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PREFACE

I have great pleasure and privilege in presenting this volume (Vol. XXI-1999) of the Delhi Law Review to our esteemed readers. I, offer, on behalf of the members of the Editorial Committee, our profound apologies for the delay involved in bringing out this issue. In the preparation of this issue, we have strived to keep up the tradition of maintaining high academic standards which the Delhi Law Review has been known for. This volume as earlier volumes contains thought provoking and scholarly papers on various contemporary and topical legal issues some of which have become subjects of public debate in the country.

I take this opportunity to express my grateful thanks not only to the contributors of this issue who have spared their valuable time in preparing their contributions but also to the members of the Editorial Committee, in particular, Prof B. Errabbi, who have taken all the pains in readying this volume.

I also extend our thanks to our readers with a request for their valuable responses which are a necessary feed-back for the members of the editorial committee for the improvement of the quality of the journal.

It is my privilege to place on record our appreciation of the services of Prof. S.S. Rathore to the Faculty of Law, Delhi University. who retired from the University on 3 October, 1999 after serving the same for a period of around 25 years.

In conclusion, I express my thanks and appreciation to the proprietor of the Shivam Offset Press for doing a thorough professional job in the publication of this volume.

Prof. A.K. Koul
Head and Dean
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PROFESSOR B. SIVARAMAYYA

1928-1999

IN MEMORIUM

It is with profound grief and sorrow that we, the members of the Faculty of Law, University of Delhi, would like to remember and recall the memories of our association with the late Professor B. Sivaramayya who died on 3-7-1999 under tragic circumstances. It was most unfortunate that a person of Sivaramayya's nature and compassion who could not even think of harming an insect was destined to suffer a violent death at the hands of two scooter-born desperados who robbed and fatally injured him almost infront of his own house on 1.7.1999. He breathed his last two days later in a hospital where he was admitted for medical treatment. Mysterious are the ways of god!

As a Professor of law in the Faculty of law, Prof. Sivaramayya served the cause of legal education and legal knowledge with distinction and dedication for a period of about 37 years (from 1.10.1956 to 18.2.1993) and left, on its academic spectrum the indelible imprints of his scholarly personality the hall-marks of which had been his remarkably disarming humility, simplicity and courage of conviction. During his long stay in the Faculty of Law, Prof. Sivaramayya had been a source of inspiration not only for generations of law students but also for generations of law teachers who considered him as their role-model and looked to him for guidance and academic leadership.

Prof. Sivaramayya was a scholar par excellence. His contribution to legal literature and knowledge had been both extensive and seminal. He was one of the very few legal scholars in the country whose writings not only influenced the course of legislative policies of the Government but also received the stamp of judicial aproval from the Apex Court of the country. Although Prof. Sivaramayya

had his specialisation in the field of Indian personal laws, his scholastic interests extended for beyond that discipline and embraced areas such as constitutional law, the problems of women and children, the problems of poverty and bonded labour and the issues of property and uniform civil code, etc. His legal writings were always marked by erudition, depth of learning, lucidity and simplicity of style.

As a person, Prof. Sivaramayya was an embodiment of virtue in all its comprehensiveness. During his life time, he staunchly believed as well as practiced the age old ideal of high thinking and simple living. It would be no exageration to say that Prof. Sivaramayya was wisdom and humility personified.

In the demise of Prof. B. Sivaramayya the Indian legal fraternity has not only lost a scholar of eminence but also a noble sole who stood steadfastly for the noble human values of honesty, integrity, sincerity, compassion and humility. It would be a fitting tribute to his memory if we strive to pursue these values which he cherished and held to his heart throughout his life.

We pray the God Almighty to bless his sole with Peace.

Prof. A.K. Koul and Prof. B. Errabbi

INAUGURAL ADDRESS*

*Justice Sujata V. Manohar***

I am very happy to preside over the inaugural session of this expert level seminar on WTO - Patents Law and National Economic Interest. In this high-level group of experts I am venturing to offer a few remarks with some timidity. Patent law, at its easiest, requires a certain degree of technical expertise. In the high technology modern world of digitalization, biotechnology and global telecommunications, privatisation of intellectual outputs, in whatever form, is bound to raise technical and legal problems. On the one hand, there is the obvious need to encourage scientific innovations and inventions with practical applications to raise the quality of life, as we know it. It is as a result of these scientific and technical advances accelerated by renowned inventors like Marconi. Edison and Benjamin Franklin, that daily living today is so much better than it used to be at the turn of this century. In the hottest weather, one can sit in the cool comfort of an air-conditioned room with the four walls of one's home and communicate with any part of the globe without moving from your armchair. I would like to remind you that in his day, Benjamin Franklin held the maximum number of patents in his name.

Patent protection and the resulting ability to earn financial rewards has spurred dramatic improvements in technology. It has made possible vast financial resources being deployed in research in basic and practical sciences, steadily extending our frontiers of knowledge. It has brought us vastly improved health care, a new range of medicines and the latest equipments for diagnosis and treatment of diseases. At the same time, the patent system requires that the users and beneficiaries of this knowledge and technology pay for the benefit they receive as a combined result of the intellectual outputs of scientists and technologists or even ordinary innovators, backed by financial sponsorship. In countries where this spurt of inventions, innovations and discoveries have taken place in this century, it was always realized that patent protection could lead to monopolist exploitation. A recent issue of time magazine carries an article

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* Delivered at the seminar on "WTO" Patents Law and National Economic Interest" organised by the Faculty of Law, Delhi University on 10-4-99.

** Judge, Supreme Court of India.

on Craig Venter, the famous genomics expert in a hurry to decode the human DNA. His private lab with private funding has been criticized by fellow scientists who say that his genome may be locked up by his financial backers with patents, blocking the advancement of science. In an opinion poll conducted on the issue of private companies trying to get patents on genes so that they can make money, 71% disapproved it. Our concerns are, therefore, not dissimilar from the concerns of other more developed countries. The patent law sought to deal with this problem by providing for compulsory licensing, check on pricing through competition and prevention of monopolies, and providing exceptions to patentability in public interest - such as morality or health. Now, with international trade becoming relatively free within member States of the WTO, international minimum intellectual property norms are also required to be met by all member states of the WTO. To benefit from the membership of WTO, India has, therefore to comply with the TRIPS norms. To do so, the Patents Amendment Act has recently been passed amidst much controversy. It is important that we examine and understand the implications of being a part of the World Trade Organisation, the obligations that such membership imposes on us, its implications for our Patent Law and its impact on our national economy.

The United Nations General Agreement on Tariffs and Trade (GATT) was created in 1948 to liberalise trade in the post-war era. Its international agreements have been evolved in a series of trade negotiations, the most recent of which being the Uruguay Round which was finalised in 1994 after discussions lasting seven years. As a result, the World Trade Organisation, has come into being whose member countries are bound to implement the principles and provisions laid down in the agreement. One of the important changes in the WTO compared to the GATT is that all counties which wish to be members and to enjoy the market access it provides will have to accept all the main WTO agreements including the TRIPS Agreement dealing with trade related intellectual property rights. Another consequence of membership is that the dispute settlement procedures as revised in the Uruguay Round will also apply to the TRIPS Agreement. What is important, under the WTO, is that the failure of a country to meet its TRIPS obligations can put in jeopardy its market access rights and other benefits under the WTO.

The agreement on trade related aspects of intellectual property rights popularly called the TRIPS Agreement came into effect on 1st of January, 1995. It is the most comprehensive multilateral agreement on intellectual property. It deals with each of the main categories of intellectual property. It deals with each of the main categories of intellectual property rights and

not just patents. It establishes standards of protection as well as rules on enforcement and provides for the application of the WTO dispute settlement mechanism. Various kinds of intellectual property in the form of copyright and related rights, trademarks including service marks, geographical indications, industrial designs, patents, layout designs of integrated circuit and undisclosed information including trade secrets are all covered by TRIPS.

The fact that TRIPS has become an integral part of multilateral trading system of the World Trade Organisation is highly significant. Because, it shows that protection of intellectual property has moved to the centre stage of international economic relations. TRIPS require its members to conform to the minimum requirements as established by it. But, it is open to all members to have by law additional requirements. They are also left free to determine the appropriate method of securing minimum requirements within their own legal system and practice. While the objective of the TRIPS Agreement as laid down in Article 7 is very laudable, some of its provisions have caused a certain amount of consternation in the developing countries. Article 7 states:

> "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare and to a balance of rights and obligations. Nobody can have any quarrel with these objectives. In fact, every country which hopes to promote creativity and ability to produce useful inventions amongst its people would require some kind of protection for this creativity in the form of patents which would bring returns to all those who have invented patentable products or processes".

Under our existing Patents Act, 1970, prior to its amendment, Section 3 enumerated inventions which were not patentable or which were not considered as inventions within the meaning of the Act. These included (1) an invention the primary or intended use of which would be contrary to law or morality or injurious to public health; (2) the mere discovery of a scientific principle or the formulation of an abstract theory; (3) the mere discovery of any new property or new use for known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. It also included a method of agriculture or horticulture and any process for

the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products. Therefore, any invention the use of which would be countrary to morality or the use of which would be injurious to public health cannot be patented even now after the amendment. It may he noted that this kind of exemption is permissible under Article 27 of the TRIPS Agreement. Similarly, any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or animals or plants to render them free of disease is not patentable and it remains so even after the amendment. This also is a permissible exclusion under Article 27 of the TRIPS Agreement. Thus, some of the concerns expressed about the implementation of TRIPS in our country have already been taken care of under the existing Section 3. Section 4 provides that inventions relating to atomic energy area not patentable.

