsibility on Ds who were unaware of V's unusual pre-existing condition and consequently could not have reasonably foreseen that his conduct could lead to V's death.[90] Certainly, justice requires that D is imputed with causal responsibility for the harm which he actually foresaw or could have reasonably foreseen might result from his conduct, and this could range from a slight wound to a really serious injury. But that is entirely different from

87. The case of *Blaue* is therefore properly classified as one belonging to the preceding sub-section as it involved V's decision to refuse treatment. Some commentators have, however, classified it as a case of pre-existing condition, regarding V's unusual religious beliefs as a psychological quirk: see P. Gillies, *Criminal Law* (2nd ed., 1990), p. 577; E. Colvin, "Causation in the Criminal Law" (1989) 1 *Bond Law Review* 253 at 263-264.
88. See D. Galloway, "Causation in Criminal Law: Interventions, Thin Skulls and Lost Chances" (1989) 14 *Queen's Law Journal* 71 at 78.
89. For example, for England, see *R. v. Johnson* (1827) 1 Lew. 164, 168 E.R. 164; *R.v. Martin* (1832) 5 C. & P. 455, 173 E.R. 202; *R. v. Murton* (1862) 3 F. & F. 492, 176 E.R. 221; *R.v. Hayware* (1908) 21 Cox 692. For Australia, see *R.v. Martyr* (1962) Qd. R. 398; *Mamote-Kulang of Tamagot v. R.* (1964) 111 C.L.R. 62. For the United States, see *State v. O'Brien* 81 Iowa 88, 46 N.W. 752 (1890); *Baker v. State* 30 Fla. 41, 11 So. 492 (1892); *Hollywood v. State* 19 Wyo. 493, 120 P. 471 (1911); *State v. Frazier* 339 Mo. 966, 98 S.W. 2d 707 (1936). There is also the Canadian Supreme Court case of *R.v. Smithers* (1977) 34 C.C.C. (2d) 427.
90. Contra. D. Galloway, "Causation in Criminal Law: Interventions, Thin Skulls and Lost Chances" (1989) 14 *Queens's Law Journal* 71 at 77 who supports the principle on the basis that it upholds the notion of respect for the uniqueness of each individual. However, as Galloway himself concedes, this view can be maintained only if the creature of the average or normal person is denied in the law, which it evidently is not.

punishing him for the death of a human being. The principle has been subjected to adverse criticism from commentators who have attempted to eradicate it altogether in preference for the foresight test,[91] or else suggested exceptions to its operation.[92] Save for one dubious recent English authority,[93] however, the courts of foreign jurisdictions have remained steadfast to the principle.

Fortunately, the "thin skull" principle does not appear to have gained a foothold in India. The courts frequently side-step the issue of causation in cases involving pre-existing conditions, going straight to the mental element of the offence. In these cases, once it is determined that V would not have died but for D's conduct (that is, factual causation), the courts proceed to consider whether, given D's ignorance of V's pre-existing condition D had the necessary intention or knowledge required by the offence in question.[94] It is submitted that the courts which have taken this approach have failed in their duty to tackle the issue of imputable causation with its important exrcise on moral judgment.

There are, however, a few Indian cases which have flushed out the issue of imputable causation in cases involving pre-existing conditions and come down in favour of applying the foresight test. One such case was *Nga Moe* which has already been discussed at some length in the preceding sub-section.[95] It will be recalled how D had inflicted a slight injury on V's head which had subsequently developed into a fatal abscess in the brain due to V being a suffer of chronic malaria. Roberts C.J. declined to impute causal responsibility on D owing, inter alia, to V's very poor state of health at the time D struck him. The learned judge regarded this pre-existing condition as something "which no reasonable man could foresee".[96] A similar ruling appears in *Kamayya and others v. Emperor*, a decision of the Madras High Court.[97] Four Ds had attacked V with sticks and knives causing injuries which were sufficiently serious to cause his immediate death. It was therefore a moot point whether V's "fatty heart" contributed to his death. However, the court intimated that such a pre-existing condition might be relevant

91. For example, see E. Colvin, *Principles of Criminal Law* (1986), pp. 70-72; D. Stuart, *Canadian Criminal Law* (2nd ed., 1987), pp. 111-112.
92. For example, see *Howard's Criminal Law* (5th ed., 1990), p. 41.
93. *R.v. Dawson* (1985) 81 Cr. App. R. 150 where V had died of a heart attack from the shock of being robbed. Unknown to the robbers, V suffered from a severe ischaemic heart disease. The English Court of Appeal quashed their convictions for manslaughter. The decision might be seen as ignoring the "thin skull" principle but it seems more likely that it was based on other grounds: see P. Gillies, *Criminal Law* (2nd ed., 1990), p. 577. Cf. *Hubbard v. Commonwealth* (1947) 304 Ky. 818, 202 SW 2d 634.
94. For example, see *Empress v. Fox* (1879) II I.L.R. 522; *Empress v. O'Brien* (1880) II I.L.R 766; *Empress v. Randhir Singh* (1881) III I.L.R. 597; *Chowkidar v. Emperor* (1922) 23 Cri. L.J. 344.
95. AIR 1941 Rangoon 141.
96. *Ibid.* at 145.
97. (1935) M.W.N. 51.

to the causal enquiry in a different set of circumstances:

> "No doubt if the attack had been of such a kind and the injuries had been of such a character as would not have been likely to cause death or could not have been inflicted with any knowledge that they were likely to cause death, then the suggestion that the man died from some abnormality such as a fatty heart would have to be taken into consideration."[98]

Hence we see the court being prepared not to impute causal responsibility upon D in a case where the injury inflicted by D did not normally lead to death. In such a case, should D have been ignorant of V's pre-existing condition, the condition might break the causal connection between D's conduct and the death.

Although the Indian courts might not have subscribed to the "thin skull" principle, it may well be entrenched in Explanation 1 to s. 299 of the Indian Penal Code. The Explanation reads:-

> "A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death."

On one view, the Explanation would regard V's unusual per-existing condition as a "disorder, disease or bodily infirmity" and would therefore eliminate it from the assessment of causal responsibility.[99] An alternative interpretation may, however, be given to the Explanation. It is arguable that the Code framers meant the Explanation merely to reflect the prevailing English common law rule that an injury which accelerates the death of a person already at the verge of death is nevertheless deemed to be the cause of death.[100] The cases contemplated here are where V's health was fast deteriorating as a result of her disorder, disease or bodily infirmity. Should D then come along and hasten this process towards death, the Explanation would not cover cases where V had a pre-existing condition which was quiescent or dormant for then V's health could not be regarded as being in rapid decline.[101] The same could be said for conditions which, while active,

98. *Ibid.* at 54 per Curgenven J.
99. This was the view taken in *Empress v. Fox* (1879) II. I.L.R. 522; and *Chowkidar v. Emperor* (1922) 23 Cr. L.J. 344. It was also expressed in *Kamayya v. Emperor* (1935) M.W.N. 51 at 53 which is difficult to reconcile with the court's subsequent statement that V's pre-existing condition might be relevant to the causal enquiry in certain circumstances.
100. See *Nelson's Indian Penal Code* Vol. II (7th ed., 1983), p. 978. See also *Gour's Penal Law of Inida* Vol. III (10th ed., 1983) where, at p. 2219, the following purpose for the Explanation is given: "for obvious reasons, a criminal cannot be heard to apportion his crime on the ground that he had only acclerated and not caused the death of the decreased which was ex visitations, (that is) imminent."
101. For example, a person having haemophilia could achieve a normal lifespan so long as she avoided physical bruising.

lack the quality of rendering V's death imminent.[102] Admittedly, this suggested narrow interpretation of the Explanation does not appear clearly from its wording but it is a feasible one which prevents the harshness of the "thin skull" principle from applying.

In the next Part, we shall consider the application of the two tests for imputable causation in cases where, not V but a third party or some natural event intervened to cause V's death.

IV. WHERE A THIRD PARTY OR EVENT CONTRIBUTED TO V's DEATH

We are concerned here with instances where D has injured V or placed her in potential danger after which a third party or a natural event causes V's death. For convenience, the cases may be classified into three groups: (1) where a third party contributes to V's death; (2) where medical treatment contributes to V's death; and (3) where an event of nature including physical complications from V's injuries, brings about her death. The second group is really a specific instance of the first but the complexity of the issues raised there warrant a separate treatment.

(1) *where a third party contributes to V's death:* Whether the intervening conduct of a third party breaks the causal connection between D's conduct and V's death will often depend on whether the third party was a responsible actor or a non-responsible one. Professors Hart and Honore have described the effect of a responsible third party in the following terms :

> "The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."[103]

An example of such an occasion appears in the judgment of the Madras High Court in *Public Prosecutor v. Suryanarayanamoorty*, noted earlier.[104] D had given a poisoned sweetmeat to N, his intended victim, who found it unpalatable and discarded it. V, a child, found the sweetmeat, ate it and died of poisoning. The court explored several hypothetical cases, one of which was as follows :

102. A person suffering from a weak heart or some other disease could continue living for months or even years.
103. H.L.A. Hart and T. Honore, *Causation in the Law* (2nd ed., 1985), p. 326. They have given the term "voluntary conduct" this special, narrow construction in their discussion. Cf. *Public Prosecutor v. Suryanarayanamoorty* (1912) M.W.N. 136 at 149 where Abdur Rahim J. was applying the usual meaning of voluntariness (that is, a conscious or willed conduct) when he said: "Nor would it be correct to lay down generally that the intervention of the act of a voluntary agent must necessarily absolve the person between whose act and result it intervenes."
104. (1912) M.W.N. 136.

"Now, suppose in this case, [N] had discovered that the sweetmeat was poisoned and then gave [sic] it to [V] to eat, it is to his act that [V's] death would be imputed and not to the accused's."[105]

Unfortunately, the court did not express any reasons as to why it regarded N's conduct to have broken the causal connection between D's conduct and V's death. It is submitted that the implied reason was because N's intervention was, in the words of Professor Hart and Honore, "free, deliberate, and informed". Such an intervention could be construed as abnormal or unexpected from the perspective of an ordinary person in D's position, that is, not reasonably foreseeable.

The Court in *Suryanarayanamoorty* also considered the converse situation involving a non-responsible third party:—

"On the other hand, suppose [N] finding [V] standing near him and without supsecting that there was anything wrong with the sweetmeant gives a portion of it to her and she ate it and was killed; could it be said that the accused who had given the poisoned sweetmeat to [N] was not responsible for the death of [V]? I think not."[106]

Earlier on in its judgment, the court considered the English case of *R. v. Michael* where D had instructed X to feed D's infant wiath a spooonful of "medicine" from a bottle (which was actually a poison) every night.[107] X had placed the bottle on a mantelpiece. The bottle was discovered by her own five year old child who gave half of its contents to the infant. D was convicted of murder. The Madras High Court's analysis of *Michael* is instructive:—

"The decision also no doubt proceeded on the ground of want of discretion in the intervenor, the child. The Indian courts may hold that a person who keeps poison at a place where others might have access to it must be taken to know that death is likely to result from the act.[108]

In this passage, we observe two justifications relied upon to hold D causally responsible for V's death despite the intervention of a third party. The first is the description of the third party as a non-responsible actor, namely, a person whose conduct was "want[ing] of discretion". The second is a subscription to the foresight test as is evident in the second sentence of the passage.[109]

105. *Ibid.* at 149-150.
106. *Ibid.* at 150.
107. (1840) 9 C & P 356, 173 E.R. 867 and discussed in *Suryanarayanamoorthy* (1912) M.W.N. 136 at 146-147.
108. *Ibid.* at 147.
109. Similarly, Professor G. Williams in his *Textbook of Criminal Law* (2nd ed., 1983), p. 394, has commented on *Michael* as follows: "It is not enough to show that there was no new intervening act of a responsible actor; it must also be shown that what happened was reasonably foreseeable. There was ample evidence in *Michael* that the latter rule was satisfied. The defendant had placed the poison in the room where the baby was, and has described it as medicine for the baby. It seems very likely that the boy of 5 who had administered it to the baby had been told or otherwise had come to believe that it was the baby's medicine".

Besides these poisoning cases, there are occasions where a third party acts to preserve herself against a danger created by D and, as a result of such action, V is killed.[110] In the English Court of Appeal case of *R. v. Pagett*, D had shot at armed police in a dark area while using V as a shield.[111] V was killed when the police returned the fire. The court held D causally responsible for V's death on the ground inter alia that a reasonable act performed for the purpose of self-preservation could not be viewed as breaking the casual connection between D's conduct and V's death if such a reasonable act was in response to D's own act. Here we see the application of the foresight test, it being reasonably foreseeable (or normal[112]) in the circumstances for the police to have returned D's fire by way of self-defence. The court also regarded Professors Hart and Hnoorse' discussion of "voluntary conduct" in the sense of being "free, deliberate and informed" as "broadly correct and supported by authority".[113] Applying this concept to the facts, the police' act of firing was not voluntary since they were pressured into doing so by D's own conduct. Put in another way, the police were non-responsible actors.

A similar reasoning appears in the New South Wales case of *R. v. Barker*.[114] D had navigated a vessel so negligently that it became stranded some distance from the shore. Passengers of their own accord took to small boats but, without negligence on their part, the boats capsized and a child was drowned. The court held D causally responsible for the child's death on the ground that it was the "direct and natural result" of D's conduct. As for the action of the passengers in trying to get to shore in small boats, this was considered reasonable in the circumstances. Thus, we see again the court's reliance on the foresight test and the related concept of a non-responsible actor in blaming D for the child's death despite the conduct of the passengers.

The courts in all of the above instances did well to apply the foresight test to resolve the difficult problem of causation posed by third party intervention. Had the substantial factor test been relied upon instead, it would have been found to lack sensitivity in distinguishing cases where the conduct of a third party broke the causal connection from those where it did

110. These occasions are distinguishable from the flight or escape cases considered in Part III where the "intervenor" acting in self-preservation was V herself.
111. (1983) 76 Cr. App. R. 279.
112. So interpreted by H. Beynon, "Causation, Omissions and Complicity" (1987) *Criminal Law Review* 539 at 551.
113. (1983) 76 Cr. App. R. 279 at 289, citing the first edition of the work.
114. *Sydney Morning Herald* 15 and 17 October 1852 and discussed in H.L.A. Hart and T. Honore, *Causation in the Law* (2nd ed., 1985), p. 335.

not. The substantial factor test might assert that a third party's conduct overwhelmed D's act on the basis that the former was so dominant as to render the latter a mere setting or part of history. But this difficult quantitative exercise is based more on intuition than anything else. By contrast, the foresight test, with its questions about whether the third party was a responsible or non-responsible actor; whether the intervention was normal or abnormal; and generally whether it was reasonably foreseeable, equips the courts with much more precise tools in reaching a morally just result.

(2) *where medical treatment contributes to V's death*: By contrast to western jurisdiction where there is a small but growing number of cases, there seems in India to be an almost complete lack of cases involving death through medical malpractice. A possible explanation for this lies in an absence in Indian legal culture of using the criminal justice process against erring members of the medical profession.[115] This may be due to factors such as the very high regard held for doctors by the community and effective protectionism by the medical profession against scrutiny from outside agencies. Nevertheless, in anticipation of the time when Indian doctors will be prosecuted for malpractice,[116] it would be useful to briefly canvass the development of the law in other jurisdictions.

The general case envisaged here is of V who dies while undergoing medical treatment to cure an injury caused by D, and the issue is when the treatment can be regarded as having broken the causal connection between the injury inflicted by D and V's death. The cases may be divided into those where the medical treatment was proper and those where it was improper. Dealing with the first group, the governing principle should be that D is causally responsible for V's death on every occasion, even when the injury inflicted by D on V was non-fatal. This is because the receipt of such medical treatment is a reasonably foreseeable consequence of the infliction of the wound.[117] And even with the great advancements in medical science, the administration of anaesthetics and the performing of operations, however skilfully done, continue to be life-endangering tasks. A related reason for imputing D with causal responsibility for V's death is because, often, the medical staff have to treat V in circumstances of emergency.[118] In such cases, the medical staff may be regarded as non-

115. There have been some medical negligence cases in Indian tort law but these are miniscule by comparison with the numbers in western jurisdictions. The leading Indian decision on this subject is *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole* AIR 1969 SC 128.

116. An instance of this occured in *Dalchand v State of Madhya Pradesh* 1977 Cri. L.J. 1374 where the court considered whether a criminal charge under s. 304A of the *Indian Penal Code* should be brought against a doctor who had administered a drug to the deceased. The court declined to do so on finding that the drug had not caused the death. The case is otherwise unhelpful in elucidating the principles which should govern doctors as third party intervenors in a causal problem.

117. See. J.C. Smith and B. Hogan, *Criminal Law* (6th ed. 1988), p. 319.

118. This does not necessarily render the treatment improper. Whether treatment is proper is very much a matter of clinical judgment which takes into account such matters as the available medical knowledge and of V's health at the time, and the type of medical facilities at hand.

responsible actors in the sense of having been pressured into performing the treatment as a consequence of D's own act.[119] Accordingly, D should be made morally blameworthy for creating the situation which necessitated the treatment resulting in V's death. If the substantial factor test were to be applied to cases involving proper medical treatment, it is not at all certain whether this same result will be reached. Take the case of V who receives a relatively minor injury from D and who dies from the anaesthetic or operation. Could it not be argued that the medical treatment was so substantial a cause of death as to overwhelm D's contribution? Under the test, the fact that the treatment was properly and skilfully conducted should be immaterial since the enquiry is concerned simply with the magnitude of the treatment's contribution to V's death. The foresight test is superior in giving prominence to the treatment having been properly conducted.

Turning now to the group of cases involving improper medical treatment, these may be categorised into cases where the treatment, though improper, was done in good faith, and those where the improper treatment was the result of negligence on the part of the medical staff. In his *Digest of the Criminal Law*, Sir James Fitzjames Stephen presented the effect these categories had on D's causal responsibility as follows:

> "A person is deemed to have committed homicide...(*a*) if he inflicts a bodily injury on another which occasions surgical or medical treatment, which causes death. In these cases it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith, or was employed without common knowledge or skill."[120]

Stephen's opinion has been generally followed by English and Australian authorities.[121]

It should be observed that this opinion allows for improper or mistaken treatment to be performed in good faith in the sense of having been based on advice which appeared reasonable to competent medical personnel at the time when it was given.[122] The same view was taken by the Rangoon High Court in *Emperor v. Abor Ahmed* when it held that "if death results

119. Cf. H. Beynon, "Causation, Omissions and Complicity" (1987) *Criminal Law Review* 539 at 549.

120. (9th ed., (1950), art. 262.

121. For example, see *R. v. McIntyre* (1847) 2 Cox 379; *R.v. Davis* (1883) 15 Cox 174; *R. v. Smith* (1959) 2 Q.B. 35; *Levy v. R.* (1949) 51 W.A.L.R. 29; (*R. v. Evans and Gardiner* (*No. 2*) (1976) V.R. 523. Cf. *R. v. Jordan* (1956) 40 Cf. App. R. 152.

122. See *R. v. Pyn* (1846) 1 Cox 339; ; *Levy v. R.* (1949) 51 W.A.L.R. 29. See also G. Williams, "Causation in Homicide" (1957) *Criminal Law Review* 429 at 516.

from an injury voluntarily caused, the person who causes injury is deemed to have caused death...even if medical treatment was given but was not the proper treatment, provided that it was administered in good faith by a competent physician or surgeon".[123] The court appears to have derived this proposition from the earlier Rangoon High Court case of *King-Emperor v. San Pai* which had opined that: —

> "A person may be guilty of murder when the immediate cause of death is the treatment administered and the question whether the treatment was proper treatment does not arise, provided that it was administered bona fide by a competent physician or surgeon."[124]

The underlying rationale for holding D causally responsible for V's death in such cases is clearly expressed through the foresight test. The test will assert that D ought to have foreseen that V might die from some error of clinical judgement which could be made by competent medical staff. These errors would be regarded as part of the normal or expected risks taken by a patient undergoing medical treatment.

With regard to cases of improper treatment due to negligence on the part of the medical staff, it may be that Stephen meant such negligence to be gross when he spoke of treatment "without common knowledge or skill". The gross nature of the medical negligence would render it abnormal or not reasonably foreseeable on D's part thereby absolving him of causal responsibility for V's death.[125] Moral blame for the death would then be imputed to the grossly negligent medical practitioner who could be convicted of homicide by a negligent or rash act under s.304A of the Indian Penal Code. Such a practitioner could also be regarded as a responsible actor. His gross negligence could amount to a free, deliberate and informed intervention so vastly deviating from normal medical practice as to be wholly unaffected by any constraints which D's conduct might have created upon those charged with treating V. The requirement of gross medical negligence also reflects the human reality that medical malpractice satisfying the lower standard under tort law is too frequent for it to be regarded as abnormal or extraordinary.[126]

It could be further contended that for the medical negligence to break the causal connection between D's conduct and V's death, the negligence

123. 1937 I.L.R. Rangoon 385 at 393 per Spargo J. However, the facts of the case did not involve improper medical treatment.
124. 1936 I.L.R. 643 at 646 per Leach J. It is debatable whether "good faith" is the same as "bona fide" since the former could be construed as objective (see s. 52 of the *Indian Penal Code*) while the latter as subjective (as in good conscience or honestly): see generally, J.F. O'Connor, *Good Faith in English Law* (1990), Chapters 1 and 5.
125. H.L.A. Hart and T. Honore, *Causation in the Law* (2nd ed., 1985), pp. 355-356.
126. See R. Perkins, *Criminal Law* (2nd ed., 1969), pp. 716-717; A. Leavens, "A Causation Approach to Criminal Omissions" (1988) 76 *California Law Review* 547 at 570-571.

must be so gross as to be sufficient in itself, apart from the original wound, to have caused V's death. This was the opinion expressed in *Hale's Pleas of the Crown* :—

> "If...it shall be made clearly and certainly to appear that the death of the party was caused by ill-applications by...those about him of unwholesome salves or medicines, and not by the wound or hurt [caused by the accused], it seems that this is no species of homicide."[127]

This opinion was endorsed by the Rangoon High Court in *Nga Moe v. R.*[128] It also seems to have been applied to the case of *Nga Ba Min v. Emperor* where the unskilful medical treatment which V received at her village was held to absolve D of causal responsibility for her death.[129] Evidence was led that the original wounds were not serious and under ordinary circumstances would have completely healed in a fortnight. Accordingly, it was the unskilful treatment, apart from the original wounds, which resulted in V's death. Whether this narrow meaning of gross negligence is the law is uncertain; Stephen for one did not so advocate in his *Digest*. It is submitted that gross medical negligence should absolve D of casual responsibility for V's death even when D had inflicted a fatal wound on V.[130] This does not, of course, prevent D from being punished for the serious offence of inflicting grievous bodily harm.

What of the substantial factor test? An attempt to apply the test to cases involving improper medical treatment will expose its insensitivity to the distinction between cases of improper treatment made in good faith and those resulting from negligence. Under the test, it is immaterial whether the improper treatment was done in good faith or negligently. The test is only concerned with whether the treatment so greatly contributed to V's death as to render the wound inflicted by D a part of history.[131] By drawing the said distinction, the foresight test is far better equipped to arrive at a just result.

Before passing on to the next sub-section, the point should be made that Explanation 2 to s.299 of the Indian Penal Code has no relevance to cases involving medical treatment which contributes to V's death.[132] The significance attached to "proper remedies and skilful treatment" by the Explanation is whether they might have prevented V from dying. The Explanation

127. Vol. I (1736), p. 428. In the parts omitted in this passage, Hale required that the wound inflicted by D was "not mortal".
128. AIR 1941 Rangoon 145 at 143. However, the reference to Hale was obiter as the facts of the case did not disclose any improper medical treatment.
129. AIR 1935 Rangoon 418, although no reference was made to Hale.
130. This would go against Hale's view: see note 127 above. However, it has the support of Stephen: see H.L.A. Hart and Honore, *Causation in the Law* (2nd ed., 1985), pp. 356-357; and the English Law Commission, No. 177, *A Criminal Code for England and Wales*, Vol. 2 (1989), cl. 17(2) of its draft Criminal Code.
131. See *R. v. Smith* (1959) 2 Q.B. 35 at 42-43 per Lord Parker C.J.
132. Contra, *Raju's Commentaries on the Indian Penal Code*, Vol. II (3rd ed., 1973), p. 978 note 18.

states that even if this was shown, D would still be held liable for V's death. Accordingly, the Explanation is not concerned with cases where medical treatment (whether properly or improperly administered) contributed to, as opposed to prevented, V's death.[133]

(3) *where a natural event contributes to V's death* : There may be occasions where D has injured or placed V in a perilous position after which some event of nature intervenes and kills V. In line with our discussion of the foresight test thus far, the best approach for the courts to approach these cases is to consider whether the intervening event was reasonably foreseeable. If it was, the courts should then go on to decide whether V's death was a reasonably foreseeable consequence of such an event. Should both the event and V's death by the event have been foreseeable, D's conduct will be regarded as having caused the death. Conversely, D should not be imputed with causal responsibility for the death if either the event or V's death was unforeseeable. Applying different terminology, while a normal or ordinary event would not break the causal connection between D's conduct and V's death, an abnormal or extraordinary one might. A good illustration of the application of these principles is found in the South Australian Supreme Court case of *Hallett v. R.*[134] D had assaulted V on a beach and left him lying unconscious by the edge of the water. V drowned when the tide rose. In imputing D with causing V's death, the court said :—

> "We are not concerned to deny that there may be cases where the extraordinary as opposed to the ordinary operation of natural forces might be regarded as breaking the chain of causation... So here if the deceased had been placed in a situation safe from the ordinary operations of the sea and had been engulfed by an extraordinary tidal wave as the result of an earthquake in the sea it may be that the earthquake and not the act of the appeallant would be regarded as the cause of death. But we cannot regard the ordinary operations of the tides at Tumby Bay...as being such a supervening cause.[135]

An Indian example is the Madras High Court case of *In re Venkatachalam Chetty*.[136] D had poisoned V and left him unconscious in a field overnight. V subsequently died of pneumonia. The court acquitted D of the murder charge upon finding that it had not been established that the pneumonia was in fact caused by the exposure. In the words of the

133. For an earlier discussion of this Explanation see, pp. 18-19 above. Contra. *Dr. Edupuganti Kesava Rao v. State of Andhra Pradesh* (1980) 40 Andhra L.T. 49.
134. (1969) S.A.S.R. 141.
135. *Ibid.* at 150. The court had earlier expressly rejected the foresight test for causation. However, the court appears to have done so because it confused foresight with the mens rea of the offence of murder (at 148-149). As noted earlier, while the foresight test embodies features of mental processes, it is distinct from the requirement of mens rea. For the contention that the decision in *Hallett* applied the foresight test under faint disguise, see *Howard's Criminal Law* (5th ed., 1990), p. 35 note 48.
136. 1942 43 Cr. L.J. 320.

court, "there was no evidence that pneumonia was a probable consequence of sleeping out" in the field on the particular night.[137] Hence V's contracting pneumonia was not reasonably foreseeable, being an extraordinary event which broke the causal chain between D's conduct of poisoning him and his death. Other examples of extraordinary natural events include being struck by lightning, drowned by flooding, freezing in a snow storm, or contracting scarlet fever from an attending doctor.[138]

The last example leads us to a group of cases involving V dying from complications setting in after being injured by D. Here again, we observe the application of the foresight test to resolve the causal problems raised by these cases. The best Indian judicial pronouncement is contained in the Bombay High Court case of *Nandkumar Natha v. State of Maharashtra*.[139] D had set V alight with kerosene causing burns to 30% of her body. V was hospitalised but no account of her extensive burns, she developed complications including septicaemia and died. After reviewing several case authorities, the court held D causally responsible for V's death. The following extracts from the judgment are culled from these authorities:

> "We take it as settled law that if a supervening factor causes the death, but if that supervening factor is a necessary consequence or a necessary incident of the injury caused by the accused, then it can be said that the act itself caused the death of the victim concerned... It is only when the intervening cause was totally unexpected or unrelated to the original injury caused by the act of the accused that one can possibly contend that the death was not the direct or proximate result of the act of the accused...
>
> [B]roadly speaking, the courts have to distinguish between two types of cases namely those cases where the intervening cause of death, like peritonitis, is only a remote and a rather improbable consequence of the injury and those cases where the so called complication which is the intervening cause of death is itself a practically inevitable sequence to the injury. In the first place, it may be that the complication was not the cause of death, but in the latter case when the probability is very high amounting to practical certainty, then death must be held to be the result in due course of natural events."[140]

137. *Ibid.* at 320 per Burn J.
138. *Bush v. Commonwealth* 78 Ky. 268 (1880).
139. 1988 Cri. L.J. 1313. Contra. the poverty of the judgment of the Indian Supreme Court in *Phino v. State of Punjab* 1975 Cri. L.J. 1109 in elucidating the principles governing such cases.
140. *Ibid.* at pp. 1319-1320. The cases relied upon by the court for these propositions were *R. v. Flynn* (1868) 16 W.R. (Eng) 319; *Lal Singh v. Emperor* AIR 1938 Lahore 31; *Salebhai v. Emperor* AIR 1949 Nagpur 19; and *Manajar Allabux v. State of Madhya Pradesh* AIR 1962 Madhya Pradesh 244. For other similar holdings, see *Nga Ba U v. Emperor* 1938 39 Cri L.J. 217; *In re Venkatachalam Chetty* 1942 43 Cr. L.J. 320; *Yohannan v. State of Kerala* AIR 1958 Kerala 207; *Aziz Khan v. State of Bihar* AIR 1964 Patna 158.

Although the expression "reasonable foresight" does not papeal in the above passages, it is clear that the concept was being embraced in such notions as "necessary consequence", "necessary incident", "a practically inevitable sequence" and "high probability". Thus, D would be causally responsible for V's death if the intervening complications which killed her were a reasonably foreseeable consequence of his conduct. Conversely, D would not be imputed with causal responsibility for V's death should the complications have been "totally unexpected" or a "rather improbable consequence", that is, not a reasonably foreseeable consequence of D's conduct.

The capacity of the foresight test to reach morally just results in the cases involving intervening natural events stands in stark contrast to that of the substantial factor test. The only guidance provided by the latter test is that the causal effect of the intervening event must have been so substantial as to overwhelm D's contribution to V's death. But no further guidance is given as to precisely how this quantitative exercise is to be carried out. Furthermore, a strict rendering of the substantial factor test will not allow a consideration of the extraordinariness or otherwise of the natural event nor the probability of occurrence, matters which, to its great credit, the foresight test takes full account of.

CONCLUSION : LEGISLATIVE GUIDELINES FOR CAUSATION

Since causation is a distinct and important legal requirement for the offences of culpable homicide and death by negligence or rashness, it is imperative that clear guidelines for determining causation be established. This is especially so when causal problems, when they do arise, are often fraught with difficulties involving both quantitative evaluations of contributing causes and fine moral judgments.

The collective judicial experience of several jurisdictions, including India, reveals the formulation of a viable approach to resolving most of these causal problems. The approach involves a two-step enquiry, looking first at whether V would not have died but for D's conduct (factual causation) and, secondly, at whether the circumstances were of such a nature as to make it morally just to impute criminal responsibility on D for V's death (imputable causation). The major difficulty has been in locating appropriate tests to determine imputable causation. One test which the courts have devised may be described as the substantial factor test. This test is useful in ensuring that D is punished only when his contribution to V's death was more than negligible or minimal. But as Parts III and IV of this article have shown, the test is too crude a guide in cases involving intervening causes. In such cases, a more refined guide is to be found in the foresight test. This test has the capacity to achieve finely tuned moral judgments about causation since it incorporates such evaluative notions as actual and reasonable foresight, normal versus abnormal consequences, ordinary as against extraordinary results, and the conduct of a responsible actor as opposed to a non-responsible one. The best approach to take regarding

imputable causation is to recognise the attributes of both the substantial factor test and the foresight test and to require the two tests to be satisfied before making D causally responsible for V's death.

Should such an approach to imputable causation be expressly embodied in the Indian Penal Code? The paucity of Indian decisions which have conducted a careful analysis of causation strongly suggests a need for such guidance in legislative form. Recent efforts in other jurisdictions at codifying the criminal law have felt the need to include provisions on causation,[141] and this has been done despite the wealth of case authorities on causation existing in these jurisdictions when compared to India.[142]

Among the various formulations by these codifying bodies, the following one by the Canadian Law Reform Commission seems the most attractive:—

> "Causation. Everyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes it."[143]

It is noted how both the substantial factor test and the foresight test are embodied in this proposed provision. The generality of the provision also provides the courts with the flexibility to apply it to the particular facts of the case. Reference to "unforeseen and unforeseeable cause" denotes the need for both actual foresight and reasonable foresight to be asent before D is absolved of causal responsibility. Perhaps, greater clarity might be gained by attaching the adjective "reasonable" to the notion of foresight.[144] Finally, it may be observed that while our discussion has focused on criminal responsibility for causing death, the Canadian proposal applies to the causing of harm in general. This is perfectly permissible since the general principles governing causation are the same whatever the consequential harm might be. The reason why this article has concentrated on death is because it has the best capacity to bring out the complexities of causation. Accordingly, should a general provision like the Canadian proposal be incorporated into the Indian Penal Code, its proper place is amongst the general explanations of the Code rather than in the part on homicide.

141. For example, the American Law Institute, Model Penal Code, *Official Draft and Revised Comments* (1985), s. 2.03; the Canadian Law Reform Commission, *Recodifying Criminal Law*, Report No. 31 (1987), draft Criminal Code, cl. 2(6); the English Law Commission, *A Criminal Code for England and Wales*, No. 177 (1989), draft Criminal Code, cl. 17.
142. Contra. the Law Commission of India, 42nd Report, *Indian Penal Code* (1971), which did not at all consider whether there was a need to include a provision on causation.
143. *Recodifying Criminal Law*, Report No. 31 (1987), draft Criminal Code, cl. 2(6).
144. See the English Law Commission's proposal, which reads, in part, that:—"A person does not cause a result where, after he does such an act..., an act or event occurs (a) which he did not foresee, and (b) which could not in the circumstances reasonably have been foreseen".: Law Commission, *A Criminal Code for England and Wales*, No. 177 (1989), draft Criminal Code, cl. 17(2). However, the English proposal is too stringent in that it additionally requires the intervening act or event to have been "the immediate and sufficient cause of the result". For a criticism of the English proposal, see D. Galloway, "Causation in Criminal Law : Interventions, Thin Skulls and Lost Chances" (1989) 14 *Queen's Law Journal* 71 at 76.

NOTES AND COMMENTS

REGULATION OF MONOPOLIES, RESTRICTIVE TRADE PRACTICES AND PRICES IN ANCIENT INDIA

YASH VYAS*

I. INTRODUCTION

THE MONOPOLY problem, i.e. the problem posed by monopolies and their attendant phenomena of restrictive trade practices including the practice of manipulation of prices, is not a product of modern society only. It is as old as trade itself. Society's aversion to monopolies and restrictive business practices finds an early expression, pre-dating the Christian era. In ancient India, the Hindu Jurists were well aware of the unscrupulous tendencies of the class of traders. For example, Manu, known as the 'father of Hindu law', described traders as 'open rogues' "who subsist by (cheating in the sale of) various marketable commodities."[1] According to him, "commerce is a mixture of truth and falsehood".[2] Similarly Kautilya, the author of the classic treatise on government, the *Arthsastra*,[3] took "traders, artisans, musicians and others as thieves in effect though not in name".[4] It is interesting to note that Kautilya deals with merchants and artisans along with criminals, thereby implying that businessmen are no less dangerous to society than criminals.[5] The law givers, therefore, prescribed various measures, particularly in the *Dharmasastra* or *Smriti*[6] period (600 B.C. to 600 A.D.), to regulate trade and commerce. Kautilya unequivocally laid down that traders must be "restrained from oppression on the country".[7]

* M.Sc. LL.B (Vikram) LL.M (London), Faculty of Law, University of Nairobi.

1. Manu IX, 257 at 387, (such citations refer to *Manusmriti*, they denote Chapter, Verse and page number), see *Laws of Manu* (G. Buhler trans.), F. Max Muller (ed.) *Sacred Book of East* in 50 volumes translated by various scholars (1879—1910, Delhi reprint 1964-1966) Vol. XXV (hereafter citations from Manu refer to this work).
2. Manu IV, 4 at 128-29.
3. The *Arthsastra* ('The science of government'), was written around 400 B.C. It is not considered as a source of Hindu law, although in many parts the laws laid down in it are almost identical with those of *Dharmasastras*, the main sources of Hindu law. The *Arthsastra's* importance, however, is that it illustrates a number of matters including law and its administration in ancient India. It is no exaggeration to say that the *Arthsastra* is the first attempt at framing a constitution for human society.
4. Kau IV, I, 204 at 231 (such citations refer to *Kautilya's Arthsastra*, they denote Book, Chapter, Verse and page number), see *Kautilya's Arthsastra* (R. Samsastry trans. 7th Ed. 1961, hereafter citations from Kautilya refer to this work).
5. See Book IV, R.P. Kangle gives title to this Book: "The Suppression of Criminals", see *The Kautilya's Arthsastra* (Kangle trans. 1963).
6. The Hindu jurisprudence regards *Smritis* or *Dharmasastras* as constituting the foundation and an important source of law. Gautama (600 B.C.—400 B.C.); Vasishta (500 B.C.—400 B.C.); Visnu (200 A.D. 400 A.D.), Manu (300 B.C. —200 A.D.); Yajnavalka (100 A.D.—300 A.D.) Brhaspati (400 A.D.—600 A.D.) Narada (400 A.D.—600 A.D. are among the Hindu legists whose works form parts of *Smriti law*. For sources of Hindu: Law and their chronology see generally P.V. Kane, *History of Dharmasastra* 5 Vols. (in seven parts 1930-62); N.C. Sen Gupta, *Evolution of Ancient Indian Law* Ch. 1 (1953); J.D.M. Derrett, *Introduction to Modern Hindu Law* Ch. 1-6 (1963); *D.F. Mulla's Principles of Hindu Law*, 1-40 (S.T. Desai ed. 1966); *Mayne's Treatise on Hindu Law and Usage* Chs. I & II (S. Srinivas Iyengar ed. 1938); S.C. Banerji, *Dharma Sutras—A Study of their Origin and Development* (1962); Shivaji Singh, *Evolution of the Smiriti Laws* 42-46 (1972); K.M. Saran, *Labour in Ancient India* (1957).
7. Kau IV, 1, 204 at 231.
8. Birendra Nath, *Jiudicial Administration in Ancient India* 8 (1979).
9. Jagdish Swarup, *Human Rights and Fundamental Freedoms* 26 (1975).
10. Ghosal, *A History of Indian Political Ideas* 534; See also *infra* note 13 and accompanying text.

The ancient Indian jurists regarded law as a branch of *Dharma*. Law and *Dharma* were not differentiated and, therefore, justice could only be conceived as conformity to the latter. "*Dharma*" is an expression of wide import meaning "the aggregate duties and obligations—religious, moral, social and legal and the rules governing these were formulated by the *Dharmasastra* or *Smritis*, which is a comprehensive code to regulate human conduct".[8] A notable and distinctive feature of Hindu polity was that all Hindus, whether king, traders or ordinary persons were subject to *Dharma* at all times. "The King was not above the law or *Dharma*, which constituted the essence of kingship. *Dharma* was the sovereign over the sovereign and it may therefore be said the sovereignty vested in it".[9] While the *Smriti* authorities held that "the King's executive edict had the force of law," Professor Ghosal points out, "they limited its authority at first implicitly and afterwards expressly be reference to its *Smritis* milieu. A doctrine declaring the king to be the sole source of law was unknown even to the most extreme champion of the authority of the temporal ruler among our ancient thinkers."[10]

Thus, the Hindu texts were the supreme source of law in ancient India. Among other matters, these texts not only provided rules of law for the regulation of trade and business, but also imposed a duty on the rulers to enforce the law as enunciated in these texts.

Monopolies and anti-competitive trade practices received particular attention from the Hindu jurists. There is ample evidence in the Hindu literature of steps taken by the state to counter-act attempts on the part of businessmen to monopolize, i.e. to control the market for any given product and consequently to enhance its price.

In this essay, we will attempt a brief outline and analysis of the regulations dealing with the monopoly problem in ancient India. It must be pointed out that our purpose here is not to examine the detailed historical development in chronological order, but to highlight certain important

features of the ancient Indian legal set-up that deal with the monopoly problem.

The study of ancient literature and law is not an easy or straightforward task. Detailed and accurate information as to the concept of law and the changes in the concept of law with time and the environment, is difficult to obtain if the society being studied is one which existed more than two thousand years ago. Moreover, the "problem of shifting ideas from actuality becomes increasingly difficult when the period under study is considerably removed from the present."[11] Keeping these problems in mind, we shall confine ourselves to the broad framework within which ancient Indian laws were evolved. Section I of this paper examines various forms of monopolies, such as state monopolies, guilds and monopoly based on caste, that existed in ancient India, as well as the measures taken to control such monopolies. Section II critically analyses the regulation of trade practices and prices, whereas section III briefly evaluates the role of the administrative machinery in dealing with the monopoly problem.

Control of Monopolies in Ancient India

In ancient India, apart from state monopolies, we come across various other types of monopolistic organisations, such as trade and craft guilds, monopoly of caste, trader's leagues and trade combinations long before the Christian era. We also find legal provisions for the regulation and control of such organisations.

A. State Monopolies

In ancient Indian literature, references to royal or state monopolies are to be found in distinct terms. As established by numerous literary sources the king was the true owner of the earth and water. In addition, the monarchs used to reserve for themselves monopolistic rights over industries which commanded wide markets and which were capable of filling the royal treasury. Thus, the king had a monopoly over mines and minerals; production of salt; products of gardens, forests and fields; and certain manufactured items. Industrial enterprises such as weaving and spinning mills; workshops where gold and silver was worked and money struck; arsenals and arms factories; factories for the manufacture of weights and measures, etc. were also operated on the king's behalf.[12] Profits from such enterprises went entirely to the Treasury.

11. Romila Thapar, *Ancient Indian Social History, Some Interpretations* 26 (1984).
12. See, e.g., Manu VIII, 39 at 259-60; Manu VIII, 399 at 323; Manu VII, 61-62 at 225; Kau II, XXV, 143 at 159; Kau II, XIX, 103 at 113; Kau II, XVI, 98-99 at 104-106; Kau II, XII, 85 at 88-89; Yaj II, 261 (This citation refers to *Yajnavalkya Smriti*, for Yajnavalkya see generally Manmatha Nath Dutt, *The Dharmasastra* (1908); Derrett, *Essays in classical and Modern Hindu Law* 39 (1976); P.K. Sen, *The Law of Monopolies in British India* (1922); Haripada Chakraborti, *Trade and Commerce in Ancient India* 295-98 (1966); Jeannine Auboyer, *Daily Life in Ancient India* 106-109 (S.M. Taylor trans. 1965); Radha Krishna Chaudhary, *Economic History of Ancient India* 152-53, 181-82 (1982); Derrett, "Some Features of Public Law in Smriti Sources" (1978) 42 The Adyar Library Bulletin 1 at 10-11.