Under section 5, however, our existing patent law permits patenting only of methods or processes of manufacture in respect of substances capable of being used as food or as medicine or drug, or substances prepared or produced by chemical processes. These would include agricultural chemicals. Now, this law has been required to be changed within the time frame provided under TRIPS to enable patenting of medicines and drugs also along with the processes. There is a genuine fear that if patenting of pharmaceutical products or agricultural chemicals is allowed number of medicines and other such products developed outside the country and protected by TRIPS would now be available here only at very high prices which most people would not be able to afford. A fear has also been expressed that there is no obligation on a patentee to manufacture the patented product in this country. He can simply import the product and such imported product would also be protected by these patents. Through patent legislation, therefore, competition can be blocked and new medicines can be sold at very high prices without the consumer having any redress.

In this context one must remember that the international community, especially the developed countries which have spent large amounts in research and development of new drugs and medicines, would like that the inventors who have spent considerable time and effort and the financier who has invested money for inventing the medicines so vital for human welfare and well-being, should get an adequate return for their efforts and ingenuity. Otherwise they would not come forward to support research. If they are to be deprived of monetary benefits through patents, and anybody could make use of the discovery which they have made by spending vast

amounts of money and labour, there would be no incentive for new discovery and new inventions in this vital area of health and welfare of mankind. In fact the whole purpose of having intellectual property protection is to ensure that those who are inventors and who have used their abilities and their intellect for producing inventions which are valuable for mankind should be adequately rewarded. At the same time, one cannot have a patent regime which gives such people a complete monopoly over their own inventions which they can exploit to the total detriment of users. While reasonable returns, especially in the field of medicines, drugs and other inventions which promote health and well-being of mankind, are obviously permissible, what has to be prevented is exploitation and exorbitant pricing. The only safeguard against such monopolistic practices which increase the price of drugs and medicines, is contained in Article 40 of the TRIPS Agreement which says that the agreement shall not prevent members from specifying in their legislations licensing practices or conditions that may, in particular cases, constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. A member may adopt consistently with the other provisions of the agreement, appropriate measures to prevent or control such practices.

The Patents Act, 1970 contains a system of compulsory licensing in cases where the patentee does not work the patent for a specified time. Abuse of the rights granted under a patent can be in various forms. For example, (1) activity such as meeting the demand for the patented articles solely by importation from abroad and not by manufacturing the patented articles locally, thereby discouraging and prejudicing the establishment of new trade or industry, (2) refusing to grant licenses to work patent locally, (3) imposing unreasonable terms on licensees thereby discouraging voluntary licensing , (4) imposing restrictive conditions on the use, sale or lease of the patented article, thereby prolonging the patent monopoly even after the patent has expired. The mechanism for avoiding this evil which India has adopted, like many other countries, is that of compulsory licensing by a statutory authority and revocation of a patent for non-working. The Patents Act provides for four types of compulsory licenses. A compulsory licence to work a patented invention may be granted on the ground 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 public at a reasonable price. Section 90 sets out the conditions when the reasonable requirement of the public shall be deemed to be not satisfied One of the conditions is where an existing trade or industry or its

development is prejudiced when the demand for the patented article is not met to an adequate extent, or on reasonable terms or where the patentee refuses to grant a license on reasonable terms for manufacturing the patented article in India; or a market for the export of the patented article manufactured in India is not supplied or developed, establishment of commercial activities in India is prejudiced and so on. One of the conditions also relates to the working of a patented invention in India on a commercial scale being prevented or hindered by importation from abroad of the patented article by the patentee. Some of these conditions are being challenged as contrary to TRIPS.

There is, however, no room, in my view, for any debate on whether India should or should not comply with TRIPS norms. We have to do so if we want to benefit from WTO. How this can be done without damaging national economic interest, is really what needs to be discussed. A part of the resentment against TRIPS is caused by the existing imbalance between the patentable innovations and inventions of developed countries as against our patentable innovations and inventions. Our technological and biotechnological advances have been slower, adequate financial support of the magnitude deployed by the developed countries for such research is also not available. Nevertheless, international funding is now becoming available for research and development. It is time we display some self-confidence in the abilities of our researchers, and attract the best talent to this work so that we can profit from TRIPS in the same way as others instead of concentrating on copying or reproducing the results of others.

This is not to say that we do not have any immediate cause for concern. In the context of fantastic scientific developments in the field of biotechnology, micro-biology and biological sciences in general, our areas of concern have been brought out in a number of articles and papers. I am happy that the three sessions of this seminar have focussed on these main areas of concern.

As I said earlier under Section 3 of the the Patents Act, 1970 there is a list of inventions which are not patentable. Among these are inventions that impinge on health and morality, But there is no express exclusion of life forms - plant, animal or human, Undoubtedly, what already exists in nature cannot be patented.

Only new and original inventions can be patented. Therefore, existing life forms cannot be patented. The problem in this area has now arisen because we have acquired the knowledge of how to cause changes in these life forms. What should be the extent of change before one creates a new life form which can be patented? In respect of seeds and plants and other life forms, the difficulty lies in deciding when something new is invented.

Often, because of the advances in genetic engineering, minor modifications in the gene structure of plants or life forms are passed off as new species invented by the patentee. How extensive should the modification be before the species produced can be considered as new? Some kind of an international agreement on the extent of such necessary modifications is required. India needs to prescribe by law the norms for judging a new life from patentability of plants and animals other than micro-organisms and essentially biological processes for the production of plants and animals other than non-biological or micro-biological processes. It should, therefore, be possible to exclude by specific legislation plants, animals including humans and all that require biological processes for production, from the ambit of patents. Article 27 makes this conditional on the member state providing for the protection of plant varieties either by patents or by an effective *sui generis* system or a combination of both. We could, therefore, have an appropriate legislation to protect plant breeders rights and new plant varieties. India has done extensive work in developing new plant varieties and in producing hybrid seeds. It is in India's interest that this knowledge is suitably protected and used for the benefit of farmers. India should also examine whether it can limit patentability of new life forms with reference to the processes deployed for their production. Anything involving a biological process could be excluded from patentability. The legislation could also protect existing bio-diversity, check destruction of rare varieties of plants, eco system and the like and prevent our existing life forms from being patented.

Patenting of life forms whether it be micro-organisms or anything else can raise serious ethical questions. According to Andrew Kimbrell, the founder of the Washington based International Centre for Technology Assessment, the economic trigger for bio-prospecting was provided by a little known 1980 United States Supreme Court decision in *Diamond* vs. *Chakraborty*. According to him, the impact of this decision makes this unheralded court decision one of the most important judicial decisions of the twentieth century. Apparently, in 1971, Indian micro-biologist Anand Mohan Chakraborty, an employee of General Electric, developed bacteria that could digest oil. General Electric applied for the U.S. patent on oil eating bacteria. This application was rejected by the patent office under the traditional doctrine that life forms (products of nature) are not patentable. The case eventually went to the United States Supreme Court which held by a four to five margin that the patent could be granted. The Court stated that the relevant distinction for patenting material is not the distinction between living and inanimate things but whether living products could be seen as a human-made invention. On this basis, patents have

been extended to all altered or engineered animals micro-plants, human cells and genes. The Merck Pharmaceutical Company had patented microbial samples from nine countries. These include soil bacteria from a heather forest on Mount Kilimanjaro, a Mexican soil fungus useful in the manufacture of male hormones, a fungus found in Namibian soil for potential use in treating manic depression, a soil bacterium in India that serves as an anti-fungal agent and a Venezuelan soil bacterium patented for use in the production of anti-biotics. Each year the drug industry spends vast amounts of money searching the world's soils for valuable micro-organisms. This activity has its plus side and its minus side. On the plus side, if ultimately it results in production of valuable medicines and drugs which can fight diseases which are today incurable or prevents diseases, the effort would have been well spent. It is important to remember that native soil cannot be patented, nor what is naturally found there. If the element of inventiveness is forgotten in the process, ethical questions may arise as in the case of patenting human genes such as the cell line of a Guaymi Indian woman or cell lines from indigenous people in Papua New Guinea and the Solomon islands. On the minus side, in the name of new inventions traditional knowledge of local peoples and tribes can be pirated and patented; traditional plants and herbs with medicinal values like neem and indigenous varieties and food-grains like basmati rice can be patented, depriving the people of the benefit of their own plant species, crops or traditional knowledge. The exclusion clause under Article 27, therefore, must be carefully examined and suitable legislation should be framed to prevent unlawful exploitation of local and traditional wealth in the form of plant varieties and traditional knowledge. However, an Act could provide for use by others of this traditional knowledge for making further improvements; but by paying reasonable compensation to those whose knowledge is being so used.

Another area of concern for India is availability of medicines and drugs manufactured by multinationals at reasonable prices. It is in this area that the developing countries have to work together to set up a suitable set of criteria to decide what would be the reasonable price. Today the same drug is sold at vastly differing prices in different countries of the world. With the flurishing of international trade one should also expect international agreements on, at least prices of drugs and medicines throughout the world or special prices for poor countries. Such drugs and medicines should also be available throughout the world, at the same time ensuring that a fair return is available to the inventor. A mere resort to compulsory licensing may not be adequate or even entirely satisfactory. We have, therefore, to work for an international acceptance of certain basic principles related to pricing and availability of medicines and drugs which affect the life and health of human beings.

There has also been a fear expressed that the patent regime under TRIPS will result in dumping of banned drugs in our country with international brand names for exploiting the local population. These are matters which ought to be taken care of by legislation in public interest which is permissible under TRIPS. Legislation can also control use of untested hybrid seeds, or those with terminator genes, preservation of local crop varieties and indigenous plants and eco-systems.

The other area of concern relates to exclusive marketing rights or EMRS for five years in respect of those products which do not have patent protection under our existing law and where we permit patent protection only to the process of manufacture. Therefore, in respect of pharmaceuticals and agricultural chemicals we have to comply with TRIPS by providing for EMRS for five years. Since we are a part of WTO, this is an obligation which we have undertaken and it is an obligation which we cannot shirk. However, in order to ensure that granting of EMRS will not be misused for hijacking prices, for stopping competition or preventing local industrial development, the provision of compulsory licensing have to be very carefully worked out within the frame-work of TRIPS. It is important to remember that countries which produce inventions and which support such research find the protection of patents beneficial and helpful for their people, generating more inventions and innovations and development of knowledge and techniques which can be beneficial to mankind. We should also hope to be a part of this information and technology explosion. If we have the requisite knowledge and the requisite skills, international funding will be forthcoming. This is happening in software. This is happening in molecular biology or at the frontiers of science. We have shown our technological skills in our space programmes and defense related projects. There is no reason why India cannot excel in research and invention of patentable products and processes. We should hope that in future we will be able to make better and more profitable use of our inventiveness through patents to promote better international trade and better agreements with other members countries of WTO, from a position of strength.