However, the state monopolies were not necessarily unchecked and were in fact supposed to be regulated in the same way as private monopolies. As pointed out earlier, rules were made alike for rulers and their subjects. The king was required to abide by the law. He was not above the law but under it. The law was said to be the 'King of Kings'.[13] Accordingly, it was laid down by the Hindu legists that the state monopolies must be regulated to subserve the common good. For instance, in Kautilya we find that, in the case of state monopolies, the superintendant of commerce should not insist on profits burdensome to people. The *Arthsastra* clearly laid down :

> "That merchandise of the king which is of local manufacture shall be centralised; imported merchandise shall be distributed in several markets for sale. Both kinds of merchandise shall be favourably sold to the people.
>
> He (superintendent of commerce) shall avoid such large profits as will harm the people."[14]

B. Guilds in Ancient India

The most prevalent type of monopolistic organisations, which formed a long-standing institution in ancient India, were the corporate enterprises guilds acquired such powers that by their misuse they were injuring the life and property of others.[15]

Traders or artisans persuing the same occupation formed guild organisations, in order to impose, in their favour, a monopoly in the trades or crafts in which they were engaged. The guilds in ancient India were a complex system, and their exact character probably varied not only in different periods but also in different localities.[16] They were of two principal kinds. The first was the merchant guild, an association of traders in a town whose members had the exclusive right to engage in trade, i.e., a single organisation

13. See *Brihad—Aranyak Upanishad* 14, 14; *The Shatpath Brahman* XIV, 4.2.26; Manu VIII, 336 at 317. See also Ramchandr Dixitaar, *Hindu Administrative Institutions* 216-26; Radhabinod Pal, *The History of Hindu Law*, 180 (reprint 1958); U.C. Sarkar, *Epoch in Hindu Legal History*, 68, 101 (1958).
14. Kau, II, XVI, 98 at 104-105.
15. Kau VII, IV, 333 at 361. For various types of guilds see Kau IV, I at 227-231.
16. For Comprehensive discussions on guilds in ancient India see generally R.C. Majumdar, *Corporate Life in Ancient India* (1969); Sen, *op. cit*, at 69-73; H. Chakraborti, *op. cit.*, Ch. VIII; R.N. Saletore, *Early Indian Economic History* Ch. IX (1973); G.L. Adhya, *Early Indian Economics* 82-89 (1966); R.K. Mukherjee, *Local Government in India* (1920); Beni Prasad, *Theory of Government in Ancient India*, Ch XI (1927); D.N. Jha, *Ancient India, An Introductory Outline* 83-85 (1977); P.C. Jain, *Labour in Ancient India* 185 et seq. (1971); Vera Anstey, *The Economic Development of India* (reprint 1956); Richard Fick, *Social Organisation in N.E. India* (S.K. Moitra trans); R. Chaudhary, *op. cit*, at 191-200; Saran, *op. cit*, Ch. IX.

with a general monopoly. Second was the craft guild, an association of persons exercising the same trade, i.e., separate organisations representing various trades and crafts.

The guilds were monopolistic in nature and their object was to eliminate or reduce competition between the members of the guild *interse* and between the members on one hand and non-members on the other. The guilds were empowered to restrict the number of persons who could enter a particular trade or craft in which they were engaged, and to restrict the entry of other guilds into their parish. They also had power to decree that a certain commodity was to be sold by a particular guild alone.[17] These powers enabled them to eliminate competition and impose a monopoly in their favour.

The guilds were corporate self-governing entities. They had their own regulations. Regulations and usages of guilds had the force of law and were recognised as valid by the state. The authority of the guilds was fully recognized, supported and safe-guarded by the rulers.[18] Members of guild who wilfully disregarded its constitution, were liable to punishment by confiscation of their property or by banishment.[19] No one was allowed to break a compact with the guilds. A transgressor was severely punished.[20]

In Kautilya, we come across a very interesting reference as to the regulation of guilds. Three methods, comparable to modern methods, were devised by Kautilya to regulate corporate organisations, viz. (1) registration of corporations, (2) laying down of checks and balances on the activities of artisans and craftsmen and formulation of penal laws to prevent their transgression, and (3) the appointment of special tribunals to administer penal laws relating to artisans and craftsmen.[21]

In order to have effective control over them, they were forbidden to transfer their activities from one region of the country to another without

17. See, e.g., *Smriti Chandrika* III Pt. 1 at 66.
18. See Gautama II, 2 at 204 (such citations refer to *Gautama Dharma Sutra*, they denote Chapter, Verse and page number), see *The Sacred Law of the Aryas* Pt. I (Buhler trans), *S.B.E.* Vol. II (hereafter citations from Gautama refer to this work); Gautama IX, 20-22 at 234; Vasistha, 1, 17 at 4 (such citations refer to *Vasistha Dharma Sutra*, they denote Chapter, Verse and page number), see *The Sacred Laws of the Aryas* Pt. II (Buhler trans), *S.B.E.* Vol. *XIV* (hereafter citations from Vasistha refer to this work); Narada X, 3 at 154 (such citations refer to *Naradasmriti*, they denote Chapter, Verse and page number), see *The Minor Law Books* pt. I (J. Jolly trans.) *S.B.E.* Vol. XXXIII (hereafter citations from Narada refer to this work); Manu VIII, 41 at 260; Yaj. II, 186-193. See also Derrett, *Religion, Law and the State in India* 188-89 (1969).
19. See Brh XVII, 13 at 378 (such citations refer to *Brhaspati—Smriti*, they denote Chapter, Verse and page number); see *The Minor Law Books* (J. Jolly trans), *S.B.E.* Vol. XXXIII (hereafter citations from Brhaspati refer to this work); Visnu V, 168 at 38 (such citations refer to *Visnu Dharma Samhita*, they denote Chapter, Verse and page number), see *The Institutes of Visnu* (J. Jolly trans), *S.B.E.* Vol. VII (hereafter citations from Visnu refer to this work).
20. See Manu VIII, 219 at 293; Yaj II, 192; Brh XVII, 9-20 at 347-49.
21. For a detailed discussion on these measures see P.C. Jain, *op. cit*, at 193-96.

notifying the authorities.[22] The main purpose of these measures seems to have been to establish control over the activities of these corporate organisations and to maintain a check on their earnings and profits.

C. *Monopoly of Caste*

A unique feature of Indian social organisation is its caste system. Indian society is divided into groups known as castes, whose membership, unlike that of voluntary associations, is determined not by selection but by birth.[23] Caste is "a corporate group , exclusive and, in theory at least, rigorously hereditary... bound together by a common profession and by the practice of common customs."[24] In ancient India caste served important economic functions. Many castes had a hereditary callings and many of their members followed it, but there was no actual obligation to do so. According to Nesfield, common occupation or division of labour is the chief, if not the sole cause of the foundation of the caste system.[25] There were some occupations which at one time could not be taken over by persons other than those belonging to a particular caste. Such castes are known as 'functional castes'. For instance, blacksmiths, goldsmiths, weavers, tanners, carpenters, potters, oilmillers, barbers, washerman etc, have their own castes and at one time only members could take up the occupations practiced by these castes. Functional castes, thus, had a monopoly over their hereditary or traditional occupations. However, in view of the fact that the bulk of such castes came from the weaker sections of society, it is doubtful that they had control over prices and output. Functional castes still exist in India but, because of rapid industrial development, rising social conciousness and the secular provisions of the Indian Constitution, such as freedom of trade and commerce, this form of monopoly is rapidly breaking up.

II. REGULATION OF TRADE PRACTICES AND PRICES

A. Trade Combinations

Organised attempts on the parts of traders to monopolize the market and to adopt anti-competitive and unfair trade practices so as to enhance

22. See R. Chaudhary, *op. cit*, at 195.
23. For a detailed discussion of the caste-system, its origin growth, functions, etc. see generally Herbert Risley, George Grieson, William Crooke, *The Ethnology, Languages, Literature and Religion in India* (1975, reprint from the Imperial Gazetteer of India 3rd ed. 1907-09); E.C.M. Senart, *Caste in India*, (E.D. Ross trans. 1977); Nripendra Kumar Dutt, *Origin and Growth of Caste in India* (1968); J.H. Hutton, *Caste in India* (1961); G.S. Ghurye, *Caste and Race in India* (1969); L.S. S.O. Malley, *Indian Caste Customs* (1974); J. Murdoch, *Review of Caste in India* (1977).
24. E. Senart, *op. cit*, at 20.
25. J.C. Nesfield, *Brief View of the Caste System of the North-Western Provinces and Oudh* (1855).

prices and profits, appear to have been quite frequent in ancient India. Kautilya refers to "traders who unite in causing rise and fall in the value of articles and live by making profit cent per cent."[26] This activity, according to Dr. Majumdar, appears to be "very much like the 'corner' or 'trust' system which is only too well known at the present day".[27]

The propriety of trade combinations and trade practices received particular attention from Hindu legists.[28] Traders' combinations were considered unlawful, and were punishable. It was specifically ordained on the state to prevent the formation of cliques among the merchants aimed at bringing about artificial rises and falls in prices. In Yajnavalkya, for instance, we find the following:

> "The highest amercement is directed for traders combining to maintain the prices against labourers and artisans although acquainted with the rise or fall of the price".[29]

The comment of *Mitakshara*[30] on this is....

> "If traders knowing an increase or decrease in market rates as regulated by the king, conspiring, through avarice, to maintain the former price against labourers, as washermen or the like; and against artisans, as painters and the rest, they shall be fined one thousand panas."[31] "Others hold, that if labourers, artisans and traders, knowing the rise and fall of the market rates, maintain the price, (that is keep up the former rates) they shall be fined".[32]

Yajnavalkya continues in the next verse:

> "The fine on traders who combine to obtain or to vend goods at wrong prices, is fixed at highest amercement".[33]

On this the *Mitakshara* aptly comments:

> "For those merchants again, who combine and stop foreign commodities, which they want at a wrong price, below the market rate, or who sell goods at prices exceeding the market rate, the fine ordained by Manu and others is the highest amercement".[34]

26. Kau VIII, IV, 333 at 361.
27. Majumdar, *op. cit*, at 78.
28. See generally Chakraborti, *op. cit.*, at 292-3 and 301-04; Adhya, *op. cit.*, 99-101; Saletore *op. cit.*, Ch. VII; Sen, *op. cit.*, at 45-56 S.S. Nigam, *Economic Organisation in Ancient India* Ch. VI (1975); Sen Gupta, *op. cit.*, at 278-28; L. Sternbach, *Juridical Studies in Ancient Indian Law* 518 20 (1965); Julius Jolly, *Hindu Law and Custom* 240-4 (1975).
29. Yaj II, 252.
30. *Mitakshara* is a running commentary on the Code of Yajnavalkya and a varitable digest of *Smriti* law. It was written in about 11 A.D. by Vijnaneswara, synthesizing various *Smriti* tests. It is the supreme authority of Hindu law except in Bengal and is still applicable to Hindus except in so far as it has been altered by legislative enactments.
31. H.T. Colebrooke, *A Digest of Hindu Law on Contract and Succession*, Vol. II 332 (1801).
32. *Ibid.*
33. Yaj II, 253.

B. Regulation of Prices

Some statements from Hindu texts even throw light on the modern-day problem of the regulation of prices and profits. The state was empowered to fix prices and profits. It was laid down, in the clearest term, that the time, place and profit elements must be kept in view while fixing the price of a commodity. Yajnavalkya says that:

> "Purchase or sale should be daily conducted according to the market prices, which are fixed by the king, the difference thereof is the legal profit of traders".[35]

The *Mitakshara* comments on this is:

> "If the king be near, according to that price which is fixed or regulated by him, should daily purchase or sale be conducted. The difference of remainder, of those prices regulated by the king, is the only profit of traders, for they may not alter the rates at their own choice."[36] The term "king" generally meant the king and his officers".[37]

The Hindu king and his officers were required to fix prices of commodities periodically. Manu laid down that:

> "Once in five nights or at the close of every half month or every month according to the nature, let the king make a regulation for market prices, in the preference of those experienced men."[38]

In another verse he says:

> "Let (the king) fix (the rates for) the purchase and sale of all marketable goods, having (duly) considered whence they come, whither they go, how long they have been kept, the (probable) profit and the (probable) outlay."[39]

In Kutilya, we find that :

> "The superintendent of commerce shall on consideration of outlay, the quantity manufactured, the amount of toll, the interest on outlay, hire and other kinds of accessory expenses, fix the price

34. Colebrooke, *op. cit.*, at 333.
35. *Ibid.*
36. *Ibid.*
37. *Ibid.*
38. Manu VIII, 402 at 324.
39. Manu VIII, 401 at 324.

of such mechandise with due regard to its having been manufactured long ago or imported from a distant country."[40]

The *Narada Smriti*, however, introduced new considerations in the fixation of prices:

> "It is for the sake of gain merchants are in the habit of buying and selling merchandise of every sort for profit. That gain is, in proportion to the price, either great or the reverse. Therefore, shall merchants fix just price for the merchandise, according to the locality and season for the merchandise, and let them refrain from dishonest dealings. Thus (by adhering to these principles) traffic becomes an honest profession."[41]

On Narada's approach R.N. Saletore observed that :

> "The question of equity was, thus, considered important especially by Narada, so that it might not ultimately harm the consumer, who is after all the last and real person to be affected by prices. It was well-known to Narada that merchants have their ingrained habit of dishonesty in their dealings, as their sole object in all transactions is only profit. That is why he emphasized that they should refrain from dishonest dealings and fix what may be called in modern term a fair price."[42]

The traders were required to adhere to the prices so fixed. Those who tampered with the prices were to be fined. According to Manu, a "man who behaves dishonestly to honest (customers) or cheats in his prices, shall be fined in the first or in the middlemost amercement."[43]

In order to check profiteering, the limits of profits were also fixed. Kautilya says that:

> "The superintendent of commerce shall fix a profit of five per cent over and above the fixed price of local commodities, and ten per cent on foreign produce. Merchants who enhance the price or realise profit even to the extent of half a pana more than the above in the sale or purchase of commodities shall be punished with a fine of from five panas in case of realising 100 panas upto 200 panas.
>
> Fines for greater enchancement shall be proportionally increased."[44]

40. Kau IV, II, 207 at 234.
41. Narada VIII, 11-12 at 149. See also Yaj II, 256.
42. Saletore, *op. cit.*, at 441.
43. Manu IX, 287 at 393; Narada VIII, 4-8 at 147-48.
44. Kau IV, II, 206, at 233; Yaj II, 255; Colebrook, *op. cit.*, at 334.

C. Regulation of other Trade Practices

Ancient Hindu law also condemned certain other trade practices which distorted competition or which were harmful to consumers. Predatory practices such as sales below cost were punishable. For instance, the *Code of Visnu* provided that illegal combination by traders to cut prices to the detriment of a competitor, was an offence, which was punishable by the highest amercement.[45] The same punishment was to be awarded to each individual seller.[46] According to Kautilya, any conspiracy on the part of businessmen to prevent sale of merchandise or to sell or purchase commodities at higher prices, was punishable by a heavy fine of 1000 panas.[47]

The practice of hoarding was also outlawed. Kautilya says that "authorised persons alone shall collect grains and other merchandise. Collection of such things without permission shall be confiscated by the superintendent of commerce."[48]

For unfair trade practices such as deceitful or misleading representations, the liability was both criminal as well as civil. Thus, in Kautilya, we find that :

> "When a trader sells or mortgages inferior as superior commodities, articles of some locality, as the produce of a particular locality, adulterated things, or deceitful mixtures, or when he dexterously substitutes other articles for those just sold, he shall not only be punished with a fine of 54 panas, but also be compelled to make goods the loss."[49]

Misrepresentations of various forms were also decried. Narada provided that "when a man shows one thing, which is faultless (to intending purchaser) and (afterwards) delivers another thing to him, which has a blemish, he shall be compelled to pay twice its value (to the purchaser) and an equal amount of fine."[50]

Dishonest dealings in weights and measures were also censured. Says Kautilya: "Middlemen who cause to a merchant or a purchaser the loss of 1/8th of a pana by substituting with tricks of hand false weights or measures or other kinds of inferior articles, shall be punished with a fine of 200 panas. Fines of greater losses shall be proportionally increased commencing from 200 panas."[51] Says Manu: "All weights and measures must be duly marked,

45. Vishnu V, 125 at 35.
46. Visnu V, 126 at 35.
47. Kau IV, II, 205 at 232; Yaj II, 249-250.
48. Kau IV, II, 206 at 233.
49. Kau IV, V, 205 at 232-33; See also Yaj II, 245-46.
50. Narada VIII, 7 at 148; Yaj. II, 257. See also Yaj, II, 249; Yaj. II, 250 (punishment provided for imitating article)
51. Kau IV, II, 206 at 233.

and once in six months let him (king) re-examine them."[52]

Adulteration of commodities was an offence. According to Manu, "for adulterating unadulterated commodities. . . the fine is the first (or lowest) amercement."[53] Adulteration of grains, oils, alkalies, salts, scents and medicinal articles with similar articles of no quality was punishable with a fine of 12 panas.[54]

Furthermore, punishment was provided for conspiracy to lower the quality of the works of artisans or to obstruct their sale or purchase.[55]

III. ADMINISTRATIVE MACHINERY

Regulation of trade combinations, prices, profits and certain trade practices by the state, suggests that the government was expected to exercise effective control over trade. This sort of intervention by government required the existence of an efficient administrative machinery. In the *Arthsastra* we come across information about a number of state officers who were responsible for the regulation of trade and industries.[56] One such officer was superintendent of commerce, who was responsible for ascertaining the question of demand and supply and rise or fall in the price of various kinds of merchandise and products.[57] The sale of commodities was thoroughly controlled by the superintendent of commerce, who had always to be alert to prevent all sorts of deceptions and conspiracies on the part of merchants. His functions were designed to protect the public against unfair dealings by tranders.

CONCLUSION

This essay has been an attempt to examine the extent of the monopoly problem in ancient India. Our brief study reveals that the Hindu jurists were well aware of the problem. It is beyond doubt that trade and commerce had reached a developed state in ancient India, and monopolistic organisations of definite forms were a common occurrence. The Hindu texts therefore provided the legal framework to regulate activities of such organisations. Trade practices and trade combinations received marked attention. Particular emphasis was given to the control of prices. Not only were prices regularly fixed, but limits to profits were also set. For effective enforcement

52. Manu VIII, 403 at 324. See also Visnu V, 122 & V, 123 at 35; Yaj. II 247, 244; Vasistha, XIX, 13 at 97.
53. Manu IX, 286 at 393. See also Manu VIII, 203 at 290, Manu XI, 50 at 440.
54. Kau IV, II, 206 at 233. See also Kau II, XII, 84 at 86; Visnu V. 124 at 35; Yaj. II, 248; *supra* note 49 and accompanying text.
55. Kau IV, II, 205 at 232.
56. Kau II at 45-165.
57. Kau II, XVI, 98 at 104.

of regulations, Hindu texts provided for civil and criminal sanctions as well as for appropriate administrative machinery. The main purpose of such measures was to protect other traders, ultimate consumers and prevent any likely harm to the people in general. The Hindu law givers were against excesses of human greed, hence they directed their efforts to keeping businessmen and even the state within the bounds of *Dharma*.

OZONE PROTECTION : BEYOND THE MONTREAL PROTOCOL

GURDIP SINGH*

I. INTROUUCTION

ON SEPTEMBER 16, 1987, the Montreal Protocol on substances that Deplete the Ozone Layer was signed.[1] It entered into force on 1st January 1989 having been ratified by the countries whose combined consumption of Ozone-depleting substances represented two-thirds of the estimated world total. The coming into force of a major environmental treaty, within fifteen months of its being opened for signature, is something of record, It reflects the seriousness with which governments and the public considered environmental protection.

The Montreal Protocol is an international agreement which imposes limits on the production and consumption of chemicals believed to be destroying the protective layer of ozone that encircles the earth. The Protocol constitutes first step toward successfully attacking the significant political, economic and scientific barriers that have doomed previous environmental agreements and may even point the way to a new era of international co-operation in protecting the global environment from other potential catastrophes. Unfortunately, the Protocol cannot be viewed as a definite solution to the problem of ozone depletion inasmuch as it does not completely ban the production or use of chemicals suspected of destroying ozone.

The present paper reviews the advances in international environmental law that culminated in the Montreal Protocol, analyses the control mechanisms of the Protocol and projects its loopeholes. Finally, the paper endeavours to point out the ways to use the protocol as a basis for the development of new mechanisms to protect the global environment.

II. THE OZONE DEPLETION PROBLEM

The "Ozone layers" which exists in the earth's stratosphere at an attitude between 12 and 50 Kilometers is a concentration or layer of the ozone molecule.[2] The primary function of the ozone layer is to absorb incoming ultraviolet rays from the sun, thus protecting the earth. The formation of ozone atoms is a relatively simple process: it requires only the interaction of ordinary oxygen and ultraviolet radiation from the sun. Through natural chemical reactions dependent upon variations in sun strength and

* Reader, Faculty of Law, University of Delhi, Delhi.

1. 26 International Legal Materials 1541 (1987).
2. Paul R. Tourangeau, The Montreal Protocol on Substances that Deplete the Ozone Layer : Can it keep us all from needing hats, sunglasses and Suntan Lotion ? 11 Hastings International and Comparative Law Review 511 (1988).

the amount of oxygen in the atmosphere, stratospheric ozone is continually produced and destroyed.

Scientists formerly presumed that there was constant level of ozone in the upper levels of the atmosphere, where oxygen is abundant. But, as early as 1979, speculation occured that the "ozone layer", a relatively thin layer of gas in the stratosphere, was subject to depletion.[3] Only eleven years later, researchers reported a hole in the ozone layer over Antarctica. Although the size of the hole in the ozone layer varies seasonally and with weather patterns, recently released data has sparked fears of wider depletion than originally postulated.

The decrease in the stratospheric ozone allows more ultraviolet radiation to reach the earth's surface. Experts estimate that for every one percent depletion of the ozone layer, there is corresponding two percent increase in the amount of ultraviolet rays that reach the earth's surface.[4] Ultraviolet rays cause damage to our health and environment and excessive exposure to these rays can be devastating causing increased cases of skin cancer, cataracts, retinal deterioration, and possible deterioration of the human immune system.[5] The environmental effects of increased ultraviolet rays exposure may include significant decreases in agricultural fields, and unpredictable alterations in whether and precipitation patterns.[6] Further, the ozone depleting compounds are believed to contribute to the global greenhouse problem, in which gases absorb reflected ultraviolet radiation, retain heat, and thereby slowly increase the earth's ambient temperature.[7]

The prime suspect in the ozone layer's destruction appears to be chlorine.[8] Chlorine destroys stratospheric ozone by "stealing" ozone's third oxygen atom. The result is a free oxygen atom and a highly reactive radical, chlorine monoxide, a compound just as destructive as the chlorine element itself. High levels of chlorine are in turn thought to be the byproducts of chlorofluorcarbons, industrially produced synthetic compounds of varying types and numerous applications. Commercial production of CFC's as refrigerants began in 1931 and, by the end of World War II, scientists had discovered CFC's remarkable propellant properties as well. Currently, CFC's are also used as blowing agents. Both non-toxic and non-flammable CFC's have proven ideal for industrial used because they are chemically inert. In other words, they are immune to decomposition or oxidation in the atmosphere. It is this ability of CFC's to withstand quick destruction that makes

3. M. Molina and F.S. Rowland, Stratospheric Sink for Chlorofluoromethenes : Chlorine Catalyzed destruction of Ozone, 249 Nature 810 (1974).
4. Gleick, Even With Action Today, Ozone Loss Will Increase, New York Times, 20 March 1988 at Y1, Col 1.
5. *Ibid*, at Y 17, Cols. 4-5.
6. *Ibid.*
7. Paul R. Tourangeau, *supra*, note 2.
8. Comment, The Montreal Protocol : Confronting the Threat to the Earth's Ozone Layer, 63 Washington Law Review 997, 1000, n. 21 (1988).

them so environmentally damaging. Instead of being destroyed in the lower atmosphere, these chemicals rise to the stratosphere where they slowly decompose in the sunlight giving off deadly chlorine atoms. In addition to their ozone depleting capabilities, CFC's also contribute to global warming by absorbing energy that is normally emitted back into the stratosphere. Accumulated in the atmosphere, these gases create a virtual blanket around the earth's surface, resulting in an atmospheric temperature rise known as the "greenhouse effect."

Because of their two-fold capability for assaulting the earth's atmosphere, CFC's clearly pose a threat to the global environment. The problem becomes more complex because CFC's are produced and used all over the world, yet the damage is occuring where we can be almost certain that no CFC's are being produced an Antarctica.

Another suspect in the ozone layer's destruction is bromine. Like chlorine, bromine also destroys stratospheric ozone by "strealing" ozone's third oxygen atom. Halons have bromine as part of their chemical makeup and are widely used in fire extinguishers.

The correlation between the presence of these compounds in the stratosphere and ozone destruction can be illustrated by the Antarctic "ozone hole". A study of this phenomenon establishes the clear relationship between chlorine, bromine, and ozone depletion.[9] Scientists testify that they fear for their health when studying the ozone hole in Antarctica because of the amount of ultraviolet -B radiation (UV-B) that they are exposed to.[10]

III. ACTIONS TO PROTECT THE OZONE LAYER

International environmental law possesses certain mechanisms to protect the ozone layer.

1. Trail smelter Arbitration

In 1941, Trail Smelter Award provided the first recognition of a State's responsibility for pollutants it could not control within its boundaries. The arbitral tribunal that heard the case declared:

> ".....no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[11]

9. Petit, Scientists Say Ozone Hole Growing Over Antarctic, San Francisco Chronicle, at A 1 Col. 1 (1987).
10. Sullivan, Ozone Hole Raising Concerns for Scientists' Safety, New York Times, at Y 9, Col. 1 (1987).
11. Trail Smelter Case (U.S. Vs. Canada), III United Nations Reports of International Arbitral Awards 1907 at 1965 (1941).

The Trail Smelter Award has established that States had the right to be free from established injury of a serious consequence. However, what establishes an injury of a serious consequence has not been defined.

2. Stockholm Conference

On 5th June 1972, the United Nations responded to the challenge of saving the planet by sponsoring the United Nations Conference on Human Environment. At the conference, the States teared apart the narrow notions of sovereignty and jurisdiction to collectively resolve complex issues of environment and development. The conference produced a Declaration which, *inter alia*, confers responsibility on States to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. This opened the doors for further developments to control the depletion of ozone layer.

The Stockholm conference also led to the establishment of United Nations Environment Programme (UNEP) which is based on the theme of ecodevelopment. Only four years after its inception, UNEP identified ozone depletion as one of five areas deserving of priority treatment.[12] In 1985, UNEP organized the conference of Plenipotentiaries on the Protection of the Ozone Layer in Vienna.[13] The conference produced a treaty, the Vienna Convention for the Protection of the Ozone Layer.[14]

The Vienna Convention for the Protection of the Ozone Layer contained no substantive provisions. However, it was combined with the resolutions from the conference to create a framework for the Montreal Protocol. For instance, the Convention included a resolution to convene a series of international workshops on both short and long term strategies to control equitably global production emissions and uses of CFC's taking into account the particular situation of developing countries as well as updated scientific and economic research.[15] Participants also authorized UNEP to convene a diplomatic conference, if possible in 1987, for the purpose of adopting such a protocol.[16] The Convention also imposed obligations on signatories to exchange research, co-operate in the formulation of standards, and adopt domestic legal or administrative measures to protect human health and the environment from ozone depleting chemicals.[17] The Convention also includes a dispute resolution provision, but there is no express obligation for signatories to arbitrate before litigating claims in the International

12. Pamela Wexler, Protecting the Global Atmosphers, 14 Maryland Journal of International Law and Trade 1 at 6 (1990).
13. Proceedings of the Governing Council at its Thirteenth Session, United Nations Environment Programme, 47 Doc. UNEP/G.C. 13/16 (1985).
14. Vienna Convention for the Protection of Ozone Layer, reprinted in 26 International Legal Materials 1516 (1987).
15. *Ibid.*, 1523.
16. *Ibid.*
17. *Ibid.*, 1529-30.

Court of Justice.[18] These provisions, while only a first step, provided the baseline for future negotiations. Given the lack of any effective environmental law precedents, the Convention must be praised for achieving a new level of-co-operation. More importantly, the drafters who met in Montreal came equipped with the knowledge of the Convention's deficiencies. Thus, once the groundwork was laid in Vienna, the participant nations were qualified to conclude an accord that would address the most obvious limitations in previous international negotiations an absence of both substantive controls and incentives that encouraged full participation by the global community.

3. Montreal protocol

Efforts to obtain an international protocol finally succeeded on 16th September 1987 when the Montreal Protocol on Substances that Deplete the Ozone Layer was signed.[19] The Montreal Protocol entered into force on 1st January 1989 having been ratified by the countries whose combined consumption of ozone depleting substances represented two thirds of the estimated world total. The coming into force of a major environmental treaty, within fifteen months of its being opened for signature, is smoething of record. It reflects the seriousness with which governments and the public considered environmental protection.

The Montreal Protocol is an international agreement to globally reduce the emission of substances known to harm the ozone layer. It contains clear measures which impose obligation on States parties to reduce production and consumption of ozone depletion substances, co-operate in developing alternative substances, and prohibit to restrict trade in these substances between parties and non-parties. The Protocol follows innovative approach to the issue of enforcement, adding incentives for countries to join the agreement.

(a) Control Measures

The most important function of the Protocol is to encourage the development of safe alternative substances as a replacement for the ozone depleting CEC's and halons. Many political, environmental, and scientific communities believe that a complete replacement of these substances is the only method of protecting ozone layer.[20]

The chemical manufacturing community also acknowledges the correlation between chlorines, bromines and ozone depletion, and explain that global regulation is the only way to bring about replacements equitably with a minimum of economic displacement. An important achievement in this regard comprises of the announcement by the world's largest producer of

18. *Ibid.*
19. 26 International Legal Materials 1550 (1987).
20. Crawford, Landmark Ozone Treaty Negotiated, 237 Science 1557 (1987).

CFC's and halons, E.I dupont de Nemours & Co., that they expected to completely phase out manufacture of these substances by sometime near the turn of the century.[21] The Protocol may successfully accomplish this complete replacement if its provisions effectively force manufacturers to develop and use alternative substances.[22]

The control measures for CFC's *versus* halons, are more stringent because these chemicals constitute the majority of emissions at this time. The protocol calls for gradual reduction of both consumption and production of the controlled substances over an 8 year period. These control measures for CFC's demand, based on 1986 levels of consumption and production : a freeze in consumption, and a freeze or a limit of a 10 percent increase in production to begin by 1990; a 20 percent reduction in consumption, and a 20 per cent of 10 percent reduction in production to begin in 1993; and further reductions of 30 percent in consumption, and 30 percent or 15 percent in production by 1998.[23] These measures are fundamental regulatory measures of the Protocol and, at best provide for final reductions by 50 percent of consumption and production of these substances by 1998.[24]

Halons, most commonly found in fire extinguishers, are chemicals having properties similar to CFC's. They are regulated separately under the agreement because they are currently produced in far smaller quantities and less is known about worldwide production and use of them. They are, however, believed to be substantially more potent at destroying the ozone layer than CFC's. Halon use in mass production began in 1970's. Because halons have the greatest capacity to destroy ozone, they account for approximately 16 percent of Ozone depletion even though they only represent a small percentage of total emissions. As a regulatory measure governing halons, the Protocol calls for freezing consumption at 1986 levels, as well as or limiting increase in production to 10 percent of 1986 in production.[25] The Protocol signifies no further measures or graduated reductions for future control of these substances.

There seems to be no logic for a separate and less stringent control measure for halons *vis a vis* more stringent control measure for CEC's. Halons are the most volatile ozone depleters. These are new in industrial applications and, therefore, have ready replacements. Thus, it would be better to subject halons to the same implementation mechanism that is applied to CFC's.

21. Barneth, Ozone Protection : The need for a Global Solution, 12 EPA Journal No. 10 at 10 (1986).
22. Thomas, Global Challenges at EPA, *Ibid.*, at 2, 3.
23. Montreal Protocol, Article 2.
24. Paul R. Tourangeau, The Montreal Protocol on Substances that Deplete the Ozone Layer : Can it keep us all from needing hats, sunglasses, and suntan Lotion ?, 11 Hastings International and Comparative Law Review 520 (1988).
25. Montreal Protocol, Article 2, paragraph 2.

(b) Entitlements of Developing Countries

The Protocol confers special status on developing countries by providing that any party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita is entitled to a special status under the Protocol.[26] This concession permits developing countries to delay compliance with the control measures for 10 years after the Protocol comes into force.[27] It also provides that these parties can calculate their base year consumption for regulation by using their average consumption levels during the period from 1995-97 inclusive, or 0.3 kilos per capita, whichever is smaller. Regular parties to the Protocol, on the other hand, base their consumption on 1986 levels. This provision effectively allows the developing countries to begin complying with the Protocol at a consumption rate substantially higher than they now maintain. These concessions exist to allow developing countries to participate in the Protocol. Thus, the provision is an important and useful method of encouraging the participation of developing nations in the Protocol.

The special status may be held under the Protocol as long as a party is a developing country, uses the controlled substances for their basic domestic needs, and consumes the substances at a rate not exceeding 0.3 kilos per capita per year.[28] There is no provision, however, that defines basic domestic needs. This may give rise to difficulties. It may be argued that many uses fall under basic domestic needs. Basic domestic needs may be construed to include domestic economic needs which could cover all aspects of the economy including production of goods for export. This would enable the developing countries entitled to special status to use or consume controlled substances in the production of goods for export.

(c) Control of Trade with Non-Parties

In addition to the reductions in production and consumption of controlled substances by the parties under the Protocol, non-parties should also be excluded from trading with parties in these substances. The banning of imports of these substances from non-parties is essential to protect the economic entities of the parties and to effectively maximize the global emission reductions under the protocol.

The protocol bans the import of bulk substanes from non-parties within one year after the Protocol comes into force.[29] The export to non-parties is restricted by the protocol which requires that exports are calculated into

26. *Ibid.*, Article 5, paragraph 1.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*, Article 4, paragraph 1.

that party's consumption figure, thereby directly reducing the amount that the party can consume under the Protocol.[30]

(d) Adjustment of Control Measures

The development of environmental regulatory laws necessitates the existence of procedures to modify regulatory control measures. Modification may be necessary because environmental regulation is based on scientific data and research that is constantly evolving. The regulatory measures must be flexible enough to compensate for new findings. Therefore, the Montreal Protocol must be able to regulate new substances or modify regulation existing substances upon discovery of new information.

The Montreal Protocol contains mechanisms which set forth the mechanisms for adjusting three critical variables of the Protocol : the ozone depletion rates for each substance, the consumption and production-reduction rates for the parties, and the addition to, or deletion from the list of controlled substances in the Annex to the Protocol.[31] It is essential that these mechanisms not only exist but should also be capable of being operational. If the adjustment mechanisms are practical and easy to use, the Protocol can be effective even in the face of drastic changes in the ozone layer. In case adjustment mechanisms are rigid and difficult to use the Protocol may become obsolete upon the discovery of new scientific data.[32]

The Protocol generally requires the parties to meet and either adopt or amend the adjusted variable.[33] The Protocol demands that adjustment should be made on the basis of available scientific, environmental, technical, and economic information which is presented to the parties by a panel of experts appointed for the purpose.[34] If consensus cannot be reached a two-thirds majority vote of the parties present and voting representing at least fifty percent of the total consumption of the parties the Protocol, will bring the adjustment into force.[35]

There are, however, certain inherent difficulties with the adjustment measures. Production and consumption caps, once set, are difficult to adjust and tend to require considerable negotiation. This is because the caps represent a large socioeconomic upheavel and artificial alteration of market demands. Thus, while the production and consumption caps are a good tool, their natural resistance to change will be problematic for any future environmental agreement.

Notwithstanding the scientific uncertainty prevailing in the area of ozone crisis, the Montreal Protocol stands on a solid scientific foundation, relying

30. *Ibid.*, Article 3, paragraph (c).
31. Montreal Protocol, Article 2, paragraphs 9 & 10.
32. Paul R. Tourangeau, *Supra*, note 116, 534.
33. Montreal Protocol, Article 2.
34. Montreal Protocol, Article 11, paragraph 3(c).
35. Montreal Protocol, Article 2, paragraph 9(c).

on the most modern scientific techniques available, including complex computer modeling, satellite measurements and advance atmospheric cheical theories. Rather than adopting an all too typical "wait and see" attitude, the drafters created a structure for fututre controls if the scientific evidence indicates they are required. The Protocol does so by calling for parties to regularly assess new information and to meet periodically to adjust control measures. Thus, the Protocol not only manages current knowledge but also demonstrates foresight and flexibility by keeping the door open for further action if it becomes necessary.

(e) Differential Economic Impacts

The most difficult obstacle facing international environmental regulators is the uneven distribution of costs and benefits involved in imposing international control. While all nations are certain to be affected by the depletion of the ozone layer, not all nations will be affected to the same degree. The most significant response of the Montreal Protocol to differential economic impacts involves the exceptions granted to developing countries. Participant developing countries now using modest amounts of the chemicals have been allowed to increase consumption for ten years before being required to abide by the restrictions of the accord.[36] Increases in developing countries consumption will, however, be limited to a maximum of 0.3 kilograms per capita per year. These countries currently have an average consumption of 0.2 kilograms per capita per year.[37] To allow for export to these qualifying countries, producing participants will accordingly be allowed to increase production by ten to fifteen percent. Furthermore, under the Protocoal the parties undertake to facilitate access to alternative substances or technology to parties that are developing countries.[38] They also undertake to facilitate the provision of financial assistance to developing countries for the use of alternative technology and for substitute products.[39] These provisions of the Protocol constitute inducement to the developing countries for accepting the Protocol.

(f) The Reluctance of developing countries

The developing countries are averse to Montreal Protocol. They justify their stand on the basis of "polluter pays" and not "victim pays" principle. They are not satisfied with the mere ten years grace period given to them for reducing CFC's consumption. They demand positive, unequivocal and definite assurance of compensation and transfer of technology from industrialized nations. Two of the Group of 77's three biggest potential emitters of CFC's India and China have not signed the Protocol and will not do so without a promise of cash and transfer of technology. The third, Brazil has signed, but says it will back out unless the cash is enough. The developing countries need adequate money and transfer of technology to become greener. These payments would be tied to measures to replace CFC's. The industrialized nations treat the proposed payment as departure from the "polluter pays" principle. According to the industrialized States, such payments would in substance amount to bribe to discourage freeriding. The industrialized countries feel that such bribery would be risky because they wonder at which countries, and at what sums, would it stop? The industrialized countries also point out that the issue of technology transfer is quite tricky. The developing countries want assurances that they will have access to technology to cut their emissions. The industrialized nations protest and contend that the technology transfer is complex issue as the intellectual property of the companies is not their to dispose off. Thus, the developing countries refuse to accept Montreal Protocol unless they are assured to access to alternative technology and adequate cash to enable them to comply with the control machinery of the Protocol.

36. Montreal Protocol, Article 5.
37. Pamela Waxler, *Supra*, note 12, at 13.
38. Montreal Protocol, Article 5.
39. *Ibid.*

IV. BEYOND MONTREAL PROTOCOL

The European Community has shown considerable interest to step up the fight against ozone destruction following the signing of the Protocol. In March 1989, the twelve member nations of the European Community met in Brussels and agreed to an immediate eighty five percent reduction with total elimination by the year 2000. Just days after the Brussels meeting a conference sponsored by then British Prime Minister Margaret Thatcher gathered representatives of 123 nations in London to, *inter alia*, discuss the issue of extending the phaseout schedules to all of the treaty's signatories. The participants at the London meeting included China, India and the Soviet Union. These countries constituted the most vocal and influential opponents of accelerated phaseout schedules. While the goal of the London conference was not achieved, the EEC, the United States and Canada did vow to go beyond Montreal Protocol's requirements and completely phase out CFC's use by the turn of the century.

The developing countries on the other hand suspect that the call for steep, immediate cuts by the West is an attempt to prevent poorer nations from becoming principal players in the global economy. In their view, it is the industrialized world, grown rich while creating the environmental crisis, that is most responsible for the current damage and capable of bearing burdens associated with CFC elimination. To obtain the co-operation of the developing countries Toronto conference on "The Changing Atmosphere: Implications for Global Security" was convened in 1988. The

Toronto conference concluded with the statement that exhorts governments to establish a "world atmosphere fund" financed in part by a levy on fossil fuel consumption of industrialized countries to mobilize a substantial part of the resources for implementation of the action plan for protection of the atmosphere. In 1989, international meeting of legal and policy experts was held at Ottawa. A corresponding "world climate trust fund" to benefit developing countries was proposed at the Ottawa meeting. Thus international movement to procure the co-operation of developing countries in protecting ozone layer is gaining strength.

There is growing international consensus that developing countries should be assisted in redressing conditions of underdevelopment causing environmental disruption. The developing countries must be extended trade, credit and/or direct financial assistance. They must be assisted in developing and financing CFC—free industrialization. At the London conference in June 1990, China and India made it clear that they will not accept any provisions that deduct the added costs of CFC substitutes from their foreign development assistance. India and China mooted a proposal at the London conference which calls for the creation of an international fund financed by the developed nations to help developing nations switch to Safer chemicals.

The international community is confronted with certain challenging questions. How can the loopholes of the Montreal Protocol be plugged? What mechanisms shall be adopted for the transfer of technology by the developed States to developing States? What should be the nature of the Global Environmental Fund? Who shall make contributions and how resources of the Global Environmental Fund shall be utilized? The Scientists, technologists, economists, politicians and legal scholars must accept the challenge to resolve the complex environmental jargon.

V. ECO' 92 : THE HOPE FOR THE FUTURE

The 1992 United Nations Conference on Environment and Development (ECO' 92) faces the difficult task of reconciliation and harmonization of developmental and environmental imperatives. The major aim of the conference is to move environmental issues into the centre of economic policy and decision making. It will focus largely on the changes we must make in our economic behaviour to ensure global environmental security. The industrialized countries must clearly take the lead. It is they who have developed and benefited from the traditional development model that has led to the present environmental dilemma. Moreover, the industrialized countries are the only ones with the means and the power to effect the transition to sustainability in our economic life.

There is compelling need for North-South co-operation to hammer out universally acceptable agreement to prevent the depletion of ozone layer.

Therefore, the full participation of the developing countries in the ECO's 92 is indispensable. To accompalish this task, the industrialized countries must take concrete measures to make available to the developing countries, on an affordable basis, the environmentally sound technologies. The success of ECO' 92 lies in the evolution of measures designed to provide additional financing to enable developing countries to participate in global environmental co-operation and to join in actions designed to alleviate global risks especially the depletion of ozone layer.

VALIDITY OF INTER-RELIGIOUS MARRIAGES UNDER HINDU LAW

DR. (MRS.) POONAM PRADHAN SAXENA*

A VALID marriage gives rise to many rights and obligations to the parties vis-a-vis each other, besides conferring legitimacy on children of this wedlock. The laws of marriages in vogue in India can broadly be classified in two categories. On the one hand is the Special Marriage Act, 1954, secular in character, allowing every Indian citizen[1] to avail of its provisions, and on the other are the traditional laws based on religion.[2]

The Special Marriage Act, 1954, which replaced the Act of 1872, with the same name was passed with the twin object of facilitating inter-religious marriages and to govern family relations of the parties married under it. The Act made it possible for parties to marry each other without having to renounce their religion as had been the case earlier under the 1872 Act. It also permitted monogamous couples married under their traditional religious based laws, to register their marriage under it, and thus benefit from its provision for succession and divorce.

In a case recently decided by the Kerela High Court,[3] an extra ordinary question arose, as to whether inter-religious marriages can also be solemnised under the Hindu Marriage Act, 1955. In other words, can a marriage between a Hindu male and a Christian female be governed by the provision of the Hindu Marriage Act, 1955; an Act which concerns with marriages of persons belonging to one religion only. The facts of the case are that one Adichan Nadar, a Hindu by birth obtained certain joint family properties on partition. His son, Karunakaran Nadar, a Hindu by birth, married Mariya Augustina, a christian lady on 26-5-1955 according to Christian rites in a Church. He later married Mariya (the same lady) according to Hindu form. On 21-5-1975, his daughter, born of this wedlock married the second defendant at the C.B.I. Church according to Christian rites. Shortly before it, on 13-3-75, Karunakaran executed a gift deed (in lieu of dowry for the marriage of this daughter) of a portion of this property (in the capacity of an absolute owner) in favour of his daughter. The daughter however could not get possession of this property; and the gift though valid, was later on cancelled by Karunakaran himself at the insistence and pressure of the other family members. The sons of Karunakaran contend, that they being coparcenors and the property being the joint family property, their father is incompetent to execute a gift deed of the same, for the simple reason that it is not his exclusive property and he is simply its manager or karta. Further, even if as Karta, he is empowered to gift a

* Lecturer, Law Centre-I, University of Delhi, Delhi-110007.

1. Irrespective of their religions.
2. The Hindu Marriage Act, 1955. The Muslim Personal Law ; The Parsi Marriage and Divorse Act, 1936; and the Indian Christian Marriage Act, 1872.
3. *K. Devabalan* v. *M. Vijayakumari* ; AIR (1991) Ker 175.

portion of family property to his daughter, he has exceeded the limits by gifting a substantial portion which was unreasonable keeping in view, that on the date of the execution of the deed; there were nine members of the family to be supported and the family's financial position was not sound. On these facts and circumstances, the court framed two basic issues for consideration, namely,

1. What is the status of this marriage under the Hindu Marriage Act, 1955;
2. Are the children born of this wedlock along with their mother (who remains a Christian) are members of a Hindu joint family; and consequently are the sons of Karunakaran, caparcenors with him, having an interest in the joint family property with him.

The lower court held[4] that their was no valid marriage between Karunakaran and Mariya; Karunakaran and his sons are not Hindus; the property is not the separate but the joint family property and while executing the gift, Karunakaran had not exceeded the permissible limits. The gift therefore is valid.

On appeal the High Court reversed this decision and held[5] that the marriage between Karunakaran and Mariya is valid under Hindu law, and the children (sons) are to be treated as members of coparcenory; the property belonged to the Coparcenory, the father was only the manager of the Karta of this Hindu joint family having restricted right of alienation. With respect to the question, whether the Karta had exceeded the powers while executing the gift, the case was remanded back to the lower court to judge its adequacy in view of the worth of the total and the gifted property.

The decision is extremely important as it raises two pertinent issues namely :

1. Can a valid marriage be solemenised between a Hindu and a non-Hindu under the Hindu Marriage Act, 1955 ?
2. Can a Hindu man and a Christian woman form a Hindu joint family with their children. Will their sons be coparcenors having interest in the family property by birth?

Both the questions were answered in the affirmative by the High Court. Regarding the first question, it is noteworthy, that the defendants had sought to prove that Karunakaran himself had embraced christianity; changed his name to Yesudasan and married Mariya in Christian form with the help of a marriage certificate. This alone according to the court was not sufficient to prove that he was a Christian, but no opinion was expressed by the court on the factum of this alleged marriage.

4. *Ibid*, at p. 177
5. *Id* p. 181

It was totally ignored and never considered at any stage. Their whole concentration was to hold the subsequent marriage performed under the Hindu law as valid as if, this was the only form of marriage the parties had undergone into.

The court's attention was invited to a large number of cases, the Hindu texts and the present Act, i.e. HMA for considering the validity of inter-religious marriages under the Hindu law. The Hindu Marriage Act (HMA) was passed in 1955 and came in force on 18th May' 1955. As this marriage was solemenised shortly thereafter, its validity should be seen in light of the provisions of the HMA and not in context of the old Hindu law and those judicial decisions[6] which themselves have been repealed[7] with the passing of the Act.

As is evident from the preamble of the Act, it amends and condifies law relating to marriage among 'Hindus', and will therefore have no application where one of the parties to the marriage is a non-Hindu.[8] Further, Sec. 5 while prescribing the conditions for the validity of a Hindu marriage lays down—

"A marriage may be solemnised between any *two Hindus*. . . . "

The learned judge observed,[9] while differing with the Supreme Court judgement in *Yamuna Bai Anant Rao Adhaw* v. *Anant Rao Shiv Ram Adhaw*,[10] that—

"Sec. 5 is only dealing with the requirement for a valid marriage between two Hindus and it has no relevancy in considering the question whether a marriage between a Hindu male and a Christian female is a valid marriage".

Sec. 5 according to present judgement, therefore has no applicability in these cases.

It is submitted that S.5 deals with essential conditions relating to the validity of a Hindu marriage and the opening words demonstrate that being

6. *Seinapatti* v. *Seinapatti*. AIR (1932) Lah. 16; *Mrs. Ailean Anandrao Chitnavis* v. *A.S. Chitnavis, AIR* (1940) Nag. 195; *Rajammal* v. *Mariyammal*, AIR (1954) Mys. 302; *Muthusami Mudaliar* v. *Masilamani*, 33 Mad 342 (A)
7. Even before the passing of the HMA, in a large number of cases it was held, that inter religious marriages are not valid under Hindu law. See, In *re Millard*, I.L.R. 10 Mad 218, at P. 211;
Budansa Rowther v. *Fatima Bi*, 26. M.L.J., 260 at p. 268; A marriage between a Hindu and a Mohemmedan cannot be recognised under Hindu law. *Re Kolandaivelu*, (1917) I.L.R. 40, Mad. 1030; A marriage between a Hindu and a Christian with Hindu rites is void.
8. Gour, "*Hindu Law of Marriage and Divorce*" (1973) p. 60 Ganapati Iyer, '*Hindu Law*' p. 404.
9. at p. 181.
10. AIR (1988) SC 644.

Hindu, is a pre-requisite for marrying under it. Consequences of violation of different clauses of Sec. 5 are given in Sec. 11 and Sec. 12. Only where the marriage is in conformity with Sec. 5, the parties to it can avail of the matrimonial and other ancilliary remedies available to them, under the Act,[11] such as divorce, maintenance alimony etc. All these sections[12] form a scheme and none of them is applicable in isolation.

One wonders, how can the marriage be under the HMA, yet outside the application of its basic sections. What will be the status of such a marriage if it contravenes any of the clauses of Sec.5. If a Hindu male, having a Hindu wife marries a Christian female, the marriage though bigamous and prohibited under Sec.5, will nevertheless be valid and not void, as according to the judgement, Sec.5 has no applicability to such cases. Further, if it is a marriage under the HMA, the matrimonial remedy of Divorce will also be available to either of these parties, i.e. both the Hindu husband and the Christian wife. According to Sec.13(1)(*ii*), if the husband ceases to be a Hindu and converts to Christian faith, it will be a ground for divorce available to the Christian wife. What a preposterous situation, that conversion to one's spouse's religion, will afford the non-converting spouse a ground for filing a petition for divorce. Such an anamolous situation was never intended by the legislature and therefore to bring such marriages under the HMA in itself is incorrect. Even if for argument sake we accept that a marriage between a Hindu male and a christian female is a marriage under the HMA, another question will arise, as to how this marriage should be solemnised? This question is extremely important as a marriage under the HMA, has to pass a dual validity test. Firstly, it must have been solemnised validly as then only it can be termed as a 'marriage'. Once it passes this test then its conformity has to be seen in light of Sec. 5.

As is evident both from the authorities as well as precedents, the parties are not competent to evolve their own ceremonies of marriage.[13] Performance of mock ceremonies or incomplete ceremonies will not make a man and a woman, husband and wife.[14] According to Sec.7, for the solemnisation of a Hindu marriage, the customary rites and ceremonies of either party to the marriage may be observed,[15] and *where it* includes Saptapadi, the marriage will be complete and binding on taking of the seventh or the final step jointly by the couple. So it visualises ceremonies, which may not include saptapadi, yet such marriages will be valid. If we follow the decision given in the present case as correct, then the customary rites and ceremonies which are to be observed in this marriage can be of either the bride's community or the bridegroom's; and as the woman happens to be a Christian,

11. See the Hindu Marriage Act, 1955.
12. *Ibid.*
13. *Mandakani* v. *Chandra Sen*, AIR (1986) Bom 172; *Bhau Rao* v. *State of Maharashtra*, AIR (1956) S.C. 1564; *Kanwal Ram* v. *State of H.P.*, AIR (1966) SC. 619.
14. *Dr. N.K. Mukerji* v. *State*, AIR (1966) All. 489.
15. *Laxman Singh* v. *Keshar Bai*, AIR (1966) M.P.) 166. See Mulla, '*Principles of Hindu Law*, 15th Ed; by S.T. Desai (1982) p. 741.

even if the marriage is performed in accordance with the customary rites of the bride's community, i.e. Christian rites, it will be a valid marriage and a marriage under the HMA. Similar will be a case, where a Hindu boy marries a Muslim girl according to the customary rites of the Muslims. Though it is a marriage solemnised under classical muslim law, it will be treated according to the judgement a marriage under the HMA. Can this absurd corollary, which follows from this judgement be sustained. The answer will definitely be in the negative.

The learned judge further observes[16]

> ". . . . . it is customary among the Hindu Nadar community in Travancore to enter into marriage alliances with Christian women"

It is submitted that after the passing of the HMA, custom has been abrogated for all purposes except where it has specifically been protected[17] under the Act. Provision has been made expressly for sustaining the existing customs in Sec.5 (iv) & (v) (which refer to a marriage between two Hindus, and according to the judgement is inapplicable to inter-religions marriages), Sec. 7 which provides for ceremonies for the solemnisation of a Hindu marriage; and Sec.27, i.e. customary divorce, but which again refers to marriage between two Hindus.

An analysis of the above provisions show that by no stretch of imagination can one conclude that inter-religious marriages are marriages covered and valid under the HMA. The HMA allows marriage only between two Hindus and any other interpretation to it is neither feasible nor was ever intended by the legislature.

On the second issue, the court held, that all the children of this couple are 'Hindus' and the sons are coparcenors having an equal right over the property; the family was a joint Hindu family, and the Karta therefore had no absolute right of disposal over the property.

One is confronted with two questions while going through the judgement on this issue. Firstly, can a Hindu man who is married to a Christian woman according to the Christian rites (or even for argument sake assuming they also married under Hindu form) form a Hindu joint family along with their Children? Secondly, can one say with precision, that all the children of this wedlock will necessarily be Hindus and the sons caparcenors? With respect to both the questions the correctness of the judgement is doubtful.

The religion of a child is determined at birth if both of his parents profess the same religion. It will be in all such cases the religion of its parents.

16. *Ibid* at p. 180.
17. Sec. 4 of the Act says:
Overriding effect of the Act : Save as otherwise expressly provided in this Act—
(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act."
(*b*).....

Where only one parent of a child is or was a Hindu, it will be regarded as Hindu if '*it is brought up*' as a member of that Hindu parent's tribe, community, group or family.[18] The term parent also signifies parents who were parties to a valid marriage.

The term 'if brought up' as a Hindu indicates that the religion of such a child cannot be determined at the time of its birth and has to be seen at a later stage in context of his upbringing. Accordingly, such a child will not be and cannot be called a Hindu, when he is born. Since the coparcenory rights vest in a son by birth they cannot be vested in a child, who at birth is not a Hindu, but can be called a Hindu later if and only if he is brought up as a Hindu. A coparcenor is a coparcenor by birth,[19] unless he is introduced into the family by adoption, which again is regarded as the child's second birth, in the adoptive family.[20]

A Hindu male can form a Hindu joint family, only with a Hindu spouse and Hindu children. Though the head of the family, he is incompetent to form a Hindu joint family with a Christian wife and children, whose religion is to be determined at a later stage and is contingent only on their being brought up as Hindus.

With utmost respect and considerable amount of distress one is forced to submit, that the judgement does not seem to be correct, as a whole, on both the issues involved.

Where the law on one point is clear and certain, the judges should not make it ambiguous. They have to proceed within the framework of the Act, and should not therefore take a contrary stand, and lay down incongrous propositions not admitted by law. Reliance on the old repealed law, while ignoring the present legal position is again unfortunate. Though the entire judgement needs a reconsideration, the present case highlights the precedents perpetuating an error of law at the cost of the litigants till the next opportunity is accorded to the judiciary in future to remedy it.

18. J.D.M. Derrett, '*Introduction to Modern Hindu Law*' (1963), p. 19-20; Mulla, '*Principles of Hindu Law*' 15th Ed; by S.T. Desai, (1982) p. 682; Gour, '*Hindu Law of Marriage and Divorce*', (1963) p. 62 T. Mahmood, '*A study of the Hindu Marriage Act*, 1955' (1980) P. 31; See also, *Lingappa Goudan* v. *Esudasan*, I.L.R. 27 Mad 13, the plaintiff was not regarded as a Hindu as his mother was a Christian.
19. Mulla, '*Principles of Hindu Law*' 15th Ed., by S.T. Desai (1982) p. 280.
20. Sec. 12. The Hindu Adoption and Maintenance Act, 1956.

PLAN OF ACTION FOR CHILDREN'S RIGHTS IN LAW FACULTIES

VED KUMARI*

THE GENERAL Assembly of the United Nations adopted the United Nations Convention on the Rights of the Child (hereinafter referred to as the Convention) in November, 1989. This signifies a universal concensus on the principles related to children. It is true that the realisation of those principles is a far cry as the Convention has yet to come into force and even when it does come into force, it automatically does not secure the rights of the children. Much more than mere ratification or accession by the member states is required for achieving the aims and objectives of the Convention.

In addition, one may point out that an international convention even after coming into force does not have the force which a municipal law has on enforcement. But it will be useful to acquiant ourselves with the rights of the child enshrined in the Convention for three reasons. First, much of the business of nations and corporations are conducted in ways which are carefully designed to satisfy the requirements of international law. "Although the issues are different, human rights treaties are in much the same category as the other international arrangements... Once (the) standards are in place, they become benchmarks for behaviour and citizens can refer to them and work to persuade the state to abide by them. The courts, officials and individuals concerned with child welfare can apply the standards wherever possible. Second, most of the rights contained in the convention have already been recognised under various legislations in force in India. And third, a comparison of the rights of the children contained in the convention with the facts relating to the life of children gives a glimpse of the gap between the facts and the aims.

RIGHTS OF CHILDREN

The convention defines a child as "every human being who is below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[1]

The principles underlying the Convention which the states parties are required to accept are that

1. the best interests of the child shall be the primary consideration in all actions undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies,[2]

* Lecturer, Faculty of Law, University of Delhi, Delhi.

1. Article 1 of the Convention.
2. *Id.* Article 3.

2. that the opinion expressed by the child on any matter affecting her/him shall be given careful consideration,[3]

3. that all efforts shall be made to ensure family care to the child,[4]

4. that all chidren shall enjoy the rights specified in the convention without discrimination,[5]

5. that the states parties shall respect the rights of the child and shall ensure realisation of those rights by taking measures to the maximum extent of their available resources,[6]

6. that states parties shall by appropriate and active means make the principles and provisions widely known to adults and children alike.[7]

The rights guaranteed by the convention may be classified in five categories—

(*a*) Right of survival and development,
(*b*) Right to name, nationality and identity,
(*c*) Right to a family,
(*d*) Right of participation, and
(*e*) Right against exploitation.

(*a*) *Right of Survival and development*—This set of rights obliges the states parties to recognise that every child has an inherent right to life and ensure the survival and development of the child to the extent possible.[8] All children are entitled to the highest attainable standards of health.[9] The disabled children shall be provided special treatment, education and care.[10] The states parties shall give special emphasis to preventive measures, health education and reduction in child mortality.[11] Every child shall have time to rest and play and equal opportunities for cultural and artistic activities.[12] The states parties shall ensure free and compulsory primary education.[13] The states parties shall refrain from recruiting children under the age of fifteen years in armed conflicts.[14] All children shall have the right to benefit from social security.[15]

(*b*) *Right to name, nationality and identity* :—The convention obliges

3. *Id.* Articles 12, 13.
4. *Id.* Articles 9, 18.
5. *Id.* Article 2.
6. *Id.* Article 4.
7. *Id.* Article 42.
8. *Id.* Article 6.
9. *Id.* Article 24.
10. *Id.* Article 23.
11. *Id.* Article 24.
12. *Id.* Articles 27, 31.
13. *Id.* Articles 28, 29.
14. *Id.* Article 38.
15. *Id.* Article 26.

the states parties to ensure that every child is registered immediately after birth and has the right to a name, a nationality and knowledge of who his/her parents are.[16] The states parties shall also protect the right of children of ethnic, religious or linguistic minorities, or indigenous groups, to belong within their own community, enjoy their own culture, profess and practice their own religion, and use their own language.[17] A child who is seeking a refugee status or who is considered a refugee under law shall be entitled to receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights.[18] The states parties shall provide necessary cooperation to the United Nations and other competent organisations in tracing the parents or other members of her/his family.[19] In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present convention."[20]

(*c*) *Right to a family*—The states parties shall respect the right of the parents to bring up their children and provide assistance to parents in the upbringing of their children.[21] "The states parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child."[22] The states parties shall also be obliged to ensure that no child is separated from her/his parents "except when competent authorities subject to judicial review determine...that such separation is necessary for the best interests of the child."[23] In all cases where separation occurs from an action of a state party, e.g., detention, imprisonment, evile, deportation or death, the state parties shall, upon request, provide the essential information about the absent members unless detrimental to the well being of the child.[24] All applications for family reunification shall be dealt with by the states parties in a positive, humane and expeditious manner.[25] The states parties shall be under an obligation to provide alternative care including placement, adoption, placement in suitable institutions, to a child temporarily or permanently deprived of her/his family environment.[26] "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to unlawful attacks on his or her honour and reputation."[27]

16. *Id.* Articles 7, 8.
17. *Id.* Article 30.
18. *Id.* Article 22.
19. *Ibid.*
20. *Ibid.*
21. *Id.* Articles 5, 18, 27.
22. *Id.* Article 18.
23. *Id.* Article 9.
24. *Ibid.*
25. *Id.* Article 10.
26. *Id.* Articles 20, 21.
27. *Id.* Article 16.

(*d*) *Right of participation*—The states parties accepting the convention will be obliged to endorse the children's right to express opinions and to have those opinions considered in matters which affect their well-being.[28] The children shall enjoy the freedom of thought, conscience and religion,[29] to meet with others and to join or form associations.[30] They shall be ensured access to and share, information from a diversity of national and international—especially sources aimed at promoting their well-being and physical and mental health.[31]

(*e*) *Right against exploitation*—The states parties to the convention shall protect children from physical and mental harm and neglect—including sexual abuse while in the care of parents or guardian.[32] No child shall be subjected to torture, cruelty and degraded treatment or awarded capital punishment or life imprisonment,[33] The states parties shall provide appropriate treatment and training for recovery and rehabilitation to children having suffered maltreatment neglect or detention.[34] States parties shall undertake to protect the child from economic exploitation and work that may interfere with her/his education or be harmful for her/his health or well being. The states parties shall take appropriate legislative, administrative, social and educational measures to protect children from the illicit use of and the use of children in the illicit production and trafficking of narcotic drugs and psychotropic substances.[35] "States parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form."[36]

"The convention on the rights of the child has been drafted to reflect the needs of children not only as a group, but as individuals at different stages of development and maturity. It is remarkable in that it not only draws together, in a single document, the key provisions of existing human rights law affecting children but also breaks new ground in key areas including adoption, survival and development, protection of the child's identity, sexual exploitation, neglect and drug abuse."[37] These rights represent the basic needs of children and naturally ought to constitute the primary responsibility of the adults. The picture of facts related the lives of children, however, does not show that children are among the first priorities of adult obligation.

28. *Id.* Articles 12, 13.
29. *Id.* Article 14.
30. *Id.* Article 15.
31. *Id.* Article 17.
32. *Id.* Articles 19, 34.
33. *Id.* Article 37.
34. *Id.* Articles 39, 40.
35. *Id.* Article 33.
36. *Id.* Article 35.
37. "Background Note No. 3 on the UN Convention on Rights of the Child" in the Media Kit by United Nations Centre for Human Rights, 1990.

II. THE FORGOTTEN FACTS

An estimated more than 100 million children live abandoned by their families on the streets of the world's cities.[38] Almost invariably those street children who can work are exploited or otherwise abused—economically, physically, and often sexually.

> Child abuse, neglect and exploitation, transcend most economic and social boundaries. Michael Jupp, Executive Director of Defence for Children International—USA, noted recently that children could be found living under a horrenduous' conditions as bonded labourers; as slaves; or as prostitutes; children had replaced old people as the poorest age group even in a most developed society, where one out of every five children lived in poverty, and alarming numbers of children were reported as abused or neglected in 1986.[39]

Even so, 'street children' are only one of the categories requiring attention. Approximately 15.5 crore children are living in absolute poverty—4 crores in urban area and 11.5 crore in rural area. Overwhelming majority of the deaths of 1.4 million children under five are preventible by easily accessible health care measures.[41] About 30 lakh children become seriously disabled from vaccine—preventable diseases.[42]

Less than 60% of births in the developing countries are attended by trained health personnel, and approximately 5 lakh women die each year from causes related to pregnancy and child birth, leaving over ten lakh young children motherless.[43]

About 40% of children under five suffer from protien-energy malnutrition, about 20% of infants are born underweight, 40% of women of child bearing age and half of the children under five suffer from nutritional anaemia.[44] Approximately 5 lakh children under five lose their sight every year because of vitamin A deficiency within a few weeks of becoming blind, two-thirds of these children die.[45]

Nearly half the children in the developing world have no access to clean drinking water. Two thirds of the children do not have adequate sanitation.[46]

Approximately 100 million children in developing countries, 20% of children of primary school age, do not attend school. Of those who attend, one third drop out before completing four grades of schooling.[47]

38. *Ibid.*
39. *Ibid.*
40. *A UNICEF Policy Review* : *Strategies for Children in* 1990s, UNICEF, 19 (1989)
41. *Ibid.*
42. *Ibid.*
43. *Id.* at 20.
44. *Ibid.*
45. *Ibid.*
46. *Ibid.*
47. *Ibid.*

Some 20% of children under age 15, fall into the category termed 'especially difficult circumstances'—victims of armed conflicts, natural disasters and the break down of traditional family support mechanisms. The world now has some 2.5 to 3 crore refugees and displaced persons, the majority of whom are children.[48]

It may also be recalled that "(a)pproximately 40% of all the young children who die in the world each year, 45% of the children who are malnourished, 35% of those who are not in school, and over 50% of those who live in absolute poverty, are to be found in just three countries—India, Pakistan and Bangladesh."[49]

India reported a child (under 16 years) population of 319.3 million[50] and its 0-5 year mortality rate stood at 149 per 1000 live births in 1988.[51] Eighty percent of live births in rural India in 1976 were handled by untrained practitioners and others.[52] In 1978 only 41.70% infants (0–1 years) and 58.69% children (1–5 years) who died, were attended by medical institutions and trained medical practitioners.[53] The literacy rate was 28.47% for girls and 53.48% for boys in the age group of 5-9 years, and in the 10 and above age group it was 28.99% for girls and 56.99% for boys in the year 1981.[54] Between 1971-1981 the number of illiterates in the age group 5-9 years increased by 1521 thousand for boys and 2398 thousand for girls, and by 785 thousand for boys and 2944 thousand for girls in the 10-14 years age group.[55] Only 44.33% of the boys and 32.21% of the girls attended primary school in 1981.[56] The drop out rate in the period 1973—78 stood at 62.7% at primary level and for middle class it was at 77.1% for 1969—77.[57] Number of children (5—14 years) involved in some economic activity and not attending school stood at a staggering 10,00,87,461 while another 7,92,26,214 were working as well as attending school in 1981.[58]

We all know these facts and "(w)e all know that we forget children when we decide where to give our attention or how to plan to use our resources. We know that we forget children when we tolerate the continued existence of violence, racism, terrorism, economic enslavement, social injustice, and political callousness, that deny them their equal share of the common heriage

48. *Id.* at 21.
49. "The Principle of First Call" in Grant, James P., *The State of the World's Children* 1990, UNICEF, 13 (1989).
50. *Id.* at 84.
51. *Id.* at 76.
52. *Child in India: A Statistical Profile,* Government of India, Ministry of Welfare, Table 2.27 (1985).
53. *Id.* Table 2.43.
54. *Id.* Table 3.2.
55. *Id.* Table 3.4.
56. *Id.* Table 3.6
57. *Id.* Tables 3.30 and 3.31.
58. *Id.* Table 8.3.

of this planet."[59]

The five year plan expenditure on education decreased from 7.6% in 1951-56 to 2.6% by 1980-85, on health it decreased from 5% to 1.9% and on social welfare from 1.6% to 0.3% over the same period.[60] The allocation for social services,[61] decreased further to 16.31% in the 7th plan from 17.4% in the 6th plan[62] with a static allocation of 1.9% for health and a marginal increase to 3.43% for education. A 53% allocation includes both women and social welfare. And this has happened despite a National Policy for Children adopted in 1974 in which the government of India had specifically declared that "(i)t shall be the policy of the state to provide adequate services to children, both before and after birth and through the period of growth, to ensure their full physical, mental and social development. *The State shall progressively increase the scope of such services* so that within a reasonable time all children in the country enjoy optimum conditions for their balanced growth."[63]

Children are also not the favourites of mass media. A survey of newspapers[64] for a month showed that the coverage given to the child by the Indian print media was less than one percent. Only 'education' and to some extent 'social and family environment' in broad terms got some coverage. Other important issues like health and nutrition, laws pertaining to children, water and sanitation and physical environment affecting child health received very little coverage. Wider and more prominent coverage was given to sensational and human interest happenings such as accidents, deaths, assaults, minors being raped and murder. There were very few articles or editorials which may help influence public opinion and attitudes or examine the functioning of projects or schemes.

In this social scenario it is not surprising, therefore, that the issues related to children remain to be highlighted and the welfare perspective of the laws concerning children is neglected in legal education also.

A quick glance at the LL.B. and LL.M. curriculla of the Delhi University shows reference to children in relation to adoption, maintenance, legitimacy and juvenile delinquency. Except for juvenile delinquency to some extent,

59. Karl Eric K. utsson, "*A Decent Life for Children : An Appeal to the Indian Community* of Artists and Intellectuals", Key note address at the National Colloquim o' Creative Thinkers, UNICEF, New Delhi, 5 (16-18 Jan. 1990).
60. *Supra* n. 52, Table 9.1
61. The head "Social Services" under the 7th Plan includes health, family welfare, housing and urban development, water supply and sanitation, welfare of scheduled caste, scheduled tribes and other backward classes special central Additive for SC component plans, Social and woman welfare, Nutrotion, Labour and Labour welfare, education, culture and art. See, Table 3.4 (b) in Vol. 1, *The Seventh Five Year Plan* 1985-90 (1985).
62. See, Table 9.1 *supra* n. 52 and *Id.* Table 3.4 (a).
63. Clause 3 of the National Policy for Children, No. 1-14/74 CDD. (Emphasis added).
64. Aditi Phadnis, "The Child in Print", Paper circulated at the creative colloquium—"The child in the 1990's—Challenges and New Horizons," by UNICEF, Jan. 1990.

these topics are not focussed from the survival and development perspective of the child. For example, adoption is not only a part of Hindu Personal law but also has vast promises as a technique for providing family care to children. Parents have the primary obligation to maintain a child but the state also accepts this obligation in case of parental failure. From the child's perspective the distinction between legitimacy and illegitimacy is unjustifiable. There is a wide range of areas in which child related questions justifiably ought to be focussed upon but are not. In the discussion on rights one can ask if children have any rights? To what extent can their rights be curtailed by the *parens patriae* doctrine? What constitutional remedies are available to children deprived of their personal liberty in the garb of protective action sending them to 'homes' no different from prisons? What, if any, are the contents of the right to life of children before birth? Is the guarantee of equality violated by procedures which place similarly situated children in two opposite environments, e.g., one devoid of all liberty and the other ensuring family care? The questions are numerous but they remain forgotten because children are not our primary concern.

UNICEF has given the principle of first call for the 1990s. "That principle is that the lives and the normal development of children should have *first call* on society's concerns and capacities and that children should be able to depend upon that commitment in good times and in bad, in normal times and in times of emergency, in times of peace and in times of war, in times of prosperity and in times of recession".[65]

The moral argument behind the call is that it is shameful for the whole human race to have so many children living in utter deprivation. The state has the moral responsibility to take special care of all those who have no say in any decision making process and may be adversely affected or even destroyed without a murmur. Children by reason of their physical and mental immaturity needs special safeguards and care including appropriate legal protection. The Indian state has accepted this responsibility as an integral part of its policy of promoting equality and social justice. The National Policy for Children declares that,

"(E)qual opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."[66] The moral principles of socialist equality and justice form the bedrock of Indian polity. Children from that perspective have to be centre-stage for it is the treatment meted out to the most deprived section of the society, the children, that reflects the sincerity of the state in upholding these principles. The constitution furthers these principles by incorporating provisions permitting special laws to be made for children,[67] prohibiting employment of children below 14 years of age in factory, mines and other

65. *Supra* n. 49 at 7.
66. *Supra* n. 63, Clause 1.
67. Article 15 (3) of the Constitution.

hazardous activities,[68] directing the state to provide universal primary education,[69] to protect children against abuse[70] and to ensure "opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment".[71]

These moral and legal principles provide arguments in addition to the utilitarian approach for making children's programmes a prominent part of our national plans for the development of human resources "so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society."[72] These arguments are inseparable from the practical.

> The long term consequences of poverty and suffering on this scale are well known. And they will affect us all, and affect us increasingly, as we move towards a new millenium. Malnutrition means poor physical and mental growth, poor performance at school and work, and the perpetuation of poverty from one generation to the next; high child death rates mean high birth rates and rapid population growth; lack of education precludes people from contributing fully to, or benefiting fully from, the development of their communities and their nations; hopelessness and the denial of opportunity erodes self-respect and sows the seeds of almost insoluble social problems for future generations; entrenched injustices and the parading of unattainable wealth before the eyes of poverty provoke an instability and violence which often takes on a life of its own; and, finally it is becoming increasingly obvious that the extermes of deprivation preclude environmental sensitivity, forcing millions to over exploit their surroundings in the name of survival.[73]

The principle of first call to children has to be given first call whether one takes moral, legal, utilitarian or practical approach towards welfare and development of children. Creation of awareness on the issues related to children is the first step in this direction and a law facutly has a significant contribution to make in this respect. It is the persons with law degrees who mould the state policy towards children as draft persons of a legislation and the rules thereunder, or while interpreting the statutes as lawyers or when passing orders as judges. It is, therefore, necessary to make the children's issues an integral part of the curricula and other activities in the law faculties to build up sensitivity among the future draftpersons, lawyers and judges.

68. *Id.* Article 24.
69. *Id.* Article 45.
70. *Id.* Article 39 (e).
71. *Id.* Article 39 (*f*).
72. *Supra* n. 63, Clause 1.
73. *Supra* n. 49 at 4.

III. ACTION IN THE LAW FACULTIES FOR CHILDREN'S RIGHTS

The term 'action' has not been used here as limited only to direct action on a specific issue relating to identified children but is inclusive of direct and indirect actions, by individuals and groups, aimed at changing the apathetic attitude of people towards children. Such action may include creation of awarencss among the masses, mobilisation of masses for direct action and taking the direct action. The scope of action in law faculties is infinite and each faculty may decide the extent to which or the areas in which it can contribute in the process. Such action may be taken at two levels in a faculty, i.e., at an individual level and at a group level.

(1) *Individual action*—An article each by law scholars on the issues, rights, status of children in the area of one's interest not only means the adoption by the legal community of the principle of first call but also creation of needed awareness and focus on the problems of children for ensuring society's first call to them. Each scholar may contribute in this process on individualistic basis irrespective of any faculty level programmes for children. For example, a person working on environment may focus on the special effects of environment degradation on children. An article on freedom of speech may examine the opportunities available to a child for the realisation of this freedom. Law and children are so integrated in society that analysis of one is incomplete without examining its effect on the other. Such articles need to be directed at persons other than legal scholars also for awareness creation and attitudinal changes of the masses and thereby, the state.

(2) *Group action*—Individual action signifies only the beginning of the process directed for ensuring first call to children. Group action within a law faculty and in collaboration with other concerned persons or organisations outside the law faculty are equally essential. The former may include focus on the children's issues in the law curricula, seminars and discussions, memorandums, legal aid, intervention in cases, filing public interest litigation, etc. The latter may aim at involvement of community in the process.

(*a*) *Children's issues in the law curricula*—Children's issues may be included in all areas where the law or the concept operates differentially for children or where it has a direct relationship with growth and developmental opportunities for children. For example, discussion on rights in jurisprudence and constitutional law may focus on the position of children vis-a-vis rights—conceptually and actually. In family law, adoption may be focussed as a means of realisation of the right of a child to a family, thereby creating awareness towards the need for universal adoption law. In matters of guardianship and adoption it is important to point out the shift in the approach of these measures from the parent's rights to the welfare of a child. The

prime concern has become the best interests of the child. An effective consultation to ascertain the child's opinion in the matter should acquire a prime place in the discussion on the subject.

In relation to the Indian Penal Code, it is important to mention that the punishments provided under it for the offences specified therein, are not applicable to offences committed by persons below the age of sixteen years in case of boys and below the age of eighteen years in case of girls. By virtue of the Juvenile Justice Act, 1986 special principle of bail and the special juvenile courts for children must be included in the discussion on the related provisions of the Code of Criminal Procedure. Focus on interpretation of words like care, protection, the best interests of the child will make Interpretation of Statutes more challenging and useful for clarifying the scope of the rights of children. Labour law ought to include the study of the child labour (Prohibition and Regulation) Act, 1986 alongwith Article 24 of the Constitution.

(*b*) *Seminars and discussions*—More seminars and discussions focussing on the children's issues may be organised.

(*c*) *Memorandum for reform*—If some consensus is reached on certain law adversely affecting any right of the child, a law faculty as a group may send collective memorandum to concerned authorities.

(*d*) *Legal aid*—The scope of legal aid, as is well known, is quite vast and it is equally so in case of children. Active social action for children's rights require assistance not only to children in judicial proceedings but also to voluntary groups involved in child welfare to overcome various legal hurdles faced by them. The legal aid centres in each faculty may play a very concrete role in this respect.

(*e*) *Intervention in cases*—Instead of writing a critical case comment after a case is decided, a timely intervention while the case is being heard will achieve better results.

(*f*) *Filing public interest litigation*—Filing of a public interest litigation may be resorted to in case of blatant injustice or illegal activity affecting the children's development and growth.

(*g*) *Action in collaboration with others*—Dissemination of information relating to the rights of children to children and others is essential for mobilisation of mass support and for realisation of these rights. Efforts in this direction include

(*i*) general and specific legal education to the social workers,

(*ii*) wider participation in community interaction programmes and schemes organised by social workers for dissemination of legal education to masses,

(*iii*) lobbying for reform.

In conclusion, what needs to be reemphasised is the importance of making the principle of first call to children, the theme song of national development. Concerted action in governmental and non-governmental circles is necessary for making it so. Each segment of society has something to contribute in this endeavour. May the law faculties be the torch bearers of the social action for children's rights!

POLYGAMY UNDER THE GENERAL CIVIL LAWS OF INDIA : STATUTES OF CIVIL MARRIAGE AND RULES OF CIVIL SERVICE

KIRAN GUPTA*

I. LAWS OF CIVIL MARRIAGE IN THE ERSTWHILE FRENCH AND PORTUGUESE COLONIES

1. Perspective

In India at present a marriage may be either performed by religious rites or contracted in the form of a civil marriage. For a long time past we have had all over the country both religious and civil laws on marriage. Laws on civil marriage have been enacted and re-enacted in different parts of India. In British India the law on civil marriage was first enacted in 1872. Today it stands replaced by some new statutes enacted after Independence. However, earlier than the first civil marriage law of British India (1872), in Pondicherry and Goa-Daman-Diu were enforced different laws of civil marriage emanating from the French and the Portuguese laws respectively. These are still in force. We shall discuss here the provisions relating to polygamy under the civil-marriage laws of the erstwhile French and Portuguese colonies in India; those enforced in the rest of the country will be taken up next.

2. Franco-Indian Law of Former 'French India' 1819-1968

Under the French Civil Code 1804 polygamy was absolutely prohibited and monogamy was of the basic rules of matrimonial law.[1] This Code had become applicable in the former French possessions in India—Pondicherry, Chandernagar, etc.—in 1819. The order of the French Governor dated 6th January 1819 by which the Code Napolean was enforced in 'French India' had assured that this would be without prejudice to local customs and usages.[2] By virtue of this provision the natives of 'French India' were to be governed by the said Code only to the extent it was not contrary to their customs. The laws on polygamy under the traditional personal laws of Hindus and Muslims thus remained protected and unaffected by the French Civil Code.

In 1881 the natives of French India were offered French citizenship and equal rights with Frenchmen subject to the condition that they would give up their personal laws and accept the French Civil Code in its entirety.

* Lecturer, Law Centre I, Faculty of Law, University of Delhi, Delhi.

1. Art. 146.
2. Francis Cyril Antny (ed.), *Gazetteer of India : Union Territory of Pondicherry* vol I, 352 (Pondicherry 1982).

Those who agreed to do so came to be known as 'Renoncants'. After 1881 the position of the French Civil Code was as follow:

(*a*) to the Renoncants it applied in full; and
(*b*) to the others it applied without prejudice to local customs and usages.

After the advent of Independence, Government of India negotiated with France a peaceful transfer of all the then French possessions in the country to the newly established Indian Republic. This was eventually agreed to by the French Government and thus French rule in the southern Indian territories of Pondicherry, etc., came to an end. These territories, in view of their different legal and judicial characteristics could not, however, be made part of the south Indian states. The Union Government, therefore, decided to turn them into a Union Territory in terms of the Constitution. The territory has since then been governed by the central government in accordance with the provisions of the Pondicherry Regulation VII of 1963 and the Pondicherry (Extension of Laws) Act 1968.

The legal and judicial system of French era was not altogether repealed in Pondicherry after it became part of Independent India. The Renoncants of the French days were given the right to be governed by the French Civil Code as before;[3] others who had not during the French rule accepted the Code in full were subjected to the central legislations relating to marriage and divorce including the Special Marriage Act 1954.[4]

The French Civil Code including its anti-bigamy provision of article 146, thus, remains part of the Indian law. In its scope it is, of course, very much limited and governs a very small section of Indians. Among the laws on civil marriage surviving in various parts of the country this, however, remains the earliest provision wholly disallowing polygamy.

3. Luso–Indian Law of Former 'Portuguese India' 1854–1910

In the erstwhile Portuguese India the legal system of Portugal was gradually enforced during about the same period and at about the same pace as the English law was introduced in British India. Among the Portuguese statutes which so became applicable in Goa-Daman-Diu was the Portuguese Civil Code 1867 which was enforced in this region on the first day of July 1870.[5] Under this Code were found the following provisions relating to polygamy;

3. Process-Verbal signed by the Government of India and France on 16 March 1963. See Joseph Minattur, *Justice in Pondicherry* (1701-1968) 145 (Bombay 1973).
4. Pondicherry Regulation VII of 1963, sec. 3 and Schedule; Pondicherry (Extension of Laws) Act 1968.
5. Manohar S. Usgaocar, "Family Laws in Goa, Daman and Diu: Are they Uniform", in Libia Lobo Sardesai (ed.), *Glimpses of Family Laws of Goa, Daman and Diu* 85 (Goa 1982).

Art. 1073. The following shall not contract marriage....
(5) those joined by another marriage, not yet dissolved.

Art. 1074. The contravention of the provisions of preceding Article gives rise to nullity of the marriage.

Under the Code, thus, polygamy was prohibited and a bigamous marriage was to be void ab initio.

Clearly, the prohibition of polygamy under the Portuguese Civil Code was repugnant to the provisions of traditional native laws. In its application to the natives the Civil Code was, however, subjected to their customs and usages which had been codified for Goa, Daman and Diu in 1853-54 later replaced by new versions—Goa: 1880; Diu: 1894; Daman: 1912). The aforestated provisions of the 1867 Civil Code, relating to polygamy, thus were to apply to the natives subject to the said Codes of local usage which had different rules relating to polygamy for different communities.[6]

On 26 May 1911 came in force in Goa-Daman-Diu the Portuguese Law of Marriage as a Civil Contract and Law of Divorce (Nos. 1 and 2 of 1910, dated 25 December 1910). These laws repealed and substituted major portions of matrimonial law under the 1867 Civil Code (articles 1056-1239). Among the provisions so repealed were articles 1073-1074, referred to above, which contained rules against polygamy. Under the new Law of Marriage 1910 there were the following articles relevant to the issue of polygamy:

Art. 4. The following shall not contract marriage....
(6) those joined by another marriage not yet dissolved.

Art. 11. The marriage celeberated in contravention of any of the clauses of art. 4 of ch.II is as between the contracting parties null and void in law as if it had never existed.

Art. 12. Declaration of nullity referred to in the preceding article may be sought by any person having an interest therein and shall be sought by public prosecutor as soon as he becomes aware of such nullity.

The right to seek a decree of nullity was not made heritable and a suit for nullity could not lie after either party's death (articles 26-27). Void marriages contracted in good faith were protected and children of all void marriages were to be legitimate (article 31).

The Laws of Marriage and Divorce of 1910 amending the 1867 Civil Code, which were enforced in Goa, Daman and Diu in 1911, did not displace any of the three codes of local usages referred to above. Their provisions relating to polygamy, reproduced above, were also to apply to the natives subject to the polygamy law under the codes of native usages.

There has been no further development in respect of the law of polygamy

6. For the text of these Codes of local usage, see *ibid.*

in Goa, Daman and Diu. The law of civil marriages enacted after Independence (Special Marriage Act 1954) has not been extended to Goa, Daman and Diu. The same is true also of the other Indian statutes of matrimonial laws. In the other former Portuguese colony in India, viz., Dadra and Nagar Haveli, however the said statutes including the Special Marriage Act 1954 have been fully enforced since 1965.[7]

II. GENERAL LAWS OF CIVIL MARRIAGE BEFORE AND AFTER INDEPENDENCE

1. 'British India' : Special Marriage Act 1872

At the behest of the then Law Member of Viceroy's Council Sir Henry Maine, a law on civil marriage was enacted in British India in 1872 under the title the Special Marriage Act. At that time it was made available to those persons getting married who declared that they did not profess any of the traditional religions of India, viz., Hinduism, Buddhism, Jainism, Sikhism, Islam, Christianity, Zoroastiarism and Judaism.[8] Later, in 1923 Sir Hari Singh Gour got the Act of 1872 amended to the effect that its law on marriage and divorce would be available also to those Hindus, Buddhists, Sikhs and Jains who opted for the same in preference to their personal law.[9] Under this Act from the very beginning there were provisions relating to polygamy and they remained unchanged after its 1923 amendment. Given below is full text of those provisions:

Sec. 2: Marriage may be celebrated under this Act...upon the following conditions:
(1) neither party must, at the time of the marriage, have a husband or wife living,
.....

Sec. 15. Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code, as the case may be; and the marriage so solemnized is void.

Sec. 16. Every person married under this Act who, during the lifetime of his or her wife or husband contracts any other marriage, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

Sec. 17. The Indian Divorce Act shall apply to all marriages contracted

7. Dadra and Nagar Haveli Regulation VI of 1965, sec. 2 and Schedule.
8. Special Marriage Act 1872, sec. 2.
9. *Id.*, sec. 2 as amended in 1923. See for details Tahir Mahmood, *Civil Marriage Law of India : Perspectives and Prospects* (ILI, Bombay 1978).

under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned or on the ground that it contravenes some or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2 of this Act.

The following features of this law are notable:

(*i*) it enforced the rule of strict monogamy;

(*ii*) a person already married, man or woman; would be guilty of the offence of bigamy under the Indian Penal Code (sections 494-495) if he or she fraudulently married again under its provisions and the second marriage would be void;

(*iii*) a person married under this Act, man or woman, would also be quilty under the said provisions of the Penal Code if he or she remarried *under any other law;*

(*iv*) clauses (*ii*) and (*iii*) would apply if the first husband or wife was "living", *i.e.* the earlier marriage was subsisting in the eyes of law;

(*v*) remarriage by a married person even after change of religion would be an offence attracting application of the Penal Code;

(*vi*) as regards the nullity of a bigamous marriage covered by this Act the Indian Divorce Act 1869 would apply.

The Indian Divorce Act 1869, which had been enacted three years earlier was now to act also as the divorce-supplement to the 1872 Special Marriage Act. It contained the following provisions relating to polygamy:

Sec. 18. Any husband or wife may present a petition to the District or the High Court praying that his or her marriage may be declared null and void. It is the husband or wife who is alone competent to institute proceedings for nullity.

Sec. 19. Such decree may be made on any of the following grounds:

. . . .

(4) that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force.

These provisions of the Indian Divorce Act would apply to a bigamous marriage hit by the Special Marriage Act 1872 by virtue of section 17 of the said Act reproduced above.[10] In a rather superfluous way, but perhaps in order to make things absolutely certain section 17, after extending the Indian

10. Indian Divorce Act 1869 no more applies to civil marriages. It now governs only the Christians.

Divorce Act and "the causes therein mentioned" (for nullity and dissolution of marriages) added that the Act of 1869 would also apply for declaration of a nullity of marriage on the ground that it contravened the requirements for a lawful marriage laid down in section 2, among which was also the requirement of monogamy.

In judicial opinion the Act of 1872 differenciated between the bigamous marriage of a person first married under some other law and then under this Act on one hand, and of one first married under this Act and then under some other law on the other—the two cases referred to in sections 15 and 16 respectively. As per a recent Allahabad decision the impugned bigamous marriage would be void only in the first case; in the second case it would entail only penal consequences.[11] This decision should, obviously, be read subject to the rider that the second bigamous marriage should have been contracted under a law which allowed polygamy (which was the case with the old Hindu law under which the second marriage in question in this case was solemnized); if that law also regarded a bigamous marriage as void, the legal position would change (as would now be the case under modern Hindu law).