I would like to thank Dr. Ashwani Kumar Bansal and the Faculty of Law, University of Delhi, for inviting me to preside at this national Seminar on WTO Patents Law and National Economic Interest. I am sure the deliberations will produce valuable results.

REFORMING CRIMINAL LAW : A POLICE PERSPECTIVE*

*R.K. Raghavan***

Respected Justice Shri G.T. Nanavati, the Vice Chancellor, Dean, Law Faculty, teachers, students, ladies and gentlemen. I feel honoured to have been invited to deliver the twelfth Professor R.V. Kelkar Memorial Lecture. This is an honour for the entire Indian Police because it recognises the deep and intrinsic links between all wings of the criminal justice system, of which police officers and lawyers are two key pillars. At the same time, I feel humble in the presence of the chairman and eminent jurists because they have devoted a lifetime to the study of law in general and criminal law in particular, taking forward the traditions left behind by Prof. Kelkar.

Prof. Kelkar was as bold in deed as he was in his lectures and writings. Impelled by his passionate belief in the rectitude of law, whenever he found its practice differing from the precept, he spoke out against the dilation and even paid a heavy price for it. Generations of students have benefitted from his lectures. His works are lucid and transparent and classic in their approach to criminal procedure. If independent India were to count its sons who have made significant contributions in various walks of life, Prof. Kelkar would certainly be among the list in law and legal studies.

We are living in a world that is becoming increasingly violent. Violence envelopes even traditionally peaceful regions. Ordinary citizens in all walks of life who are normally law abiding and believe in the rule of law are greatly affected by it. The Indian scenario is in particular far from comforting. Violent crime during the decade (1986-96) went up by 33.7%. Homicides alone rose by 38.1% . The corresponding figure for rapes was 86.7% (Crime in India 1996). Alongside this is the cold fact that conviction rates have either been stagnant or have been falling under some heads of crime.

Against the above background of high crime and increasing fear of violent crime, consumers of police services, viz., the community in

* Prof. R.V. Kelkar Memorial Lecture 1999.

** Director, Central Bureau of Investigation, New Delhi.

general, rightly turn to police leaders and ask us-we professionals - as to what is being done to preserve and protect public order and render justice to those victimized by persons who have no faith in civilized living. Here, as a senior serving police officer, I am aware of the oft-repeated accusation that the day-to-day functioning of the police is hampered, among other factors, by an archaic legal framework that is founded on distrust of the police. It is further said that the police could give a better account of themselves if the current criminal law of the country undergoes certain basic reforms.

The pro-reform position taken by police may not be wholly untenable, although it is difficult to subscribe to a demand sometimes by them that sweeping changes are warranted. At the outset itself, I would like to make my own stand quite clear. I am not for sweeping overnight changes. But I am for well conceived incremental changes which would facilitate better police control over crime and the underworld. In effect, I plead for a sense of balance and fairness within the framework of the rule of law that is fundamental to our Constitution.

I propose to begin with a few widely accepted propositions that serve to highlight the importance of criminal law in a democratic society, A firm but humane application of criminal law is essential for the proper functioning of constitutional democracy. Otherwise, the consequence would be one of lawlessness and anarchy. The administration may perhaps care to pay only minimal attention to social welfare schemes in certain difficult fiscal situations, but at no point of time can it afford to ignore criminal justice administration. It should be remembered that all economic development ultimately rests on a peaceful that believes in respect for law. It is possible that a person can eke out a living on his own without any assistance from government, if only he is given a sense of security. Herein lies the importance of criminal law and its role in establishing a sound criminal justice administration.

Lord Macaulay gave us a valuable gift in the form of the Indian Penal Code of 1860. It is a masterpiece of legislation which contains a description of almost all types of crime. Some of the criminal statutes enacted after Independence include the Prohibition of Dowry Act, 1961, the Prevention of Corruption Act, 1988, the Prevention of Food Adulteration Act, and the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act. All these laws specify various form of human conduct in the process of declaring them as offences and lay down different terms of punishment. We also have an outstanding Criminal Procedure Code which was totally revised in 1973 with a view to taking into account the needs of the times.

It is this Code, more than any other, that has grabbed police attention for possible reforms.

The policeman in the field has to face many hurdles in the discharge of his investigative functions, To start with, he cannot really exercise his powers of search and arrest unless an FIR has been registered. Though the law provides for preliminary investigation, the fact remains that the accused or a witness is not duty bound to reply to the queries of the police officer unless there is some legal compulsion. Here the punishment for evading replies is simple imprisonment for one month or a fine of Rs. 500/-. Such a penalty is hardly deterrent.

Again, the registration of the FIR is a tricky matter because all sorts of complaints are tendered at the police station, some of which may be totally false and some only partially true. Indeed, the really watertight case is often not reported. *Suo motu* registration in indeed possible, but practical experience shows that the average police station is so over-worked, the SHO (and Writer) would be quite happy dealing with existing complaints rather then create more work for themselves. Hence, the first and foremost legal requirement is to make submission of false reports and false complaints to the police severely punishable. The law no doubt provides for perjury, but only in relation to a trial. Here the punishment is three years. The police officer, who is an agent of the court, is as much offended by perjury as the court itself. Hence, any false statement made to the police officer before or after registration of a case should be punishable by a term of imprisonment for not less than two years and the offence be made non-bailable. Section 182 of the IPC provides only for six month imprisonment or a fine of Rs. 1000/- or both. This illustrates the light view that was taken by Lord Macaulay. It is my prayer that this sentence should not be subject to the general leniency shown by learned courts in such matter.

A related point is the disowning of statements by witnesses. As we are aware a police officer records such statements during the course of investigation and submits them with other relevant evidence to the court along with the charge-sheet. Here, it has been noticed that due to various pressures - social, economic or political - witnesses retract their statements in court. One can well understand how weakened the prosecution case will become if key persons such as eye-witnesses or the complainant himself/herself changes the original version to the police while deposing in court.

Unfortunately, in our Criminal Procedure Code, as opposed to codes in a few other countries, there is no provision for witnesses to sign their statements. Hence, there is no sanctity for the statement recorded by the police officer in as much as it has no legal cover nor a witness, judicial or otherwise, to testify to the accuracy of the statement. It is indeed true that

the police officer has to record a certificate that he has read out the contents to the witness and the latter has to certify that the contents are true and correct. But, since the witness does not commit himself/herself on paper, he or he she is quite capable of going back on his/her statement at a later stage. It is no doubt true that police officers, sometimes in ignorance and sometimes due to over-enthusiasm, put certain words in the mouth of the witness which the latter had not intended to speak. But this is only a human failing and the learned court can always question the witness and ascertain the central point of the statement. Thus, another possible amendment to our Criminal Procedure Code and the Evidence Act is to make statements to police officers binding on the witness by some mechanism such as a statement on oath, an affidavit or a judicial confession. We may recall the recommendation of the Law Commission in its reports, 14th & 41st Which need to be taken up by our legislators as early as possible.

One sore point with the police is the Constitutional requirement {Article 22 (2)} that a person arrested by them will have to be produced before the nearest Magistrate within 24 hours of the arrest. The human rights objective of this stipulation is laudable. Nevertheless, the police belief is that this limit is unreasonable if one reckons the need to question the individual and get all relevant information for quickly processing with further investigation, including effecting more arrests. I am aware that a longer time, sometimes 72 hours, is given to police investigators in a few countries. This needs to be beaded. It is my view that the existing legal position puts enormous pressure on the police and leads them to undesirable practices which bring a bad name to the whole force.

Another important point which I want to place before this distinguished gathering is : When, in many parts of the world, a confessional statement of the accused recorded by the police is admissible in evidence, why is the position different in India? A police officer, though he may be of the rank of Superintendent of Police or Director General of Police, is still not competent to record the confessional statement of any accused, even when it is voluntarily given. Why this distrust? The law that allows the officers of the Customs & Excise and Enforcement Directorate to record such a statement excludes the police officer. Police officers also come from the same society and broadly similar background as these government officials and the distinguished members of the Bar or the judiciary. On the face of it, this smacks of unintended discrimination.

This anomalous situation could be described as a hangover of our colonial legacy, but is one that deserves a hard look so that the distrust of the police yields place to healthy respect. This is particularly when the ultimate acceptability of such a confessional statement depends on it being

voluntary and truthful. Therefore, I strongly plead that the time has come, as the Law commission has said, to confer authority on senior police officers to record confessional statements. One thing which may be said is that our Constitution itself does not disfavor this. Our own Supreme Court has upheld the provisions of Terrorist & Disruptive Activities Prevention Act, 1987 empowering the Superintendent of Police to record a confessional statement.

All police investigation will come to nought if prosecution witnesses do not feel secure while deposing against the accused. It is widely known that fear of reprisal from the accused and his associates deters many a witness from coming out with the truth while testifying before the Court. Unfortunately in India, unlike in a few countries of the West, there is no exclusive legislation for witness protection. Here again it would be easy to say that a citizen should be able to discharge his/her duty by fearlessly stating the truth in court. But who is to protect the witness if the is threatened by the henchmen of the accused? Why is the law silent of this aspect of witness protection ?

While the existing criminal law, especially the Criminal Procedure Code, is protective of the rights of the accused, whose personal freedoms are sought to be enforced at any cost, the prosecution operates under tremendous odds. An example is the procedure with regard to grant of bail. Fristly, the police in the from of the SHO/IO has to state before the committal court the reasons for not agreeing to a request for bail by the accused. Such reasons can only be adduced if sufficient investigation has already been conducted. But, it would be difficult at the initial stages for the I.O. to state the grounds on which he opposes the bail. Further, he may require the arrested person for interrelation. Police Custody or police remand is no doubt granted more liberally than before by the courts. But there is an obligation to complete the interrogation within the stated period of one week, 10 days or maximum one fortnight. This places immense strain on the police machinery because once the accused or interrogated person leaves police custody, he is no longer available for questioning under normal circumstances. The police would have to apply through the Court to examine him in the jail and this has its own limitations. Bail is also granted very readily for the accused, sometimes even in law & order situations. When enlarged on bail, they return to the scene of crime and either commit further crimes or intimidate the witnesses.

Anticipatory bail in no doubt a measure which helps an innocent person or a person wrongly suspected of a crime to obtain the personal freedom of movement when being harassed by the investigative agencies.

However, the fact remains that this provision is being misused by the accused in various cirumstances to obtain anticipatory bail from courts which are not familiar with the facts of the case and which physically lie far away from the scene of occurrence. Hence, there is no logic in grant of anticipatory bail to persons without hearing the police side of the story. Further, Section 438 of Cr.P.C. was introduced by alter amendment and since TADA and SC/ST (Prevention of Atrocities) Act have made it non-applicable, there does notepaper to be any insurmountable problem in deleting it from the law books, The whole bail law therefor needs a fresh look, especially in the context of reported wide regional differences in their application.

Another police perception is that stays and restrictions on execution of warrants of arrest are sometimes granted quite freely by some appellate courts. While there is here an important element of protection of human right, we have to think to the danger to individual victims and to the society resulting from such restraints action against persons accused of crime.

Let us go back a few steps to a burning issue. It is common knowledge that the power of arrest given to Police Officers generates corruption as well as violation of human rights. There is a generally well founded criticism that law enforcement agencies resort to more arrests than are necessary. I also share this perception. The National Police Commission had recommended more than two decades ago that this power should be exercised with great caution and restraint. the Supreme Court had an occasion to consider the law of arrest in *Joginder Kumar's Case*[1] and laid down some guidelines regarding the power of arrest of police in a case involving grave offence like murder, dacoity, robbery, rape, etc. Where the accused was likely to abscond and evade the processes of law. The Law Commission in its 154th Repot has also recommended many amendments in the Cr.P.C. to ensure that the power of arrest is used only when it is genuinely required and is not misused by the police. The Supreme Court has prescribed certain procedural guidelines in *D.K. Basu's Case*[2] to ensure the dignity of human rights.

I fully support the view taken by the law Commission, Supreme Court and National Human Rights Commission. In the event of contravention of these guidelines and the spirit thereof, the erring policeman should be taken to task. Only then we can build a society that is based on order.

Another burning issue we have to address ourselves is offences against women. Crimes which are specifically directed against women, where

1. (1994) 4 SCC 260.
2. A.I.R. 1997 S.C. 610.

women alone are victims, fall under this category. Besides the constitutional guarantees, India is also committed to the protection of the rights of women in the international sphere ever since we rectified the CEDAW (Convention on the Elimination of all forms of Discriminations against Women).

Rape is one of the most serious offences in any civilized society. The Supreme Court has voiced the concern of all of us in the judgment in *Gurmit Singh* vs. *Punjab*[3] that rape is not merely a physical assault but is destructive to the entire personality of the victim. Rape degrades the very soul of the helpless female. Various judicial decisions have brought in far reaching amendments in the law and practice on the subject. This will have to be a continual exercise if law and the procedure in the area are to keep pace with trends of criminality. There is now a debate on whether or not rape merits the capital punishment. The debate is relevant although its implications need to be studied carefully.

Eve-teasing, known to the Western world as sexual harassment, should cause us immense concern because of its wide prevalence. In *Visakha* vs. *Rajasthan*[4] the Supreme Court issued guidelines to all government and private organisations directing them to take effective steps with regard to prevention, as well as initiate criminal and disciplinary action against offenders. Departmental committees have been formed to monitor sexual harassment at the work place but positive action, as obtaining in USA, where an affected person can apply for relief in courts is needed here too. Tamil Nadu has brought in exclusive legislation to tackle this menace. This deserves to be studied by other States.

Offences where children are victims and those which are specifically committed against children are slowly coming into national prominence. It is very unfortunate that the criminal predators are eating into the world of innocence, and consequently, crimes against children are showing a phenomenal increase. In 1992, 26% of the rape victims were children less than 16 years. In 1996 this percentage went up to 28% . Other crimes like infanticide, buying and selling of girls for prostitution and paedophilia have all increased over the years.

Child Sex Abuse is exhibited in many crude forms like child pornography and child trafficking too. Some of the recent judicial pronouncements throw light into certain interesting matters with respect to investigation and prosecution of crimes against children. The judgment by the Delhi

3. A.I.R. 1996 S.C. 1396.
4. A.I.R. 1997 S.C. 3011.

High Court in *K.C.J. and others*[5] has ushered in a high level of sensitization of all concerned in handling child victims of rape. The need of 'child-minder' has been appreciated by the High Court. The Court has drawn up the mechanisms to protect the child victim from the din and bustle of the court room, so as to pave way for free and fair deposition. However, the problems faced by the child victim in this particular case where she has been continuously sexually abused, has thrown up challenges to the legal definitions of rape and has brought to light the need for a comprehensive law dealing with Sexual Assault on Minors.

Without a realistic procedural law, all other legislation cannot achieve the object of a low-crime society. Procedural laws outline the machinery for investigation of crime and trial by the courts and the functionaries manning such machinery. For instance, the new Cr.P.C. of 1973 did away with Honorary Magistrates and Justices of the Peace. Whatever the rationale behind such a move, the fact remains that one level of interface between the public and the judiciary was removed, placing a greater burden on the magistracy, which has to deal with a whole set of petty offences and is consequently unable to deal fairly with trial cases. No doubt, the creation of tribunals and consumer courts as well as the Lok Adalats have revived the system of a non-formal judicial system, but they have their limitations because police work is not greatly reduced. It is for consideration whether there is a case for the revival of the old system of Honorary Magistrates who will handle petty cases and also engage in the resolution of minor disputes, thereby saving precious police time.

A related point is the requirement to separate the less serious offences and provide for a sentencing procedure by which the committal courts award a caution, suspended sentences or even community service in lieu of the regular sentence which only adds to the burden of the present courts and on the general criminal justice delivery system. This principle of prioritisation is practiced in western countries which have well established legal systems but suffer from acute shortage of staff and would thus like to concentrate their resources on quality cases rather than small and petty cases. It is heartening that Delhi has Petty Offences (Summary Disposal) Rules which is worthy of being adopted in other States also.

The rationale of the Probation of Offenders Act is beyond question. Essentially this means that first time offenders are not subjected to the riggers of incarceration in jail. But the practical experience is that many first time offenders revert to a life of crime and commit second and third

5. (1999) 2 SCC 89.

crimes and do not regard the first offense as a necessary check or deterrent. "Spare the rod and spoil the child" is a well known proverb. Unless proper correctives are administered, a first time offender is likely to repeat his criminal behavior. In this regard, we may suggest the prescription by law of community service and other non-penal restriction of the accused in cases when they are convicted of offenses which do not constitute any grave violation of the law. Indeed, it would be in the fitness of things for the convicted person to help the family of victim to rehabilitate itself instead of serving out a dry sentence in jail. Examples from the West are available in plenty and the recent cases of Mike Tyson, the boxer and Eric Cantona the famous footballer come to mind.

It will not be inappropriate here to refer to the considerable opposition to bringing the hierarchy of Prosecutors under the Dirctor-General of Police. Hence one finds the phenomenon of an independent Directorate of Prosecution that operates outside the police. Investigation and prosecution are essentially police functions. It is universally accepted that, in order to get good results, the investigator should have the benefit of the knowledge and experience of a Law Officer at every stage of the investigation to assist him in the discharge of his duties. I do not dispute the wisdom behind the establishment of the Directorate of Prosecution with a cadre separate from the police but I am of the view that it should be under the overall charge of the Chief of Police. Experience has shown that in the States where a distinct Directorate of Prosecution outside of the DGP control has been established, the investigator does not receive the kind of assistance that is necessary for his success.

In conclusion, I would like to plead for a holistic approach to the problem. All of us sitting here come into play only when the informal control of the family, school, university and society break down. When I grew up, we had to ask the permission of our elders before speaking or coming up with a suggestion. We had opinions but they were our own, not given unless asked for. Fostering respect for our elders, for our women folk, our teachers and our saints - in general, our cultural tradition - will automatically act as a crime preventive. It is always better to prevent the outbreak of a fire rather than rush hither and thither dousing it.

As long as man exists, there will be two sides to his personality : the dark and the light, the bad and the good. The criminal justice system steps in to protect us from ourselves, to protect society from the depredations of a few misguided people, to protect our culture and heritage from wanton destruction. So we are all partners in this common objective and in strengthening one, we strengthen all.

I would like to end by recalling what Lord Denning said in the context of a refusal by the London Police to register a case as directed by the Home Secretary :

> The police shall be accountable to the law and the law alone. No Minister of the Crown shall tell the Commissioner of Police whom to arrest and whom not to arrest.

We are grateful to the Supreme Court of India for expressing similar sentiments. When such professional autonomy has almost become the prerogative of the police in India, the latter can possibly perform better even under existing constraints without merely pleading constantly for radical legal reforms. Such reforms are bound to come by themselves once police professional credentials are well and truly established. It is just possible that in such a situation, the community itself could rise in support of such reforms in order to strengthen the police hands in the common fight, against crime and graft.