2. Civil-Marriage Law of Cochin State 1935

The former princely state of Cochin had enacted a Civil Marriage Act (XXI of 1110) in 1935. It was mainly based on the British-Indian Special Marriage Act 1872. Anti-bigamy provisions of the said Act were also incorporated into the Cochin Act. It declared bigamous marriage to be null and void and also penal under sections 474-475 of the Cochin Penal Code (provisions of which were identical to the provisions of sections 494-495 of the Indian Penal Code).[12] It also made the British-Indian Divorce Act 1869 (making provision for nullity decrees and dissolution of marriage on the ground of bigamy, etc.) applicable to the marriages performed under its provisions.[13] The Cochin enactment of 1935 thus placed Cochin on a footing equal with British India in respect of polygamy.

3. Special Marriage Act 1954

After Independence the British-Indian Special Marriage Act 1872 was repealed and replaced by a new Special Marriage Act enacted by Parliament in 1954. Unlike the 1872 Act it includes also its own law on divorce. The law of marriage and divorce under this Act is available as an option to the religion-based personal laws to all Indian citizens; any two persons belonging to whatever religion may marry under this Act. Also an existing marriage performed as per the religious law of the parties or either party thereto can

11. *Shephali Chatterjee* v. *Kamla Chatterjee*, AIR 1972 All 531.
12. See secs. 3, 16 and 17 of the Cochin Act of 1935.
13. Sec. 18.

subsequently be registered under this Act, in which case it will be treated as a civil marriage retrospectively from the date of religious marriage.[14]

The following provisions under the Special Marriage Act 1954 relate to polygamy:

Sec. 4. Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:

(*a*) neither party has a spouse living;

. . . . .

Sec. 15. Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872, or under this Act, may be registered under this chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:—

(*a*) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;

(*b*) neither party has at the time of registration more than one spouse living;

. . . .

Sec. 24. (1) Any marriage solemnized under this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if—

(*i*) any of the conditions specified in clauses (*a*), (*b*), (*c*) and (*d*) section 4 has not been fulfilled,....

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of section 18, but the registration of any such marriage under chapter III may be declared to be of no effect if the registration was in contravention of any condition specified in clauses (*a*) to (*e*) of section 15:

Provided that no such declaration shall be made in any case where an appeal has been preferred under section 17 and decision of the district court has become final.

Sec. 43. Save as otherwise provided in chapter III, every person who, being at the time married, procures a marriage of himself or herself to be solemnized under this Act shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code, as the case may be, and the marriage so solemnized shall be void.

Sec. 44. Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code, for the offence of marrying again during the life time of a husband or wife, and the marriage so contracted shall be void.

14. See Special Marriage Act 1954, secs. 4, 15-18.

An analysis of clause (*a*) in section 4 of the Act brings forth the following features:

(*i*) both polygamy and polyandry are prohibited by this Act in equal terms;

(*ii*) use of the word "spouse" shows that the first marriage must be a lawful and valid marriage according to the law applicable to it and this could be the Special Marriage Act 1872, this Act (of 1954), a religious law, or a customary law;

(*iii*) the word "living" read with the word "spouse" shows that the first husband or wife as the case may be must be alive and marriage with him or her must be legally subsisting on the date of the second marriage.

All these provisions would apply when a marriage *initially* takes place under the special Marriage Act 1954. It is particularly notable that a person who is already married even under his religious law (*e.g.* the Hindu Marriage Act 1955) cannot have a second marriage under the Special Marriage Act as long as his first marriage is legally subsisting.[15]

When a marriage already existing is sought to be subsequently registered under section 15 of the Special Marriage Act 1954, it will be a condition precedent to such registration that at the time of such registration neither party should have "more than one spouse living" [cl.(*b*)]. Since the words "spouse living" used here are same as under section 4(*a*), the analysis given by us above would apply also in the case of the registration of an existing religious marriage as a civil marriage.

Among the four marriages declared by section 24 of the special Marriage Act 1954 to be null and void is marriage solemnized in violation of the condition of monogamy contained in section 4(*a*) of the Act.[16] Where an existing marriage is registered as a civil marriage in contravention of the condition of monogamy mentioned in section 15(*b*), the statutory provisions relating to void marriages, however, do not apply. In such a case only the

15. *Parameshwari* v. *Muthojirao Scindia*, AIR 1981 Kant 40; *Uma Charan Roy* v. *Kajal Roy*, AIR 1971 Cal. 307.

16. After its amendment in 1976 section 24 provides that a declaration of nullity in respect of a void marriage can be made only while both the parties are alive.

registration may be cancelled. So, where a marriage which is in fact bigamous has been fraudulently registered under the Special Marriage Act 1954, on the detection of the fraud its registration as a civil marriage would be cancelled by a declaration under section 24(2). This implication of the Act of 1954 has been noticed in some cases.[17] Apparently, the marriage after the cancellation of registration would come back into the fold of the law under which it was initially solemnized; it is that law which will govern its validity now onwards. Thus, if the marriage was a Hindu marriage solemnized after the commencement of the Hindu Marriage Act 1955, even after cancellation of registration as a civil marriage it will remain a void marriage. As far as the Special Marriage Act 1954 is concerned, the only other consequence of the detection of fraud in a fraudulently registered civil marriage could, under section 45 of the Act, be imposition of the penalty under section 199 of the Indian Penal Code.

Sections 43 and 44 of the Special Marriage Act 1954 provide penalties for bigamy; both of them extend the application of sections 494-495 of the Indian Penal Code. The first of these applies when a person already married procures a *new* civil marriage under the Act; when he registers the same marriage as a civil marriage and later it turns out to be a bigamous marriage, section 43 will not apply. This is clear from the opening words of section 43 —"Save as otherwise provided in chapter 3". Section 44 applies when a person married under the Act of 1954 marries again during the lifetime of the first spouse. Here, the words "any other marriage" make it clear that a second marriage is not permissible even by the religious rites recognized by any of the personal laws. In other words, one who opts for a civil marriage must remain monogamous as long as the first spouse is alive and marriage with him or her is legally subsisting.

Notably, both sections 43 and 44 declare a bigamous marriage to be void. This seems to be a repetition since, section 24 already declares all such marriages to be null and void.

Children of a marriage which is null and void under the Special Marriage Act 1954 will be legitimate in law irrespective of whether the marriage has been declared void under this Act or any other law, and this applies to cases hit by anti-bigamy provisions of the Act as well (section 26).

4. Foreign Marriages Act 1969

The Foreign Marriages Act 1969 contains the law on civil marriage for persons marrying outside India and may apply where at least one of the parties to an intended marriage is an Indian citizen. Also may be registered under this Act as existing marriage solemnized in a foreign country between two Indian citizens or an Indian citizen and a foreigner (section 17). Like the Special Marriage Act 1954, this Act also requires that at the time of marriage neither party should have a spouse living [section 4(*a*)]. As regards matrimonial reliefs in respect of foreign marriages, chapters 4, 5, 6 and 7 of the Special Marriage Act 1954 are applicable to the marriages solemnized under or governed by the Act of 1969 (section 18).

17. See, e.g.,'*Lungna Bhattacharjee* v. *Shyamlal*, AIR 1975 Cal. 6.

As regards nullity of a bigamous marriage, the following features of the Foreign Marriages Act 1969 are notable:

(*a*) violation of section 4(*a*) of this Act is covered by the provisions of section 24 of the Special Marriage Act 1954—a bigamous foreign marriage solemnized under the Act of 1969 will thus be void and can be so declared under section 24 of the Act of 1954;

(*b*) a bigamous foreign marriage which is not solemnized under the Act of 1969 will not attract the provisions of section 24 of the Special Marriage Act 1954;

(*c*) an existing foreign marriage which is bigamous but is fraudulently registered under the Foreign Marriages Act 1969 will also not attract the provision of section 24 of the Special Marriage Act 1954; in such a case only the registration under the 1969 Act will be cancelled on the detection of the fraud. Also a false declaration made in this connection will be an offence punishable under section 21 of the Act.

A person who has contracted or registered a marriage under the Foreign Marriages Act will be guilty of bigamy if during the subsistence of the first marriage he or she marries again, and in such a case the IPC law on polygamy will apply. This is provided for by section 19 of the Foreign Marriages Act 1969 which is given below:

> Sec. 19. (1) Any person whose marriage is solemnized or deemed to have been solemnized under this Act and who, during the subsistence of his marriage, contracts any other marriage in India shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code, 1860 and the marriage so contracted shall be void.
>
> (2) The provisions of sub-section (1) apply also to any such offence committed by any citizen of India within and beyond India.

It will be seen that the law applicable to civil marriages, both domestic and foreign, do not make any concession for the rules of any religion permitting polygamy to any extent. The only concession made by these laws in this regard is that if an existing bigamous marriage is fraudulently registered under their provisions, on the detection of fraud these laws would not treat the marriage as null and void and would let it be governed by the religious law under which it had been initially solemnized. Unlike the civil marriage law of Goa, Daman and Diu, no religious custom is directly or indirectly protected by the modern civil marriage laws of India.

The Special Marriage Act 1954, as an option to the various religion-based personal laws, until after the expiry of thirty-five years virtually remains a rather exceptional law. The number of civil marriages is still limited, comparatively people continue to prefer religious marriages. Most of those who go in for a civil marriage do it for the sake of an inter-religious marital relationship.[18]

III. RESTRICTIONS ON POLYNAMY UNDER CIVIL SERVICE RULES

Article 309 of the Indian Constitution in its Proviso empowers the President or his deputy to make rules regulating the recruitment and conditions of service of appointees under the services and posts "in connection with the affairs of the Union". The same power it confers on the governors of the states in respect of services and posts "in connection with the affairs of the state." Besides, article 313 continues in force all the laws and rules of the pre-Constitution period relating to administrative services. Under these provisions of the Constitution are in force at present a number of Conduct Rules relating to civil and administrative services. Many among these incorporate, inter alia, anti-bigamy provisions very relevant to our present work. Among these are:

(*i*) All India Services (Conduct) Rules 1968—Rule 19;
(*ii*) Central Civil Services (Conduct) Rules 1964—Rule 21; and
(*iii*) Corresponding provisions of the State Govern ent Service (Conduct) Rules.

Similar Rules containing regulations relating to bigamy are found also under 'Standing Orders' of government corporations, constituted under parliamentary statutes. Some Municipal Service Rules also make reference to bigamy. We will make here a survey of anti-bigamy provisions under Service Rules and Standing Orders of this nature. Our survey of these rules is merely illustrative and representative, and not exhaustive.

1. Government Service Rules

Rule 19 of the All India Services (Conduct) Rules 1968 provides as follows:[19]

R. 17. (1) No member of the service shall enter into, or contract, a marriage with a person having a spouse living; and
(2) No member of the service, having a spouse living, shall enter into, or contract, a marriage with any person;

18. For a recent empirical study on the working of the Special Marriage Act 1954 see Tahir Mahmood cited *supra* note 9.
19. Sec. 19 was added by G.I. Cabinet Sectt. (Deptt. of Personnel) Notification No. 9/32/70, AIS (III) dt. 10 March 1971.

Provided that the Government may permit a member of the service to enter into or contract, any such marriage as is referred to in clause (1) or clause (2), if it is satisfied that—

(*a*) such marriage is permissible under the personal law applicable to such member of the service and the other party to the marriage; and
(*b*) there are other grounds for so doing.

(3) A member of service who has married or marries a person other than of Indian nationality shall forthwith intimate the fact to the Government.

It will be seen that this Rule prohibits the following:

(*i*) marrying a person already married;
(*ii*) remarriage of a person already married.

In the first case the 'person already married need not be in the services; the restriction is for the person who marries such a person. In the second case it is the status of the serviceman himself which is relevant; if he is already married and his first marriage is subsisting he is not allowed another marriage. Notably, both the restrictions apply to both men and women. In other words, a service person governed by these Rules cannot practice polygamy or polyandry as the case may be; nor can he or she be a party to a marriage which is bigamous for the other party to the marriage.

It is noticeable that by using two separate expressions, viz., "enter into" and "contract" Rule 19 brings within its purview both the sacramental and contractual forms of marriages. It thus covers all personal-law marriages as well as civil marriages. The Rule, of course, applies irrespective of religion, caste and creed.

The general restriction of Rule 19 is subjected to a Proviso which empowers the central government to permit what the general provision of Rule 19 prohibits. For this permission there are two conditions which Rule 19 specifies. By virtue of these conditions the following situations may arise:

(*i*) If an unmarried government servant wants to marry an already married person, or a married government servant wants to remarry during the subsistance of the earlier marriage, the government may allow the same if the personal law applicable to the applicant permits the desired marriage; if the personal law applicable is a bar to the desired marriage, under no circumstances can the government allow it.
(*ii*) Where the desired marriage is allowed by the personal law applicable to the applicant, the government can permit the marriage,

provided that there are "other grounds" for the same. In other words, even if a personal law unconditionally allows its followers to practice any form of polygamy, the government cannot allow the same unless there are reasonable grounds for exempting the applicant from the general anti-bigamy provision of Rule 17.

On a deeper analysis of Rule 19 of All India Services (Conduct) Rules 1968 we find that at present a Hindu, Buddhist, Sikh, Jain, Christian or Parsi government servant cannot be allowed bigamy under any circumstances, as the personal laws applicable to them prohibit all forms of polygamy. The Proviso to Rule 19 is thus at present confined in its scope to the Muslims; and in respect of the Muslims it may be used by the government to permit:—

(*a*) marriage of a female government servant to a man who is already married; and

(*b*) remarriage of a male government servant during the subsistance of an earlier marriage.

A Muslim government servant cannot be permitted to marry a woman who is already married or, if that government servant is a female herself, to remarry during the subsistance of her first marriage—since these marriages are already prohibited by the Muslim personal law and cannot therefore be allowed under Rule 19. Where Muslim law allows a bigamous marriage, Rule 19 may be invoked—provided that there are reasonable grounds for the same.

Rule 21 of the Central Civil Services (Conduct) Rules 1964, in its principle and wording, is the same as Rule 19 of the All India Services (Conduct) Rules 1968. Similar provisions are found in most of the State Government Servants (Conduct) Rules. For instance, under the U.P. State Government Servants (Conduct) Rules, Rule 27 provides as follows :[20]

R. 27. No government servant who has a wife living shall contract another marriage without first obtaining the permission of the government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him.

The government of India has in a memorandum laid down the guidelines for entertaining and deciding applications for relaxation of anti-bigamy restrictions under Rule 21 of the Central Civil Services (Conduct) Rules. The memorandum says:[21]

"Cases under this rule have been referred to the Home Ministry for advice whether the permission sought should be given, without any

20. Added to the U.P. Government Servants (Conduct) Rules on 31 January 1955.
21. M.H.A., O.M. No. 219/51-Ests., dt. 16 February 1955.

preliminary enquiry into the facts alleged. Such references have caused unnecessary loss of time as no advice can be given without ascertaining to what extent the facts alleged are correct. It is, therefore, requested that before such cases are referred to the Home Ministry, the Ministry or Department concerned should cause an enquiry to be made on the following lines:

The first point to be scrutinised when an application for permission is received, is whether such marriage is permissible under the personal law applicable to the applicant. If so, the question arises whether there are sufficient grounds for allowing an exception to government's general policy. The alleged grounds, given in support of the request should be scrutinised to see whether the allegations are true and well founded. In case the wife also joins the application, it should be ascertained whether she has willingly consented and whether any letter, etc., purporting to proceed from her is genuine and is the outcome of her own free will. For this purpose, higher officers in the department concerned may, if necessary, send for the applicant and his wife and make personal enquiries. Where the first wife's views have not been stated, they should, if possible, be ascertained. If permission is sought on ground of alleged sickness of the wife, as much information as possible should be obtained in consultation with the medical authorities. The arrangements made by the husband for the maintenance of the first wife should also be ascertained and it should be examined whether they are satisfactory."

In another memorandum issued after the enforcement of the Hindu Marriage Act 1955 the government clarified the inapplicability of Rule 21 to persons governed by the said Act., saying:[22]

"The question of granting permission for remarriage will not arise in the case of persons governed by the Hindu Marriage Act 1955, as a second marriage is possible under the said Act only after the person concerned has obtained a divorce against his present wife from a court of law. Once he has obtained a divorce, he is free to remarry and government's permission is not necessary. There is, therefore, no point in forwarding applications for remarriage from persons governed by the Hindu Marriage Act."

In a third memorandum the government made the following clarification:[23]

"A question has been raised whether the rules prohibiting bigamous marriage are at all attracted by a case in which a male candidate for government service contracts a second marriage but the woman with whom the second marriage is contracted does not, under the law,

22. D.G., P & T's Memo No. 62/3/58-Disc., dt. 28 April 1958.
23. M.H.A., O.M. No. 25/35/60-Ests(A), dt. 9 December 1960.

acquire the status of a wife or when a female candidate contracts a marriage with a person which is void by reason of his already having a wife living. It is hereby clarified that even a marriage which is legally null and void by reason of there being a spouse living at the time of the marriage, would disqualify the person concerned for appointment in government service."

In 1970 the government decided that new entrants to Central Services would be required to give a declaration in respect of their marital status. Text of the Memorandum issued in this respect follows:[24]

"The question of revision of the standard rule to be incorporated in the recruitment rules and the declaration to be obtained from new entrants to government service has been examined. It has been decided that various recruitment rules may be amended as indicated in the Annexure and the form of declaration to be obtained from the new entrants to government service should be as given thereunder.

ANNEXURE

Amendment to Recruitment Rules

No Person:—

(*a*) who has entered into or contracted a marriage with a person having a spouse living; or

(*b*) who, having a spouse living, has entered into or contracted a marriage with any person,

shall be eligible for appointment to service:

Provided that the Central Government may—if satisfied that such marriage is permissible under the personal law applicable to such person and the other party to the marriage and there are other grounds for so doing—exempt any person from the operation of this rule.

Declaration to be obtained from new entrants to Government Service

1. I, Shri/Shrimati/Kumari.....declare as under:

(*i*) that I am unmarried/a widower/a widow;

(*ii*) that I am married and have only one spouse living;

(*iii*) that I have entered into or/contracted a marriage with a person having a spouse living—application for grant of exemption is enclosed;

24. M.H.A., O.M.No. 25/37/67-Ests(A), dt. 22 April 1960.

(*iv*) that I have entered into and contracted a marriage with another person during the lifetime of my spouse—application for grant of exemption is enclosed.

2. I solemnly affirm that the above declaration is true and I understand that in the event of the declaration being found to be incorrect after my appointment, I shall be liable to be dismissed from service.

Date..... Signature.....

Application for Grant of Exemption

(*Vide para 1 (iii)/1 (iv) of the Declaration*)

To

The _____

_____

Sir,

I request that in view of the reasons stated below, I may be granted exemption from the operation of restriction on the recruitment to service of having more than one wife living/a woman who is married to a person already having one wife or more living.

Reasons..... Yours faithfully,

Dated..... Signature.....

In a number of cases the judiciary has had an occasion to pronounce verdicts on the nature, scope and legal position of anti-bigamy provisions under the administrative service rules. In *Ram Prasad Seth* v. *State of U.P.*[25] the relevant provision of the U.P. State Government Servants (Conduct) Rules was challenged before the Allahabad High Court. A Hindu government servant of U.P., already married twenty years ago sought permission to marry again. While the application for the second marriage was still under consideration of the state government, the Hindu Marriage Act 1955 prohibiting bigamy in absolute terms came in force. There was thus no question of the application being granted by the government, since by implication of Rule 27 of the U.P. Government Servants (Conduct) Rules the government could consider an application for bigamy only if the personal law of the applicant allowed it. The case before the court involved

25. AIR 1957 All 411.

the question of validity of the newly introduced anti-bigamy law of the Hindu Marriage Act 1955. The High Court, of course, decreed the constitutional validity of the restrictions of polygamy both under the 1955 Act and Rule 27 of the U.P. Government Servants (Conduct) Rules.

In Tamilnadu a Muslim government servant challenged the constitutional validity of Rule 21 of the Central Civil Services (Conduct) Rules 1964. In a long judgment the Central Administrative Tribunal observed:[26]

> "Rule 21 should be read as a whole without excluding the proviso. It is no doubt true if the proviso were not there, sub-rules (1) and (2) of Rule 21 are likely to affect the personal law of members belonging to the Muslim community, under which they can marry more than one wife. But the proviso actually safeguards their interest. It merely provides a restriction or a fetter on their right by saying that before they contract a second marriage they must get the permission of the government. The proviso which imposes such a restriction should be taken to be a reasonable restriction imposed in public interest and the said provision cannot be said to take away the right under the personal law to the persons belonging to Muslim community. Admittedly the applicant is a government servant and he is governed by certain conduct rules formulated by government under Art. 309 of the Constitution as being applicable to other government servants. Therefore, there is nothing wrong in the government framing a rule saying that before a government servant marries a second time, when the first wife is alive, he must take the permission of the government even if the personal law of the government servant concerned permits him to have more than one wife. Therefore the contention of the applicant that Rule 21 is invalid in law has to be rejected and the impugned order cannot be challenged on this ground."

In *Vinodi Lal* v. *Union of India*,[27] it was disputed whether the anti-bigamy provision of the Central Civil Services (Conduct) Rules would apply to Delhi policeman since the Police Rules 1964 (made under the Police Act 1861 applicable in Delhi) did not have a corresponding provision. A head constable on duty in Nepal had committed bigamy and disciplinary proceedings were taken against him, challenging which he raised this question. The Central Administrative Tribunal upheld the disciplinary action against him, confirming the applicability of anti-bigamy provision of the Central Civil Services (Conduct) Rules to the case in question.

In a Bombay case a rather strange ruling was given. If a married man marries an already married woman, is it a case of bigamy? The answer of some courts is 'no' since this is no marriage in the eyes of law.[28] We are

26. *V.M. Taliarullah v. Govt. of India*, ATR 1986 (2) CAT 526 (Madras).
27. (1988) 5 SLR 543 (CAT) Delhi.
28. *C.G. Rangabashyam* v. *Ranjani Murugan*, 1981 Cri. L.J. 577.

not convinced of the wisdom of this decision even under the Indian Penal Code.[29] A similar decision was, however, given in a service case.[30] Under the civil service rules such a decision seems even more objectionable, since Rule 21 of the Central Civil Services (Conduct) Rules neither uses the word bigamy nor defines it. This Rule simply prohibits marriage of a government servant to a woman already married; it does not say that if the male government servant so doing is also already married the Rule would not apply to him. In any case there is nothing in Rule 21 suggesting that a marriage hit by its provisions must be valid under the personal law applicable to the government servant concerned. On the other hand Government Memorandum dated 9 December 1960 (reproduced above) makes it abundantly clear that the bigamous marriage may not be a legally valid marriage for the application of anti-bigamy provision of the service Rules.

2. Corporation and Municipal Service Rules

Under the Indian Air Corporation Act 1953, Standing Orders concerning discipline and appeals have been formulated in exercise of the power conferred in this regard by section 45 of the Act. Regulation 15 under these Orders reads as follows:

> R.15. No employee who has a wife living shall contract another marriage without previous sanction of the General Manager, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him. Likewise, no female employee of the Corporation shall marry any person who has a wife living without obtaining such previous permission.

In a case decided by the High Court of Madras[31] the constitutional validity of this Regulation had to be discussed and decided upon. It was pleaded before the court on behalf of a Muslim employee of Indian Airlines Corporation that Regulation 15, quoted above, "lacked guidelines" on the question of granting exemption from the general restriction on bigamy imposed by it. On a thorough examination of the language of the Regulation and its policy and rationale the court arrived at a decision that the Regulation did not introduce an element of unconstitutional discrimination. The court observed:

> "However, if the rule indicates the policy on the object which inspired it and which is its basic structure, the mere fact that the rule by itself does not set out in explicit terms completely and with precision all the contingencies or exigencies which would warrant the exercise

29. See., Kiran B. Jain, "Vice of Bigamy and Indian Penal Code: Ramifications of an Archaii Law", 32 *JILI* 386 (1990).
30. *Tanaji Bhandiha Awale* v. *State of Maharashtra* (1985) SLR 459 (Bom).
31. *Khaizar Basha* v. *Indian Airlines Corporation* AIR 1984 Mad 379.

of the power will not make the rule hit by the mischief of discrimination. Discretionary power is not always discriminatory, especially when the policy and the object behind the rule is clear."

The thrust of this decision was that Regulation 15 was not unconstitutional since it did not in absolute terms prohibited bigamy; and the court made it very clear that it was not going into any other question relating to the anti-bigamy restriction of Regulation 15. Its constitutional validity as a whole and on the ground of its conflict with Muslim personal law was not an issue before the court and, therefore, it did not probe into it.

The Madhya Pradesh Municipal Service (Executive) Rules 1973 enacted under the Madhya Pradesh Municipality Act contains the following anti-bigamy provision:

R.10.(1) No male candidate who has more than one wife living and no female candidate who has married a person having already a wife living shall be eligible for appointment to the service or post :

Provided that the State Government may, if satisfied that there are special grounds for doing so, exempt any such candidate from the operation of this sub-rule.

This Rule substantially agrees with the principle incorporated in Rule 19 of the All India Services (Conduct) Rules 1968 discussed above.

Some time ago the case of a Muslim employee of the Banaras Hindu University was referred for opinion to the late Justice M. H. Beg who was requested to give an opinion if the Central Government Services (Conduct) Rules 1964, requiring prior permission for polygamy, could be deemed to be applicable to the university employees. The case is, reportedly, still pending awaiting the advice of some other experts.[32] Anti-bigamy provisions under the various service-conduct rules are in fact a form of subordinate legislation meant to curb a social evil which could not be eradicated by direct legislation due to the sensitive nature of personal-law reform. Imposing the interpretation of personal law on these rules so as to curtail their strength and scope is, in our opinion, inadvisable. These rules, we feel, should be kept apart from the niceties of direct legislation on bigamy and its interpretation by the courts.

32. Justice M.H. Beg died before he could give his opinion in the case. The case is within the author's personal knowledge.

STUDENTS' SECTION

SOME ASPECTS OF THE RIGHT AGAINST SELF-INCRIMINATION IN INDIA

THE WORKING of a criminal system in a country and the doctrines that govern the system are heavily dependent on the philosophy in which the criminal jurisprudence of that country is rooted. If the norms which guide the criminal systems can be grouped under the two broad headings, to say, Crime Control and Due Process, our system fairly fall under the latter.[1] But it is a fact that no country in the world had adopted a classical model of either system without any compromise because of the inherrent defects in each system. Even in countries like the United States of America which originally adopted a perfect Due Process Model, the judicial trend is shifting towards the other model in some fronts, even when they try to maximise the protection for individual liberty. The recognisation of the STOP AND FRISK RULE in TERRY v. OHIO[2] and the public safety exception to the famous MIRANDA WARNINGS upheld in NEW YORK v. QUARLES[3] are enough proof for this proposition. In fact, as said before, because of the inherrent hazards involved in each system every sovereign nation is forced to opt for a point somewhere between these two classical models. Indian criminal system is not an exception to this rule. But where a middle point is opted it may tend to be close to any one of these two systems. This tendency largely depend upon the culture of the people, their respect for law, sociological factors etc.

Our system is basically a Due Process Model. But at the same time the influence of Crime Control Model is not completely absent in our system. The rules regarding search and seizure embodied in the Code of Criminal Procedure, 1973 itself are enough to illustrate this. Moreover, in some cases we will see that even the judiciary is moving in this direction. Thus when the U.S. Supreme Court evolved the STOP AND FRISK doctrine in *Terry*,[4] Indian Supreme Court held in *Malkani's Case*[5] that the wire-tapping of the accused's conversation without his consent, will not be considered as illegally obtained evidence.

This shift, by and large, depend upon the need of the society. It is also true that this change is necessary, for a self imposed subjugation to any

1. For a better discussion on the different aspects of the two systems, refer Herbert L. Packer, *Limits of Criminal Sanction*, (1968). Also see R.V. Kelkar, *Outlines of Criminal Procedure*, (1984), Ch. 13.
2. 39 U.S. 1 (1968).
3. 467 U.S. 649 (1984).
4. *Supra* note 2.
5. *R.M. Malkani* v. *Maharashtra*, AIR 1973 SC 157.

philosophy without considering the changes in the society and its needs would be rediculous and cannot ensure justice. At the same time we must guarantee the most fundamental rights, irrespective of the doctrines and the doctrinal shift.

This paper calls for a change in a big way in the approach to the protection against self-incrimination on the one hand, and at the same time, seek more protection for individual liberty in the existing and proposed systems. These two propositions might look paradoxical. Of course, this balancing is difficult but it certainly is worth trying.

II

Right Against Self-Incrimination—A Pragmatic Approach

Article 20(3) of the Constitution of India confer a fundamental right on all persons against self-incrimination, saying;

> "No person accused of any offence shall be compelled to be a witness against himself."

The same protection was guarenteed in S. 342 of the Code of Criminal Procedure, 1892.[6] But the makers of the Constitution must have thought it necessary to give this right a constitutional protection, in the absence of which manipulations of this right by the future governments are possible and hence the Article.

What is the scope of Article 20(3) ? (Indeed this study include a close scrutiny of the various terms and phrases used in the article like, "accused of an offence," "offence", "to be a witness" etc. But it is not done here, for that is not the aim of this work and also for the reason that these issues are already discussed by many authorities on Constitutional Law and Criminal Law). It is known to all that an accused person is not bound to answer any question that is put to him in a court of law. He can be totally silent. But the sweep of this Article does not stop there. In *M.P. Shamra* v. *Satish Chandra*,[7] Supreme Court held that the protection guarenteed in Article 20(3) is not limited to the court room testimony. Hence the court observed:

> The phrase used in Article 20(3) is 'to be a witness' and not 'to appear as a witness.' It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to the person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.[8]

6. Ss. 313 and 315 of the new Code.
7. (1954) SCR 1077.
8. *Id*, at p. 1086.

This view was further reiterated in another celebrated decision *Kathi Kalu Ogbad* v. *Bombay*.[9]

Further, in *Sharma's Case* it was decided that the right against self-incrimination is available not only in regard to the oral evidence but documentary evidence also. But this view, intended to settle a dispute, worked just opposite. Consequently a series of contradicting judgements by various High Courts followed[10] particularly with regard to the validity of the compulsorily taken thumb impression, hand-writing specimen etc.: Ultimately *Oghad* set this dispute at rest, limiting the operation of the Article 20(3) protection to only such documents which contain the personal knowledge of the accused. Of late, decision after decision, judiciary is trying to widen the ambit of Article 20(3), to afford more protection to the accused.

When things are like this, if anyone argue that the right against self-incrimination should be limited, it will be criticised as an attempt to bring the horse before the cart. But do we really need so much protection? Or, is this the right kind of protection which is required today ? Is this prohibition a tool in the criminal's kit to defeat justice? A non-prejudicial approach to these questions always suggest us to re-define the range of the protection granted, for the harsh reality is that it is often misused than used.

Misuse of this protection is common wherever it is granted. Judiciary is also aware of this fact. This sentiment is expressed by Justice Byron R. White in his dissenting judgement in MIRRANDA v. ARIZONA[11] when he declared that the rule of the case which required elaborate warnings and offer of counsel before the right against self-incrimination could be effectively waived, would return killers, rapists and other criminals to the streets and have a corrosive effect on the prevention of crime. But at the same time, common-sense does not allow us to argue that the protection against self-incrimination should be completely abolished. Then a balance has to be struck between these two competing interests. In fact, our Supreme Court also held in *Sharma's Case*[12] "...there is no inherrent reason to construe the ambit of this [Article 20(3)], fundamental right as comprising a wide range. Nor would it be legitimate to confine it to the purely literal meaning of the words used...." Janardhan Das J. to arrive at this conclusion takes help from "*Wigmore on Evidence*"[13] in which the famous jurist observed:

> [I]ndirectly and ultimately it [the right against self-incrimination] works for good—for the good of the innocent accused and the community at large. But directly and concretely it works for ill, for the protection of the guilty and the consequent derangement of civic order.

9. AIR 1961 SC 1808.
10. *Farid Ahmed* v. *State*, AIR 1960 Cal 32, *Dorai Swami* v. *Palaniandi*, AIR 1956 Mad 632, *Balraj Bhalla* v. *Ramesh*, AIR 1960 All 157, *In Re. Sheik Moh. Hussain*, AIR 1957 Mad 147.
11. 384 U.S. 436 (1966).
12. *Supra* note 7.
13. V. 8, pp. 314-5.

There ought to be an end to judicial *can't* towards crime. We have already too much of what a wit has called 'justice tampered with mercy'. The privilage therefore should be kept within the limits the strictest possible.

Once again the question is the same—where to draw the demarkating line? To answer this question first we should discuss the purpose of the protection granted; and for this essentially we should look into the history of the evolution of this right.

Article 20(3) was discussed in the Constituent Assembly on December 2, 3 and 6; 1948. A search through the Constituent Assembly Debates shows us that Article 20(3) was adopted by the makers of the Constitution without much discussion on it. The reason may be that by then the right against self-incrimination had become a universally accepted principle of the criminal jurisprudence. Nevertheless, B.N. Rao in his notes on the Draft Report dated April 8, 1947[14] pointed out that the sub-clause (2) (as it stood in the Draft Construction) was based on the Fifth Amendment of the American Constitution. Fifth Amendment drew its inspiration from the English Common Law. In England, the doctrine had a historical origin. It arose from a feeling of revulsion against the inquisitorial methods adopted, and the barborous sentences imposed, by the Courts of Star Chamber in the exercise of its criminal jurisdiction. This came to a head in the case of John Lilburn and the abolition of Star Chamber and the firm recognition of the principle that the accused should not be put on Oath and that no evidence should be taken from him. In course of time this principle was extended as a privilage to witness against self-incrimination in giving oral testimony or in producing documents.[15] Thus this right originally evolved in England as a protection gainst the 'judicial attrocities', when the Court and the Police were not much different. The philosophy behind this rule was, as it is evident now, that if such protection was not granted the unholy alliance of the Court and the Police (as it was the then state of affairs) would torture the accused and compel him to confess or plead guilty. It was never intended to defeat justice. But unfortunately, without a proper study of the purpose and the amplitude of the right in the light of the changed senario, our framers of the constitution adopted this rule as a whole, which thus can be held against police investigation as well as Court trial.

Now the question is whether the right against self-incrimination be extended even to the Courts in the changed circumstances where the Courts are distinctly separate from the executive and thereby from police actions? Our police may still not be much better, but by no stretch of imagination Indian Courts can be equated with the Courts of Star Chamber. The Courts

14. B. Shiva Rao, *The Framing of Indian Constitution : Select Documents* (1967), V. II, p. 149.
15. The historical background of the right against self-incrimination has discussed by the Supreme Court in *Sharma's Case, Supra* note 7, at p. 300. Also see Seervai, *Constitutional Law of India* (1985), V.I, p. 770.

in India are the vanguards of the individual liberty. But at the same time it has a duty to see that the law of the land is respected, that justice is done. But the wide sweep of the present Article 20(3) incapacitate the Courts from fulfiling this duty to a large extent. Thus as said by Justice Byron and quoted above, Article 20(3) protection is misused to return killers, rapist and other criminals to the streets. Therefore it is submitted here that the operation of Article 20(3) should be kept out side the Court room and at the same time these rights must be enforced more vehemently with respect to the police investigation. The Courts should be granted the authority to examine an accused just like any other witness. He should be cross-examined and re-examined to sift the truth out of the facts. Here the accused is not being tortured nor compelled but he is just co-operating with the Court as a responsible citizen of this country, which he is bound to do, since he had adopted justice as a constitutional value along with liberty.[16]

One may argue that the provisions contained in Ss. 313(1) and 315(1) of the Criminal Procedure Code, 1973 are enough to secure this purpose. But this contention is misleading. S. 313 is to enable the accused to personally explain any circumstances appearing in the evidence against him. Moreover, sub-section (2) and (3) provide that no Oath shall be administered to him before he is examined, nor his failure to answer or his false answers will not make him liable for punishment. Likewise, S. 315 declares that an accused person shall be a competent witness but only in his own request in writing. Evidently these provisions are to help the accused—ofcourse for a good reason. But what is intended here is a provision to examine the accused as a witness not only to prove his innocence but also to prove the truth.

In *Nandini Sathpathi* v. *P. L. Dhani*[17] the court speaking through Krishna Iyer J. observed that the word compulsion as used in Article 20(3) includes "any mode of pressure, subtle or crude, mental or physical, direct or indirect by sufficiently substantial applied by the policeman for obtaining information". This definition is fine in so far as the police interrogation is concerned. But this is not enough. The word 'compulsion' must be re-defined. Thus the accused must be made to speak in the Court, he should be made to produce all necessary documents in his custody, including those which contain his personal knowledge. Conferring a right to complete silence on the accused is out of the purpose of Article 20(3). This is the kind of judicial activism we require today. If the Courts are hesitant to do so, then the Parliament should come forward with a bold amendment to fulfil the purpose.

Interestingly, constitutional advisor Shri B.N. Rao suggested an amendment of Article 26(2) of the Draft Constitution, October 1947 (Article was later re-numbered as Article 20(3)) in a similar line. The Article, amended

16. See, Preamble to the Constitution of India, 1949.
17. AIR 1978 SC 1025.

as suggested by shri Rao reads as follows:

> "No person shall be punished for the same offence more than once nor, *save as provided in S.* 132[18] *of the Indian Evidence Act*, 1872 *as in force at the commencement of the Constitution*, shall any person be compelled in any criminal case to be a witness against himself"[19] (Italics supplied).

The aim and use of this amendment is explained by B.N. Rao himself in his explanatory notes supplied to the Drafting Committee on October 7, 1947. He explains:

> Without these words the clause may lead to failure of justice, particularly in criminal cases. The rule contained in S. 132 of the Indian Evidence Act deprives a witness of the right of refusing to answer incriminating questions, but provides that, if a witness is compelled by the court to answer, the incriminating answers will not subject him to any criminal charge except a prosecution for giving false evidence. *This rule has the merit of securing the benefit of his answer to the cause of justice and the benefit of the protection against self-incrimination.*[20]

But this realistic approach was not appreciated by the Drafting Committee. Had this amendment been approved, position would have been much better. But then, the amendment was rejected on the ground that the intention of the Article is that any person accused of any offence should not be compelled to be a witness against himself and that the amendment suggested would not be *necessary* if this intention was made clear.[21] The amendment was thus not against the spirit of the constitution, it was only a question of *necessity*. This is cited here with a view to substantiate the arguement that if need arise, there is scope for an amendment to Article 20(3) without damaging the basic structure of the Constitution. Certainly, such an amendment might not have been necessary for the land our forefathers dreamt, but we know, today it has become a crying necessity here.

When everybody is busy in finding new ways for enlarging the amplitude of personal liberty, this dissenting note might take time to strike a chord. But this is the truth, justice demands it.

18. S. 132 of the Indian Evidence Act, 1872 reads as follows: "A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, such witness, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. Provided that no such answer which a witness whall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except in a prosecution for giving false evidence by such answer".
19. *Supra, Select Documents*, V. III, p. 11.
20. *Id.*, at p. 200.
21. *Id.*, at p. 330, "Minutes of the meeting of the Drafting Committee, November 1, 1947".

III

Now we shall move on to the second aspect of the problem. How far is our individual liberty secured under the existing police investigatory system? This issue is discussed here particularly in connection with S. 27 of the Indian Evidence Act, 1872 (hereinafter referred to as 'S. 27'), and the provisions regarding search and seizure contained in the Code of Criminal Procedure, 1973.

(a) Onslaught of S. 27 on Liberty

The general rules of evidence regarding confessions are given in Ss. 24, 25 and 26 of the Evidence Act. Section 24 forbids confessions caused by inducement, etc. Section 25 invalidates confessions made to a police officer and section 26 excludes confessions made by the accused while in police custody, except within the immediate presence of a magistrate. Section 27 is an exception to this general rule which reads:

> Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of any police officer, so much of such information, whether it amounts to a-confession or not, as relates distinctly to the fact thereby discovered may be proved.

The scope of the section is explained by the Supreme Court in *Deoman Upadhyaya's Case*.[22] In this case, Shah J. observed:

> S. 27 is found on the principle that even though evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is, therefore, declared provable in so far as it distinctly relates to the fact thereby discovered. This provision invites criticism from many angles.

This section seems to suggest that the police can, when the accused is in their custody, use any method to extract information, but such information should lead to the discovery of a material fact. More often, police as a matter of their privilege, resort to illegal means like torture which may vary in degrees. The validity of S. 27 was tested against the protection guaranteed under Article 20 (3) in various cases. It was decided in different High Court decisions[23] that the compelled statements and the discoveries made as a result thereof, will be hit by Article 20(3). In *Bombay* v. *Kathi Kalu Ogbad*[24]

22. (1961) II SCJ 334.
23. See, *Doom Singh* v. *State*, AIR 1957 All 197, *Amrut* v. *Bombay*, AIR 1960 Bom 488, *Orissa* v. *Basanta Bag*, AIR 1959 Ori 33, *Radha Krishnan* v. *State*, AIR 1960 Puj 294.
24. *Supra* note 9.

Supreme Court observed that as to the statements admissible under S. 27 of the Evidence Act, they "are not within the prohibition [of Article 20(3)] unless compulsion has been used in obtaining the information". It was also said that compulsion is a question of fact and that the statements made will not become inadmissible for the only reason that they were made while in police custody, though that fact, coupled with others, might establish that the statement was compelled. Thus the present position is that as a rule S. 27 statements and discoveries are admissible in evidence unless torture or compulsion to obtain it is proved.

In all the above cited cases, validity of S. 27 was tested only with Article 20(3). But it is submitted here that this is not the right approach. Before deciding the validity of S. 27 it should be tested with Articles 20(3), 21 and 14 of the Constitution of India. Moreover, this study must be conducted with a reasonable understanding of the actual police behaviour and how S. 27 provisions are being manipulated in their hands.

Before we proceed further with the constitutional aspects, it is necessary to say that if a person is taken under the police custody, he is bound to be maltreated. Custodial deaths are no more a news to us. But why torture? In most cases this torture is with an aim not to make the accused confess (because the police is better aware of S. 26, Evidence Act), but to get information. In some cases police succeeds but in most cases they fail. And in yet other cases, police themselves plant a piece of evidence and force him to "discover" it.

It is possible to argue that the above discussion is of little use since *Oghad* has made it clear that if compulsion is proved the evidence will be invalid. But what is more important is how to prove compulsion. Can an ordinary citizen prove that he was compelled to make the statement in question when he was in the police custody ? For him, even after fourty years of independence, police station is a devils den. He has no means to prove his case while the police has the know-how to crush even his internal organs without causing a visible scratch outside. They have the mechanism to make a custodial death a suicide. Ordinary man is always at the receiving end. In these circumstances it is next to impossible for him to prove that he was compelled while in police custody. Thus the police always use S. 27 as a weapon to encroach upon individual liberty. Moreover, the burden of proving compulsion is thrust upon the accused for whom it is practically impossible, his right guarenteed under Article 20 (3) becomes a mere illusion. The freedom intended to be conferred under Article 20(3) is not this kind of illusiory freedom. The Article is enacted with a view to provide real and substantial protection to the accused from all kinds of compulsions. But we have seen that this is not just possible when S. 27 is in force. Unfortunately these facts could not attract our Bench when they sat to decide the validity of S. 27. Thus it is submitted here that considering the real working of the section and the potential mis-use of it, S. 27 of the Evidence Act which has now become a threat to the individual liberty should be declared as violative of Article 20(3) and hence unconstitutional.

S. 27 is liable for attack from two more angles. Article 21 makes it clear that no person shall be deprived of his liberty except according to a procedure established by law which must be 'just, fair and reasonable'.[25] The procedures established, such as search and seizure, to compel an accused to produce documents are elaborated in the Criminal Procedure Code. These provisions do not authorise criminal methods to obtain production of things. Thus when a person is tortured to produce certain documents, it is clearly against the procedure established by law and hence violative of Article 21. If S. 27 works as an enabling provision for such violation, even that section is liable to be struck down. Lastly, S. 27 contravenes Article 14 also.[26] Now it can be said almost axiomatically that Article 14, among other things, strikes at arbitrariness "because an action that is arbitrary must necessarily involve a negation of equality".[26a] Thus when we confer a right upon the accused—that he would not be compelled to give evidence—and provide him with no legal equipment to prove his case when his right is denied—when he is actually compelled—it would amount to arbitrariness, something prohibited under Article 14.