LEGAL EDUCATION AND PROFESSIONAL TRAINING

*A. S. Bhat**

Globalisation has started to affect not only the market economy of the nation, but the whole system of education. The imperatives of economic and technological development has to pursue sustainable human development in which economic growth shall serve social development and ensure environmental sustainability. A highly skilled work force different from the earlier era will be required in the capital intensive technological development to change the existing industrial scene towards sophisticated and automated process. The service sector which is less capital and more labour intensive shall be no exception to the change in a highly competitive global economy under the conditions of liberalisation and privatisation. The educational system has, thus, to respond to the crisis of change and act as an instrument for a social change to develop not only an economically prosperous society but also to make adequate provisions for equity and social justice. The University Grants Commission in its IX Five Year Plan Proposals for the Development of Higher Education observed[1]:

> The University has a crucial role to play in promoting social change. It must make an impact on the community, if it is to retain its legitimacy and gain public support. Universities have to find solutions to the nation's problems . It is necessary for them to address themselves to the issues whether these be social such as women, health or welfare, or, scientific and technological, such as transfer of technology and appropriate technology for the community.

Higher education in general and legal education in particular is passing through a critical phase of globalisation and is beset with many challenges. Dunkle's proposal resulting in the establishment of World Trade Organisation (WTO) after the United Nations Commission on International Trade Laws (UNCITRAL) have become the compelling forces to promulgate the modified laws. In social and family disputes and advanced communication system impact of globalisation is being realised to change the existing laws in order to make them accord with the needs of the times. Globalisation, ensuring free movement of goods, unrestricted flow of trade and related investments, global protection of intellectual property rights, and prohibition of tariff and non-tariff barriers that restrict trade in goods, and services, shall necessarily require free movement of legal services[2]. 'The legal profession in the changing scenario has to equip and prepare itself to face the new challenges and give up the apprehension of fear of competition. In view of this changing scenario the existing system of legal education should receive a very serious consideration. The main focus of the present paper is on: (1) inadequacies and deficiencies in the existing legal system; (2) dichotomy of five year & three year professional courses; and (3) Pre-enrolment training

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1. University Grants Commission: Policy Frame and Programmes, June, (1996) at p.65.

A. Existing System of Legal Education

There has been a phenomenal growth in legal education since the fifties. It is estimated that at present there are over 500 law teaching institutions with an enrolment of over 300,000 students. Despite the diagnosis and prescriptions for improvement, the situation has only deteriorated further necessitating administration of remedial measures on an emergency basis. As early as 1954, The Law Commission (Setalvad Commission) of India in its fourteenth Report depicted a very dismal picture of legal education. It observed[3]:

> ...Legal education is imparted in part-time classes by teachers who are mainly legal practitioners who run many of these so called law colleges which are housed in buildings belonging to arts colleges and other institutions...Most of the students who crowd these institutions are young men who have not been able to secure employment; they take a course in law while awaiting

2. N L Mitra, *Trade in Legal Services: opportunities and constraints* 10 NLJ (1998) p.32 at p.65.

3. 14th Report of The Law Commission of India Vol I (1954) at p.522.
See also UGC Report of the Curriculum Development Centre in Law (1990) at p.4 which provides, that the bulk and generality of students pursue part-time studies in law, that is either morning or evening classes for about three hours a day. Most of them are employed. Of these employed, some come to law school to improve their qualification of in-service promotion, others come towards the eve of superannuation hoping that a law degree will assist them later during retirement. A few part-time students, who are eligible to appear at competitive examinations under the UPSC or PSC, pursue law with the expectation of added advantage.

> for a job with no intention of practicing law as a profession. . .. some of these institutions are so overcrowded that classes are held in shifts and there are several hundred students on the rolls of each class... It is to these crowded classes that the part-time lecturer imparts his instruction, and the attendance he commands is only due to the anxiety of the pupil to have his attendance marked when the lecturer calls the roll. It is not surprising that in this chaotic state of affairs in a number of these institutions, there is hardly a pretence of teaching and that the holding of tutorials or seminars would be unthinkable. A senior lawyer characterised these law colleges as 'profit-making industry'.

It will not be out of place to mention here that The Law Commission of India has approvingly quoted the observations of a law teacher who had said that, "there are already a plethora of LL. Bs, half baked lawyers, who do not know even the elements of law and who are let loose upon society as drones and parasites in different parts of the country. Several of them did not even know what subjects were prescribed in the LL.B programme, did not know the names of the prescribed books and asserted cheerfully that all they had done was to cram the lecturer's notes[4]".

It has been reported that two-thirds of law graduates do not join the Bar. Their only object being attainment of some general knowledge about law or to improve their employment prospects generally. To improve the quality of professional training the Bar Council of India distinguished professional legal education from non-professional (liberal or general) legal education and confined its efforts towards the former for which it had a statutory responsibility and left the latter to the discretion of the Universities. The Council came forward with a new scheme of five year integrated LL.B Course after 10+2 as the way out to improve professional legal education. The two fold categorisation of Law teaching institutions received a severe jolt from the vested interest groups and the Council

4. See, *Supra note* 3 at pp. 522-23.
Madhava Menon in his article *"Legal aid and Legal Education: A challenge and an opportunity"* published in essays edited by him in June, 1974 on clinical education for the students in service setting has observed that the law students are perhaps the singular professional group who devote the minimum time for their studies despite "the fact that LL.B. is now three year programme after graduation. Leaving exceptions apart, normally compulsory percentage of attendence brings him to the classes for few hours in a week and he finds himself "out - of business" for the larger part of the day the year round. Law studies have become the professional course for the rejects, the mediocre and the educated unemployed and the law schools have become the breeding centres of student revolt and unrest.

diluted its stand by allowing both 3 year and 5 year LL.B courses to continue. The UGC Report of the Curriculum Development Centre in law, though felt the necessity of modernised legal education, avoided going into the controversy of dichotomy of 'liberal' and 'professional' legal education[5]. The report observed that the liberal/professional dichotomies disable us from addressing the hidden curricula underlying legal education enterprise[6].

It did, however, emphasise that 'modernisation' of legal education must.. ..draw commitment specifically from the Indian Constitution and especially the Fundamental Duties of citizens crystallized in Part IV of the Constitution[7]. "Adjudged by these constitutional obligations and standards" the report observed, that, "the present curricular, pedagogic and scientific effort are liable to be declared as violative of the constitutional letter and spirit[8]"

The authority of the Bar Council of India to regulate and maintain the standards of legal education was resisted, besides some vested interest groups, by The All India Law Teachers Congress[9]. The Congress in its outburst observed,[10] in its technical sessions, that:

1. Law teaching and the maintenance of law schools and law colleges and the standard of legal education should be the exclusive domain of law teachers;
2. The role of the Bar Councils in maintaining the legal educational standards in the country so far has been far from satisfactory and the curriculum devised by the Bar Council of India from time to time has not been in tune with the ground realities of the law schools;
3. The Bar Council of India has neither taken into account the needs of the legal education nor has it provided any support, financial or otherwise to make the legal education socially relevant and academically sound; and
4. The Congress, in the net result, suggested the establishment of an All India Legal Education Council to oversee, monitor and regulate law teaching and law schools in the country.

5. See, *Supra note* 3 at pp. 11-12.
6. *Ibid* at p.12.
7. *Ibid* at p.13.
8. *Ibid* at pp. 13-14.
9. See working paper on "Review of the Advocates Act, 1961" of The Law commission of India circulated to law secretaries of state governments vide letter no. F. No. 6(3)(62)/99-LC(LS) dated 13/8/99 at p. 17A.
10. *Ibid* pp.17A-17B.

The apprehensions of All India Law Teachers Congress are genuine and deserve a very serious consideration. The Congress did not challenge the authority of the Bar Council of India vested in it under the Advocates Act, 1961 to lay down standards of legal education. All it says is that the control of Bar Council over legal education has resulted in deterioration of standards of education and given rise to indiscipline. It is in sordid instances worth mentioning here in the history of the Bar Council of India that it came out of the deep slumber of Kumbhkarna to reform the legal education. The first one happened in late eighties when the Council insisted that institutions imparting legal education must adopt a five year law course by admitting the students after plus two. The hard posture taken by Bar council of India withered away after two years when it retraced its steps[11] and allowed the 3 year and 5 year LL.B courses to continue as professional courses thereby discouraging even those universities which took the Bar Council directives seriously and prepared themselves for the switch over to professional programmes. In the second instance, the Council hurriedly drafted outline of the revised syllabi for implementation by institutions imparting legal education with effect from the academic session, 1998.

The outline of the courses has drawn severe criticism from the academia and the apprehensions expressed are well founded . In a multi religious country like India which is further divided into winter and summer zones all the educational institutions go for atleast two and half months vacation with an addition of two more months enjoyment of national and other holidays in a year. The conduct of examination and declaration of results of two semesters also extends upto one month . A teacher thus gets less than four months in one semester to teach a particular course of the type devised by the Bar Council of India. Completion of such a course with a discussion of its practical utility in the Class is neither practicable nor justifiable resulting in the production of half baked law graduates , again, in the name of the reform of legal education . Further , courses which would normally be spread over two semesters have been combined in one course with an imperative from the Bar Council of India not to make any changes in the course. This has resulted in further deterioration of the standards of legal education . After all a student is not to be taught a bare Act but the whole of the legislative and judicial history of a provision and its relevance and utility in society. Mere completion of the course within the shortest academic calendar of the university shall

11. D.N. Jauhar, *legal education: A case for five year law programme* 41 J.I.L.I. (1999) p.66 at p 68.

perforce a student to resort to cheaper books/craming of lectures to pass the examination for obtaining a law degree and thus further deteriorate the legal education which is already in a state of crisis in the fast changing global scenario.

The authority for devising curriculum for professional legal education by the Bar Council can neither be doubted nor challenged. Listing the functions of the Bar Council Of India, s. 7(h) of the Advocates Act, 1961 provides as follows:

> "to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the state Bar councils"

The legislature has thus in clear and unambiguous terms conferred the power of laying down standards of legal education on the Bar Council of India with the only restriction to exercise it in consultation with the universities and the State Bar Councils. Additionally, under s.49(a) and (d) of the Advocates Act, 1961 the Bar Council of India has the power to make rules, interalia (a) to prescribe the minimum qualification required for admission to a course of degree in law in any recoganised university and (b) to prescribe the standards of legal education to be observed by such universities. It has been observed that the power to make rules prescribing the standards to be followed by universities imparting legal education and to enforce those rules through inspection of law colleges and recognition of degrees in law of such universities has never been in doubt and universities by and large followed Bar Council of India rules in structuring their law education programmes[12]. Thus, in pursuance of the Act and the rules ,all universities imparting legal education in the country changed over in 1962 to the three year law course from the then prevailing two year law programme, discontinued double courses and revised the curriculum to reflect the Council prescribed compulsory and optional subjects[13].

The expression "laying down standards of legal education" by the Bar council of India has invited comments from college managements and some section of law teachers. This function of the Bar Council of India is intended to include not only the prescription of subjects to be taught but also to determine, *interalia*, the duration of the course , the content and distribution of subjects in the curriculum, the hours of teaching ,the text books to be followed, the nature and the extent of physical and intellectual

12. N. R. Madhava Menon, *Legal education for professional responsibility-An appraisal of the five year LL.B. Course* Vol. 13 (1986) IBR (JBCI) p.436 at p.439.
13. *Id.*

facilities required , the qualifications of the teachers etc[14]. All these matters are incidental to the laying down of standards of the legal education .What can otherwise amount to the laying down of standards of legal education? Prof. Madhava Menon while reflecting on the scope of the expression " laying down standards of legal education" observed[15]:

> This is neither new nor extraordinary procedure for professional education. The Medical Council, The Dental Council, The Nursing Council, The Pharmacy Council and such other professional organizations do exercise these powers in varying degree according to the demand of circumstances in order to fulfil their statutory and professional obligation of maintaining standards on the part of their members. This power of professional bodies to lay down norms determining the qualification and training of its members exists in other countries as well . In England the academic requirements for barristers and solicitors are determined by the respective professional bodies and not by the universities which happen to teach the bar prescribed academic courses.

The requirement of consultation process as a statutory requirement under s. 7(h) of the Advocates Act,1961 with universities and state Bar Councils took seven years to complete. The seminar held in 1977 in Bombay and attended by the Vice-chancellors and deans of law faculties of various universities and other representatives of the state Bar Councils, suggested drastic changes in the preliminary proposals of legal education. It was due to this consultation process that the reduction in the number of teaching hours stipulated (from 6½ hours to 5½ hours each day), the revision of the permissible strength of part time teachers (from 25 per cent of total teachers to 50 per cent) in law colleges, the extension of time for continuing with the old three year law course to meet the just expectations of students and lateral entry for graduates and post graduates in the third year of the five year course have been incorporated in the rules at the instance of the State Council representatives or of the law teaching community[16].

A harmonious approach is required to be made while prescribing the legal professional curriculum without eroding the autonomy of the universities and without encroaching upon the functions of the Bar Council of

14. *Ibid* at 441
15. *Id.*
16. *Ibid* at 442-43.

India . Both UGC and Bar Council have standing bodies of law panel of teachers and Legal Education Committee, respectively, from around the country, which empowered to maintain standards in higher legal education. By consultation with UGC Law panel, the purpose of consultation with universities would be met substantially . Joint decisions among the BCI, UGC and Law Ministry would make the policy planning academically sound, professionally significant and the decisions easily implementable[17]. As the BCI consists of members from the State Bar Councils, there is no need to have State Bar Council representatives in legal Education Committee[18]. This shall require the enlargement of Legal Education Committee with equal participation of the Bar , the judiciary and the academics .The enlargement requirement shall avoid further scrutiny of the decisions by the Bar Council which is not only avoidable but shall accord an honourable status and autonomy to the LEC[19]. Thus, the UGC Act 1956 and rules of BCI are to be amended in such a manner that the procedure of placing the decision of the LEC before the Bar Council corresponding with the universities is dispensed with and the entire process must be shifted to the LEC so that on issues of professional legal education, the Bar Council speaks through the LEC only[20]. The decisions of LEC with representatives from various professions shall thus be unobjectionable and uniformly applicable throughout the country.

B. Dichotomy of five year and three year professional legal education

The dichotomy of five year and three year professional legal education system is straining too much the nerves of the bar, the bench and academia. If a five years course in professional legal education is a success one cannot jump to the conclusion that a three year law course after a three-year's graduation programme is ipso-facto bad and ineffective. The debate between 'five years' or 'three years' professional courses should depend upon input stage of the students, contents of the legal professional course and the practical training required for development of expertise in the legal profession[21]. Elucidating the three components required in a professional legal education, Mitra observed[22]

17. *Supra note* 9 at p. 18.
18. *Id.*
19. *Ibid.* at 19.
20. *Id.* at 19.
21. N.L. Mitra, *A few questions in the beginning* vol. XXII 4 (1995) IBR p. 73 at p77.
22. *Id* at. 77.

> ...In legal education a multi-base level educational input is beneficial because law has its role in every branch of knowledge. For example, a corporate lawyer is required to have a fair understanding of the accounting and disclosure system; a criminal lawyer is to have command over the forensic science; an intellectual property attorney has to have good command over the physical and biological sciences. Often a lawyer does good job if he has good knowledge in mathematics and statistics. Besides psychology, philosophy and logic, Anthropology and literature are also required for success in legal profession. Medicine, engineering and technology are presently thought to be a good ground for flying taking off into legal profession. Law is needed everywhere. So, in almost all countries legal education takes into its fold students coming from each discipline.

No one can deny the fact that in the professional legal education a multi-disciplinary base level input is required. In a three year professional legal education programme a student has a stronger base level education of science, social science, commerce, arts. etc. as compared to the one in a five year integrated LL.B course. The mental faculties of students in a three year legal education course are more matured as compared to those of five year integrated students. With a stronger base level education and matured faculty three year course students of professional legal education do not require more than three years to acquire the professional skill, viz; analytical skill , research skill, communication and drafting skill and the like[23]. The Bar Council of India in Rule 5 of the Rules on legal education has also permitted lateral entry to part II of the five year law course to a candidate who is a graduate of a university, or possesses such academic qualifications which are considered equivalent to a graduate degree of a university by the Bar Council of India. The professional training in the strict sense in a five year integrated course starts from the second part that is, third year whereas in the three year programme the professional training starts on the entry of a student who has a much stronger multi-disciplinary base input. Thus, excepting that a precious one year is saved in five year integrated programme there is not much difference between the three year and five year professional legal education training.

Instances are not far to seek where institutions imparting legal education in three year courses have made a rich and significant contribution towards the society. If the NLSIU claims to be a great success in view of its five year integrated course, the University of Kashmir, also, does not lag

23. *Id.* at 79-80.

behind in its three year professional course[24]. There are, also, multiple instances where imparting legal education has become a 'profit making industry' which produces 'half baked layers' who are rightly termed as 'drones and parasites' upon society. Such instances are large in number and has earned a bad name both for the academia and profession. Their indifferent attitude towards legal education cannot prove the three year professional programme a failure. The courses devised by the Bar Council of India both for five and three year programmes are welcome. However, mere devising of courses for implementation without looking into the ground realities, as pointed out somewhere in this paper, is to make the task more onerous. There is definitely a need and urgency to reform legal education to face the challenges of globalisiation in a successful manner but the change can be brought out slowly and steadily with the co-ordinated efforts of Bar Council of India ,UGC, State Bar Councils and the state Governments. The ambitious practical utility training programmes devised for implementation requires a huge financial support from UGC and state Governments to make the infrastructural facilities available even to those institutions who have a reputation of producing very competent professional lawyers.

The success of whatever programme depends among many other things upon its effective implementation. The Bar Council is vested with a power under s. 7(i) of the Advocates Act, 1961 to recognise Universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities or cause the State Bar Councils to visit and inspect Universities in accordance with such directions as it may give in this behalf. There is substantial truth in the criticism levelled against the Bar Council of India, that inspite of concrete evidence of the existence of spurious colleges with no full time teachers, no libraries and no regular classes, they continue to admit large number of students, the Council took no steps to disaffiliate such colleges or de-recognise the degrees of Universities which allow affiliation of such colleges.[25] If the Bar

24. The faculty of law, University of Kashmir, Srinagar, strictly admits students in LL.B & LL.M on the basis of merit through entrance test and adheres to the courses prescribed by the Bar Council of India. In addition to the prescribed courses the faculty has rigorous scheme of continuous assessment which has been paying rich dividends. Participation in moot courts, attending lok adalats and participation in legal awareness programmes is a regular and normal activity of the faculty. In the recent moot court competition organised by the Bar Council of India at Hyderabad our team of students secured the fifth position. The students work on socially relevant research projects during summer and winter vacations under the supervision of competent teachers. The faculty has earned the name of being a model deparhnent in the university.

25. See *Supra note* 12 at p.443.

Council of India falters in its own statutory obligation, the failure cannot be attributed to 3 year LL.B programme. Commenting on the dis-affiliation power of the Council, it has been observed[26] that:

> ....the Act has not given enough teeth to the Council's power to compel obedience on the part of the colleges. The Act empowers the council only to recognise or not to recognise the degrees of the universities for the purpose of enrolment. It has no power to disaffiliate individual colleges and all it can do is to ask the university concerned to disaffiliate the college, if necessary, under threat of de-recognition of its degree.

The Bar Council of India has now framed detailed rules under the Advocates Act, 1961 on legal education to deal effectively with the implementation of its directives. It is to be seen how_ far the Council succeeds in discharging its statutory responsibility to deal with the erring colleges/institutions and halts the mushroom growth of law colleges which are totally devoid of infrastructural facilities. It is heartening to note here that the Bar Council of India in its resolve to improve the standards of legal education has in the recent past disapproved the establishment of a number of law colleges and did not grant fresh approval to an equal number of new colleges which had applied for approval of affiliations[27]. To reform the professional legal education in order to make it socially relevant and purposeful the Bar Council of India should frequently inspect the institutions imparting legal education and ensure implementation of its directives. The institutions in turn should lend full support to the Council and make legal education an active instrument of social justice to face the global challenges. It is hoped that co-ordinated and joint efforts of Bar Council of India, University Grants Commission, Judiciary and the Universities to monitor constantly the functioning of legal institutions will restore the lost glory of legal education and make the democratic system of the country more vibrant and effective.