Thus we have seen that if we experiment S. 27 with Article 14, 20(3) and 21 together, in the light of the deplorable history of police torture in this country, it will turn the litmus of constitutionality red—Section 27 of the Indian Evidence Act would be declared as unconstitutional. If it is not done, again there will be more cases of police torture, more number of custodial deaths etc.

There is another side of it. If the information and the subsequent discoveries made under S. 27 are declared invalid, at least in few cases, criminals will evade punishment. Justice should not fail because there is no alternative available. This problem could be solved in two ways. One is that S. 27 should be amended appropriately, attaching a rider to it, as in the case of S. 26 confessions. In other words, to save a statement from invalidation, it should be made in the immediate presence of a Magistrate. The presence of a Magistrate will make a lot of difference. Or the Courts should be given the power to examine the accused, to gather information and to order him to produce the documents which are in his custody and knowledge. This is the practical importance of the submission made in the second part. Thus the power which is misused by the police must be taken away from them—to protect individual liberty, and should be deposited

25. *Maneka Gandhi* v. *Union of India*, AIR 1976 SC.
26. In *Deoman Upadhayaya's Case*, *Supra* note 22, S. 27 was tested against Article 14. But there the issue was different, it was not arbitrariness. The main question in *Deoman's case* was if S. 27 was void as offending Article 14 of the Constitution as the section makes an unreasonable classification between 'persons in custody' and 'persons not in custody' while accepting evidence against them. The court held by a four to one majority that 'persons in custody' and 'persons not in custody' do not stand on the same footing nor require identical protection and hence Article 14 is not contravened in that case.

26a. *Ajay Hasia* v. *Khalid Mujib Shervardi*, AIR 1981 SC 487.

with the courts—to use it to secure justice, a cherished ideal of our constitution. Simultaneously, the Police force must be well equiped with state-of-the-art machinaries to find out evidence in a more scientific way, in the absence of which the police may tend to fall back on their traditional methods.

(b) Search and Seizure

The last issue which is proposed to be discussed in this article is the search and seizure provisions under the Code of Criminal Procedure, 1973. In India, there is no fundamental right against search and seizure unlike in America and in many others countries.[27] The Fourth Amendment to the U.S. constitution declares that "...the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, no Warrents shall be issued, but upon probable cause, supported by Oath of affirmation, and particularly discribing the place to be searched, and the person or thing to be seized..." During Constituent Assembly Debates, Shri Kazi Syed Karimuddin moved an amendment to Article 14, Draft Constitution (which was later renumbered as Article 20 in the present constitution) which would have granted similar rights, if passed.[28]

Although the amendment was rejected, it is worth noting the sentiments expressed by Dr. B. R. Ambedkar saying that even though the right against unreasonable searches and seizures are well protected under the Code of Criminal Procedure, considering the importance of these rights, they may well be placed beyond the reach of the legislature, as an abrogation of these rights are always possible. Yes, if it is because the framers of our constitution believed that these rights are well protected under the existing provisions of the Code of Criminal Procedure[29] and hence they were not placed under Part-III of the constitution, we have a constitutional duty to see that those provisions are strictly observed.

Though there are ample provisions in the Criminal Procedure Code regarding search and seizure for all occassions, we know, illegal searches and seizures are more common than legal. Why is it so ? The force of laws depend upon the sanction attached to it if they are failed to be observed. Sanctions could be of two kinds: (*i*) by prosecuting the person who violate the rules of the game, or (*ii*) by excluding the evidence obtained through such illegal searches. Unfortunately in Indian laws, these required sanctions are missing.

In spite of the Fourth Amendment protection, illegal searches were common in the U.S. also. To do away with this difficulty, the American

27. Clauses (2) and (5) of the Irish Constitution and Articles 114 and 115 of the German Constitution guarantee protection similar to that which is guarenteed in IV Amendment of the U.S. Constitution.
28. See the Constituent Assembly Debates on Aritcles 14 (Draft constitution); Amendment No. 512, *Constituent Assembly Debates*, V. VII, pp. 794-8, 840-2.
29. See, Ss. 93 to 105, Code of Criminal Procedure, 1973.

Courts developed a new device which is called the EXECLUSIONARY RULE. This principle was first applied in BOYD. v. UNITED STATES.[30] The rule precisely means that if evidence is obtained through an illegal means, then that evidence cannot be valid before the Court of Law. Though the Court in ADAMS V. NEW YORK,[31] restricted this rule to the situation in which a positive act was required by the defendent, the decision in WEEKS V. UNITED STATES[32] over-ruled that qualification. This rule was again followed by the Federal Courts in a number of decisions and ultimately in MAPP V. OHIO,[33] the Supreme Court held that the EXCLUSIONARY RULE is applicable to the *Federal* as well as *State* prosecutions. The reason why the Court has developed this rule is clear from *Mapp's* decision. Justice Tom C. Clark wrote for the Court; "nothing can destroy a government more quickly than its failure to observe its own laws" and that other remedies for the Fourth Amendment violation had proven worthless. A second purpose of the rule articulated by Justice William J. Brennen, dissenting in UNITE STATES V. CALANDRA[34] is that of "assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behaviour, thus minimising the risk of seriously undermining popular trust in government." As a third purpose of the rule, the Court emphasised in ELKINS V. UNITED STATES[35] "the rule is calculated to prevent, not to repair. Its purpose is to compel respect for the constitutional guarentee in the only effectively available way—by removing the incentive to disregard it."[36]

In India also validity of illegally obtained evidence was questioned in a number of cases. As understood, illegal search and seizure is nothing but compelling a person to produce something. Thus, if any evidence is obtained through an illegal search or seizure from the custody of an *accused*, that evidence cannot be proved against him as he has the protection granted under Article 20(3). Interestingly, in *Boyd* and in *Mapp*, the American supreme Court referred to Fourth Amendment and also to Fifth Amendment which guarantee right against self incrimination to declare an illegally obtained evidence invalid, when Fourth Amendment itself was more than enough for the purpose.

In the Indian context, *illegal* searches and seizures are against Article 21 also, since they are not *the procedure established by law*. The established

30. 116 U.S. 616 (1886).
31. 192 U.S. 585 (1903).
32. 232 U.S. 383 (1914).
33. 367 U.S. 643 (1961).
34. 414 U.S. 338 (1974).
35. 364 U.S. 206 (1960).
36. For a better understanding of the American position see, "search and seizure", Leonard W. Levy (ed), *Encyclopedia of American Constitution* (1986), p. 1628, "Unreasonable search ', *Id.*; at p. 1947, "Exclusionary Rule", *id.*, at p. 663. Also see Martin Shapiro and Rosco J. Tesolini, *American Constitutional Law* (1979) Ch. 15.

procedure for search and seizure is given in the criminal Procedure Code, 1973. When the searhces do not comply with these procedures, they can certainly be challanged as violative of Article 21.

In *R.M. Malkani* V. *Maharashtra*, the petitioner's conversation over telephone was tape-recorded by the police without his knowledge and was produced before the Court as evidence. The petioner argued that the action of the police amounted to violation of Article 20(3) and Article 21 of the constitution. While rejecting the first argument of the petitioner that the action was violative of Article 20(3), the Court rightly observed that at the time of taperecording the petioner was not accused of any crime, a precondition to invoke article 20(3), nor he was compelled to give evidence. But the second claim of the petitioner, violation of Article 21, was disposed off by the Court in an unsatisfactory manner. Instead of veryfying whether there was any procedure established by law for recording telephonic conversation and whether the police had followed that procedure, the Court simply took the view that the method employed by the police was neither unlawful nor irregular and hence it is not hit by article 21. One reason for this approach could be that the impugned action was not a 'search' in its strict sence.

In *M.P. Sharma* v. *Satish Chandra*,[37] the question was whether an order for search and seizure of documents from an accused person violative of Article 20(3). The Court held, considering both Articles 19 (1) (f) and 20(3), that the search and seizure as a rule is valid. But in this case the question of the validity of an *illegal* search was not involved and therefore that question was not decided. But in *Radha Krishnan* v. *State of U.P.*,[38] the Court clearly held that evidence obtained through illegal searches and seizures are valid. Surprisingly, while discussing this issue, the Court has never mentioned article 20(3) anywhere in its judgement.

The validity of illegally obtained evidence was challenged invoking Article 20(3) in the Supreme Court in many cases[39] that followed, but in all those cases, the circumstances neceessary for invoking Article 20 (3) were absent.

Again in *State of Maharashtra* v. *Natwarlal*[40] relying upon its earlier decision in *Radha Krishnan*,[41] the court held:

> So far as the alleged illegality of the search is concerned, it is sufficient to say that even assuming that the search was illegal the seizure of the article is not vitiated. It may be that where the provisions of Ss. 103 (S. 100 of the new Code) and 165 of Criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because

37. *Supra* note 7.
38. AIR 1963 SC 822.
39. See, *Yusuf Ali* v. *Maharashtra*, AIR 1968 SC 147, *Magraj Patodia* v. *R.K. Birla*, AIR 1975 SC 1295, *R.M. Malkani* v. *Maharashtra*; AIR 1973 SC 157, *Pooran Mal* v. *Director of Inspector*, AIR 1974 SC 348.
40. (1980) 4 SSC 669,
41. *Supra* note 38.

> of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. *But beyond these two consequences no further consequence ensues.* (Italics supplied).

This approach of the apex Court is dismal. Because of this even the last hope of the common man is shattered. The decision follows that the executive may encroach upon one's liberty, but judiciary will not interfere and one should resist such attacks oneself if so wish, a more dangerous proposition.

One reason for the Court to take such a stand could be that in these cases the alleged action was rather *irregular* than *illegal*. But if it was so, the Court should have clarified it in the judgement itself without leaving any room for misinterpretation of the word 'illegal' in future. Otherwise, taking help from this ambiguity, even greater illegalities may be tried to be defended. Realising the gravity of the problem, the Law Commission of India has conducted a detailed study on evidence obtained illegally or improperly and submitted its report[42] suggesting certain reforms of the existing laws. Though the Commission was not in favour of adopting the U.S. model EXCLUSIONARY RULE, it took the view that there is need for confirming on the Courts a discretion to exclude evidence obtained illegally or improperly if, in the circumstances of the case the admission of such evidence would bring the administration of justice into disrepute. To facilitate this purpose, the Commission suggested an amendment to the Indian Evidence Act, 1872 by additing a new section to it, viz; Section 166-A. The proposed S. 166-A says, *inter alia*, that while determining whether the evidence should be excluded, the Court should consider all the circumstances surrounding the proceedings and the manner in which the evidence was obtained, including the extent to which human dignity and social values are violated in obtaining the evidence.

This amendment may not cure the defects completely. Nevertheless, the significance of the amendment lies in the fact that there is no other better alternative available at present. But unfortunately, nothing is done towards this direction by the legislature so far.

IV

This discussion ends here incomplete. There are so many other aspects of right against self-incrimination which have to be explored. But the purpose of this article was to make the reader aware that there is scope for improvement in the present laws conferring this right. We have seen, how some of the provisions can be modified to protect individual liberty and secure more justice. What we need today is the balancing of right and duty. For this a revolutionery approach is required. It is already late, but it is always better to be late than never.

REJI GEORGE*

42. The 94th Report of the Law Commission of India, 1983.

* Final LL.M. Campus Law Centre.

DUNKELISATION OF INDIAN PATENT LAW : A PALLINDROMIC INEVITABILITY

I. INTRODUCTION

THE DICHOTOMY between the myth that Governs a individuals thought and the practical consideration that actually determined his responses to reality is the predominant leitmotif characterising a Wide crossections perception of the issues relating to TRIPS[1] as incorporated in the Dunkel Draft[2]. Negotiation of GATT.[3] At the heart of the debate lies the conflict between the pressing urgency to stimulate the inflow of foreign capital and frontier technology so as to support the process of economic liberalisation which necessitates adopting a nonconfrontationist posture and the belief that sccumbing on the issue of TRIPS will effect not only the wealth allocation and technology transfer between develop countries and India to the long term detriment of India but also subvert India's economic sovereignity.[4]

This article examines the rationale of the assumptions underlying this conflict. The areas to be explored will relate to the impact of the operational interaction between (1) the Indian patent law as a mechanism designed to countenance (*a*) the growth and development of a indegenous technological base and (*b*) to facilitate the transfer of imported technology by balancing the conflict of interest between monopolistic rights granted to private interests and the necessity of safeguarding the public or national or national interest and (2) the structure as envisaged in the Dunkel Draft on Patent Law'[5] In the process the Article discusses some of the central dilemma facing the Indian policy : Considering the formidable pressure by the US on India to offer higher level of protection for IPR[6] in the back

1. TRIP see Ministrial Declaration on the Urguay Round. Declaration of 20th September 1986 in GATT BISD Thirty Third Supplement 19, 25-26 (1987).
2. Draft final Act Embodying the results of the Uruguay round of Multilateral trade neogation MTN/TNC/W/FH 1991 (Annex III) p. 57-59, (here in after Draft Act).
3. GATT Opened for Signature in October 30, 1947. 6/stat. AS, TIAS No. 1700, 55 UNTS 187 Reprinted in 4 GATT, BISD (1969). Further Reference see—J.H. Jackson World Trade and the Law of GATT. O LONG, LAW AND ITS LIMITATION IN THE GATT MULTILATERAL TRADE SYSTEM (1985), K. DAM, THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANISATION (1970). R. HUDEC THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY.
4. See Rajni Bakshi Sovreignity At Stake. The Times of India 19 January 1992.
5. Draft Act Supra Note 2. Part II Section V. See also Penrose E.T. The Economic of International Patent System (1975).
6. The Mandate to negotiate improved protection in other countries is supported by the statutory authority of section 301 of the Trade Act of 1974 as amended by the 1988 Trade Act. It empowers the USTR in case US rights or benefits under a trade Agreement are violated or and action policy or practice of a foreign country unjustifiably burdens or restrict US commerce..... to (A) Suspend with draw or

drop of the compulsion created by the process of economic liberalisation—can India entertain the option of adopting a intransigent hard stand vis a vis the Dunkel Draft suggestions relating to patent reform. In the alternative would it not be more prudent stand to negotiate in order to drive a hard bargain.

II. GATT IPR THE LINKAGE

Objectively intellectual property signifies the legal rights encapsulated in the idea embodied in a product of the human intellect. Such ideas whether as factum of knowledge or information are possessed of the quality of being incorporated in tangible objects simultaneously in unlimited numbers anywhere in the world.[7] Intellectual property rights have been broadly classified into two branches namely :

(*a*) Industrial Property and (*b*) Copy Right and include.

(1) Literary artistic and scientific works.
(2) Performance of performing artist, Phonogram and broadcast.
(3) Invention in all fields of human endeavour.
(4) Scientific discoveries.
(5) Industrial design.
(6) Trademark, service mark and commercial names and designs.
(7) Protection against unfair competition.

and all other rights resulting from intellectual property activity in the industrial scientific literacy or artistic fields.[8]

Industrial property relates to the creation of human intellect whether expressed as patents or utility models industrial designs trade marks, service marks trade names, indication of source, appellation or origin, and the repression of unfair competition.[9]

A detailed examination of these definition is not warranted by the scope of this article the focus being upon patent system. Patents, a concept Central to Industrial property rights broadly conceived, as a controversial area in north-south dialogue has assumed disruptive dimensions.[10]

prevent the application of benefits of trade agreement concessions—— (B) impose studies or other import restrictions on the goods and fees or restriction on the service of such foreign country——or (C) enter into binding agreements with such foreign country to (1) eliminate the unfair act policy or practice or provide the US with compensatory trade benefits.

7. Phillips Jermy Introduction to Intellectual Property Law 1986. See also WIPO Background Reading Material on IP 3 (1988).
8. Article 2 (VIII) of the convention establishing the WIPO (1967).
9. See Article 1 (2) Paris Convention as revised at the Stockholm Revosion Conference July 14, 1967.
10. Refer Patel S.J. Intellectual Property Rights in the Uruguay Round A disaster for the South ECO POL Weekly 1987.

A patent is a right of exclusive use granted to a inventor for a specific duration in exchange of public disclosure of the invention.[11] A UNCTAD report describes patent as follows "a patent is a legally enforceable right granted by virtue of a law to a person to exclude, for a limited time others from certain acts in relation to a described new invention". In the Indian context explaining the rational of a patent system the Ayyangars report observed the theory upon which the patent system is based is that the opportunity of acquiring exclusive right in an invention stimulates technical progress in four ways. First that it encourages research and invention; Second that it induces an invention to disclose his discoveries of keeping them as a trade secret; third that it offers a reward for the expenses of developing invention to a stage at which they are commercially practicable; and fourth that it provides an inducement to INVEST capital in new lines of production.[12]

Though patents have been on the international scene since a long time[13], most studies of the operation of the patent system have been inconclusive with regard to the social and economic utility of such systems[14]. However Industrialised Country's economists hold a different view point.[15]

The Current International System of Protection

The principle international mechanism affording patent protection consist of a variety of treaties administered by international organisations (predominantly WIPO)[16] which essentially coordinate nation states legal regimes that are relied upon to provide subtantive norms & enforcement procedures. The Paris Convention for the protection of industrial property acts as the principal international umbrella for national patent systems.[17] The principle features of the convention merits brief examination.

11. LEE S.H. The Role of Patents in the Promotion of Technological Development and Transfer of Technology.
12. Ayyangars Committee Report (1959) Para 17.
13. The First Patent statute was enacted by the city state of Venice 500 years ago.
14. See Fritz Machlup JAN ECONOMIC REVIEW OF THE PATENT SYSTEM (1958) ALSO SEE J. JEWKES, D. SAWERS, AND S. STILLERMAN, THE SOURCE OR INVENTION 25-54 (1958).
15. See Maclaughlin Richards and Kenny, The Economic Signaficance of Piracy in INTELLECTUAL PROPERTY RIGHTS : GLOBAL CONSENSUS, GLOBAL CONFLICT (R.M. GADBAW AND T. RICHARD EDS 1988). Also see M.L. Burnstein Diffusion of Knowledge Based Products : Application to Development Economics 22 Econ. Enquiry 612, 615-18.
16. WIPO was established by multilatral convention on July 14, 1967.
17. March 20, 1883 as revised at the Stockholm revision conference (1967). See Generally 1-3 S. LADAS PATENTS TRADEMARK AND RELATED RIGHTS : NATIONAL AND INTERNATIONAL PROTECTION (1975). Also See EXISTENCE SCOPE AND FORM OF GENERALLY INTERNATIONALLY ACCEPTED AND APPLIED STANDARDS/NORMS FOR PROTECTION OF INTELLECTUAL PROPERTY GATT DOC. MTN. GNG/MGU/W/24, 3 JUNE (1988) (here inafter WIPO report).

The convention by ennuciating certain minimum international standards seek to ensure protection to the patent holder, at the international level. The minimum standards are reflected in (*a*) the principle of national treatment (*b*) the right off priority (*c*) the rights of patentees.

The national treatment provisions ensures equality of protection by not permitting discrimination to nationals of the contracting states. Nationals of the noncontracting states are also protected if they are domiciled or have a real or effective industrial or commercial establishment in a contracting state.[18] This provision effectively excludes any requirement of reciprocity of protection.[19]

The right of priority, a basic right provided by article 4 offers protection to the patent applicant desiring protection in several countries. On the basis of the first application filed in one of the contracting states, the applicant may within 12 months apply for protection in all other contracting states. The later applications will be construed as having been filed on the same day as the first application. From the legal point of view as S.P. Ladas puts it "the right of priority is essentially a legal defense accorded by article 4 of the convention to persons admitted to its benefits against the grounds of invalidation which under the provision of national legislation concerning the novelty of inventors might be opposed to then or against persons who file in the meantime a patent application for the same invention.[20]

Article 5 of the convention which states the rights and certain obligations of the patentees reflects the historic compromise between the conflict of interest of patent holders and the public.[21] Article 5A (i) provides that "importation by the patentee into the country where the patent has been granted of objects manufactured in any of the countries of the union shall not entail forfeiture of the patent". This article by allowing the creation of captive markets through import monopolies is a source of great controversy. Compulsory licencing through legislative measure to prevent abuses resulting from the rights conferred by a patent e.g. failure to work the patent. (Article 5A (2) is a prerogative exercisable by a member country).

The right of compulsory licencing is subject to many qualification.

The convention being a compromise between private interest of the patent holders and the public interest, embodied in it is the recognition of the basic freedom and flexibility of member state to legislate according to their own perception of their national interest.[22]

18. Article 2 & 3 of the Paris Convention.
19. Prof. P.S. Sangal Paris Convention and Indian Patent System : Legal Perspectives at 35.
20. S.P. LADAS PATENTNS TRADEMARK AND RELATED RIGHTS NATIONAL AND INTERNATIONAL PROTECTION 1975 P. 462.
21. PERNROSE E.T. THE ECONOMIC OF INTERNATIONAL PATENT SYSTEM (1951).
22. See GHC Bodenhausen "GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY (Geneva BIRPI, (1968) P. 15-16.

The paris convention has been revised from time to time: The last revision conference after Stockholm in 1967, held its Ist session in Geneva in 1980. Second in Nairobi in 1981. Its third and fourth session in Geneva in 1982 and 1784 respectively. The revision conferences been unsuccessful.[23]

The basic proposal submitted to the diplomatic conference contained amendments to articles 1, 5, 5A, 5 quarter, 6 ter, 13, 20, 21, 22, 23, 24, 26, 27, 28, 27, 30.[24] Article 5A, is a major bone of contention between developed and developing countries resulting in the breakdown of the talks.

India is not a member of the Paris Convention. The debate over its membership is going on, without entering into the merits of the debate it is submitted that the present Uruguay round of MTM has robbed the debate of its importance.

Other important international treaties forming a part of the international patent system are (*a*) The Patent Cooperation Treaty, Washington 1970 (*b*) Strasburg Agreement Concerning the International Patent Classification 1971 (*c*) Budapest treaty on International Recognition of the Deposit of Microorganisims. . . 1980[15]

The contemporary international treaty system governing patant protection does not operate as an effective substantive rule making mechanism nor does it meaningfully address domestic enforcement procedures. These matters fall within the internal legal jurisdictions of individual states. Consequentially substantial disparities in enforcement procedures, practice and substantive rules prevail.[26]

The developed countries articulating their desire for a enhanced level of protection with respect to patents are of the opinion that the international patent system is inadequate[27] as (*a*) It does not sufficiently comprehend development in frontier areas of technology.[28] (*b*) A minimum patent term is not set by it[29] (*c*) No express provision pertaining to the payment of full compensation for compulsory licensing is made. (*d*) Too permissive with respect to granting of compulsory licences (*e*) Absence of effective dispute settlement procedure or standards for national enforcement.

The MERGER Logic

The quest to merge international patent regime with international trade

23. Refer. for detail WIPO Background reading material on intellectual property (1988) p. 59.
24. *Ibid* p. 59.
25. For the Text of these Conventions Sec WIPO and UNESCO COPY RIGHT Laws and Treaties of the World (1987).
26. See WIPO REPORTS *Supra* Note 17 at 9-11.
27. See Dam The Growing Importance of International Protection of Intellectual Property, 21 Int. Law 627 (1987).
28. See US Frame Work Proposal to GATT Concerning, Intellectual Property Rights, 4 Int. Trade Rep. (BNA) 1375, 4 Nov. (1987).
29. *Ibid.*

policies which until recently were relegated to distinct & seperate spheres is underscored by fundamentally economic considerations.[30] Established industrial economies comparative edge over certain traditional sectors having diminished a concious shift of focus & resources into areas of greater comparative advantage—activities that are creativity, knowledge and research intensive has become imperative. This fact together with the emergence of new copying technologies has focused attention on the imitation abroad of domestic technologies and inventions.

In order to arrest this unintended transfer of wealth from industrialised economies to the developing and newly industrialised economies the industrialised countries specially the United States[31] with support of other industrialised countries[32] persuaded the full GATT membership to include in the URMTN ministerial declaration mandate for negotiation on trade related aspects of intellectual Property Rights.[33]

This mandate has been the subject matter of controversy both before & after its adoption, between the developed and developing countries.[34]

Indian View (On Patents)

India had initially strongly resisted the linkage between trade and patent protection.[35]

The Indian position argues that patent protection is a mechanism for advancing industrial policies and that countries at different stages of economic development must have the flexibility in the patent system to take into account disparities in economic development.[36] India argued for exemption from patent protection in areas such as pharmaceuticals, food products, chemicals, microorganisms & agricultural machinery & methods.[37]

Arguing that it would not be rational to stipulate any uniform criterion for non-patentable inventions or restrict the freedom of developing countries to exclude any specific sector or product from patentability.[38] India articulated the need for permissive compulsory licensing—especial in areas such as food pharmaceuticals & chemicals. Further domestic laws should govern licences of right to determine fair compensation.[39] The Indian

30. See Global Concensus *Supra* Note 15.
31. See *Supra* Notes 6.
32. See Intellectual Property Committee Keidanren, UNICE, Basic Framework of GATT Provisions on I.P. : Statements of Views of the European Japanese and U.S. Business Committee (1988). For the role of other business organisation See Turnbull, I.P. & GATT : TRIPS at the Midterm, IJ, Properietary Rights 9, 11 (1989).
33. See *Supra* Note 1.
34. See 5, Int. Trade Reporter (BNA) 1012, 1107 (July 14, Aug. 5, 1988).
35. See GATT : Indian proposals says Developing Countries Should Get Patent Trademark Concession, 6 Int'l Trade Rep. (BNA) 953 (July 1989). The Indian position has been outlined in detail in position paper submitted to TIPS working group in July 1989. (Herein after Indian Paper).
36. See Indian Paper *Ibid* Para 4 at 2.
37. *Ibid* Para 8, 17 at 3-7.
38. *Ibid.*
39. *Ibid* Para 13, 14 at 5-6.

position as is apparent was not in consonance with the developed countries perception.

Bilatral Pressure

The U. S. while professing its preference for GATT based multilateral "negotiation for resolving trade problems has simultaneously under taken a program of direct bilateral negotiation used with the threat and use of unilateral economic sanctions in order to attain its objective of enhanced patent protection by foreign countries of U.S. industrial property right owners.[40]

India, succumbed to the US pressure and accepted the merger of trade related aspects of intellectual property within the GATT.[41] However India made it clear that it was referring to national border measures that might be taken to afford improved Intellectual Property protection and not to the negotiation of a universally applicable I.P. Code.

III. PATENT AND ECONOMIC DEVELOPMENT : INDIA'S PATENT LAW

Before undertaking a evaluation of the Dunkel Draft proposal on patents in order to examine the extent to which they are in consonance with India's development priorities, it is important to (A) appreciate the role of patent system in economic growth and development. (B) The extent to which the Indian patent Act 1970 fits the bill.

(A) Role of Patent System in Economic Development

It is important to note that historically, all countries leading in industry and economic growth have a highly developed patent system.[42] Technology being by nature both a private good in creation and a public good in productive use or consumption creates the dilemma—If all are free to use technology who will bear the cost associated with its creation.

Technological progress is a integral component of economic growth and industrialisation.[43]

Two basic prerequisite for the effective functioning of a system engineered to promote technological progress are (1) the existence of incentives for motivating inventive activity, innovation, and diffusion processes and (2) the systematic generation and dissemination of technical information which can be easily utilised by any skilled person in their respective fields.

40. See *Supra* Note 6.
41. See GATT Indian Accepts Policing of Trade Related Aspects of Intelectual Property within in MNT TALKS, 6 Int. Trade Rep. (BNA) 1176 Sep. 20, 1989.
42. F.K. Beier, "Traditional and Socialist Concept of Protecting Inventions", IIC Vol. 1 1970, p. 328 at 334.
43. Oldham, Freeman, and Turkan, Trends and Problems in World Trade and Development, UNCTAD DOC. TD/28 Suppl. (Nov. 10 1967) p. 6.

The patent system provides an excellent legal and institutional backdrop organised to meet the needs for both the elements. In built into the patent system are the twin functions (*a*) Incentive function—(vide exclusive right for the inventer and (*b*) Informative function—(vide public disclosure).

Given these two important function the patent system contributes to economic progress of developing countries in two mainways (*a*) as an incentive for the development of indegenous technology and (*b*) an an instrument facilitating the transfer of technology.

It is important to note that the grant of a patent being a trade off between private rights and public interest the patent law systems in most developing countries contain various measures for the limitation in public interest of the private rights confered by the grant of patents.[44] Such measures have included compulsory licences, licences of right, automatic lapse, revocation, use and expropriation by state, provisions against failure to work or insufficent working, limitations on the importation of patented articles and an failure to satisfy national market demand etc. In short from the developing countries view point patent is considered as a instrument of national economic policy to be used with other policies such as incentive to national inventiveness, transfer of technology and foreign investment for the realisation of the national development objectives.

The problematics between developed and developing countries an patent protection is epicentered on the extent to which these safeguards militate against the private rights of the patentee on one had and the extent to which the nonimplementation of these measures will adversely effect the developmental necessities of the developing countries.

The operation of a patent system depends therefore on the specific development requirement of a country which itself is determined by its state of economic development.

Most countries successfully industrialised and economically developed went through five stages.[45]

(*a*) In the first phase production of goods once imported was through import substitution programme. Technology was mainly acquired through the import of machine that embodied it.[46]

(*b*) In the second phase the countries went in for the import of technology that was not embodied in machinery. Designs and drawings and sophisticated patent were imported through equity participation. The R & D units of these countries in this stage also developed mainly to adapt and absorb the imported technology to suit local conditions.

44. See UNCTAD, The Role of the Patent System in the Transfer of Technology to Developing Countries (New York 1975).
45. N.S. Siddhartan, Industrial Development and Foreign Collaboration Yojna Aug. 15 1991 p. 54.
46. *Ibid.* p. 54.

(c) In the third phase the R & D units of the developing countries were adequately equipped to create their own technology or significantly improve on the imported technology to suit the needs of the developing countries. These were also imported to other developing countries. Thus in this phase the developing countries were not only importers but also exporters of technology. However the income received from technology imports was marginal as compared to the payment towards technology import.[47]

(d) The fourth phase is that of technological self sufficiency where the receipt and payments relating to the import and exports of technology is balanced. Most European countries are in this phase.

(e) The countries in the fifth phase are net exporters of technology. Currently Japan US and Germany enjoy this states.[48]

For countries in the first three phase (India being in the third) acquisition of advanced technology is a crucial component of the development strategy. The presence of a strong patent system is imperative to facilitate such transfer of technology.[49]

(B) Indian Patent System

(1) *Historical Evolution*

The history of patent a statutory creature is embedded in the enactment of the Indian Legislature. Act (XV of) 1859—"Acts for Granting Exclusive Previleges to Inventors" was the first authentic patent legislation in India though its genesis can be traced to ACt (14) of 1856. It afforded protection to inventions and extended the right of priority from 6 to 12 months. Designs protection was added vide the Patterns & Designs Protection Act. It was followed by the Protection of Invention Act 1883. These Acts were consolidated by the two consolidating and amending legislations in 1888 and 1911.[50] The 1988 Act introduced the concept compulsory licencing and aspects of crown use. The 1911 legislation was the predominant legislation till the passing of the Patents Act 1970 though subject to many amendments.

Independent India's concern to ensure that the patent system was in consonance with national interest is manifested in its appointment of the

47. *Ibid.* p. 55.
48. *Ibid.* p. 65.
49. M.P. Bhatnagar, Paris Convention an India in Indian Patent System and Paris Convention : Legal Prespectives (1986). Also see Dr. Mrs. S.K. Verma, The International Patent System and Transfer of Technology to Developing Countries—A Critique at p. 31, 32 legal Prespective (Edt. K. Singh & P.S. Sangal 1986) reflecting on the International Patent Systems Inadequacy to "assist in the development process" "there is no doubt that for the process industrialisation of the country by means of obserption of imported technology and development of indegenous technology a sound patent system is essential.
50. Invention and Design Act 1888. Indian Patent Design Act 1911.

Bakshi Tek Chand Committee in 1948[51] to review the patent law in India. Subsequently a Committee headed by justice N. Raja Gopala Ayyangar was established to advice the government on revision of the patent law.[52] The radical suggestions of the committee after parliamentary twist and turns culminated in the enactment of the Patents Act 1970.

II. Patent Act 1978 : Basic Principles

The overall objective of the legislation can be inferred by reading the opening lines of sec. 48 (Rights of the Patentee) with sec. 83 (General Principles Applicable to Working of Patented Invention) sec. 48 (1) begins with "subject to other provisions contained in this act . . . . . "

Section 83 says "without prejudice to other provisions contained in this act in exercising the power conferred by this Chapter (Chapter XVI working of patents, compulsory licence, licence of right and revocation) regard shall be had to the following consideration . . . .

(a) that patents are granted . . . . . to secure that the inventions are worked in India .." .. and

(b) that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article.

(i) *The Rights of the Patentee*

The rights of the patentee vide sec. 48 broadly speaking are (1) subject... a patent granted before the commencement of this act shall confer on the patentee the exclusive right . . . . to make or use sell or distribute the invention in India.

(2) Subject .... a patent granted after the commencement of this act shall confer on the patentee.

(a) Where the patent is a article or substance the exclusive right. . . . . to make use sell or distribute in India.

(b) Where the patent is a method or process of manufacturing an article or substance .... the exclusive right .... in India. A bifurcation thus is made between process and product patent. Sec. 5 limits certain categories to process patents only ....

In the case of inventions—

(a) claiming substance intended for use, or capable of being used as food or medicina or drug, or

(b) relating to substance prepared or produced by chemical process including alloys .... compound

no patent shall be granted in respect of claims for the substances

51. Reports of the Patents Enquiry Committee (1948-50).
52. See Report on the Revision of the Patents Law (1959).

themselves but claims for the method or process of manufacture shall be patentable. The life of process and product patent under section 53 is normally 14 yrs. Though in the case of food medicine or drugs the process patent shall have a term only of 5 yrs. from date of sealing of the patent, or 7 yrs from the date of the patent which ever shorter.

(2) Rights of Power and Government

The patent act 1970 invest the government with extensive rights and powers. A distinction has been effected between the condition precedent rights that accrue to the government on the grant of a patent and the rights which accrue after a patent has been filed.[53] Sec. 47 details the condition precedent right while sec. 97-103 ennumerate the use and acquisition powers. Vide Section 97(3) they are mutually exclusive.

Section 47 permits the government or anyone acting on its behalf, the right to import any new machine, apparatus or any other patented article or article made by a process which is patented for the purpose of its own use. Sec. 47 (3), also vests the conditions precedent rights in any person for the purpose merely of experiment or research including the imparting of instruction to pupil. The government may also import any medicine or a drugs patented in India for the purpose of distribution in any dispensary, hospital or institution maintained by or on behalf of the government or which the government may specify in this behalf by notification.

The use and acquisition powers of the government subsequent to the granting of patent is also exhaustive.

Vide sec. 99(2) the government or any one acting on its behalf may import any machine, apparatus or other article including medicine or drug which have been patented before the passing of the act. This is extended vide 99 (2) (1) (b) to any dispensary, hospital or institution by or on behalf of the government ....

Under sec. 100 (1) the government rights over patents granted under the act extends both to the patents that have been granted and those that have been applied for under sec. 100(2) the central government may freely use an invention if it has already tested tried or documented any invention independent of the patentee or before the claim was filed for priority. In all other cases the central government or any person authorised by it can use the invention any time after complete specification has been submitted. (In the of medicine drug or food it should not exceed 4% of the exfactory bulk price). Vide sec. 100(3). The use of the invention may not be notified to the patentee if the public interest so warrants (100(5)). The right to sell is included in the use sec. (100(6)).

53. See power without responsibility on aspects of the Indian patent legislation journal of Indian Law of Institute Vol. 33, 1991 (here inafter aspects).

3. Compulsory Licensing, Licences of Right and Revocation

Vide sec. 84(1) of the act for a period of 3 years from the date of sealing of the patent a patentee's exclusive rights is protected. There after any person may apply to the controller of patent for a compulsory licence on the grounds that (the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price) Sec. 84(1) & 84(5). Vide sec. 85 in considering such an application the immediate factors to be kept in mind are

(1) The nature of the invention. The time which has elapsed since the sealing of the patent or the measures already taken by the patentee or any licencee to make full use of the invention.
(2) The ability of the applicant to work the invention to the public advantage.
(3) The capacity of the applicant to provide the capital and working the invention...

"Reasonable requirements of the public". The factors which determine that this requirement are met are classified in the Act under section 90. The first of the circumstances is when the result of default of the patentee to work the patent is that—

(1) An existing trade or industry or its development, or any new trade or industry of any person ... in India is prejudiced;
(2) The demand for the patented article is not being met to adequate extent or on reasonable term from the manufacturer in India.
(3) A market for the export of the patented article manufactured in India is not being supplied or developed.
(4) The establishment or development or commercial activity in India is prejudiced (90a).

The second circumstance arise when the patent holder imposes such conditions on the grant of the patent that the manufacture sale or use of materials not protected by the patent is restrained or the development of any trade or industry in India is prejudiced (90b).

Thirdly, when the patentee is not being worked to the fullest extent particable in India (70c).

Fourthly, when the demand for the patented article in India is met to a substantial extent by importation from abroad (90d).

Fifthly, if the working of the patent on a commercial scale is constrained because the article is being implemented by the patentee, those directly or indirectly purchasing from him and those against whom he wishes not to impose his patent monopoly 70(e). The list in the act is neither exhaustive nor exclusive.

Licences of Rights

Under section 86(1) on the basis that reasonable requirement of the public with respect to the patented invention has not been satisfied or the patented invention is not available to the public at a reasonable price, the central government may apply for a licence of right. The decision is left to the controller 86(2) "but in areas like food, medicine drug or chemical processes...." 3 years after the granting of process patent there is an automatic licence of right 87(1)b. In both licences of right and automatic licences of right the patent holder can be requested by anyone for a licence as a matter of right and if they do not agree on the terms and condition between them, the controller shall decide.

Revocation

If even after granting the compulsory licence or licence of right, the central government still feels that reasonable requirement of public are not satisfied it can apply to the controller under section 89 to revoke the patent. Further, the central government may revoke patents if the patent or the mode of its exercise is against the state or generally prejudicial to the public (Sec. 66).

In the nature of an observation it is important to note that the powers of the government over the patentee is heavily loaded against the latter. It is too restritive to subserve the purpose of encouraging inflow of technology in the frontier area of science. More importantly inspite of such restriction the foreign domination in patent in drugs chemicals food and other sectors continues. In 1972-73 68.6% of the application was by foreigners as against 31.41 by Indians. Out of the total number of patent sealed that year 79.2% were foreign owned. Of the total number of patent enforced 83.3% were foreign. In 1986-87, more than a decade later the situation has not changed ...28.1% of the total patent application were by Indians as against 71.7% by foreigners. Of the total patent enforced 83.3% are foreign owned.[54] This indicates that the patent system has failed in encouraging the growth and development at fast pace indegnous technology while at the same time restricting the transfer of foreign technology. This restriction in the transfer of technology accounts for India's lack of competitiveness in the international market, as it is not price competitive its technology being old. India's contribution to world trade has declined from 3% in 1955 to 0.5% (1989). There is distinct and urgent need to reform the Patent Act 1770 for the patent system to complement India's move towards comprehensive economic liberalisation. It is in this back drop that an objective evaluation of Dunkel Drafts Proposals on Patents is essential.

54. See Aspects *Supra* Citation 53 at p. 70.

IV. THE DUNKEL DRAFTS PROPOSALS

The area of controversy broadly conceived relates to rights of the patentee, the rights invested in the contracting parties relating to compulsory licencing, licences of rights, power to revoke, the extention of product patent to cover presently excluded products, the duration of patent etc. We will examine by detailing the provisions in the Dunkel Draft the value of these apprehensions and try to draw attention to the broad areas of similarity in so far as the limitation on the rights of the patentee is concerned, between the Patent Act 1970 and Dunkel Draft Proposals.

Vide article 27(1) of section 5 part ii (Annex III) the Dunkel Draft patent shall be available for all inventions whether product or process. Subject to the provisions of article 27(2), 27(3).

Article 27(2) excludes from patentability such inventions the commercial working of which is necessary to prevent for public order or morality including to protect human animal or plant life or health or to avoid serious prejudice to the environment under 27(3) a diagnostic, thereaptic and surgical method for treatment of human a animal are excluded from patent, 27(3)b further excludes plants and animals other than microorganism and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, affording protection to plant variety either by patent or by a effective suigeneris system has been made mandatory.

Under sec. 27(1) patents shall be available and patent rights enjoyable irrespective of whether the product is imported or locally produced. To infer from this that the draft has equated importation of patented product with the working of the patent locally would be erroneous. Restriction on the patentees rights as elucidated under article 30, 31 allow for appropriate action under the national law to prevent such a construction.

The rights of the patentee conferred by article 28 is in consonance with those granted under section 48 of the Patent Act 1970. Article 28(1), states that the exclusive rights of the patentee in case of product patent includes the prevention of third parties not having his consent from the acts of making using offering for selling or importing for these purposes the product. The same rights are made available under 28(1)b to subject matters of process patent 28(2) affords to the patentee the rights to assign or transfer by succession the patent and to conclude licensing contracts.

These rights are subjected to many exceptions which broadly constructed lakes cognizance of the Indian concern in relation to compulsory licencing and licences of right.

Article 30 of the Dunkel Draft (part ii section v) provides for exception to the exclusive rights conferred by a patent provided they do not unreasonably conflict with the normal exploitation of a patent and does not unreasonably prejudice the legitimate interest of the patent owner.

Under article 31 of the Dunkel Draft, a party may allow for other use

(use different from that under 30) of the subject matter of a patent including use by the government or third party authorized by the government though this exception is qualified.

In the case of an national emergency or other circumstances of extreme urgency or in the case of public non-commercial use article 31(b) allows for the waiver of even these qualifications.

Further subclause (K) of article 31 provides that where the use is permitted to remedy a practice deemed as anti-competitive qualification under (*b*) and (*f*) of article 31 will not apply. Article 31(1) permits the exploitation of second patent which cannot be exploited without impinging on another patent.

Article 32 provides that a patent may be revoked or forefeited subject to judicial review. This again does not militate the stipulation under Patent Act 1970 relating to revocation.

Under article 34 the burden of proof for the purpose of civil proceeding in respect of infringement of the rights of patentee shall be on the defendant. However article 34(1) when read with 34(2) implies that the burden shifts to the alleged infringer if the plaintiff discharges the initial burden.

Article 33 mandates that the term of protection without discrimination shall be for a period of 20 years from the date of filing. The draft also provides for product patents for food drug medicine and chemicals. However under article 65(1) read with (2), (3) & (4) a transitional period of 10 years is afforded before the enactments to force in the context of some developing countries including India.

It is evident on examination that the Dunkel Draft proposals on patent far from undermining India's economic sovereignty may provide the foundation to amend those areas of the Patent Act of 1970 which restricts the transfer of foreign technology and their localisation.

V. INDIAN OPTION

India's view's on incorporating the Dunkel Draft suggestion and to that extent reforming the existing patent law must contemplate:

(*a*) The economic crisis India is presently saddled with and that the recovery plant conceived by the government is fused with the long term objective of *integreting the Indian economy into the global economy*.[55]

(*b*) *India's susceptibility to bilateral pressures* under sec. 301 of the US Trade Act as amended in 1988 on the issue of higher patent protection along with other areas of intellectual property.[56]

(*a*) The Indian economy is passing through a traumatic phase with continued pressure on balance of payment large budget deficit and double digit inflation. The longterm objective of the strategy engineered *is to increase the efficiency and international competitiveness industrial production* to rapidly modernise India's financial sector increase the productivity of capital and enhance the operations of the public sector. The success of the economic reforms is greatly dependent on the economy's ability to generate a tremendous thrust in the export sector. To achieve this thrust inflow of technology infrontier areas foreign investment and greater competitiveness through further opening of the economy to outside competition is imperative. Indian's response to the Dunkel Draft suggestions on reform of patent law will have direct impact on this inflow.

(*b*) On February 26th 1992 expires the US ultimatum to India to either provide higher protection to intellectual property face punitive tariffs on Indian export under special 301. With China having reached agreement with US India is now the only country listed under special 301. India's desire to sort out the issue at the multilateral level through international negotiations at the current Uruguay round of trade talks has already received a severe set back due to China's agreement to provide patent protection to pharamaceutical and chemicals for 20 years as of 1st January 1993 and to protect products developed since 1986 for seven and half years. While limiting its ability to force companies to licence the production of patented products. Comparative analysis of INDO US trade position will reveal that India is no position to withstand the trade pressure that the US could exert at the bilateral more so when it economic reforms are so precariously balanced.

Tactless intrasigence on the patent law issue could not only attenuate India's bargaining position bilatrally but also lead to its complete isolation among the 108 participating nation on the issue of higher standards of intellectual property protection.

VI. CONCLUSION

Viewed in the context of these compulsions a pragmatic approach for India would be to negotiate for trade concessions adequate to ameliorate short term economic distortions, as well as to cushion the long term adverse implications in certain sectors in return for greater intellectual property protection.

Having accepted the linkage between trade related aspects of intellectual

55. P. Chidambaram in Times of India December 24 He also observed that. "The provisions of compulsory licencing also appears to allow India to accomodate its concern through the National Law".

56. See *Supra* Note 6.

property and GATT India should lay emphasis on the principle of *reciprocity a fundamental principle occupying a central position in GATT.*[57] Reciprocity as understood in GATT practice connotes that a country need not make a trade concession unless it receives something in return. Persuing the line of reasoning that because the GATT had not addressed the industrial property issue sufficiently India had been free to adopt a national policy which did not favour very high protection to industrial property, if this freedom is impaired there is a economic cost to be absorbed and because India has a right to rely on a bargain it has entered into,[58] it should be compensated.

BAL GOPAL DAS*

57. See Jackson *Supra* Note 2. at 240.
58. The Right of Reliance on the Terms of the General Agreement is Based on the Doctrine of Pacta Sunt Survanda.

* LLB IIyr. Campus Law Centre, Faculty of Law, University of Delhi.

INTER-COUNTRY ADOPTION—A TRYST WITH DESTINY

INTRODUCTION

THE SUPREME Court of India in *Lakshmikant Pandey V. Union of India*[1] "legislated" the law relating to Inter Country adoption.

There was no uniform law, prior to this exhaustive indulgence, dealing with Inter Country adoption. The Bombay High Court under its rule making power issued a notification dated 10th May, 1972 incorporating rule 361-B in chapter XX of the rules of the High Court of Bombay (original side), 1957. The rules provided for the Guardians and Wards Act, 1890 (herein after referred to as the GW Act, 1890) to be used to facilitate inter country adoption. The High Court of Delhi also issued similar orders. The Gujarat High Court did not frame any specific rules but made certain observations in *Rashilal Mehta's case.*[2]

Although there is no legislative enactment providing for inter country adoption, the ancient Hindu Law, however, recognised 'adoption' among Hindu's. Adoption in a Hindu Society has the sanction of religion. According to traditional Hindu principles adoption takes place in order to provide a male Hindu with an heir who will perform the "shradda ceremony" after his death. 'Son' is indispensible for spiritual as well as material well being. According to Vasistha "There is no heavenly region for a sonless man".[4] Hence, in the ancient Hindu Society only a son could be adopted by a male.

The reason for adoption in the Hindu Society was governed by (*i*) the natural desire to have a son as an object of affection, (*ii*) as protector in old age (*iii*) and celebration of name and also for the perpetuation of lineage. Adoption was always effected by a ceremony, the physical handing over of the child was sine qua non of such ceremony. Adoption resulted in the complete severance of relationship between the child and his original parents. Thus, according to Hindu Law adoption is both spiritual and legal.

The Shastric law was modified and given a legislative content in the Hindu Maintenance and Adoption Act, 1956. This legislation is only applicable to Hindus and the changes brought about by the legislature is a reflection of the modern Hindu Psyche.

1. AIR 1984 SC 469. Also see AIR 1986 SC 272.
2. AIR 1972 Guj 193.
3. Derret : Critique of Modern Hindu Law (1970).
4. Datta Chandrika 1.22 as in "HINDU LAW OF ADOPTION MAINTENANCE AND GUARDIANSHIP" By S.Y. Gupta (1970).

Chapter II of the Hindu Maintenance and Adoption Act, 1956 deals with adoption. The principle provisions relate to the requisites and condition of valid adoption, persons capable of giving in adoption and persons capable of taking in adoption. The act also lays down the effects of adoption.

However, in India, Christians were governed by the common law of England. In common law the rights, liabilities and duties of parent's were inalienable and therefore adoption did not have the sanction of common law. There cannot be any contract for adoption, the same is held void as against public policy. The Mohammedan law does not recognise adoption while Parsi law does not provide for the same.

A PUBLIC INTEREST PETITION

In a res integra decision[5] the Supreme Court sought to give a uniform law governing inter-country adoption. The decision arises from a writ petition initiated on the basis of a letter by an advocate Mr. Lakshmikant Pandey complaining of the mal-practices indulged by social organisations and voluntary agencies engaged in the work of offering Indian Children for adoption to foreign parents'. The complaint was based on a report in "The Mail" highlighting the fate of such children. The Petitioner sought relief by restraining Indian based private agencies from carrying out further activities of routing children and also directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out these obligations.

The Court realising the socio-legal vacuum and the importance to formulate safeguards laid down the principles and norms for inter country adoption. The court considered the draft of the Children bill of 1972 and 1980[6] which had failed to become an Act of Parliament. The Hon'ble bench was influenced by various drafts and declarations such as—the UN declaration on the Rights of the Child, 1959, draft prepared in 1978 by an expert group under the ageis of the UN,[7] draft guidelines of procedures concerning inter country adoption formulated at the Internation Council of Social Welfare Regional Conference of Asia and Western Pacific held in Bombay in 1981 and approved by the workshop on Inter country Adoption held in Brightan, UK in 1984 and also the National Policy on Children, 1974. In this enterprise the court was assisted by various social and child

5. Supra note 1.
6. In 1972 the bill was introduced by H.R. Gokhle, Law Minister, it went to a joint select committee which submitted its report with recommendations in 1976 but the same was withdrawn in 1978. The bill was again introduced in 1980, the Parsi members and those of some other minority community objected to it's becoming a law.
7. The Economic and Social Council by its Resolution 1925 LVIII requested the Secretary General of the United Nations to converse a group of Experts with relevant experience of family and child welfare. In pursuant of this mandate an Except Group was convened in December 1978.

welfare organisations, acting as interveners, prominently, the Indian Council of Social Welfare.

THE MODUS OPERANDI

At the outset, the hon'ble Judge, makes a distinction between children available for adoption living with their biological parents and those living in welfare centres. It is interesting to note that even though the court states that it is not concerned with adoption of children living with their biological parents, it, however, lays down the law for adopting children whose parents are traceable and available for consultation.[8]

In paragraph 9 the court acknowledges the absence of statutory enactment providing for adoption of a child by foreign parents.[9] Bhagwati, J, in the same paragraph says".....resort is had to the provisons of the guardians and wards Act, 1890 for the purpose of facilitating adoption". The court then discusses S. 4(5), 7(1), 8(9) & (b), 9, 11(1), 17 and 26 of the Guardians and Wards Act, 1890. In the later part of the same paragraph, the Hon'ble Judge states "these relevant provisions of the GW Act, 1890 which have bearing on the procedure of carrying through inter countary adoption" a purposive his-application of using the the word *bearing* when the provisions of the GW Act, 1890 are *binding*. The coercive status of an authoritative text, arising from a valid enactment is within legal tradition and more specifically within legal doctrines[10]—a theory which stands mutilated by the above observation.

The GW Act, 1890 is used to achieve a twin purpose (*a*) to remove the child from India (*b*) and to prevent any claim for custody of the child. The judgement envisages that the adoption will be according to the law of the country to which the foreign adoptive parents belong.

To this extent the application of the GW Act, 1890 can be said to be colourable. The fiduciary status of the guardian as provided in S. 20 of the GW Act, 1890 is destroyed by successive adoption under a foreign law. Further, as highlighted by Prof. Sampath "The application of Foreign Law by Municipal Court for resolving disputes involving foreign elements is based on a certain principle of private international law. However, we can hardly invoke the principle of private international law in the present context. It is a straight incorporation of foreign law of any country to which the adoptive parents belong, become part of the law of this country.[11]

WELFARE—THE OVERRIDING PREMISE

After validating the use of the GW Act, 1890 to effect inter country adoption the court deals with the subject matter of adoption. The court is

8. Prof Sampath, "An instance of excessive legislation" AIR 1985 Rajasthan and Sikkim.
9. *Supra* note 5.
10. Peter Goodrich, Reading the Law : a critical introduction to legal method and techniques (1986).
11. *Supra* Note 8.

not confronted with any legal or moral dilema in dealing with destitutes or abondaned children residing in child welfare centres. The over riding premise being the welfare of the child and his right to family. The contents of "Welfare' has not been discussed, reference to S. 17(2) of the GW Act, 1890 is superfluous. Section 17 of the GW Act, 1890 deals with matters to be considered by the court in appointing guardians. S.17(2) states "In considering what will be for the welfare of the child, the court shall have regards to the age, sex and religion of the minor. The character and capacity of the proposed guardian and his nearness to the kin of the minor, the wishes, if any, of a deceased parents, and any existing or previous relation of the proposed uardian with the minor or his property". The concept of welfare emerging from the gudgement is not a product of consistent deliberation. The court fails to take cognizance of the concept of welfare of a child as contained in various social legislation, the absence of cross reference makes the conclusion incohate. A positive mark in this context is in para 16 of the judgement where the court stresses that every effort must be made by a recognised social or child welfare agency to find placement of the child in a Indian family.

The source of Right to Family can be traced to the documents of the United Nations and therefore can only be given the status of an obligation. Further, an emerging trend in modern thoughts on adoption, submitted in the latter part of this paper, is in contrary to the absolutist view of a child right to family.

LEGAL DESTITUTION

The court, next, while laying down the law for adoption of children living with their biological parents forward a two stage procedure. First the biological parents are required to relinquish the child in favour of the child welfare centre by a document of surrender. The judgement states that the biological parent are required to sign a document of surrender attested by two responsible persons. Thus providing for a legally created destitute.

Second, that after a period of three months from the date of relinquishment the child can be made available for adoption. The child is to be given in adoption without further reference to the biological parents' the court herein abrogates the provision of S. 11(1) of the GW Act, 1890 which requires notice to be given to parents of the minor in proceedings under the act. The Supreme court only provides for notice under Section 11(4) to be given to the Indian council of child welfare to discharge the functions of a scrutinizing agency. In the wisdom of these observations the following question remains; What is the legal effect of a document of surrender? What is the status of such a document in view of public policy which invalidates a contract for adoption between non-Hindus

Further, the creation of destitutes by law reflects the failure or absence

of a social security system and this is also in contrary to the rhetorics in our National Policy for children, 1974. It cannot be rebutted that poverty and wretchedness are prime causes of voluntary relinquishment. The social disapproval of a child of an unwed mother also leads to voluntary relinquishment. These are causes which are to be tackled by socio-economic methods. A law providing for adoption within three months of relinquishment under such conditions is both obnoxious and repulsive.

The Supreme court in justifying the abrogration of the notice provisions contained in section 11 of GW Act, 1890 states ".....we are definately of the view that no notice under this section should be issued to the biological parents of the child since it would create considerable embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parents for guardianship of the child".[12] The court also fears that the biological parents having the whereabout of the child may try and contact the child causing emotional and psychological disturbance in the child. In the same paragraph the court said "the possibility cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents." These observations can be viewed as arising from the backdrop of poverty and underdevelopment. The court, provides the rich adoptive parent's a law which enables them to overcome a hypothetical crisis, emasculating the sentiments of a poor Indian—who first had to relinquish a child due to socio-economic reasons and now stands humiliated by not being consulted during the adoption proceedings.

The Supreme Court directs that no notice of application for guardianship be published in any newspaper and further, the proceedings should be held in camera and treated as confidential. This is in contrary to the practice in the ancient Hindu and Roman Societies where adoption was legally recognised and always effected by a ceremony in public. Lord Delvin speaking on a wardship case said "it must be remembered that the object of disclosure...is not merely to remove a sense of injury that might otherwise result from secrecy—because secrecy may itself prevent the points from being fully canvased and so possibly prevent that course being taken, if the full facts were known could truely be in the interest of the ward".

THE BUREAUCRATIC PARAMETERS

The essentials in effecting an inter country adoption :[13]

(1) Guardianship Petition.
(2) Certificate of Acceptability to Adopt.
(3) Certificate of Indian Social Agency.

12. *Ibid*, Para 22.
13. See D Paul Choudhury, "Inter Country Adoption", Socio-legal Aspects, (1988).

(4) Certificate of Foreign Agency.
(5) Declaration and attestation of Adoptive parents.
(6) Declaration of Willingness.
(7) Child Study Report.
(8) Home Study Report of the Adoptive parents.
(9) General Power of Attorney.
(10) Scrutiny Report.
(11) Reply to Petition.
(12) Forms of Summons.

In the above documents & reports the following are also to be attached:

(*a*) Photograph of the Applicants.
(*b*) *Marriage Certificates.*
(*c*) *Declaration concerning health*—together with certificate regarding medical fitness duly certified by Medical doctor plus a sterility report if available.
(*d*) *Declaration of Financial status supported by* employers certificate, income tax assessment order, bank reference, and a statement of any property owned by the applicant.
(*f*) *Reference letter*

On receiving these statements the recognised Indian agency decides whether to accept the application or not, incase of acceptance and if a suitable child is available for adoption the Indian agency prepares a child study report containing a brief social background of the child and also details of his or her physical, mental and emotional development, in accordance with the child's age. The agency encloses some recent photographs of the child. This is sent to the foreign sponsoring agency which in turn discusses the feasibility (of adopting the child) with the parents or the prospective adopter. If they agree to accept the child, the child study form and the attached medical report is counter signed by both the applicants as a token of acceptance. It is then returned to the Indian agency with the following undertakings from the adoptive parents and sponsoring foreign agency.

(*a*) Declaration by the applicants stating their willingness to accept the child.
(*b*) That the child will be legally adopted within 2 years of arrival in the country of the adoptive parents.
(*c*) In case of a disruption in the family of the adoptive parents before adoption, the foreign agency should undertake to make an alternative placement after seeking approval of the Indian agency.
(*d*) A progress report must be submitted as stipulated in the Judgemen *t.*

The completed documents are then submitted in the court by the processing agency. Next, the court deciding on the guardianship petition will order the Indian council of child welfare or the Indian council of Social welfare to scrutinize the case and submit its report. The Supreme Court in 1986[14] persisted with the requirement of having the certificates, declaration and documents submitted along with the application to be notarised by a public notary and the signature of the notary should be attested either by an officer of the ministry of External affairs or Justice or Social Welfare of the foreign country or by an officer of the Indian mission. The Petitioners contention of unnecessary hardship and delay was rejected without due deference. In para 12 of the 1986 Judgement, the court held that there was a difficulty is executing a bond by a foreigner unless the bond is executed in favour of the Indian Mission in that country. The court found it safer to take a bond from the representative of the foreign sponsoring agency in India. In the alternative the court suggested that a bond could be taken from the Indian Social welfare agency which in turn will take a bond from the sponsoring agency. The Supreme Court drastically reduce the role of the representative of a foreign social or child welfare agency operating in India. The prolonged reporting provision is a deterrent and was contested in the review petition. The Supreme Court rejected the contention and upheld the reporting requirements. It is through these bureaucratic parameters that the court seeks to establish bonafides of the transaction.

The judgement confers certain duties on social welfare agencies—without clearly establishing a correlative claim. A duty so conferred in infructuous. Again, the absence of sanction in case of disobedience makes the scheme incoherent. The "hope and trust" approach is a fallacy—the will of the court cannot automatically manifest into circuitous commands. The efficacy of this model has to be tested in the matrix of modern thought on adoption and the problems faced by social workers in the field of inter country adoption.

MODERN PERSPECTIVES—THE ROLE OF WELFARE AGENCIES

In the past century, the need for adoption has under gone many changes. Maine in 1861 said "Adoption is probably the most universal method utilised by all societies in all agies to insure the continuity in family". This is a statement of depreciating significance. Adoption is increasingly becoming a child oriented activity, distancing itself from the Hindu and Buddhist religions doctrines of spiritual and material aggrandizement. The *welfare* concept of adoption is a post World War II phenomenon where thousands of Austrian and German children were adopted by families in Europe and America.

In the United States, the English common law with its "blood will tell"

14. *Supra* Note 12, Para 11.

attitude did not provide for adoption. The Roman law was incorporated in the corpus Juris of United States to facilitate adoption but, with a fundamental difference. The Roman law is from the perspective of the father or the male adopter while the American law consistently protected the interest of the child. The 'Best-Interest' formula is the most important contribution of United States to the field of adoption. The following table illustrates cross-racial adoption in USA.

Year	*No. of Adoption*	*Country*
1948-1962	1845	Germans
	987	Japanese
1953-1962	4162	Koreans
1953-1981	38129	Koreans
1963-1976	3267	Vietnamese

The other factors leading to increase in inter-country adoption is due to the growing rate of infertility in Western countries and the social acceptance of single parents which limits the scope of intra country adoption.

The role of the social welfare agencies is dictated by this emerging trend in adoption. "The 'How' of Adoption is as valid as 'Why'. Those who work in adoption realise that the inputs of the very positive mandate given by the Supreme Court is a lot to adoption officials more than in public mind".[15] This observation is relevant considering that the Supreme Court has overlooked the positive role of social welfare organisations. Joseph Reid[16] states" adoption agencies are creatures of the public and society has created it to fulfil its responsibilities to the children. The only way that adoption service can be strengthened and extended to every child who needs them is for the public to understand clearly and accept the rationale that lies behind the practice of social service agencies". He further enumerates the role of child welfare agencies, they being established to find homes for children needing adoption. "They are to be sure, when the adoptive applicant first comes to the agency, he comes for a service it can render to him and to differentiate it from giving or witholding the child".[17]

The power to withold adoption is corollory to the power to give in adoption. 'Power' in is active connotation is excercisable in a given situation. The Hon'ble bench fails to create a situation in which the power to withold can be exercised.

An agency, generally, is required to determine whether 'adoption' is a solution for the needs and desires that brought the prospecting parent's to the

15. Ms Nonita Chandy, Ashraya, Banglaore in the Adoption Seminar (1989) organised by the Indian Council of Child Welfare.
16. Joseph H. Reid Social Work, USA Vol. 2 No. 1 Jan 1957. See "Social Work on Adoption" Robert Tod (ed).
17. *Ibid.*

agency. They should be capable of distinguishing desires which have their source in excessive media campaign highlighting the plight of children in under developed countries or children in war-torn countries having lost their families. Any motivation to adopt inorder to strengthen a shaky marriage should be discouraged. There are instances when parents seek to raise an international family—a cultural attitude often reflected in newspapers and Journals. Yes, the motto has changed from "A home for every child" to "Right parents for every child". The third world status of the child cannot be the reason for compromising his security. The social security system has to be built up to take care of every destitute—inter country cannot become the rule. It is unfortunate that the premier child and social welfare agencies in India have, in the guise of scrutinizing agency been assigned the role of a 'Post Office'.

The Supreme Courts recognition of 'A Child's Right to family' has to be preceded by a "Child's Right to *his* family'. The creation of legal destitutes by a process of surrender of the child will never assuage misery and humiliation of the deprived in the institution of adoption.

CONCLUSION

The inordinate delays in processing adoption cases defeats the objectives which the Hon'ble court sought to achieve. D. Paul Choudhary[18] in his book on inter country adoption states the view of various countries involved in adoption of Indian children, "The legal requirements in India tend to be more conservative than any other country in the World".[19] In France the view is that "A number of security problems tend to arise in handling cases and delay in adoption procedure is very lengthy with respect to India".[20] Similar views are also recorded in statements made by representatives from Norway, Sweden and Switzerland. It is submitted that the legislature rationalizes this procedure and enact a more functional law relating to inter country adoption. The Judgement, arising from a public interest petition has given the normative guide lines. It is now for the legislature to give this land a law built on the foundation provided by the Supreme Court and based on the Directive Principles of State Policy as in Chapter IV of the Indian Constitution.

It is necessary for us to recognise that the social value of the child increases with the fall in his economic value. It is on this essential fabric that the "safeguards" should be woven. The rise in Social-value is the limitation for a rule encouraging inter country adoption. The social cost for the upbringing of a child should never become a subject of compromise. The challenges preceeding the need to find adoptive foreign homes should be addressed with clarity and conviction.

SANJAY SEN*

18. *Supra* Note 13.
19. *Ibid*, Ch. 13, View of Representatives from Netherland.
20. *Ibid.*

* LL.B. Final Year, Campus Law Centre, University of Delhi.

STATE LIABILITY IN TORT—A PROPER PERSPECTIVE

"In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature."

(vide *Kasturi Lal* v. *State of U.P.* reported in AIR 1965 SC 1039)

I beg to differ. The remedy lies, not in the hands of the legislature, but in overruling Kasturi Lal's Case.

Kasturi Lal's case is the leading decision of the Supreme Court in which the principles of State liability in tort are enunciated. In this case. A police officer misappropriated the gold, seized from the plaintiff, which had been deposited in the Police Malkhana and absconded. It was found that the police officers failed to observe the provisions of the U.P. Police Regulations in taking care of the gold seized. The Supreme Court, however, appying the principle of 'sovereign immunity', absolved the State of its vicarious liability for the tortious acts of its employees committed in the course of their employment.

The State, in India, can be sued under Article 300 of the Constitution. Article 300 (1) provides (1), interalia, that the State may sue or be sued in relation to its affairs in cases like those in which a corresponding Province might have sued or been sued if the Constitution had not been enacted. Thus Article 300 (1) relates back through successive Government of India Acts to the legal position immediately prior to the Act of 1858. In each case, therefore, the question arises whether a suit would lie against the East India Company had the case arisen prior to 1858. If it did, the State can be sued, while if did not, the State is not liable for the tort committed.

East India Company had a dual character of performing commercial functions and of exercising sovereign power as a representative of the British Crown. It was in the latter character that the East India Company claimed sovereign immunity based on the English maxim 'king can do wrong' (hereinafter referred to as the maxim). This dual character of East India Company has been explained in Peninsular and Steam Navigation Company Case (P & O case).[2] In that case, the plaintiff filed an action under Section 55 of Act IX of 1850 to recover from the Company Rs. 350/-,

1. AIR 1965 SC 1039 p. 1044
2. (1861) 5 Bombay H.C.R. App. A.

the damages sustained by them by reason of injuries caused to a horse of the plaintiff through the negligence of certain servants of the Company. Sir Peacock, holding the Company liable, said:

"There is great and clear distinction between acts done in exercise of what are usullay termed sovereign powers, and acts done in condSct of undertaking which might be carried on by private individuals without having such powers delegated to them...."[3]

powers usually called sovereign powers by which we mean powers which cannot be lawfully exercised except by a sovereign or a private individual delegated by a sovereign to exercise them, no action will lie".[4]

"There is great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them...."[5]

"When an act is done or contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or a private individual delegated by a sovereign to exercise them, no action will lie."[6]

The Supreme Court in Kasturi Lal's case relied on these observations of Sir Peacock to hold that the maxim was applicable to East India Company and hence to the State, in India, thereby granting it immunity from an action in tort committed in the exercise of its 'sovereign power'. It held[5] that since the negligence of the police officers were in the exercise of statutory powers which can be characterised as 'sovereign powers', the State was not liable for the same.

On the basis of non sovereign activities of the State as distinct from its sovereign activities, the liability of State in tort has been accepted in several cases, for instance driving a Government Jeep rashly carrying teams to play matches in an Air Force vehicle,[7] the act of taking children to Primary Health Centre in Government vehicle,[8] driving back military officers from place of exercise to College of Combat, Mhow,[9] taking a truck for imparting training to new recruits[10] or running of hospitals.[11]

3. *Ibid* on p. 15.
4. *Ibid* on p. 15-16.
5. AIR 1965 SC 1039 p. 1048.
6. A.I.R. 1962 SC 933.
7. A.I.R. 1967 Delhi 98.
8. A.I.R. 1978 M.P. 164.
9. A.I.R. 1978 M.P. 209.
10. A.I.R. 1978 ALL. 417.
11. A.I.R. 1982 Bombay 27.

On the other hand, maintainence of military road,[12] maintainence of highways[13] or checking of Army Personnel on duty being a function intimately connected with the Army discipline[14] have been held to be sovereign activities.

CRITICISM OF KASTURI LAL'S CASE

Though the said decision relies on several precedents to support the distinction between trading and sovereign function, it is surprising that there is no reference to the judgment of one of the judges comprising the Constitution Bench of the Supreme Court in Kushaldas Advani's case.[15] Dealing with the scope and ambit of Section 176 Government of India Act, 1935, Mukherjee, J. as he then was, had traced the historical background of section and observed that.[16]

> "Much importance cannot be attached to the observation of Sir Peacock in P & O case. In that case the only point for consideration was whether in the case of a tort committed in conduct of business that Secretary of State in India could be sued, the question was answered in the affirmative. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the Court to decide".

He upheld the Bombay High Court decision delivered by N.H. Bhagwati J., as he then was, who had observed.[17]

> "If the observation of Peacock C.J. in P & O case at page 15 be read in conjunction with the various illustrations which he has given of the 'Acts of State' following thereupon, they only go to show that even though the distinction drawn in the manner stated afore, what he really meant was that the acts alone in the exercise ofthe sovereign powers were meant by him to be understood as the 'Acts of State' in the strict sense of the term as laid down by Betty J. in (1904) 6 Bom 131 at page 138".

Mukherjee J. had noted Lord Atkin's passage in *Eshugtayi Elekov* v. *Government of Nigeria*[18] about the expression 'Act of State'. Lord Atkin had pointed out the ambiguity of the expression 'Act of State'. He said.[19]

12. A.I.R. 1951 Madras 203.
13. (1972) I MLJ 71.
14. (1973) 75 PLR I.
15. (1950) SCR 621.
16. *Ibid* on p. 696.
17. (1949) 51 Bombay LR 342.
18. (1931) AC 662.
19. *Ibid* on p. 671.

> "This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to the subjects within the territiorial jurisdiction, it has no special meaning, and can give no immunity from the jurisdiction of the Courts to inquire into the legality of the act".

The Privy Council decision in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*[20] can also be understood in the same sense.

In the Introduction to the 9th Edition (1952) of Dicey's Law of Constitution, pages *cl, cli,* it is observed that

> "Liability of East India Company extends to all wrongful acts which are not covered by the narrow meaning which the Courts apply to the true 'Act of States', whether or not they be acts which could have been done by a private individual or trading corporation".

Rao & Chitaley[21] lean towards the above view. Seervai has stated[22]

> "It is submitted that the judgment is clearly wrong. It failed to distinguish between an act of State and an act done or purporting to be done under the authority of municipal law, thus overlooking the distinction made by a long line of Privy Council decisions. Again, the observation in the judgment that the distinction made in the P & O case betweem the trading and the sovereign functions of the Company had been consistently followed, is clearly wrong and is made per incuriam. Thirdly the judgment is self-contradictory. Gajendragadkar J. rightly observed that in England the immunity of the Crown from liability for a tort was based on the maxim that 'the King can do no wrong'. But the P & O Case had in terms said that in determining the liability of the East India Company that maxim had no force. Consequently, the P & O judgment required Gajendragadkar J to hold that the Union of India could claim no immunity from liability for tort, since the East India Company could claim none.

M.P. Singh[23] too, is of the view that Kasturi Lal's case is not correct law. He refers to Pushpa Thakur v. Union of India[24] where the Supreme

20. (1859) 7 MOO IND APPEAL 476 at p. 531.
21. The Constitution of India—A.I.R. Commentaries by Chitaley & Rao 2nd Ed. p. 531.
22. The Comstitutional Law of India by H.M. Seervai 3rd Ed. Vol. 2 p. 1795.
23. Shukla's Constitution of India by M.P. Singh 8th ed. p. 591.
24. A.I.R. 1986 SC 1199.

Court held the Union of India liable for the negligent deriving by a military jawan of a military truck thereby seriously injuring the appellant and granted compensation of Rs. 1 lac. The Court did not apply the principle of sovereign immunity of State for the act of its servants.

THE FALLACY OF KASTURI LAL'S CASE

Had the claim of the plaintiff in Kasturi Lal's case been made under Article 32 of the Constitution for the violation of his fundamental right to property guaranteed under Article 31 and 19(1) (f) of the Constitution as it then stood, the decision in the said case would have been different. However, it is submitted, that the entire approach of the Supreme Court in Kasturi Lal's case regarding the question of tortious liability of the State was erroneous.

The decision in Kasturi Lal's case rests on the observation of Sir Peacock in P & O case which, according to the Supreme Court, extended the maxim to East India Company giving it immunity for activities considered to be sovereign. It is erroneous to assume that the provisions of Article 300 are to be construed in the light of the maxim. In *the Rao v Advani*[25] Tendolkar J. cited Sir Peacock himself stating on page 9 of P & O Case.

> "In determining the question whether East India Company would, under the circumstances, have been liable to an action, the general principles applicable to sovereign and State, and the reasoning deduced from the maxim of English law that 'King can do no wrong,' would have no force."

This judgement was upheld by the Supreme Court in 1950. It is suprising that the Supreme Court, in Kasturi Lal's case, did not even refer to its earlier decision of 1950.

However, even if it is presumed that Sir Peacock had said what was attributed to him by Gajendragadkar J. in Kasturi Lal's Case the fallacy lies in overlooking the provisions of Article 372 of the constitution. It has been held that this Article applies to the principles of Common Law which have been held by judicial decision to be applicable to India, for instance, the principle of priority of Crown debts.[26]

In U.K. the *Adam* v' *Naylor* decision[27] summarises the law governing tortious liability of the Crown prior to 1947. In the said case, the action for damages by a injured boy and *administratix of a deceased* boy, the injuries and death being caused by the explosion of a mine buried in sandhills by the military authorities, failed. Criticising the practice of nominal defendents, the Court held that since a claim on tort cannot be made directly

24. Shukla's Constitution of India by M.P. Singh 8th ed. p. 591.
25. A.I.R. Bombay 297.
26. A.I.R. 1965 SC 1061.
27. (1947) KB 204.

against the Crown, it cannot be made indirectly either. It must be proved by the plaintiff that defendent himself owed a duty of case to the Plaintiff and failed to discharge that duty.

The said case resulted in the passing of the Crown Proceeding Act, 1947. Section 2(1) of the Act subjects the Crown to all those liabilities for a tort committed by its servants for which any private individual would be liable.

It is true that the Crown Proceeding Act was not extended to India. However, having been passed by the British Parliament on 31st July, 1947, it modified the Common Law as it stood prior to 15 August, 1947, the date of commencement of the Indian Independence Act, 1947. Since Crown Proceeding Act became operative from 1-1-1948, i.e., prior to the commencement of the Constitution, the Common Law as modified by the Crown Proceeding Act, 1947 would have been the law in force vide Article 372 Explanation I and not the maxim as extended in Kasturi Lal's case.

It can be argued that the modified Common Law had not received judicial recognition between 1-1-1948 and 26-1-1950. It is submitted that is a question of fact in each case whether any particular branch of Common Law became a part of the law of India or in any particular part of it.[28] Since several judicial decisions[29] had held that common law principles granting immunity to Crown and its servants from an action in tort applied to East India Company, the subsequent modification of such principles did not require recognition. Apart from this, it was not really necessary to recognise this modification as the only judicial decision[30] between the said period had expressly held and rightly so that the maxim had no application to the East India Company and held the State liable on that ground.

The decision of Kasturi Lal's Case would not stand the test of Article 372 as Article 372 is subject to the provisions of the Constitution. The supposed 'sovereign powers' of the State, being a feudalistic concept, is inconsistent with the basic scheme of the Constitution and could not have continued to be in force after the commencement of the Constitution vide Article 372. In U.K., the Crown is supreme. In India, the Constitution is supreme and the executive is merely a creature of the Constitution. The State, in India, cannot claim sovereignity qua its people from whom it derives it sovereignty.

It needs to be emphasised that Article 372 has no relevance, whatsoever, in determining the liability of State in tort as the English maxim does not apply to the State in India. I have proceeded with the above argument merely to counter the premise of Kasturi Lal's Case that the maxim applied and conferred sovereign powers to the East India Company and hence to State in India.

28. A.I.R. 1967 SC 997.
29. I.L.R. 28 Bom 314; A.I.R. 1915 Mad 993; A.I.R. 1932 Cal 834.
30. A.I.R. 1949 Bom 247. para 41.

DOES THE STATE, IN INDIA, ENJOY SOVEREIGN POWERS ?

The distinction between sovereign and trading activities of the State as laid down in Kasturi Lal's Case has been negatived by necessary implications by the Supreme Court in the landmark case of *Madhav Rao* v. *Union of India* or the Privy Purse Case[31] where the full bench (II Judges) had to consider the action of the President derecognising all Rules under Article 366(2) of the Constitution. It was contended on behalf of the Union of India that the action of the President was in exercise of his sovereign powers and was not amenable to judicial scrutiny. The Supreme Court rejected the contention[32] and held that the function of the President stemmed from the Constitution and not the British Crown. Given below are some relevant paragraphs from the judgments of three of the learned Judges—

Hidayatullah C.J....

> "Since there are no sovereign or political powers under our Constitution every action of the Executive limb of Government must seek justification in some law. The very existence of Article 363, which is said to incorporate some kind of paramountcy or act of State, shows that there is no political power outside the law, otherwise an additional bar would hardly have been necessary."[33]

Shah J....

> "The plea that in recognising or 'derecognising' a person as a Ruler, the President exercises 'political power' which is a 'sovereign power'....inconsistent with the basic concept of our Constitution of division of State functions."[34]
>
> "The functions of the State are classified as legislative, judicial and executive : the executive function is the residue which does not fall within the other two functions. Constitutional mechanism in a democratic policy does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be tested for their validity before the lawfully constituted courts: *Rai Sahib Ram Jawaya Kapur and Others* v. *State of Punjab;* (1) *Jayantilal Amritlal Shodhan* v. *F.N. Rana*; (2) and Halsbury's Laws of England 3rd Edn., Vol. 7, Art. 409, at p. 172."[35]

31. (1971) 3 SCR 9.
32. For a detailed discussion on the question raised see "The Bhopal Case : A Subversion of the doctrine of parens patriae" by the same author in *The Indian Advocate* Volume XXIII 1991 (Part II July—December)
33. *Ibid* on p. 53.
34. *Ibid* on p. 74.
35. *Ibid* on p. 75 (1) (1955) 2 SCR 225, (2) (1964) 5 SCR 294.

> "We are unable to agree with the Attorney General that 'old unidentified concept of paramountcy of the British Crown' was inherited by the Union, by reason of the instruments of accession and merger agreements. The British Crown....exercised paramountcy because it was the dominant power....But that paramountcy lapsed with the Indian Independence Act, 1947....After the withdrawal of the British power and extinction of paramountcy of the British power the Dominion Government of India did not and could not exercise any paramountcy over the States....It is difficult to conceive of the government of a democratic Republic exercising against its citizens 'paramountcy' claimed to be inherited from an Imperial Power. The power and authority which the Union may exercise against its citizens and even aliens spring from and are strictly circumscribed by the Constitution."[36]
>
> "....paramountcy with its brazen-faced autocracy no longer survived the enactment of the Constitution. Under our Constitution an action not authorised by law against the citizens of the Union cannot be supported under the shelter of paramountcy. The functions of the President of India stem from the Constitution—not from a 'concept of the paramountcy of the British Crown' identified or unidentified. What the Constitution does not authorise, the President cannot grant."[37]

Hedge J.—

> "There is nothing like a political power under our constitution in the matter of relationship between the executive and the citizens. Our Constitution recognises only three powers viz. the legislative power, the judicial power and the executive power. It does not recognise any other power. In our country the executive cannot exercise any sovereignty over the citizens. The legal sovereignty in this country vests with the Constitution and the political sovereignty is with the people of this country. The executive possesses no sovereignity. There is no analogy between our President and the British Crown. The President is a creature of the Constitution. He can only act in accordance with the Constitution."[38]
>
> "It is strange that the learned Attorney General representing the Union of India should have claimed that the Government of India inherited any aspect of the paramouncy exercised by the British Crown. Paramouncy as claimed by the British Rulers was one of the manifestation of imperialism. It is surprising that the Government of this country whose people had fought imperialism for

36. *Ibid* on p. 93-94.
37. *Ibid* on p. 94.
38. *Ibid* on p. 169.

years and who are even today supporting both morally as well as materially the countries which are fighting imperialism should claim to have inherited even a fraction of imperialism is the very antithesis of rule of law. It was a power exercised by a superior sovereign over the subordinate sovereigns. I fail to see how the Government of India can consider itself as a superior power in its relationship with the citizens of this country....It is an insult to our Constitution to say that any facet of imperialism has crept into it."[39]

CONCLUSION

It is a matter of deep regret that even after the Privy Purse case, the Courts in India continue to accept the distinction between 'sovereign' and 'trading' activities of the State[40] and have on several occasions absolved the State of its liability for tort committed in course of the former[41] following Kasturi Lal's case. It is ironical that the State, in India, relies on the maxim to claim immunity for any tort arising from the exercise of its 'sovereign power' when the maxim is no longer operative in England. A Bill entitled "The Government (Liability in Tort) Bill' was introduced in the Lok Sabha in 1967. However, since the decision in Privy Purse case is the law of the land by virtue of Article 141 of the Constitution, it is not necessary to have a law on the Statute Book like the one in England to make the State, in India, liable for a tort arising in the course of its activities. It would not be a sound proposition of law for the State to continue to raise the plea of 'sovereign power' or of 'sovereign immunity' to escape its liability in tort.

AMAN HINGORANI*

39. *Ibid* on p. 166.
40. A.I.R. 1981 MP 65, A.I.R. 1975 Mad, 3 A.I.R. 1975 Orissa 41, (1973) 75 PLR 1, (1972) 1 MJL 71.
41. A.I.R. 1982 Bom 27, A.I.R. 1981 J & K 60 A.I.R. 1979 J & K 6, A.I.R. 1978 MP 164 A.I.R. 1978 MP 209, A.I.R. 1978 All 417, A.I.R. 1972 All 486.

* LL.B. Final Year, Campus Law Centre, University of Delhi.

MITAKSHARA JOINT HINDU FAMILY : A DIMENISHING ENTITY

INTRODUCTION

HINDU LAW, as observed by learned commentator, Mulla,[1] has the most ancient pedigree of any known system of jurisprudence. Hindu law consists of two main schools of law—

(*a*) *Dayabhaga School*—prevailing in Bengal.
(*b*) *Mitakshara School*[2]—Governing about 80% of the Hindus in rest of the country.

Two basic features of the Mitakshara School have been:

—Right of the son by birth to a share in the family property.
—Devolution of property by the principle of Survivorship.

Joint family is a unique feature of Hindu Law, parallel of which is not to be found in any legal system of the world, with its main features being joint living and sharing of property.

However, in the 20th Century there have been large scale changes brought about in the traditional concept of a Mitakshara joint Hindu family by certain legislations enacted and judgements passed. An attempt is made through this article to study the effect of such developments on the Mitakshara joint family and its inalienable features of 'Right of Son by birth' and 'Rule of Survivorship.' Article has been divided into following three parts—

A.—Impact of Central Legislations
B.—Impact of Judicial Pronouncements
C.—Impact of State legislations.

A. Impact of Central Legislations:

A modest beginning to modify the Old Hindu law was made with the passage of *Hindu Law of Inheritance (Amendment) Act*, 1929[3] and *Hindu Women's Right To Property Act*, 1937[4] which added certain female heirs to the list of heirs recognized under Hindu Law, but gave only a limited estate to females. *Hindu Gains of Learning Act*, 1930 laid down that any gains

1. Mulla, Principles of Hindu Law, 15th Ed. p. 1.
2. Scope of this work limited to Mitakshara school.
3. Son's daughter, Daughter's daughter, sistor added to list of heirs.
4. Widow added to list of heirs.

made by a co-parcener on account of training—whether ordinary or specialized, or education will constitute his seperate property, whether the learning was imparted, wholly or in part, out of joint family funds or by the funds of any member of the joint family.[5] Earlier such gain was accredited to the coparcenery property.

In 1944, a Committee under the Chairmanship of Justice B.N. Rau[5a] was appointed to submit a report on 'Codification of Hindu Law'. The Committee recommended the abolition of the Mitakshara joint family system and the 'Rule of pious obligation', in its report submitted in 1947. The report favoured a joint Hindu family as envisaged under Dayabhaga. However, owing to opposition from the orthodox sections of Hindus, the idea of a Hindu Code could make no progress and instead the 'Code' was fragmented into a number of seperate acts.

One, such act was the *Hindu Succession Act*, 1956 (hereinafter referred to as 'Act')—enacted to amend and codify law relating to intestate succession among Hindus. In the words of Prof. J.M. Derrat "Law of Inheritance is comprehensively reformed and no one need fear dying intestate. Old effected principles should give way to those with which society advances with the rest of the world in field of education, science and technology".

The Act was described as a step towards Uniform Civil Code which is one of the objectives set out in Article 44 of our Constitution.[6]

—Section 4 of the Act gives overriding application to the provisions of the Act and in effect lays down that in respect of any of the matters dealt with in the Act, it seeks to repeal all existing laws which are inconsistent with the Act.

—Whereas Section 6 of the Act purports to retain the Doctrine of survivorship, the Provisio to the Section tries to minimize its application in a very limited number of cases. The provisio reads:

"If the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case maybe, under this Act and *not by survivorship*."

Presence of any one of the nine heirs, out of the twelve mentioned in Class I of the Schedule, namely—(1) Daughter (2) Widow (3) Mother (4) Daughter of predeceased son (5) Widow of predeceased son (6) Son of a predeceased daughter (7) daughter of a predeceased daughter (8) daughter of a predeceased son of a predeceased son (9) widow of a predeceased son of a predeceased son—would make the coparcenery property devolve not by

5. Venkatasubramania v. Eswara AIR 1966 Modras 266.
5a. Hereinafter Referred to as Rau Committee.
6. Justice Beg, Proceedings of All India Seminar on "Recent Legislation of Hindu Law: Its socio-legal implications", 1971: 1 Ku. L.J.

'Survivorship', but in accordance with rules of intestate succession laid out in Section 8, of the Act.

—Section 30 of the Act empowers a coparcener to dispose off by will or other testamentary disposition, his interest in a Mitakshara coparcenery property. Implications of Sec. 30 of the Act have far reaching socio-legal importance, as before the Act, no coparcener, not even a father could dispose by will his undivided coparcenery interest. Hence Sec. 30 is destructive of of Hindu Coparcenery as now the coparcener can give his interest to anyone he likes and not just to one among his coparceners.

—Section 8 of the Act along with Section 19 of the Act, mark another major departure from old succession law. Sec. 8 introduces two classes of heirs [Class I and Class II] and then agnates and lastly cognates. These classes of heirs include females also and all of them, male or female, take the property absolutely. Section 19 (1) (*b*) clearly states that all the heirs take the property as tenants-in-common and not as joint-tenants. No longer would the heirs take the property as members of a joint and undivided Hindu family, with any rights of Survivorship.

—Section 14 of the Act recognizes the right of the woman to hold property absolutely. It converts all limited estates of women into full fledged ownership and effectively removes such property from the ambit of coparcenery property.

—Section 28 of the Act enables persons with disease, defect or deformity and other disabilities not mentioned in the Act, to succeed to property. Under the old Hindu law such persons were disqualified from succeeding.

B. Impact of Judicial Pronouncements

A similar trend of disintegration of joint family system is also being reflected upon by certain judicial pronouncements.

In *Gurupad v. Hirabai*[7], to determine a widow's share in the interest of her deceared husband's coparcenary property, the Supreme Court expounded the scope of Explanation I to Sec. 6. Approving of the decision in *Rangbbai v. Laxman*[8], Chandrachud, C.J. observed:[9]

"Once an assumption of partition is made to determine the share of the deceased in the coparcenery property, one cannot go back on it and ascertain the share of the heirs without reference to it.... All consequences which flow from a real partition have to be legally worked

7. AIR 1978 SC 1239.
8. AIR 1966 Bom. 169.
9. *Ibid* at page 1243 (para 13).

out.... Inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenery property at the time of his death in addition to the share which he or she received or deemed to have recieved in the notional partition."

Thus the fiction of notional partition is carried out throughout to give it full effect and a partition is worked out among the co-parceners, and there is no further fluctuation of shares of the female members, even if they decide to stay united.