C. Pre-enrolment training

Pre-enrolment training before entry into the legal procession is another grey area bristling with controversy. The original advocates act, 1961 in s. 24(d) prior to its amendment dealt with the qualifications of a person to be admitted as an advocate on a state roll. The relevant portion of the section reads as follows:

26. *Ibid.* p.444.
27. See Arun Mishra keynote address at the seminar on post -enrolment Training V. XXVI 2 (1999) IBR p.1 1 at p.13 10

> "s.24(d) — he has undergone a course of training in law and passed an examination. After such training both of which shall be prescribed by the state bar council."

The aforesaid clause(d) of s. 24 was omitted by section 18 of the amending Act 60 of 1973 with effect from 31st January, 1974. The reasons given for deleting the pre-enrolment training and examination was given in the statement of objects and reasons' of the (Amendment) Bill of 1970 which is profitably reproduced below:

> The Bar Council of India has decided that in future a degree in law can be obtained only after undergoing a three-year course of study in law after graduation as a result of which the age of entry into the legal profession becomes much higher than the age of entry in other professions. It is, therefore, felt that after a three year course in law in a University, it is not necessary to retain the statutory provision in the Act requiring a further examination or practical training.

The Supreme Court in *V. Sudeer* v. *Bar Council of India*[28] relyng upon the above paragraph of "statement of objects and reasons," held that "It becomes clear from a mere look at the said paragraph that it was the Bar Council of India which had decided that a degree of law obtained by a person after undergoing three-year course of study after graduation would be enough for qualifying him to be enrolled as an advocate under the Act and, therefore, pre-enrolment training till then required of him before getting enrolment was not necessary"[29]

There is logic in the argument that after the introduction of the curriculum prescribed by the Bar Council of India, further practical training before enrolment is redundant. The new curriculum envisages the implementation of four comprehensive practical training programmes during the course of studies in the institutions imparting legal education. These training programmes are of great practical utility to a person who joins the practice after its successful completion. A look at these four practical oriented programmes devised by the Bar Council of India becomes necessary. Each practical training programme is to form a separate paper of 100 marks with the following course contents:

28. 1999 (2) Scale 32.
29. *Ibid* at p.40.

PAPER I : MOOT COURT, PRE-TRIAL PREPARATIONS AND PARTICIPATION IN TRIAL PROCEEDINGS

This paper will have three components of 30 marks each and a viva of 10 marks.

(a) Moot Court (30 Marks): Every student will do at least three moot courts in a year with 10 marks for each. The moot court work will be on assigned problem and it will be evaluated for 5 marks for written submission and 5 marks for oral advocacy.

(b) Observance of Trial in two cases, one Civil and One Criminal (30 marks): Students will attend two trials in the course of the last two or three years of LL.B. Studies. They will maintain a record and enter the various steps observed during the attendance on different days in the court assignment. This scheme will carry 30 marks.

(c) Interviewing techniques and Pre-trial preparation (30 marks): Each student will observe two interviewing sessions of clients at the Lawyers Office/Legal Aid Office and record the proceedings in a diary which will carry 15 marks. Each student will further observe the preparation of documents and court papers by the Advocate and the procedure for the filing of the suit/petition. This will be recorded in the diary which will carry 15 marks.

(d) The fourth component of this paper will be Viva Voce examination on all the above three aspects. This will carry 10 marks.

PAPER II: DRAFTING, PLEADING AND CONVEYANCING

This course will be taught through class instructions and simulation exercises, preferably with assistance of practicing lawyers/retired judges. Apart from teaching the relevant provisions of Law, the course will include 15 exercises in drafting carrying a total of 45 marks and 15 exercises in Conveyancing carrying another 45 marks (3 marks for each exercise).

NOTE:

(a) Drafting:

General principles of drafting and relevant substantive rules shall be taught.

(b) Pleadings:-

(1) Civil; (i) Plaint (ii) Written Statement (iii) Interlocutory Application (iv) Original Petition (v) Affidavit (vi) Execution Petition and (vii) Memorandum of Appeal and Revision (viii) Petition under Articles 226 and 32 of the Constitution of India. (2) Criminal: (i) Complaints (ii) Criminal Miscellaneous petition, (iii) Bail Application and (iv) Memorandum of Appeal and Revision.

(c) Conveyancing;

(i) Sale Deed (ii) Mortgage Deeds (iii) Lease Deed, (iv) Gift Deed (v) Promissory Note (vi) Power of Attorney (vii) Will

The remaining 10 marks will be given in a viva voce examination which will test the understanding of legal practice in relation to Drafting, Pleading and Conveyancing.

PAPER III : PROFESSIONAL ETHICS, ACCOUNTANCY FOR LAWYERS AND BAR-BENCH RELATIONS

This course will be taught in association with practicing lawyers on the basis of the following materials:

(*i*) Mr. Krishnamurthy Iyer's book on "Advocacy". (ii) The Contempt Law and Practice.

(*iii*) The Bar Council Code of Ethics.

(*iv*) 50 selected opinions of the Disciplinary Committees of Bar Council and 10 major judgments of the Supreme Court on the subject.

The written examination in this paper will have 80 marks and the viva voce will carry 20 marks.

In lieu of the written examination, colleges may be encouraged wherever appropriate to give the students, seminars and projects where they are expected to research and write persuasive memoranda on topics identified in the above subjects.

PAPER IV : PUBLIC INTEREST LAWYERING, LEGAL AID AND PARALEGAL SERVICES

This course carrying 100 marks will have to be designed and evaluated according to local conditions by the Colleges in consultation with the Universities and State Bar Councils. It can be taught partly through classroom instructions including simulation exercises and partly through extension programmes like Lok Adalat, Legal Aid Camp, Legal Literacy and Para Legal Training. The course should also contain lessons on negotiations and counselling, use of computer in legal work, legal research in support of Public Interest Litigation, writing of case comments, editing of Law Journals and Law Office Management. The marks may be appropriately divided to the different programmes that each university

might evolve for introduction in the colleges under its control.

After devising such an intensive scheme of practical training programme, there does not seem to be any necessity and justification of training, for a further period of one year or 18 months. The Bar Council of India is either doubtful of its successful implementation or considers these training programmes inadequate for entry into the profession. In the former case the Bar Council is or be vested with powers to visit the institutions imparting legal education to ensure successful implementation of the training programmes and take desired action as per its rules against the erring institutes/colleges, instead of burdening all the law graduates with the additional training period. In the latter case where the devised practical training programmes are considered inadequate, the impugned Bar Council of India Training Rules 1995 adopted vide Resolution No.128/95 can no longer be considered to make a significant addition to the practical training of a trainee advocate. If the pre-enrolment training was discarded as spelled out above in the statement of objects and reasons of the (Amendment) Bill of 1970, the same logic can be applied herein as well. A law graduate was admitted into the profession before 1974 on his mere attainment of a professional degree without undergoing any practical training. Now, that this entry into the profession is being extended further by a period of one year or 18 months programme, is it not making him a late beginner in the career than his counterparts in other professions? In *V. Suder* v. *Bar Council of India*[30] the Supreme Court dealing with the impugned pre enrolment training rules observed[31].

> ...The Bar Council of India by way of interim measure can... consider the feasibility of making rules providing for in practice training to be made available to enrolled advocates. Such an exercise may then not fall foul on the touchstone of section 49(1)(ah)... Such rules can also provide for appropriate stipend to be paid to them by their guides, if during that period such enrolled junior advocates are shown to have no independent source of income... Then in the light of section 17(2) of the Act such newly enrolled advocates who are required to undergo in-practice training for first one year of their entry in the profession can legitimately fall in the category of other advocates apart from senior advocates as contemplated by that provision.

The Supreme Court, in the aforesaid case has imposed a responsibility for payment of stipend to junior advocates which the parliament should

30. *Supra note* 28.
31. *Ibid* at p.62.

consider before making suitable statutory amendments in the Advocates Act, 1961, if at all, pre-enrolment training is considered to be necessary. Imposition of a condition of stipend upon senior advocates who are likely to act as guides shall be detrimental to the interests of trainee advocates. Advocates in general, with exceptions apart, would be unwilling to take a trainee advocate under his guidance. The Government, instead, must consider the making of a strong infrastructural base in the institutions imparting legal education and monitor the effective implementation of practical training programmes devised by the Bar Council of India, through its agencies.

It is argued that it would be fallacious to think that everything required to make a good lawyer could be capsuled into a law course, however, long and arduous[32]. It is pertinent to reprouduce here some observations of Dr. N. C. Sen Gupta: Proficiency in Law is obtained by a willing practitioner or student by practice and not from text books only. When the new entrant gets a case as a junior lawyer, he has to prepare it. In doing so, he has to find out the law from the books. It is this search for law that gets him into the touch of actual law which, in a really brilliant young man develops a real brilliancy of the practitioner in law[33].