Final blow to the institution of Mitakshara coparcenery was dealt by the revolutionary Supreme Court decision in *Wealth Tax, Commr., Kanpur v. Chandrasen*.[10] The judgement delivered by Mukharji, J.,[11] while approving of the view taken by Allahabad,[12] Madras,[13] Madhya Pradesh[14] and Andhra Pradesh[15] High Courts and disapproving that of Gujarat High Court,[16] held "that under Sec. 8 of the Act, the property of the father who dies intestate devolves on his son in his individual capacity and not as a Karta of his own family". Therefore, son's son would have no interest on birth in such property and this would be regarded as the separate property of the son. This marks a total departure from the old Hindu law where the son acquired automatic interest on birth in any property which the father inherited from father's father. This judgement strikes at the root of the concept of 'Right of son by birth' prevalent in Mitakshara.

In coming to the decision, strong reliance was placed, by the Supreme Court, on the arguement that the list of heirs in Class I includes predeceased son's son, but does not include son's son[17]. So a son's son was not intended to succeed. The above view was also reinforced by Sec. 19 of the Act which clearly provides that heirs take the property as tenants-in-common and hence as absolute owners.

The above Supreme Court decision has been criticized by learned commentators like Paras Diwan[18] and Prof. Sampath[19] on the ground that there is no provision in the Act dealing with the character of the property inherited by the son from his father. Hence, the Supreme Court proceeded to decide on a wrong premise.

However, the above judgement is supported by Mayne.[20] The effect of the above judgement has been to transform Mitakshara into Dayabhaga,

10. AIR 1986 S.C. 1752.
11. *Ibid* at page 1748 (para 14).
12. (1968) 67 ITR 164.
13. 114 ITR 523.
14. 138 ITR 673.
15. 144 ITR 18.
16. 108 ITR 117.
17. *Ibid* at page 1757 (para 14).
18. Paras Diwan, Modern Hindu Law 7th Ed., 258.
19. Banaras Hindu University; See, "Whither Hindu Joint Family Law? Yet Another 'Faux Pas' from the Supreme Court" A.I.R. 1988 Journal 1.
20. Mayne's Hindu Law & Usage 12th Ed., 542.

conferring absolute right of disposal on the son, vis-a-vis property inherited from his father. In effect, after the passage of the Act, no new Mitakshara Joint Hindu family can come into existence. Only the property obtained by a coparcener on a partition would amount to his ancestoral property in respect of which his son would enjoy a right by birth.

C. Impact of State Legislations:

Certain Legislations have been brought about in some states, further undermining the significance of Mitakshara coparcenery.

In State of Kerala, *Kerela Joint Family System [Abolition] Act*, 1975 was passed, bringing about changes as were envisaged in the Hindu Code Bill [L.A. Bill No. 42 of 1947].[21] It has converted the Mitakshara family into Dayabhaga family and has abrogated the rule of pious obligation of Hindu son.[22] There would be no right in a son, born after the commencement of this Act.[23] A partition would deemed to have been affected on the date of commencement of this Act and each coparcener would hold his share absolutely,[24] there being no fluctuation on account of any birth or death.

The day of the passage of this Act has been described as red-letter day in the annals of Hindu community in Kerela.[25]

Another, revolutionary act was passed in the State of Andhra Pradesh—*Hindu Succession [Andhra Pradesh Amendment] Act*, 1985. This Act seeks to remove the discrimination between sons and the daughters under Mitakshara, by conferring upon the daughters, unmarried on the date of passage of the Act,[26] the status of 'coparceners'.[27] Now, even the daughters, along with the sons, would be entitled to a share, on partition of the ancestoral property. Although retaining the Mitakshara system, this Act brings about a revolutionary change by creating equal status for Hindu sons and daughters.

Conclusion :

It is humbly submitted that the Mitahshara Joint Hindu Family system has outlived its usefulness and as per the recommendations of the Rau Committee[28] should be abolished. This process of abolition was started with the passage of Hindu Succession Act, 1956, and has continued with judicial pronocencements.[29]

21. Ss. 3, 4, 5, 6 of Kerala Act are on lines of Ss. 86, 87, 88, 89 of Hindu Code Bill.
22. *vide* S. 5.
23. *vide* S. 3.
24. *vide* S. 4.
25. P. Parmeshwaran, "The Kerala Joint Family System (Abolition) Bill, 1973—A Study" 1981 KLT, 7-8.
26. 17-8-1976.
27. *vide* Sec. 29-A(1).
28. *Supra*, Note 5a.
29. *Supra*, Notes 7,8,10.

Many learned commentators have also advocated the abolition of joint family system of Mitakshara, citing following reasons:[30]

(*a*) In its present state Hindu law is too complicated with its codified and non-codified parts. So there is a need to *achieve uniformity and simplicity* in Hindu law and to make it compact in form and easily accessible.

(*b*) People are increasingly *using joint family as a tax-shelter.* Self-acquired property is converted into ancestoral property for purposes of tax-evasion.

(*c*) Hindu law, in its present form is *discriminatory towards women.* This is illustrated by a simple illustration:—A Hindu male dies leaving behind his ancestoral property, with a son and daughter as his only heirs. Whereas the son would get 3/4th of such ancestoral property, daughter would be entitled to 1/4th share only.

An effective step towards disintegration of the Mitakshara joint family would be *to remove Sec. 6 of the Hindu Succession Act*, 1956. Sec. 6 recognices the ancient legal formulae of acquisition of right by birth and devolution by survivorship. Sec. 6 appears in the form of a compromise between people advocating for reform and those in favour of retention of Mitakshara coparcenery.[31]

The next step in the same direction would be *to adapt Kerela Joint Family System (Abolution) Act*, 1975, *for the rest of the country*. This Act completely does away with the rules of 'Right of the son by birth' and 'Devolution by Survivorship'. Also, by effectuating an immediate partition among all existing Mitakshara joint families, it remedies the situation with immediate impact. Not only does it prevent new Mitahshara joint families from coming into being, it also transforms all present ones into Dayabhaga families.

The Andhra Pradesh Act has adapted a different mode of removing inequality between males and females by including the female from participation in the ownership of coparcenery property [vide Hindu Succession (A.P. Amendment Act, 1985], with a right to partition[32] and her share devolving by Survivorship upon remanining members of the coparcenery.[33] It was felt such exclusion of daughters has led to the socially pernicious 'dowry system' with its attendant social ills.

Both the above legislations have been truly ameliorative acts seeking to create equality between males and females. But they differ in one vital

30. Prof. Sivaramiah, Proceadings of All India Seminar on "Recent Legislations in Hindu Law: Its Socio-Legal Implications", 1971: 1 Ku.L.J., 146-153.
31. Mulla, Principles of Hindu Law, 15th Ed., 907.
32. Sec. 29-A.
33. Sec. 29-B.

aspect whereas the Kerala Act seeks to destroy the Mitakshara joint family completely, Andhra Act seeks to bring about reform within the framework of Mitakshara joint family system.

It is submitted that the *Kerela Act would be a better option* than the Andhra Act, as it buries deep inside the last relics of 'Mitakshara Joint Family', and is characteristic of the age which is one of great ideals and fast changing theories. Even the deep rooted traditions must yield to march of time and it is time that Mitaksha Joint Family should go.

AMIT BANSAL*

*LL.B. IInd Year Student, Campus Law Centre, University of Delhi.

BOOK REVIEWS

POPULATION CONTROL AND THE LAW : PROBLEMS, POLICIES AND REMEDIAL MEASURES by S.P. Singh Sehgal, (1989), Deep & Deep Publications, New Delhi, pp. 264, Price Rs. 225.

WOMEN, BIRTH CONTROL AND THE LAW by S.P. Singh Sehgal (1991), Deep & Deep Publication, New Delhi, pp. 183, Price Rs. 175.

The data thrown up by the 1991 census makes a fascinating reading. The population of the country on the sunrise of March 1, 1991 is provisionally put at 84.39 crores.[1] According to the U.N. estimate, the population of the rest of the world in 1990 was 443.9 crores. This means that about 16 percent of the world's population lives in India. In other words, every sixth person of the world is an Indian. The immediate impact is the pressure of population on land. The country accounts for only 2.42% of the total world area. The area of India is 3.28 million sq. km.

In absolute terms, the population of India has grown by 16.06 crore during the decade 1981-91. This is almost equal to the population added during the three decades 1931-41, 1941-51, and 1951-61. The absolute addition to the population during the decade 1981-91 is more than the total population of Japan.[2]

Thus high growth rate of population is one of the most crucial problems facing the nation today. If the present rate of population growth is not checked, we might expect a population of more than a billion by 2000 A.D. or so and we may become the most populous country in the world, overtaking China.

It is true that India is the first country in the world which adopted an official programme for family planning and population control soon after independence and made it an integral part of its Five Year Plans. But the efforts and efficiacy of the family planning are apparent in the growth of population. The approach of the Government in dealing with the problem of increasing population, so far, has been 'demographical', 'sociological' and later on 'clinical'. Legal aspect of this problem has not been dealt with. There are very few legislations affecting the women's fertility, directly or indirectly. As far as importance of law to population control is concerned, apart from serving as a tool for the enforcement of population policy, it must incorporate and reflect the population policy itself.

It is in this context that Dr. B.P. Singh Sehgal has undertaken the study of various socio-legal aspects of this problem. The first book, entitled

1. Census of India, 1991, *Provisional Population Totals*, Paper 1, p. 1, published by the Registrar General & Census Commissioner, India.
2. *Yojna*, Vol. 35 : No. 9, May 31, p. 4, (1991).

'*Population Control and the Law : Problems, Policies and Remedial Measures*' is a compilation of various articles, written by the author which reflect the various aspects of the inter-action between law and population control.

It contains fourteen Chapters. Four[3] out of fourteen Chapters deal with the issue of 'women and population control'. Out of these Chapters, one entitled 'Marriage Age of the Women in India',[4] has not been specifically related to population control. In these eight pages, the various enactments relating to the marriage age of a girl and the validity and invalidity of the marriage performed against the provisions of those enactments have been discussed. This Chapter ought to have been omitted from this book, particularly because, the points which have been discussed in this Chapter, are also discussed in other three Chapters[5] entitled : "Role of Woman in Population Control"; Law Women and Population in India"; and "Effect of Age of Marriage of Woman on Population Control". As far as these three Chapters are concerned, as their names suggest, there is lot of repetition. For example marriage age of woman is discussed on p. 82-86, then p. 99-100 and p. 117-127. Similarly 'education of female' is discussed on p. 91-94 and also on p. 103-104; 'employment of woman' is discussed on p. 94-96 and then on p. 104-106.

The laws relating to contraceptives, abortion and sterilization form the subject matter of another six Chapters[6] entitled "Legal Basis of Fertility Control in India", "Population and Law : The Fundamental Rights Aspects in Indian Perspective", "Contraceptives for Fertility Control : Some New Judicial Trends", "Sterilization : A Need for Legislation"; "Compulsory Sterilization for Population Control : Some Policy Issues"; and "Medical Termination of Pregnancy Act, 1971: Some Constitutional Issues". But the angles from which these laws—relating to contraceptives, abortion and sterilization—are discussed are of course different, though there is again some repetition. In fact this problem of repetition has been acknowledged by the author himself in the preface.

The Indian Legislature has not so far attempted to make any direct law concerning the manufacture, sale or use of the various contraceptive devices or for that matter with the dissemination of fertility control information. The Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, prohibits the publication of any advertisement referring to any drug used for the procurement of miscarriage in women or prevention of conception in women or correction of menstrual disorder in woman, etc. Apart from this, Indian Post Office Act, 1898 contains laws pertaining to obscene and objectionable publication, their transmission by mail etc. But most of these laws hardly come into action as Government itself, in pursuance of its de-

3. Chapter No. 4, 5, 6 and 7.
4. Chapter No. 6.
5. Chapter No. 4, 5 and 7.
6. Chapter No. 2, 3, 10, 11, 13 and 14.

clared public policy, has distributed and publicised, birth control devices. Here the author suggests[7] that the Government should with due regard to the social and cultural traditions remove legal and administrative obstacles to manufacture, display, advertisement, sale and widespread distribution of quality contraceptives and enact such provisions as may be necessary to make contraceptives readily available. Existing laws on obscenity are required to be changed if they forbid the publication, broad-casting, telecasting or mailing of family planning material.

The chapter entitled "Medical Termination of Pregnancy Act 1971: Some Constitutional Issues" focuses firstly on the question as to how far the Government's population policy promoting the use of abortion, is in accordance with the constitutional provision; and secondly, on the constitutionality of the MTP Act, 1971. As far as the first issue is concerned, the Indian Constitution guarantees to every person the protection of life and personal liberty except according to procedure established by law.[8] Thus any coercive restriction on the right of women compelling her to adopt a particular fertility control method may not have constitutional validity as that would amount to an enterference in the life and liberty of that woman. Here the author, is of the view, that population policy adopted by the Government of India, in so far as it provides various options to the woman to adopt any method of fertility control is not an interference in the life and liberty of that women.[9] As regards the second issue, he observes that the rule of 'pith and substance' as evolved by the judiciary provides the basis for examining the constitutional validity of MTP Act. The Act is a piece of legislation in respect of a subject in the Concurrent and List its incidental encroachment on the field of 'public health', a subject in the State List, should not affect its validity. However, he is of the view, that it is better if the ambiguity is removed by inserting the appropriate provisions in the Constitution or the MTP Act.

While discussing the law relating to voluntary sterilization under the heading "Sterilization : a Need for legislation"[10] he observes, that sterilization was generally used for other purposes, either eugenic (to prevent physically or mentally inadequate progeny) or therapeutic (normally to protect physical or mental health), its use as a means of fertility control is of recent origin. In the absence of any comprehensive legislation, the modern sterilization, may it be, therapeutic, eugenic, punitive or voluntary for the purpose of fertility control may lead to some constitutional problems. Hence, this chapter examines the constitutional validity of such sterilization operations.

The book also contains a chapter[11] based upon an empirical study of

7. Dr. B.P. Singh Sehgal, *Population Control and the Law*, 53, (1989).
8. *Constitution of India*, Article 21.
9. Dr. B.P. Singh Sehgal, *Population Control and the Law*, 220 (1989).
10. *id.*, at p. 170.
11. *id.*, at p. 181.

human nature towards voluntary sterilization for fertility control. The main objective of this empirical study has been to enquire as to how far the medical practitioners have the knowledge of the guidelines and instructions issued by the Government for the purpose of performing and determining the eligibility of the patient undergoing voluntary sterilization. Further the awareness among the general public and their attitude towards these guidelines and administrative instructions have also been atsessed. A sample of ninety respondents was chosen from within the area falling under the territorial limits of Jammu Municipality. The author has based his findings on the analysis of the data collected for the study through primary and secondary sources by applying the social science research techniques. The findings of the study reveal that the people are not aware of these facilities and the medical practitioners do not strictly follow the provisions of laws. However, a majority of respondents, both male and female favour a legislation on voluntary sterilizations for the purpose of limiting the number of children.

Another important chapter[12] examines the need of compulsory sterilization for the purpose of population control. Here he clarifies some of the issues caused by compulsory sterilization of persons. In particular he examines its compatibility with personal liberty. He feels that under the doctrine of "compelling state interest," compulsory sterilization may be justified. He cautions, however, that for such extreme steps, the Government has to explain to the people about the "compelling state interest" before executing such policy. Accordingly, he came to the conclustion that such legislation should be adopted only in dire need and when all other alternative remedies fail.

Other chapters included in the book are: "World Population: International Problems and Remedial Programmes[13] 'Law and Status of Children in India,[14] 'Judicial Approach Towards Obscenity,[15] Appendices include (i) The Medical Termination of Pregnancy Act, 1971, (ii) National Population Policy, (iii) Guidelines for voluntary sterilization (iv) Incentives for Government employees for promoting small family norms in the state of Jammu and Kashmir.

A Comprehensive bibliography is also given at the end.

The second book by Dr. B.P. Singh Sehgal, *Woman, Birth Control and the Law* is an attempt in the direction of examining the Government's population policy and laws directly regulating the fertility of women.[16] The book is divided into five chapters. In chapter one, 'Introduction' he discusses the nature of the problem of population growth by analysing the 'birth rate' (1901-1981), 'death rate' (1901-1981), 'Population growth rate'

12. *id.*, at p. 213
13. *id.*, Chapter No. 7, p. 17.
14. *id.*, Chapter No. 8, p. 128.
15. *id.*, Chapter No. 9, p. 148.
16. Dr. B.P. Singh Sehgal, *Women, Birth Control and the Law*, preface, (1991).

(since 1872 when first census in India was taken); 'Density of population' (1951-1981); 'Sex ratio' (1901-1981); and religious composition' (1961-1971). Another half of the first chapter contains the population policy adopted by the Government. The law regarding the legislative competence of the matters pertaining to population control and the family planning; the efforts made by the Government in promoting the population control programmes through various five-year plans etc. are discussed in it.

The second chapter "Law and Fertility Regulation" starts throwing light on the role, the law can play in this field. Here he examines the 'human rights and population control; human rights and the Indian Constitution; 'validity of population policy', and the 'right to privacy and fertility control'. Then he proceeds to discuss the socio-religious attitudes towards fertility control. This he examines in the historical perspective. He takes the view that the attitude of the members of a particular religion towards policy of family planning is mostly determined by their religious injunctions. In this context he discusses the stand-points of India's two main theologies *i.e.* Hindu and Muslim.

'Fertility Control and Penal Laws' form the subject-matter of chapter three. This chapter is divided into three parts (*a*) Abortion (*b*) Sterilization and (*c*) contraceptives. In part 'A' (*i.e.* abortion) he discusses the relevant provisions of Indian Penal Code, 1860 and the Medical Termination of Pregnancy Act, 1971. In Part B (*i.e.* sterilization), among other things, he discusses the legal status of sterilization. Since there is no specific legislation regarding the legal status of sterilization, he examines its position with reference to the existing Penal Code provisions. He has also discussed the relevant foreign cases on this point. In Part 'C' (*i.e.* contraceptives), he discussed the Governments' efforts of communication techniques to educate and motivate the people about this device of family planning.

Chapter four is entitled "Fertility Laws and Practices in Other Countries". In this chapter, an attempt is made to discuss the laws affecting the status of women, which indirectly affect their fertility, especially the laws relating to abortion, sterilization and contraceptive as prevailing in some selected countries of the world. The countries affected by the rapid population growth in one way or another representing both developing and developed groups from far East Asia, the West and Middle East have been selected for this purpose. The countries are: Malaysia, Singapore, Japan, United Arab Republic (Egypt), Former Union of Soviet Socialist Republics (USSR), Sweden and the United States of America.

The most important chapter of the book is the last one namely "Appraisal and Suggestions". Here Dr. Sehgal has made certain recommendations for adoption of new laws or for amending the existing ones to cope with the present population problem.

He is of the view that the population policy ought to be formulated with the object of achieving the social goals mentioned in the Directive Principles of the Constitution on the one hand and safeguarding the Fundamental

Rights and democratic norms enshrined therein, on the other hand. Population policy must be framed in such a way as to make the average citizen aware of the threat that the uncontrolled fertility poses to his present plight and future prospects. The common man must be made to realise that excessive population growth is at the base of the problem of poverty under the present socio-economic conditions prevailing in the country. He feels that as the increase in the age at marriage of a woman cuts the reproductive span, the present age of marriage of woman should be increased, from 18 to 21 years. As far as child marriage is concerned even though we are having Child-Marriage Restraint Act, 1929 prohibiting an under-age marriage, but the reality is that child marriages are being performed all over the country. Dr. Sehgal observes that one of the causes of the violation of this law is the mild punishment for its violation. So he submits that the violation of this law should be made more severely punishable.

To begin with, requirements can be enforced easily especially in organised sectors, for example, by amending the civil service rules so as to permit disciplinary action against a Government servant who marries an under-age bridge or gets his or her minor children married. Further the State Governments must appoint Child Marriage Prevention Officers at block level with duties to prevent marriages, being performed in contravention of the provisions of the law and to collect evidence for the effective prosecution of persons contravening provisions of such statutes.

He advocates for the adoption or a measure adopted in Philippines. In Philippines, Ex-President Marcos issued a decree forbidding any official to perform marriage unless the couple has attended a course on scientific birth control. Professor Sehgal rightly streses if a country where eighty percent population is Roman Catholic, who are generally conservative, can adopt this measure, then why can't India adopt such a measure?

As regards contraceptives, he feels that in the presence of various direct and indirect anti-contraceptive laws, it is difficult to expect the present population policy to produce any desirable results. Therefore, a comprehensive legislation on contraceptives is eminently needed. The same is the position regarding sterilization. We are having no comprehensive legislation on sterilization. Here Professor Sehgal expresses the opinion that in its absence, sterilization is liable to cause legal hardships both for medical practitioners as well as for patients. So, he suggests that the Government should enact a Central Legislation to cover sterilization on therapautic, eugenic and socio-economic grounds. He offers some of the draft rules, too, in this respect.

The Medical Termination of Pregnancy Act, 1971; Sterilization Guidelines-Eligibility; and Maharashtra State Government Legislative Assembly Bill, 1976, for restriction on the size of the family of certain persons, are included in the Appendices. At the end, the book also contains table of Statutes and Acts; table of cases; bibliography and subject index.

On the whole, both the books are fairly comprehensive. There is no

doubt that the work is scrupulously researched and well-written. The author's scholarship and deep knowledge of different issues relating to the subject are reflected throughout both the books. Even though there is no sufficient case law directly upon the subject. Professor Sehgal has nevertheless made an attempt to discover the judicial pronouncements applicable and helpful to the readers.

The author has succeeded in initiating a debate on the need of punitive regulative measures for checking and controlling the undesirable pressure on the society. The books have valuable information containing relevant statistical data and case law and should be considered as welcome addition to the literature on the subject.

We hope that the books would be of immense use to the administrators to improve their performance in policy making and for the legislators to understand the role which law can play in controlling the population growth. Both the books must find place in every library.

PROFESSOR P.S. SANGAL
MS. USHA TANDON

THE RIGHT TO KNOW by S.P. Sathe (1991) N.M. Tripathi Pvt. Ltd., Bombay. Pp. XX+58. Price : Rs. 50.00.

THE Monograph under review is based on three lectures delivered by Prof. Sathe under the auspices of the Campus Law Centre Endowment Lectures (1990), University of Delhi. The present work covers three important fields of legal education : Constitution, Administrative law and Jurisprudence. It handles three basic and interrelated concepts : Education, Information and Knowledge. In view of the above configuration, the consumers of *Sathe* will find a *triveni sangam* in the present treatise. Prof. Sathe deserves appreciation for initiating discussions in a field which has yet to attract the attention of the Indian law academics. The learned author also deserves congratulation for taking up the cause of the right to know at a time when the Indian democracy is at the crossroad. Its stresses and strains can be overcome by a vibrant democracy. Such a change can be possible if "We, the People of India" are well informed of what we should know.

The right to information and the right to know do find some place in the Indian administrative law text books but on the comparative law forum this area has received, according to Birkinshaw, 'a considerable amount of critical attention'.[1] But in this direction the constitutional law and jurispridential studies have yet to make any serious start.[2] *Sathe* handles the

1. Patrick Birkinshaw, *Freedom of Information the Law, the Practice and the Ideal*, 1988, 2. It is surprising that *Sathe* has missed this reference though, he has handled the comperative information law-*Id.* at 52-54.
2. This is evident from *Sathe's* Bibliography section *Id.* at xvii.

present subject from Administrative law and jurisprudential view points.

Sathe opens with 'information : Fuel for Indian *Perestroika* and *Glasnost*'. The first lecture concentrates on the general introduction. The 'information regime' divides knowledge into two parts : the primary and the higher education. The former, according to the learned author, 'helps a person to read, write and learn', and in case of latter, 'one gains skill, expertise, academic distinction, etc.' The State must, *Sathe* says, provide free but compulsory primary education to every citizen of India and in case of the higher education the State must make facilities for such education. Knowledge is the basic necessity of the human being. It has three dimensional advantages. It brings about healthy society, democracy and excellence in every field. But the unfortunate blot on the Indian history has been that this resource is not properly tapped. The result, according to *Sathe* is that, 'the process of transforming the colonial state into a democratic state got arrested.'[3] Therefore, the need of the day is that the Indian democracy must see the light of 'the right to education' and 'the right to information' in its proper perspective. Until we achieve this, *Sathe* advocates that there will be 'no glasnost' and in turn 'no perestroika'.[4]

In this introduction to the 'information regime' *Sathe* has missed to elaborate and interrelate 'education', 'information' and 'knowledge'. The learned author has answered the question knowledge for whom? Knowledge for what? But how much knowledge is a question which remains unanswered. This question is important because we know that 'a little learning is a dangerous thing'. And lastly, we have also to examine the question : education by whom? Is it by a political party in power having majority, marginal majority or the mixture parties majority show? The sad experiences of Doordarshan or we may call it in some cases[5] a 'closed darshan'; punishment for discussing the dissolution of state assemblies in the class or dragging the name of the higher dignitary in the question paper; move to rewrite the history capsul of India; the State inaction in promoting a balanced education in environment and development; the imposition from above the compulsory and over expanding compensatory discrimination to enter into the temple of learning; the appointment of I.A.S. and politician as head of the educational insitution, are some of the many aspects which we have to examine before handling the right to know and right to education.

Sathe traces the sources of the right to know and information in the twin law fields. In the region of Constitutional law comes : the procedure established by law (Art. 21), save by authority of law (Art. 300A) and except according to law (Art. 265). In the area of administrative law : the right of hearing and reasoned decision are the essential aspects of the said right.

The 'secrecy regime', according to the learned scholar, 'has brought in exploitation, deceit, oppression and authoritarianism', *Sathe*, examines this

3. *Sathe* p. 5.
4. *Id.* at 6.
5. *See* for example, *Indira Jaising* v. *Union of India*, A.I.R., 1989, Bom 25.

regime in three departments of the state. At the administrative level, there is 'culture of secrecy' which is the 'ethos of our administration'. The Legislature passes the law which comes into operation with immediate effect but it is not easily accessible and the position of the subordinate legislation is worst. Further even if it is available, it is "understood at best by not more than five per cent of the people". Now coming to the judiciary, at the highest level information is available but the lower courts' decisions are inaccessible. In order to avoid these hurdles *Sathe* calls upon the judges, lawyers and the social action groups to make the right to legal aid a reality and it must be available even without being asked for. As regards the people of India, *Sathe* says, "our first demand should be" that "(R)ight to primary education must therefore become a fundamental right".[6]

The first lecture in the end deals with right-duty and liberty-no right, the Hohfeldian correlative. *Sathe* draws two circles : the outer circle is of liberty to know and in the inner circle comes the right to know. There are certain limited areas where the State is bound to give information and this gives rise to the right to know. But in rest of the cases, it is only liberty to know where the state is not duty bound to give information. Finally the discussion closes with six questions.

The Second lecture makes an intensive and indepth study of the questions raised in the first Part. The six questions are: When is an individual bound to give information to another individual? When is a person free not to give information to another person? When is a person bound to give information to the State? When is a person entitled to be informed by the State? When is a person free not to give information to the State? And finally, when is the State at liberty not to give information to a person? The author has tried to answer the questions from various view points of different laws. The advocates of the right to information will find here a treasure. For the research scholars it is an indispensable treatment. It may be pointed out that the right to information is a developing area in the Indian environmental law and so this field also requires some mention in *Sathe*.

The answers try to specify the scope of the right to information of a person against other person/persons and against the State. Further, the said right has been discussed in both the positive and negative sense. In this treatment one will find a clear cut demarcation between the 'information regime' and 'secrecy regime'. Further, the informations in *Sathe* if weighed, will find that there are nearly eighteen pages dealing with cases of 'not to give information' and hardly six pages materials on 'to give information'. This clearly shows that the Indian Legislature generally tilted the balance more in favour of 'secrecy regime' rather than allowed the right to information. And this disbalancing has, according to *Sathe*, made 'not giving of information' "the rule" and this culture helps the government departments to work more in secrecy or closed chamber rather than in a open

6. *Sathe*, p. 13.

atmosphere. To undo this the second lecture closes with the suggestion of the right-duty relationship in the information society.

It may be pointed out that *Sathe's* dos and don'ts of the information regime have remained untouched with the corruption jurisprudence.[7] There are varieties of informations, for example; adulterated information, censored information, missinformation and also problem of accurate, reliable and full account of information, explosion and implosion of information, and further, the public and privatisation of information recepients, economic, political and social values of information. There is use and missue and legitimate and illegitimate use of information. Further, the information may be used for the welfare of the people and there may be commercialisation of information. In this connection Birkinshaw[8] deserves mention He brings out the use of the right to information under the U.S.A. Freedom of Information Act, 1974 and his data show that the highest consumers of the right were the commercial bodies who contributed 50 to 60 per cent requests. This raises the question of a special treatment for the use of information. This dimension could have been given some place in *Sathe*.

The final lecture comes out with a blue print of the Indian right to information. *Sathe's* model gives two interrelated structures : the constitutional and legislative frame works. Coming to the Constitutional wave length, *Sathe* suggests that, "the right to information may be added as clause (aa) to article 19(1)" and the restrictions to this right may be incorporated in "clause 2A" to be inserted after clause (2) which is as follow:[9]

> Nothing in sub-clause (aa) of clause(1) shall affect the operation of any law, in so far as such law imposes reasonable restriction on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or privacy or in relation to copy-right, contempt of court and contempt of the legislature.

The advantages of such a change over, according to *Sathe*, are: firstly, the right will be enforceable through the Supreme Court under article 32; secondly, it will not be easy to repeal this provision; and lastly, even if repeal is to be effected, the doctrine of basic structure will come in the way.

It may be submitted that the constitution of India, the lengthiest constitution in the world, would be further burdened by two more new clauses. Will it make any difference if in clause (a) of article 19(1) the word 'information' is added before "speech and expression" and the additional ground may be included in article 19(2)? The additional word in article 19(1)(a)

7. See Upendra Baxi, *Liberty and corruption : Antulay case and Beyond*, 1990.
8. Patrick Birkinshaw, *Freedom of Information the Law, the Practice and the Ideal*, 1988, 40.
9. *Sathe*, p.60.

will not only fit in the tune and frequency of "speech and expression" but also further nourish the freedom in article 19(1)(a). As regards the proposed additional grounds are concerned, the privacy right now comes in article 21 and the judiciary will balance the right to information and right to privacy accordingly.[10] The law laid down in *M.S.M. Sharma'a* case will take care of the third additional ground; and finally, "the procedure established by law" would take care of other situations. Or alternatively, is not, the wave length of Justice Bhagwati in *Maneka Gandhi*'s case and its aftermath,[11] enough to get the constitutional stamp on this right? In this case, the right to information will get patronage of two articles 19(1)(a) and 21. Further, such inter-linking will allow germination of new supplementry rights in the information society. Further the emergency shall not cast its shadow on this right as article 359 omits article 21 from its purview and thus the right to information will "speak the same language during war and peace" subject to "the procedure established by law".

In the present discussion of the right and restriction, the fundamental duties under Chapter IVA of the Indian Constitution do not find any place in *Sathe*. The research scholar may explore this underdeveloped field and do justice with the neglected area.

At the last lag of the voyage to *triveni sangam*, *Sathe* takes the readers to the comparative information law. Though it devotes just two and half pages but it takes us from Sweden, U.S.A., Canada and finally to Soviet Russia. The author gives valuable guidelines[12] and a blueprint[13] for the Indian law planners. This way *Sathe's* mission ends with "laudable goals" and great aspirations. Now it is for "we, the people" to see that the germination of *Sathe's* seeds of right to information is not further delayed[14] in the Indian soil. India, being the champion of democracy and liberty, cannot afford to lag behind in the race of the world's information law. And the Indian Parliament must rise at the occasion when the great struggle for human freedom is in progress. The academics also owe a duty to explors the vast left outs of the information jurisprudence.

To conclude, the present work opens a new vista in the Indian Liberty Jurisprudence. *Sathe* is one more step forward in the Indian crusade for the luxuriant growth of liberty whose vigour will yield in successful Indian democracy. Sathe's style is lucid, simple and greatly informative. It is thought provoking. The present writer is of the opinion that a dip in this

10. See *Railway Board* v. *Niranjan Singh*, A.I.R. 1969 SC 966 where it was laid down that the right of there is an inherent limitation in exercise of ones fundamental right.
11. See for example, *Chandal* v. *Delhi* Univ., A.I.R. 1978 Del. Where the court brought the right to education in Art. 21 an aspect not taken into consideration by *Sathe*.
12. *Sathe* pp. 53, 54-55.
13. *Id.* at 57-58.
14. The interesting recent development in the Indian scene is : the telecast on Doordarshan of the question hour in both the Houses of Parliament, though unfortunately not live but pre-recorded, at the national morning network. Is not *Sathe* find some action ?

holy academic *triveni sangam* would be rewarding. Some body has divided books into three categories :

> Some books to be tested, other to be swallowed and some few to be chewed and digested.

Sathe deserves to be included in the class of 'some of the few' to be chewed and digested'. The present work will be of great interests to a very wide segment of consumers of the information regime and members of the information society.

M/s. N.M. Tripathi, Bombay must be congratulated not only for "the small but beautiful" but also for the 'right to know' at a reasonable price. The artistic cover, depicting magistic beauty of nature with maximum shadow and minimum light, silently speaks about the vast ocean of unknown and further that the known, instead of having more freedom, is subject to many restrictions.

Last but not the least, the present reviewer is greatly indebted to the Faculty of Law, University of Delhi, one time abode of the present writer, for giving him the privilege and honour to write a review of the book of his former teacher. Is not this a coincident that *Sathe's* foreword[15] and review are written by his former students.?

C.M. JARIWALA*

HUMAN RIGHTS : AN INSTITUTIONAL FRAMEWORK FOR IMPLEMENTATION, S.L. Bhalla, Delhi : Docta Shelf Publications (1991). pp. xvi+237. Rs. 220.00 : $ 20.

THE VIOLATION of human rights (HR) all over the world is a cause of deep concern today. The common standards and objectives of the international instruments can not serve any useful purpose unless the HR can effectively be implemented. It is no doubt a difficult task. With the establishment of the United Nations, however, the promotion and protection of HR has become indispensable for the maintenance of international peace and security. The UN Charter has created specific HR obligations upon the member states particularly in terms of Articles 55 and 56. But the two main stages can be identified in the achievement of common standards and objectives : the Universal Declaration of Human Rights (UDHR); and, the International Covenants of 1966 and Optional Protocol.

Since the UDHR did not provide for any implementation machinery,

15. Prof. Upendra Baxi, Vice-Chancellor, University of Delhi has written the forword.

* LL.M., Ph. D. (London), Professor of Law, Banaras Hindu University, Varanasi-5.

some mechanism was devised for the protection of HR. The main responsibility of discharging the obligation undertaken by the Economic and Social Council (ECOSOC) has been delegated to the Commission on Human Rights as one of the functional commissions of the ECOSOC. The jurisdiction of the commission has expanded in two areas. *One*, it monitors periodic reports on HR submitted by the UN members pursuant to the ECOSOC procedure. *Two*, it considers the complaints of HR violations received by the UN. The commission establishes from time to time the *ad hoc* working groups of experts comprising of eminent jurists and prison officials. Such a Working Group was established in 1967 to investigate the charges of torture and ill-treatment of prisoners, detainees or persons in police custody in South Africa, and later its terms of reference were extended to deal with the question of violation of trade union rights. A special Working Group was also established in 1969 to investigate the allegations concerning Israel's violations of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War in the Middle East.

Apart from this, the commission establishes subsidiary bodies to examine questions falling within its jurisdiction. The most important instance of permanent type is the Sub-Comisssion on the Prevention of Discrimination and Protection of Minorities. The Committee on Periodic Reports is the other type of subsidiary bodies which monitors the reporting system of HR progress. Another important development is the new precedent of serious public discussion of countries singled out for consideration in the sessions of the commission. The rapid activation of a Human Rights Commission supports the argument that the Charter's references are not wholly cosmetic.

Under the regime of the covenant on Civil and Political Rights (CPRC), the Human Rights Committee has been established as a supervisory organ to study reports submitted by states parties and also to request additional information from states. Since the committee is not empowered to judge whether the states have discharged their obligations under the CPRC this restriction has diminished the scope of the action of the Committee. However, it has derived additional powers from the Optional Protocol to consider petitions of individuals, subject to the jurisdiction of a state party to the Protocol alleging HR violation set forth in the CPRC. Very few states have ratified the Optional Protocol, and these states represent a small part of the international community. This is indicative of the widespread reluctance of the UN members to permit international security of complaints made against them by their own nationals.

No specialized implementation machinery has been set up under the Covenant on the Social and Economic Rights (SERC), and it falls under the general supervision of the ECOSOC. The only implementation procedure is the reporting by the states concerned on the measures adopted and progress made in achieving these rights in accordance with the ECOSOC procedure. The reports are sent to the ECOSOC, the Commission on Human Rights and the relevant specialized agencies. However, the SERC

has made clear that the ECOSOC or the Commission on Human Rights can not make specific recommendations on the reports. The Covenant is, therefore, a very weak instrument. It is difficult to imagine the effective implementation procedures unless the progress of states parties toward the realization of the rights under the SERC are subject to some kind of impartial scrutiny.

There is no doubt that the International Covenants as well as the ECOSOC procedure reveal serious weaknesses. Both the Covenants have raised the possibility of conflicts between their implementation provisions and the various existing procedures of the specialized agencies or regional orginazations. Both of them provide in general terms that nothing in them "shall impair the provisions of the UN Charter and that of the constitutions of the specialized agencies in regard to matters dealt with in these Covenants". On the other hand, the Optional Protocol prohibits the consideration by the Human Rights Committee of any communication when the same matter was being considered under any other international procedure of settlement. Obviously, the implementation procedures within the UN framework appear to be weak, but the recognition is implicit that the effective protection of substantive rights would lie in fair procedure. No doubt, the implementation of this procedure must begin with the human rights organs themselves.

Now Dr. S.L. Bhalla has presented a penetrating study about the institutional framework for HR implementation. Realizing that the framework can not be examined in vacuum, he has treated the subject as a part of broader field which comprises the study of international concern for HR, contemporary international endeavours, national action for implementation, and the dynamics of regional co-operation for HR. The further realization that something more has to be done at the implementational level has prompted the author to suggest for the creation of an International Human Rights Organization (IHRO). Speaking of the book itself, Prof. Upendra Baxi has affirmed the author's elaborate meditation on the disheartening paradox of the proliferating HR instruments and the author's plea for a universalistic agency to aggregate the total norm-setting and implementation. The author, in the preface, mentions the prospect of an institutional framework for HR implementation at a time when a new international climate has become a reality after the end of the cold war, superpower confrontation, profound changes in the Soviet Union, and the aftermath of the Gulf War.

The work is neatly divided into eight chapters. Chapters 1 and 2 deal with international concern for HR, as well as the UN prescriptions and practice on HR implementation. Chapter 1 is the introductory part of the book and this provides a comprehensive and concise account of the genesis of international concern for HR, and significance of the HR provisions in the UN Charter. Not only does this provide a stimulating background of the study, but more specifically it highlights the relevance of the Charter

provisions with HR implementation. Chapter 2 gives the historical background how the UN has gone into action on HR with the idea of International Bill of Rights in the making. Starting with the UDHR and the two Covenants, the author has examined the efficacy of the three implementation techniques included in the Covenants. He has also sought to appraise the UN action on HR. The focus is on the HR implementation in the UN context. An understanding of the UN system of implementation as well as promotion and protection of HR is crucial to the understanding of the functioning of the global system of implementational mechanism. However, the author has not discussed many of these developments some of which are still in an inchoate form, such as the greater recourse to the good offices of the UN Secretary-General, and more frequent use of fact-finding groups.

Chapter 3 of the study is invaluable not in the sense that it stresses the contemporary international endeavours on HR by the International Labour Organization (ILO) and the well-developed mechanism of regional procedures by the European and American Conventions on Human Rights, but also because it includes the study of endeavours by the international non-governmental organizations (NGOs) like the International Committee of the Red Cross, the International Commission of Jurists, and the Amnesty International. Thus, Chapter 3 clearly deals with three issues relating to the ILO; the European and American Conventions on HR; and the international NGOs. *First*, he has analyzed the functioning of the ILO as an independent international machinery for monitoring the application of international labour conventions and has acknowledged its pioneering role as a model for an institutional framework of HR implementation. The author has discussed the sophisticated and effective ILO procedures of investigation of violations of consideration of complaints, which include impartial consideration by quasi-judicial bodies. The basic principle of due process has attained a central role among the ILO principles of supervision. *Second*, turning to the next theme, he has discussed the role of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. His discussion benefits from the availability of the rich body of jurisprudence of the European Commission on Human Rights and the European Court of Human Rights. He has, however, not clarified the issues involved in the relationship between the regimes established under the Charter of the Organiation of the American States and under the American Convention on Human Rights. *Third*, the author has highlighted the extremely important role of the NGOs in assisting HR implementation and in focusing public opinion on its violations. These NGOs function by the methods of diplomatic initiatives, reports and by mobilizing public opinion. However, the author has not taken note of the contribution of other prominent international NGOs in the field of HR, such as the Anti-Slavery Society, the Commission of the Churches on International Affairs, the International Association of Democratic

Lawyers, the International Defence and Aid Fund, the International Federation of Human Rights, the International League for Human Rights, the Minority Rights Group, Survival International, and the World Peace Council. So far the author has discussed the role of the Amnesty International, however, it is important to note here that the Amnesty International presents itself as a world-wide HR campaign in 120 countries; but it is not the "world wide movement", it is surprisingly weak outside the West Europe and North America. Although the number of members and countries with Amnesty groups is growing, the gap in membership strength between the western developed world and the third world developing countries is widening continuously.

Chapter 4, which deals with the environmental implementation of HR, is in fact concerned with the principal obstacles which inhibit any proposal to strengthen the worldwise HR programme. Under this heading, the author has discussed the relevance of governmental attitudes, significance of proper implementation machinery and formulation of HR norms. While considering the diversities and disparities as well as challenges and opportunity in the realization of HR, he has attempted to examine the phenomenon pervading the effective implementation of HR. Having stated at one place that the environmental considerations dictate that implementation machinery should be multiplied and decentralized (p. 115), he ventures to enquire whether it was practicable to secure on the global level a uniform observance of identical obligations by a form of international control in the field of HR. Being pessimistic with the truncated set-up with limited powers, multiplicity of authority without proper cohesion and lack of integrated approach to deal with complex problems in the UN penorama on HR, he has felt the need for a general instrument of implementation with independent wholetime authority that can articulate mankind's concern for HR.

Chapter 5, which is exclusively devoted to the theme of IHRO, examines the need for, and nature of this institution, outlines the tasks it should make in view of the expectations of humanity. The author is not in favour of any such organization within the UN framework and rejects any idea of a permanent subsidiary organ or any proposal of activating the UN Commission on Human Rights. He has suggested for the creation of IHRO, as a single-purpose universalist agency on HR, to function with the help of three organs : the Human Rights Assembly; the High Commission on Human Rights; the ecretariat; and the eight divisions of the High Commission on Human Rights. The author has admitted that such an idea was merely an utopia, but argues at the same time that it was because of the lack of imagination, expertise and realism that no coherent, systematic or readily acceptable substantive law on HR truly responsive to HR could be possible with the UN system. The success of any endeavour in the field of HR, according to him, can be possible only when "a self-reliant, self-governing and self-directing organizational framework devote exclusively and dispassionately to furthering the cause of human freedoms". Having

admitted that the radical proposal about IHRO may not be acceptable to a large number of states at the present time, he suggests at an initial stage an IHRO with a bare membership of 20 to 25 state parties to it.

Chapters 6 and 7 deal with the problems as to what other modalities at other levels be created in order to extend the HR movement beyond the realm of IHRO and to carry it close to the individuals. Against this background, Chapter 6 addresses to the theme of national action to implement international HR standards, where the precise nature, powers and cooperation of the National Commission on Human Rights (as a sub-commission of the IHRO) have been discussed. The question arises that if the UN has failed to persuade the national governments to establish national organs of HR, how can a balance between the appropriate sphere of national and international competance in the field of HR may be possible. The meridian line connecting the opposite poles has, however, been identified by the author in Chapter 7 on dynamics of regional co-operation on HR. The main object of the Chapter is to answer the problem as to how to reconcile the existing independently functioning regional arrangements for the protection of HR in Africa, America and Europe with the global attempt. The author has not discussed some of the efforts by the Asian states to create regional machinery for HR protection. It would not be out of place to mention that a few proposals were made in this regard. In 1965, the Bangkok Congress of the South-East Asia and Pacific jurists had discussed for drafting an Asian Convention on HR, while another proposal for a similar Convention was made by the Ceylon Conference of the International Commission of Jurists in 1966. But these attempts could not succeed. There appears to be little possibility in near future of a regional convention in Asia because of the lack of cooperation between the states. However, the possibility of HR convention or commission in the sub-regions of Asia on the basis of concern for minimum standard cannot completely be ruled out. India has acceeded to the two Covenants in 1979 without any reservation in respect to Art. 4 of the CPRC, but it has not yet ratified the Optional Protocol, though it has expressed reservations with regard to Art. 9, 12, 13, 19(3), 21 and 22 of that Covenant as well as reservation to Art. 4, 7(c) and 8 of the SERC.

Finally, Chapter 8 is the conclusion. The author himself calls his study and "academic utopia" (p. 22); he is at the same time optimistic that the proposed structure of IHRO will take time and patience to achieve. He has suggested, therefore, that the UN must take initiative to set up a high-powered UN Preparatory Committee of jurists and experts from various countries to process the proposal.

The book invites a full and friendly discussion on all points of agreement and disagreement; but only a few remarks are made here within the framework of a book review. This reviewer, for instance, entirely shares the author's position and arguments about the international concern for HR and the UN prescriptions and practice on HR implementation. The

points of agreement are also with the author's pages on national action to implement HR standards, the dynamics of HR regional cooperation as well as the contemporary international endeavours. But it is difficult for the reviewer to agree that an international agency or the global organ of implementation should be created outside the framework of the UN. On balance, however, it may be fair to conclude that the establishment of IHRO will not involve significant duplication of existing machinery and the institution will certainly not do harm; and that its creation may hold the promise of stimulating and strengthening the entrie programme in the field of HR. The reviewer feels that an IHRO can be possible within the UN system itself. The Charter is working very well and there is nothing wrong with it. Keeping in view the expectations of the founders of the UN, the *travaux preparatoires* and the evolution of the UN practice, it can be said that the Charter is a flexible document, and many new changes can well be accommodated in the UN system. Despite developing the idea of IHRO, the author has not discussed the relationship of IHRO with the ECOSOC and the UN Secretary-General. Nor has he discussed the relationship between the IHRO and the HR international covenants. Though It is difficult to predict the precise relation between IHRO and the control mechanism under the SERC, perhaps the jurisdictional problems would bulk large. Similarly, it is also difficult to predict the relation between IHRO and the CPRC, the Human Rights Committee and the scope of the individual petitions and the Optional Protocol.

The serious criticism which can be brought against this book is that discussion on the following two points are lacking: (1) some of the *earlier proposals* for establishing institutional framework within the UN system for the HR implementation; and, (2) *existing institutional bodies* within the UN framework that deal with the matters of HR.

So far the *earlier proposals* for creating a separate institutional framework within the UN system are concerned, two attempts can specifically be mentioned. *First* the General Assembly (GA) had discussed, at one stage, the proposal for the establishment of a *UN High Commissioner for Human Rights.* In view of the greater difficulty of extension of HR provisions, a suggestion was made that the proposal could be considered in a broader context, and that it was wise to consider the reasons justifying the creation of the UN High Commissioner for Human Rights. A proposal was also made that the office would occupy a position in relation to the work of the Sub-committee on the Prevention of Discrimination, and the committee on the Elimination of Racial Discrimination. But the proposal could not be accepted.

Second, the other proposal was made by the Philippines in connection with the discussion on review and revision of the UN Charter in order to improve the effectiveness of the UN. The government had observed that HR was being considered in the usual process in the sub-commission, *ad hoc* committee or by the Special Rapporteur, in the Commission on Human

Rights, and the ECOSOC, followed by the Third Committee and finally in the plenary meetings of the GA. Since the matter was to process through incredible repetition, the government had argued that the Commission on Human Rights be elevated to a *Human Rights Council* on the level with the ECOSOC and the Trusteeship Council. The Philippine had also suggested a jurisdictional provision similar to Art. 37 of the Statute of the International Court of Justice to be included in the Charter and which might read : "Whenever a treaty or convention in force, or a decision of an international organization, provides for reference of a matter relating to human rights to a special committee or commission, the matter shall be referred to the Human Rights Council, unless the parties to the treaty or convention or the international organization concerned decide that the special committee or council should be continued." This proposal was also defeated.

So far some *existing institutional frameworks* within the UN system are concerned, the author has again failed to notice the following four institutions. *First*, *The UN High Commissioner for Refugees* (UNHCR) functions under the authority and policy directions of the GA and the ECOSOC, and is concerned with HR protection of the refugees. HR of the refugees and other displaced persons are to be properly protected. There are millions of refugees in the world today, and their numbers are rising. In addition, there are millions who are victims of mass expulsion, and internal flight within their own countries. The UNHCR promotes the protection and assistance to refugees, and effective implementation of international standards by working towards their employment, education, residence, freedom of movement and safeguard against being returned to their country of origin. In discharging international protection functions, the UNHCR seeks to ensure that refugees receive asylum and are provided favourable conditions of their country of permanent asylum.

Second, The phenomenon of the disappeared persons is currently one of the worst forms of violations of the right to life and liberty. These are the persons who had once been arrested and later disappeared without any trace and the security authorities denied all knowledge about their arrest or whereabouts. In recent years tens of thousands of people have suffered the ordeal of "disappearances": forced abduction at the hands of the authorities of their own country in an atmosphere of terror and repression. It was not until 1978 that the UN expressed deep concern about reports from various parts of the world about the enforced or involuntary disappearances as a result of excesses on the part of law enforement or security authorities. In 1980, the *UN Working Group on Enforced or Involuntary Disappearances* was created. During 1985, the UN reported on the cases of disappearances in 36 countries in all parts of the world. This UN Working Group, visiting Sri Lanka in October 1991, is said to have received nearly 2000 petitions from people searching for their disappeared relatives. There were a large percentage of over 5,325 detainees in the Sri Lankan prisons and detention camps without any enquiry or trial for more than one year.

Third, the other institutional framework is the *UN Committee against Torture*. The UK has appeared before this Committee in Geneva during November 1991 to defend the police record on the treatment of the suspected terrorists. The British delegation in its report to the Committee has claimed that procedures and laws in the UK were in conformity with the provisions of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Fourth, the ECOSOC responded to the growing international activity by indigenous organizations by establishing the *UN Working Group on Indigenous Population*. The Working Group is mandated to review developments pertaining to the promotion and protection of HR of indigenous people and to give special attention to the evolution of standards concerning the rights of indigenous people. These people are the descendants of the original inhabitants of lands which boasted of rich culture and advanced civilization before they were revaged by alien colonisers. Although the Working Group is not authorized to adjudicate complaints, it has become one of the most important forums for initiating concrete protective measures.

Despite these comments and general reservations, the reviewer is of the opinion that the contribution made by Dr. Bhalla to the study of HR can not be underrated. The author deserves congratulations for such an excellent work. A precise literature on the institutional framework for HR implementation is very much limited. Through the availability of Dr. Bhalla's book, the efforts of teacher and student are greatly facilitated. Therefore, this work is an important venture. Implementation, the heart of international protection of HR, pervades the entire book. The range of mechanisms discussed is impressive.

Dr. Bhalla has brought out a useful work focussing on the institutional framework of HR implementation. If HR has to become meaningful, some effective machinery of implementation would be needed. Let us at once state that the study is a very good work. Viewed as a positive contribution to international studies, the success of this book is assured. The author has applied analytical precision to the subject, but, not content with that alone, has taken a strong stand in favour of IHRO as a viable institutional framework. The work provides a sound basis of knowledge for those who will be watching the HR implementational institutions with close interest.

D.P. VERMA*

* M.A., LL.B. (Patna), LL.M. (Dalhousie). Reader, Faculty of Law, Banaras Hindu University, Varanasi.

IDENTIFICATION OF DISPUTED DOCUMENTS, FINGER PRINTS AND BALLISTICS (1957) By Russell A. Gregory's. Revised 4th Edition (1989) by Kaushalendra Kumar. Eastern Book Company, Lucknow. pp. xxii + 314 Price Rs. 125.

EVIDENCE OCCUPIES a prominent place in the process of unearthing the truth of accusation in a criminal case. Evidence means testimony, writings, material objects or other things presented to the senses that are offered to the existence or non-existence of a fact. Every testimony or exhibit with the slightest bearing on the issue before the court cannot be admitted as evidence; it ekes out the valuable time of the court and causes unreasonable delay in the administration of justice. Therefore, to make a trial speedy, fair and just, fixed rules of evidence must be created and acted upon. It is in this process of evolving definite rules of evidence that only specific depositions which have close nexus or are material to the case are admissible.[1]

Evidence given by a non-expert or unskilled witness may be admissible under Section 6 to 11 of the Indian Evidence Act, while evidence given by an expert may also be admissible in cases falling under Section 45-51 of the said Act. Such an expert evidence may relate to any matter calling for special knowledge, particularly on question of Art and Science.[2]

The rapid development in the field of science and technology and its penetration in every walk of human life, has made the present day *criminal to change* his pursuits of the commission of crime. The change in modus operandi of the modern criminal has equally necessitated the operators of criminal justice system to be posted with recent developments in science and its application to the field of criminalistics.

Any standardised scholarly work in the field of criminal science has served a bottleneck to number of researchers in the field of criminalistics for a long time. Moreso, the awareness as to the gains and use of scientific techniques in the detection of crime and criminal has remained covered over the years. The book[3] under review is a step forward in creating awareness and furnishing relevant scientific information in the field of criminalistics and the use of expert opinion under the law of evidence. It would take up too much space to comment on all questions dealt within the book—it gives information about such important subjects as identification of disputed documents, finger prints and ballistics and the acceptance of the opinion of experts in these fields by various courts of law to resolve conflicting problems. All the three problems have been studied on legal and scientific basis.

Of special interest is the part dealing with identification of disputed

1. Paul B. Weston & Kenneth M. Wells: *Criminal Evidence for Police*, 1, 3rd ed. (1986).
2. Munir ; *Law of Evidence*.
3. Russel A. Gregory's; Revised edition by Kaushalendra Kumar, *Identification of Disputed Documents, finger* prints and Ballistics (1989).

documents. The analysis regarding the importance of document from birth to death or for the creation of legal relations between two individuals to relations between two countries in the international world is valuable for every one. It is asserted that in every person's manner of writing there is a certain distinct prevailing character. Therefore, the genuineness and identification of author in a disputed document can well be established through the analysis of handwriting. The book is especially rich in information about the various characteristics of hand-writing like coordination, movements, relative size of letters and speed of writing of various individuals. The distinction between two person's handwriting are discussed on the background of scientific knowledge. On the issue of identification of handwriting classical global examples have been cited (page 6) to make it clear that a man's handwriting has direct relationship with his brain. All types of handwriting; including the use of type writer or where deliberately an unusal method of writing which is used by the author, have been discussed comprehensively and in a very simple language. On the examination front of handwriting, the book stresses the importance of utilising the scientific techniques; ranging from the use of ordinary microscope to the use of ultra-violet rays and video spectral comparator.

Another especially interesting and informative section of the book is the part dealing with finger print. Finger print is also reliable and important aspect of evidence in a criminal case. Though the finger prints were in vouge thousands of years before christ as mark of the manufacturer of pottery but officially for the purpose of evidence it was recognised during 1858-1880 by Sir William Herschel. In India it was added under the head of expert evidence under Section 45 of Indian Evidence Act in 1899.

The technical and complicated part of evidence—finger print, has been discussed in the book in the most simple and lucid manner. The history of finger prints, its classification and characteristics is very much absorbing. The technical part dealing with the lifting, preserving and presenting a finger print from the crime scene has been discussed systematically. The stress has been laid on the importance of the use of lifting tapes, silicon rubber and Banzidine solution for lifting finger impression which are blood stained or in dust and analyses through the use of scientific inventions like microscope, ridgedatas and edgescopy. The book has brought forth in a vivid manner the methods to distinguish between two types of finger prints.

The last part of the book deals with the most important aspect of criminalistics—Ballistics. Ballistics includes many things, which are dealt in the book in detail at page 207. However, due to excessive use of sophisticated weapons (five arms) for the commission of crimes during the past decade in India, the study of forensic ballistics has received importance.

The book has interestingly traced that the gunpowder was invented in India, improved in Europe and for the first time used in Rome in the form of a device known as Roman Candle Tubes (page 208, 209).

The book has tried to resolve the conflict arising out of two expert

opinions in case of use of fire arms (the one by medico-legal expert regarding the nature of injury and the other by ballistic expert regarding the use of weapon) by suggesting that ballistic opinion should be regarded as final. The suggestion given by the author has not yet been followed in the cases coming up before the courts.

The book has brought forth in detail the types of fire arms ranging from smooth bore weapons to assault rifles and small arm ammunition to cartridge shells. The book has in a very simple language discussed the most technical aspect of criminalistics.

Every part of the book has been supported by the case law which the courts have decided while accepting the opinions of experts in the field of criminalistics.

The book is a valuable addition to the existing literature and covers in a comprehensive way, identification of disputed documents, finger prints and ballistics and their use in establishing the actual accused in a criminal case. It will be of great relevance to students of criminalistics, lawyers and the judges dealing with criminal cases. The book deals with conceptual explanations in general has also documented the important case law. Its style is lucid which makes it worth reading. The book opens up new vistas for scholars in the field of criminalistics.

DR. SUBASH C. RAINA*

FUNDAMENTALS OF INTERNATIONAL LAW, by S.L. Bhalla, Docta Shelf, Delhi, 1990, pp. vi+287, Price: Rs. 120.00

IN THE contemporary state of world affairs international law has assumed immense practical importance. It is therefore highly desirable that fundamentals of international law should be brought out for study so that it can form the foundation of the knowledge of international law as applicable to diverse situations. The book under review is, therefore, a welcome addition to the already existing material on the law of Nations.

The author has divided the book into seventeen Chapters which respectively deal with International Law : Origin, Evolution and Definition; Nature of International Law: Whether it is Law or Not?; Subjects of International Law; Sources of International Law; Relationship of International Law and Municipal Law, Reconition; Jurisdiction; Law of the Sea; State Responsibility; Succession; Nationality, Extradition and Asylum; Treaties; Diplomatic Relations; International Dispute Settlement; Laws of War; and, Neutrality.

The author has tried to compress within the limits of 257 pages (Text) a vast subject like international law. Detailed synoptical contents are

* Lecturer, Department of Law, University of Jammu, Jammu.

appended at the end of the text. List of cases and subject index is also given in the last of the book.

The titles of the chapters are conventional and so is the treatment of the book. The discussion in each-chapter is by sub-titles and is supported by references to academic writings, treaties and conventions. The author is particular to seize upon the relevant case law. He has referred to Indian cases also wherever relevant. Thus the author has successfully combined the discussion of principles and rules of international law with decided cases. The author's discussion of the decisions shows good understanding of various aspects of international law.

Undoubtedly, the book under review represents an honest attempt to portray the fundamentals of international law systematically and precisely. But, an analytical treatment of the subject is missing however. The book lacks richness in references-both quantitative and qualitative. Incomplete references and citations are there. Besides, materials have been used from secondary sources though such uses are very few. Further, the absence of bibliography in the book reduces its utility.

Printing is clear, price is reasonable and the general get up of the book is good. By and large, it is free from mistakes except for few printing mistakes which probably crept in because of hasty proof reading, for example, 'terminology, has been rendered as 'teminology' (p. 61); 'with' as 'with' (p. 82); 'obligations' as 'oblgations' (p. 83); 'Cannon' as 'Canon' (p. 141); 'auditory' as 'audatory' (p. 156); 'peremptory' as 'pre-emptory' (p. 198); 'preparatoires' as 'preparatories' (p. 199), 'erstwhile' as 'ertwhile' (p. 233, f.n. 15).

Now, therefore, it is with the intention of making this good book still better in future that the following points are made:

ONE : In Ch. 1, the author's discussion is extremely sketchy (pp. 6-7). Consequently, it is of very limited utility to readers in developing a sound and clear understanding of the substance, structure and role of international law- both traditional and modern. Bare enumeration by the author of some of the developments which have rendered the traditional approach towards international law as unsatisfactory without any attempt to explain these developments (p. 7) further reduces the utility of Ch. 1.

In Ch. 2, the author concentrates on the theoretical controversy as to the nature of international law, namely, whether international law is true law or not ? (pp. 11-19). The discussion, though archaic, is not totally irrelevant.

However, one would like the author to combine into one the discussion in Chs. 1 and 2 and to highlight the changes that have occurred in international society in the last half of the 20th century as a result of modern economic exigencies, the sociological views, that prevail today and the modern advances in technology which, in turn, have affected the nature, contents, structures and foundations of international law.

TWO : Notice should be taken of the imbalance in terms of space allotted by the author to each Chapter and the sections falling within them. For example, Ch. 4 runs into 34 pages (31-64) whereas Ch. 11 runs into 4 pages only (176-179); Ch. 4 alone constitutes 34 pages of the book whereas Chs. 1, 2, 3 and 11 do so only when taken together; the discussion of one single source of international law, namely, "determinations of international organs "covers 22 pages (42-64) whereas the discussion of all other sources covers only 12 pages (31-42).

THREE : In Ch. 4 on Sources of International Law, while dealing with "Determinations of International Organs" (pp. 42-64) as Sources of International Law, the author has referred to Security Council Resolutions, decisions of I.C.J. & P.C.I.J. But, surprisingly, a reference to the U.N. General Assembly Resolutions either as a form of emerging law in their own rights ("soft law") or as evidence of custom and/or general principles is missing Ch. 4. This needs to be taken care of.

FOUR : The reviewer very much appreciates the author's efforts to state the Indian practice while discussing the relationship between international law and municipal law (Ch. 5, p. 73). At few places, Indian law has also been referred to, e.g., Civil Procedure Code (Ch.8 on Jurisdiction, p. 132, f.n. 4); Maritime Zones Act (Ch. 9 on the Law of the Sea, p. 145, f.n. 4); Extradition Act (Ch. 12 on Extradition, p. 183, f.n. 3). In the opinion of this reviewer, however, a similar effort to state the Indian law, policy and practice in certain other areas also would certainly have enhanced the practical value of the author's work, e.g., Recognition of States and Governments (Ch. 7); State Responsibility (Ch. 10); Nationality and Asylum (Ch. 12); War and Neutrality (Ch. 16 and 17), and the like.

FIVE : While dealing with the problem of jurisdiction on aircraft (Ch. 8, p. 137), the author has simply demonstrated the outline of the law of civil aviation crimes under the International Conventions of Tokyo (1963), Hague (1970) and Montreal (1971). A mere demonstration of the law hardly serves any meaningful purpose here in absence of an attempt by the author to expose the readers to the jurisdictional controversies over offences and acts committed on board an aircraft.

SIX : In Ch. 9, the author has very rightly taken notice of the impact of the 1982 Law of the Sea Convention on national policy and legislation. But he has failed to take into account the impact of the Convention on international law and on the work of the international organizations (e.g., UNESCO, FAO, WMO).

SEVEN : At the present time both international legal theory and international legal practice recognise the proposition that international organisations are subjects of international legal responsibility and subjects of international legal claims. Since it is only recently, however, that international organisations have began to participate actively in international relations, the problems of their responsibility is only beginning to be elaborated. Therefore, Ch. 10 on state responsibility could have been made

still more useful by widening it to include a discussion on responsibility of international organisations.

EIGHT : Undoubtedly, the U. N. is the core of the modern system of peaceful means for settling disputes and inspite of the complexity of the international situation, the system for the peaceful settlement of disputes provided for the U. N. Charter has yielded positive results. But the author in his book has given a shabby treatment to the role of the U. N. in resolving disagreements and disputes among states (Ch. 15, pp. 221-222).

In sum, the book under review is not intended to be a work of reference or authoritative text on international law. The author has, however, succeeded in his task of exposition of the fundamental principles and rules of international law and preparing a very useful summary for the benefit of students or even lay persons who may wish to have a glance at international law. The book certainly deserves a place in law libraries.

R.A. MALVIYA*

THE SALE OF GOODS ACT, 1930 by Praful R. Desai (1990), N.M. Tripathi Pvt. Ltd., Bombay, pp. viit 147. Price Rs. 40.00.

AMONG ALL the commercial contracts, the sale of goods is the most common. The law in the India relating to the sale of moveable goods is contained in the Sale of Goods Act, 1930. The Act, in fact, codifies the law relating to sale of goods, originally contained in sections 76 to 123 of the Contract Act, 1872. By the enactment of this Act, the provisions of the Contract Act, 1872 were repealed. However, the unrepealed provisions of the Indian Contract Act, 1872 continue to apply except in so far as they are inconsistent with the express provisions of the sale of Goods Act (Sec.3). The Act is mainly based on the English Sale of Goods Act, 1893, with such modifications as were necessary to suit our needs.

The book under review discusses the law on Sale of goods as enshrined in the Sale of Goods Act, 1930. The chapterisation in the book broadly follows the provisions of the Act. The book comprises seven chapters. The first chapter 'Introduction' deals with the definition and nature of sale. It encompasses Sections 1 to 8 of the Act. It discusses the definitional provision (Sec.2) of the Act as also the essentials of a contract of sale and how sale is different from other types of transactions, for example, hire-purchase agreement, bailment, contract for work and labour. Chapter two deals with the provisions (Sections 11-17) relating to conditions and warranties in a sale contract. Since Section 16 incorporates the common law doctrine of *Caveat Emptor* and statutory exceptions thereto, the main emphasis in

* M.A. (Luck.), LL.B. (Alld.), LL.B., Ph. D. (Banaras), Reader, Law School, Banaras Hindu University, Varanasi-221005.

this chapter is laid on the stipulations in the nature of conditions and warranties. Stipulations regarding time, description and sample also find their mention.

Chapter III covers sections 18-30 of the Act, which deals with the passing of property and transfer of title (ownership) between the buyer and the seller. Chapter IV "Performance of the Contract of Sale" talks about the performance and the rules regarding the delivery of goods by the seller to the buyer. It also deals with the rights and duties of seller and buyer of goods under a contract of sale. Chapter V encompasses carriage by sea, i.e. "international sales", covering f.o.b., c.i.f. and ex-ship contracts. It delineates the nature of these contracts and rights and duties of the parties thereto. Chapter VI, "Remedial measures", deals with the right of an unpaid seller (Sections 45-56) and the remedies of the buyer against the seller (section 57-61). The topic of auction sales has been taken up in Chapter-VII. At the end of each Chapter, a "summary chart" is being given, which provides a graphic view of the entire chapter.

As it is claimed by the publisher that it "presumes no previous knowledge of the subject by the reader and the exposition is simple and direct" (back cover page), it very-well conveys the standard of the book. It is very elementary in its approach. Except adding a new chapter on international sale (Ch. V, Carriage by Sea), it does not add anything new to the existing literature on the Sale of Goods Act, 1930. The discussion on f.o.b., c.i.f. and other forms of contracts, i.e., in the cases where sea transit is involved, in the form of a separate chapter, has not been generally found in commentaries written on Sale of Goods Act. This is a welcome treatment by the author and he has given such contract their rightful place under the Sale of Goods Act. But apart from that, there is a lack of serious discussion on any aspect of the contract of sale of goods. The cases have been discussed in the form of illustrations and to make it farther from any serious study, Indian cases do not find much mention even by way of examples. The cases like *Vishnu Agencies* v. *C.T.C.* (AIR 1978 S.C. 449), *The State of Madras* v. *Gannon Dunkerley & Co. (Mad.) Ltd.* (AIR 1978 S.C. 560) do not figure at all in the discussion related to the nature of sale. There has been no mention of transactions taking place under a statute nor is there any reference of 46th Amendment of the Constitution of India which, for tax purposes, have dispensed away with the distinction between a sale contract and other commercial contract, i.e., hire-purchase, contract for work and labour, statutory transactions etc. At other places also, leading Indian cases have not been cited. For example while discussing the transfer to title (ownership—Ch. 3), the case of *Central National Bank* v. *United Industrial Bank* (AIR 1954 S.C. 181) does not figure at all. It is further to be noted that though the author has referred to the English cases by way of illustrations and has cited them in footnotes, he has not mentioned anywhere the changes that have taken place in England by the

passing of Consolidating Sale of Goods Act, 1979, replacing thereby its earlier Act of 1893.

The book, thus, is merely a handbook and cannot be referred for any serious work. It does not reflect any research on the part of the author nor there is any analysis of the subject matter. Except to get the knowledge of the working of the Act at a glance, the book is not of any value and cannot be recommended for the teaching or research of this subject.

*PROF. (MRS.) S.K. VERMA

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

LETTER TO THE EDITOR-IN-CHIEF

Review of *Consumer Protection Law of India : An Eco-legal Treatise on Consumer Justice* (1991)[1] published by Indian Law Institute, New Delhi.

Rejoinder

THIS REJOINDER is an earnest attempt in the domain of developing consumer protection law or in other words an explanation of those ideas and concepts that shaped and finally emerged as consumer protection law for the country based on author's explorative and stimulating research study which culminated into the book reviewed. The Review of my book in your esteemed journal has raised a pertinent issue as to whether a review of a book should or should not be a charter of vituperative abuses.

The unusual review and the unusual circumstances, which need not be stated here, has cast a responsibility on me to mend the remiss conduct of the reviewer affecting not only the capability of this humble author, but lowering the esteem of the country's two distinguished legal luminaries who opted to pen down some commendations with regard to my labour in a field where no work had been done at a time when I undertook he research study of Indian Consumer Protection Law. The entire review is an amalgam of personal prejudices, malice, venomous subjectivity and is aimed solely to denigrate my research endeavours.

Para 1 :

The reviewer has found the work "useless' for any serious study without caring to show as to how it is so. In other words he has chosen to pass unwarranted strictures on the abilities of Dr. S.D. Sharma, Vice-President of India, who besides holding a high constitutional office, has been a reputed legal scholar and a former professor of law. Dr. Sharma has concluded his study on Consumer Justice (Foreword) as a "welcome research formulation." The reviewer has also questioned the wisdom of Mr. Justice R.N. Misra, Chief Justice of India (as he then was). Hon'ble Mr. Justice R.N. Misra also holds high academic credentials besides vast experience as a distinguished lawyer and judge to evaluate the study. His finding (foreword), that the pages of the book have "analysed the matter from legitimate angle" and "has presented dependable reading material for everyone interested in the subject" is dismissed as "useless' by the reviewer.

It is a matter of great satisfaction for me that two distinguished legal luminaries of India and many others, who have conveyed their opinions, did find the work worthwhile, interesting and very useful. These are the

1. Review of R.K. Nayak's book "Consumer Protection Law in India : An Eco-legal Treatise on Consumer Justice" by S.N. Singh, 13, Delhi *Law Review* 222-26 (1991).

men having discerning capabilities and experience. I am extremely grateful to them for having opted to highlight the merits of the book which they considered should be brought to notice, whereby the shortcomings were made known to be removed in a later edition of the book. It may be stated that the study related to an uncharted field and the study was pioneered by me at the instance of former Judge Mr. Justice P.N. Bhagwati, Judge, (as he then was), Supreme Court of India who reposed confidence in me to undertake this study. It was Mr. Justice P.N. Bhagwati who approved the draft for printing as Chairman, Research Committee, Indian Law Institute for which this author is extremely grateful.

Para 2 :

It also contains mere expressions and opinion of personal nature of the reviewer about the author rather than anything relating to the contents of the book. No analysis of any material has been taken from the book to substantiate his views. Indeed, it could not have been done since the reviewer had his focus on the author and not on the book.

Para 3 :

The reviewer has used epithets such as "superficially tries to conceptualise"....."to project himself as the prolific writer." These and other such exercises are to give vent to some personal grievances against the author rather than to attempt an honest and objectively studied comment on the book. My humble opinion is that the tenor of expression and language used in para 3 of the review are highly subjective, of a personal nature and not very decent on the part of any legal academic. The omission of Bureau of Indian Standards Act, 1986 instead of the earlier statute on the subject could not have been avoided as the production of the book was unduly delayed and relevant pages, where the references occur, had already been printed earlier. However, this could be taken note of and perhaps could have been rectified through an errata which unfortunately was not done. To this extent, the reviewer Dr. S.N. Singh is right.

Para 4 :

I find myself unable to join debate on a highly personalized, prejudicial remarks in para 4 particularly when the reviewer has determinedly and deliberately chosen to throw mud. I may say that the comments herein do not touch the contents of the book at all.

Paras 5, 6, 7 & 8 :

To avoid the waste of space and the time of readers these paras can be taken together. These are repetitive exercises on prejudices, predilections, provocations and need not be replied. The only comment that may be offered is that these paras form a larger part of an essay written by Dr. S.N.

Singh as to how to charge a legal researcher with abuses and vilify him in the garb of academic writing. It may be reiterated that the review does not contain an analysis of legal research and research formulations. In the last few decades, the legal community has witnessed both a surge of scholarly interest in and the fast growth of research projects designed to achieve a better understanding of the role of the legal process in the society of our nature and values. Evidently, the compilation of prejudicial remarks do not make this writing either a book-review or any honest comment on the quality and utility of the research work.

It is unfortunate that Dr. S.N. Singh had arranged to take the script from the author on the pretext of preparing the index, tables of cases and statutes, voluntarily much in advance which he failed to do, and he returned the script after several months, that too after many reminders without doing the promised work of indexing of the book. Instead of preparing the promised index and tables of the book he prepared this Review to demolish my academic credentials.

In the last page of the review, the reviewer mentions about Consumer Protection Act, 1961 (Britain) that there was no such legislation ever passed there. The reviewer should see the British books on the subject and he will find the statute which will help him to wipe out his ignorance.

Last but not the least, any sincere legal research involves honest and dispassionate investigation to serve the socio-economic causes and in this regard the author has made some attempt to achieve something worthwhile for the millions of suffering consumers of the country. I do not claim perfection in my legal creativity, but I have done what the reviewer has not done in the area of developing consumer law. I quote:

> "What is wanted is sound, publishable research, not unattainable perfection." If we are to enliven our teaching, if, indeed, we are to keep it alive and to contribute to the advancement of learning, we must do, and stimulate research. Publication of anything worthwhile is clearly desirable——even though, as any person who has published knows, every publication is a hostage to fortune; the severest of critics are often those who have never published. Indeed, publication is the very thing the perfectionist will probably never attain : *le mieux est l'ennemi du bien.* And yet we cannot say, with the Duke of Wellington, "Publish and be damned;"[2]

Sd/-

(R.K. NAYAK)

Associate Research Professor
Indian Law Institute
New Delhi-110001

2. B.A. Wortley, "Some Reflections on Legal Research After thirty years", 24 *JILI* 175 at 179 (1982).

LEGAL AID CLINIC—ANNUAL REPORT 1991-92

The Legal Aid Camps in 1991-92 were regularly organised under the leadership of Professor P.S. Sangal, Dean, Faculty of Law, University of Delhi. He appointed Shri S.P. Singh, Reader, Law Centre-I as Director of the Clinic and the following teachers as members of the Legal Aid Clinic.

1. Professor Mata Din, Campus Law Centre
2. Shri U.M. Deshmukh, Reader, Campus Law Centre
3. Shri Sunil Gupta, Lecturer, Campus Law Centre
4. Shri O.B. Lal, Lecturer, Law Centre-II
5. Shri O.P. Saxena, Lecturer, Law Centre-I, and
6. Shri D.S. Bedi, Lecturer, Campus Law Centre

Shri A.K. Dhingra was assigned the duty to look after the arrangements and expenditure and preparation of Accounts for the Camps during the year, 1991-92, in consultation with Shri D.S. Bedi.

The first Legal Aid Camp was held at Jahangirpuri (Delhi) on 25th of December, 1991 where a large number of victims of *Sura* tragedy explained and gave facts about their tragedy which were recorded by our students on the proforma of questionnaires. We have processed those questionnaires and are planning to file a PIL for getting relief for *Sura* victims.

The second Legal Aid and Literacy Camp was organised at Razapur Village (Rohini) on 22nd March, 1992, in which around 120 students from the three Law Centres participated. The main speakers at the Camp were Mr. S.N. Dhingra, Addl. Distt. Judge, Delhi; Pradhan of Razapur Village; Professor P.S. Sangal, Chairman, Legal Aid Clinic. They spoke on the various aspects of law which affect the villagers. A large number of villagers attended the Camp and sought legal advice, which was given by Shri O.P. Saxena, Shri D.S. Bedi, Shri O.B. Lal, Shri Sudhir Kumar Jain, Shri Narinder Verma and Shri S.P. Singh.

The third Camp was held on 29-3-92 at village Bharthal near Bijwasan, New Delhi in which around 150 students from three Centres participated. The main speakers at the Camp were Professor Mata Din, Shri O.P. Saxena and Shri D.S. Bedi. Professor Jay Erstling, Visiting Professor and his wife were the special invitees who took keen interest in the legal aid and advice to the villagers. The 150 students who participated in the Camp went to the houses of the villagers in small groups under supervision of teachers. They collected information about their legal problems and on the spot legal advice was tendered.

The fourth and the last Legal Aid Camp was organised in village Jharoda Majra (Burari) on 12th April 1992 in which around 130 students participated. Professor P.S. Sangal, Chairman; Shri S.P. Singh, Director; and Shri O.P. Saxena were the main speakers. They informed the villagers about the objectives of Legal Aid Clinic, Delhi Legal Aid and Advice Board and CILAS and also spoke on the problems of the villagers.

After the Camps, the Legal Aid Clinic followed up the matters with different authorities and thus got lot of help for the poor and needy villagers. The regular camps of the Legal Aid Clinic became so popular that large number of persons have been coming to the Office of the Legal Aid Clinic for legal aid and advice. Professor P.S. Sangal and Mr. O.P. Saxena on behalf of the Legal Aid Clinic also filed a Public Interest Litigation in the Hon'ble Delhi High Court in regard to the menace on Delhi roads of stray cattle. The Delhi High Court has already given directions to Municipal Corporation of Delhi and the Police authorities in this regard.

Mr. Ashok Kumar Sharma regularly sits in the Office of the Legal Aid Clinic and attends to the needy persons.

S.P. SINGH
Director, Legal Aid Clinic

Statement of Ownership and other Particulars

about the DELHI LAW REVIEW

Place of Publication	Faculty of Law, University of Delhi, Delhi-110007
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	The Central Electric Press, 80-D Kamla Nagar, Delhi-110 007
Publisher's Name, Nationality and Address	Professor P.S. Sangal, Indian, Dean, Faculty of Law, University of Delhi, Delhi-110 007
Editor's Name, Nationality and Address	Dr. (Mrs.) Nomita Aggarwal, Indian, Faculty of Law, University of Delhi, Delhi-110 007
Owner's Name	Faculty of Law, University of Delhi, Delhi-110 007

I, P.S. Sangal, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

P.S. Sangal

> There ought to be an end to judicial *can't* towards crime. We have already too much of what a wit has called 'justice tampered with mercy'. The privilage therefore should be kept within the limits the strictest possible.

Once again the question is the same—where to draw the demarkating line? To answer this question first we should discuss the purpose of the protection granted; and for this essentially we should look into the history of the evolution of this right.

Article 20(3) was discussed in the Constituent Assembly on December 2, 3 and 6; 1948. A search through the Constituent Assembly Debates shows us that Article 20(3) was adopted by the makers of the Constitution without much discussion on it. The reason may be that by then the right against self-incrimination had become a universally accepted principle of the criminal jurisprudence. Nevertheless, B.N. Rao in his notes on the Draft Report dated April 8, 1947[14] pointed out that the sub-clause (2) (as it stood in the Draft Construction) was based on the Fifth Amendment of the American Constitution. Fifth Amendment drew its inspiration from the English Common Law. In England, the doctrine had a historical origin. It arose from a feeling of revulsion against the inquisitorial methods adopted, and the barborous sentences imposed, by the Courts of Star Chamber in the exercise of its criminal jurisdiction. This came to a head in the case of John Lilburn and the abolition of Star Chamber and the firm recognition of the principle that the accused should not be put on Oath and that no evidence should be taken from him. In course of time this principle was extended as a privilage to witness against self-incrimination in giving oral testimony or in producing documents.[15] Thus this right originally evolved in England as a protection gainst the 'judicial attrocities', when the Court and the Police were not much different. The philosophy behind this rule was, as it is evident now, that if such protection was not granted the unholy alliance of the Court and the Police (as it was the then state of affairs) would torture the accused and compel him to confess or plead guilty. It was never intended to defeat justice. But unfortunately, without a proper study of the purpose and the amplitude of the right in the light of the changed senario, our framers of the constitution adopted this rule as a whole, which thus can be held against police investigation as well as Court trial.

Now the question is whether the right against self-incrimination be extended even to the Courts in the changed circumstances where the Courts are distinctly separate from the executive and thereby from police actions? Our police may still not be much better, but by no stretch of imagination Indian Courts can be equated with the Courts of Star Chamber. The Courts

14. B. Shiva Rao, *The Framing of Indian Constitution : Select Documents* (1967), V. II, p. 149.
15. The historical background of the right against self-incrimination has discussed by the Supreme Court in *Sharma's Case, Supra* note 7, at p. 300. Also see Seervai, *Constitutional Law of India* (1985), V.I, p. 770.

in India are the vanguards of the individual liberty. But at the same time it has a duty to see that the law of the land is respected, that justice is done. But the wide sweep of the present Article 20(3) incapacitate the Courts from fulfiling this duty to a large extent. Thus as said by Justice Byron and quoted above, Article 20(3) protection is misused to return killers, rapist and other criminals to the streets. Therefore it is submitted here that the operation of Article 20(3) should be kept out side the Court room and at the same time these rights must be enforced more vehemently with respect to the police investigation. The Courts should be granted the authority to examine an accused just like any other witness. He should be cross-examined and re-examined to sift the truth out of the facts. Here the accused is not being tortured nor compelled but he is just co-operating with the Court as a responsible citizen of this country, which he is bound to do, since he had adopted justice as a constitutional value along with liberty.[16]

One may argue that the provisions contained in Ss. 313(1) and 315(1) of the Criminal Procedure Code, 1973 are enough to secure this purpose. But this contention is misleading. S. 313 is to enable the accused to personally explain any circumstances appearing in the evidence against him. Moreover, sub-section (2) and (3) provide that no Oath shall be administered to him before he is examined, nor his failure to answer or his false answers will not make him liable for punishment. Likewise, S. 315 declares that an accused person shall be a competent witness but only in his own request in writing. Evidently these provisions are to help the accused—ofcourse for a good reason. But what is intended here is a provision to examine the accused as a witness not only to prove his innocence but also to prove the truth.

In *Nandini Sathpathi* v. *P. L. Dhani*[17] the court speaking through Krishna Iyer J. observed that the word compulsion as used in Article 20(3) includes "any mode of pressure, subtle or crude, mental or physical, direct or indirect by sufficiently substantial applied by the policeman for obtaining information". This definition is fine in so far as the police interrogation is concerned. But this is not enough. The word 'compulsion' must be re-defined. Thus the accused must be made to speak in the Court, he should be made to produce all necessary documents in his custody, including those which contain his personal knowledge. Conferring a right to complete silence on the accused is out of the purpose of Article 20(3). This is the kind of judicial activism we require today. If the Courts are hesitant to do so, then the Parliament should come forward with a bold amendment to fulfil the purpose.

Interestingly, constitutional advisor Shri B.N. Rao suggested an amendment of Article 26(2) of the Draft Constitution, October 1947 (Article was later re-numbered as Article 20(3)) in a similar line. The Article, amended

16. See, Preamble to the Constitution of India, 1949.
17. AIR 1978 SC 1025.

> There ought to be an end to judicial *can't* towards crime. We have already too much of what a wit has called 'justice tampered with mercy'. The privilage therefore should be kept within the limits the strictest possible.

Once again the question is the same—where to draw the demarkating line? To answer this question first we should discuss the purpose of the protection granted; and for this essentially we should look into the history of the evolution of this right.

Article 20(3) was discussed in the Constituent Assembly on December 2, 3 and 6; 1948. A search through the Constituent Assembly Debates shows us that Article 20(3) was adopted by the makers of the Constitution without much discussion on it. The reason may be that by then the right against self-incrimination had become a universally accepted principle of the criminal jurisprudence. Nevertheless, B.N. Rao in his notes on the Draft Report dated April 8, 1947[14] pointed out that the sub-clause (2) (as it stood in the Draft Construction) was based on the Fifth Amendment of the American Constitution. Fifth Amendment drew its inspiration from the English Common Law. In England, the doctrine had a historical origin. It arose from a feeling of revulsion against the inquisitorial methods adopted, and the barborous sentences imposed, by the Courts of Star Chamber in the exercise of its criminal jurisdiction. This came to a head in the case of John Lilburn and the abolition of Star Chamber and the firm recognition of the principle that the accused should not be put on Oath and that no evidence should be taken from him. In course of time this principle was extended as a privilage to witness against self-incrimination in giving oral testimony or in producing documents.[15] Thus this right originally evolved in England as a protection gainst the 'judicial attrocities', when the Court and the Police were not much different. The philosophy behind this rule was, as it is evident now, that if such protection was not granted the unholy alliance of the Court and the Police (as it was the then state of affairs) would torture the accused and compel him to confess or plead guilty. It was never intended to defeat justice. But unfortunately, without a proper study of the purpose and the amplitude of the right in the light of the changed senario, our framers of the constitution adopted this rule as a whole, which thus can be held against police investigation as well as Court trial.

Now the question is whether the right against self-incrimination be extended even to the Courts in the changed circumstances where the Courts are distinctly separate from the executive and thereby from police actions? Our police may still not be much better, but by no stretch of imagination Indian Courts can be equated with the Courts of Star Chamber. The Courts

14. B. Shiva Rao, *The Framing of Indian Constitution : Select Documents* (1967), V. II, p. 149.
15. The historical background of the right against self-incrimination has discussed by the Supreme Court in *Sharma's Case, Supra* note 7, at p. 300. Also see Seervai, *Constitutional Law of India* (1985), V.I, p. 770.

in India are the vanguards of the individual liberty. But at the same time it has a duty to see that the law of the land is respected, that justice is done. But the wide sweep of the present Article 20(3) incapacitate the Courts from fulfiling this duty to a large extent. Thus as said by Justice Byron and quoted above, Article 20(3) protection is misused to return killers, rapist and other criminals to the streets. Therefore it is submitted here that the operation of Article 20(3) should be kept out side the Court room and at the same time these rights must be enforced more vehemently with respect to the police investigation. The Courts should be granted the authority to examine an accused just like any other witness. He should be cross-examined and re-examined to sift the truth out of the facts. Here the accused is not being tortured nor compelled but he is just co-operating with the Court as a responsible citizen of this country, which he is bound to do, since he had adopted justice as a constitutional value along with liberty.[16]

One may argue that the provisions contained in Ss. 313(1) and 315(1) of the Criminal Procedure Code, 1973 are enough to secure this purpose. But this contention is misleading. S. 313 is to enable the accused to personally explain any circumstances appearing in the evidence against him. Moreover, sub-section (2) and (3) provide that no Oath shall be administered to him before he is examined, nor his failure to answer or his false answers will not make him liable for punishment. Likewise, S. 315 declares that an accused person shall be a competent witness but only in his own request in writing. Evidently these provisions are to help the accused—ofcourse for a good reason. But what is intended here is a provision to examine the accused as a witness not only to prove his innocence but also to prove the truth.

In *Nandini Sathpathi* v. *P. L. Dhani*[17] the court speaking through Krishna Iyer J. observed that the word compulsion as used in Article 20(3) includes "any mode of pressure, subtle or crude, mental or physical, direct or indirect by sufficiently substantial applied by the policeman for obtaining information". This definition is fine in so far as the police interrogation is concerned. But this is not enough. The word 'compulsion' must be re-defined. Thus the accused must be made to speak in the Court, he should be made to produce all necessary documents in his custody, including those which contain his personal knowledge. Conferring a right to complete silence on the accused is out of the purpose of Article 20(3). This is the kind of judicial activism we require today. If the Courts are hesitant to do so, then the Parliament should come forward with a bold amendment to fulfil the purpose.

Interestingly, constitutional advisor Shri B.N. Rao suggested an amendment of Article 26(2) of the Draft Constitution, October 1947 (Article was later re-numbered as Article 20(3)) in a similar line. The Article, amended

16. See, Preamble to the Constitution of India, 1949.
17. AIR 1978 SC 1025.