Many top lawyers and judges clamouring for improvement in legal education were themselves products of only a two year course[34]. Their socio-economic background, right social connections, the fact that many of them were second or third generation lawyers, opportunities offered by big cities, exposure and, of course, hard work during actual practice made them what they are[35]. This does not mean that there is complacency and no more improvement in the existing structure is required[36]. Legal

32. Jamshed B. Pardiwala Vol XXV (2) 1998 IBR p.79 at p.93.
33. See *Supra note* 3 at p.1230 The products of the earliest legal education who have been regarded to be pleaders, as distinguished from Vakils-some of whom distinguished themselves at the Bar and some of them also on the Bench, were not law graduates at all.
34. *Ibid* at 1232 Justice Dwarka Nath Mitra, Justice Chandra Madhab Ghosh, Sreenath Das, Kali Mohan as in Calcutta, similarly judges at the High Court of Madras like Muthuswami Iyer were not law graduates at all.
35. Dhaiasheel Patil, "*Legal education - The journey so far*" Vol. XXVI (1) 1995 IBR p.43 at p. 53. Mr. P. N. Bhagwati, former Chief Justice of India once said to the author with a twinkle in his eye: "Mr. Patel, as a law student I used to attend the college and do a job as well. But I hope I did not make too bad a judge".
36. While presiding in a seminar on 'Legal aid' organised by the Sringar District Legal Services Authority, the author of this paper suggested for suitable statutory amendment in the Jammu and Kashmir Legal Services Authorities Act, 1997 to enable the senior students of LL.B to represent the cases of persons entitled to such services under the supervision of teachers or senior lawyers. Involvement of students with such schemes shall make the clinical legal education programme more effective and meaningful.

education forms the bed rock in the effective system of administration of justice. Advanced knowledge, explosion in communication, technology and plummeting computerising course are shrinking distances and eroding border and time[37] very fast, unlike many stable decades of twentieth century. To keep pace with the changing times developing countries have to initiate policies that will enable them to narrow or bridge the gap that separates them from rich countries[38]. The alarming bells of gloablisation and its impact on India warrant the transformation of the texture of legal education[39]. To face the challenges of globalisation, ineffective laws are to be weeded out and substantial changes are to be made in the exisiting bar devised curriculum in order to make it socially relevant and purposeful. The bar and judiciary has to work in co-operation with academia to overcome the difficulties faced by the latter, to achieve excellence in the field of legal education. The urgency of improvement expressed by various committees[40] from time to time for failure of existing legal education should not be attributed only to academic institutions but shared by all, concerned with the administration of justice.

Conclusion

A democratic state wedded to rule of law requires a properly equipped crusader of justice who has undergone requisite requirements of legal education whether functioning as an advocate before law courts or as a judge deciding *lis* between contesting parties or as a research scholar in law or as a professor imparting legal education[41]. However, unceremonial death is bound to occur to a system which fails to keep pace with the changing times in the present day global scenario. Mere complacency and ostrich like approach shall be viewed very seriously by generation in posterity. The diagnosis of the ailment of the existing legal education having been identified, there is an urgent need of proper treatment to put it in the global market. Serious concern of various agencies to remedy the ailment requires joint and co-oridnated efforts to monitor the progress of the system, constantly. Strong instructional base involving financial inputs

37. "Legal Education in India in 21 Century: Problems and Prospects", published by All India Law Teachers Congress, Faculty of Law, University of Delhi, 1999 at p. 485.
38. *Ibid.*
39. *Ibid.* at pp. 487-488.
40. Justice A. M. Ahmadi Committee Report on *"Reforms in legal education and entry into legal profession"*, see also Bhubaneshwar Statement of Law Ministers working group on legal education vol. XXII (4) 1995 IBR pp. 7-42.
41. Justice S. B. Majmudar, inaugural address at the All India Law Teachers Congress (AILTC) on *"legal education in India in 21st century: Problems and prospects"*, *supra note* 37 at p. IX.

and capable human resource in the institutions imparting legal education though an arduous task shall yield rich dividends and lead the country to face the challenges of 21st century. Without any disregard of the autonomy of institutions, socially relevant courses are to be devised to keep pace with the changing times. Hard decisions to ensure effective implementation of curriculum shall strengthen the system of legal education. Compromise on academic failure on account of pressure from Government shall prove dangerous and disastrous to the health of legal education in general and legal profession in particular. The judiciary has to rise to the occasion and circumvent the activities of the vested interest forces and agencies which stand in the middle of the mission of persons who are in pursuit of salvaging the legal education.

THE LEGAL REGIME OF SUBSIDIES AND COUNTERVAILING MEASURES IN WORLD TRADE ORGANIZATION (WTO)

*A. K. Koul**

The problem of subsidies and countervailing measures became the intense subject of negotiations in the World Trade Organization (WTO) on account of its rampant use in international trade since the birth of General Agreement on Tariffs and Trade (GATT) in 1947. The use of subsidies in industry and agriculture in 1980s was resorted to by the governments under the influence of political and social pressures embarking on massive financial commitments. In order to support ailing industries, to stimulate infant industries and to promote exports, subsidies have become an important element in world trade to the extent that, in some sectors, financial ability to subsidize exports have overridden competitive reality[1]. Subsidies for the LDCs are important for the sustenance and maintenance of their economies at whatever stage of development the economies of LDCs are.

Accordingly, the scope of this paper is to unfold the problem of subsidization in international trade and the earlier attempts to deal with it, taking into account the historical background leading to the negotiations of final subsidies in the Uruguay Round and its incorporation in the WTO and finally the position of the LDCs interests in the WTO.

I. Subsidies in International Trade

Subsidies continue to be one of the most frequently used, though controversial, instruments of domestic and commercial policy of the governments which provide subsidies for a great variety of purposes, including assistance to facilitate the foundation or expansion of new industries, to encourage exports, to create new jobs, or to enhance national security by ensuring that a country can provide itself with certain products. Subsidies can also be an instrument to serve as a means to support or ensure an internationally competitive position for certain high tech industries. The subsidies code of GATT 1980 in fact, recognizes the reality that subsidies

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1. GATT, GATT Activities 1988, at 47 (1989)

are an important tool of government policy, and are used to promote social and economic policy objectives[2].

The subsidies code further notes some of the governmental objectives, which are promoted by the use of subsidies:

(*a*) The elimination of industrial, economic and social disadvantages of specific regions;

(*b*) To facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reasons of changes in trade and economic policies, including international agreements resulting in lower barriers to trade;

(*c*) Generally to sustain employment and to encourage re-training and change in employment;

(*d*) To encourage research and development programmes, especially in the field of high technology industries;

(*e*) The implementation of economic programmes and policies to promote the economic and social welfare of developing countries; and

(*f*) Redeployment of industry in order to avoid congestion and environmental problems[3].

The use of subsidies by various governments depends on the varying needs of the governments. United States for instance provided industrial subsidies at the rate of 0.5% while Sweden subsidized at the rate of 7.4% in 1986 and other OECD countries industrial subsidies varied from 2 to 3.5% of their GDP[4]. According to G.C. Hufbauer,[5] in the 1970's and early 1980's government subsidies proliferated in response to hard times in agriculture and declining industries. This trend has been reversed. In most industrial countries subsidies are stable or declining, and in certain developing countries they are being slashed. The subsidy climate changed dramatically in the late 1980's for several reasons such as budgetary stringency, as the claims of health, education, and the environment pressed upon resources in nearly all the industrial countries; growing public skepticism that industrial policy can revive sunset industries; and

2. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.GATT BISD (26th supp.) 56(1980) herein after referred as Subsidies Code
3. *Id.*, at Art. 11(1).
4. Ford and Suyker, Industrial subsidies in the OECD Economics, OECD Working Paper No.74 at 1,47 (Table I) (1990).
5. G.C. Hufbauer, *Subsidies in Completing the Uruguay Round*: in J. Schott (ed) A Results-Oriented Approach to the GATT Trade Negotiations 93-94 (1990).

fiscal bankruptcy in many Latin American countries, which brought a halt to the long standing practice of allowing their industrialists to feast on rich menu of public subsidies. Yet, despite the present adverse climate for public subsidies, many delegations in the GATT Negotiating Groups on Subsidies and Countervailing Measures were less than anxious to see their future freedom to subsidize curbed by an international code.

On the other hand J. Schott[6] believes that decline of subsidies in the OECD countries in 1980's and the economic downturn of 1990's may have the effect of providing subsidies to industries suffering difficulties.

However, subsidies continue to be of great concern in international trade negotiations as subsidies have assumed a greater importance as a tool of government's economic policy as against tariffs, which have been reduced to an insignificant level. Also, once tariffs have lost significance as a governmental economic policy, there is more incentive to use subsidy as a ready instrument for solving economic, social and political problems besetting the governments, howsoever small it may be as it can change the production patterns from one country to another[7].

II. Historical Background

A. Efforts to deal with subsidies prior to the Uruguay Round.

Countervailing duty laws are one means of addressing the adverse effect of subsidies to offset the amount of subsidization, which certain imported goods, might have received. Countervailing duty laws, in fact, have been employed as a remedial measure for more than one hundred years; for example, the United States enacted a countervailing duty laws in 1890[8] and 1897[9].

GATT, 1947 in its Articles VI and XVI addressed the problem of subsidies and countervailing measures. Art. VI deals with the imposition of antidumping and countervailing duties and defines 'countervailing duty' as a 'special duty' levied for the purpose of offsetting any bounty or subsidy bestowed, either directly or indirectly, upon the manufacture, production or export of any merchandise, and limits the amount of any countervailing duty imposed by a contracting party to an amount equal to

6. *Ibid.* J.Schott, *The Uruguay Round: What can be achieved in Completing the Uruguay Round.*
7. G. Hufbauer, A View of the Forest in Subsidies and Countervailing Measures: Critical Issues for the Uruguay Round, World Bank Discussion Paper No. 53 at 13(B.Balassa ed. 1989).
8. Tariff Act of 1890 to deal with the bounties paid on the exportation of certain grades of sugar. Tariff Act of 1897 U.S enacted a general Countervailing Duty Law.
9. The General Agreements on Tariffs and Trade, 1947:55 U.N.T.S. 187.

the estimated bounty or subsidy determined to have been granted. Paragraph 6(a) of Article VI establishes that a contracting party may not impose anti-dumping or countervailing duty on another contracting party unless it determines that the subsidization is such as to cause or threaten material injury to an established domestic industry, or is such as to materially retard the establishment of a domestic industry.

Article XVI deals with subsidies in general and export subsidies in particular, and sets out the basic obligations of a GATT member country. Paragraph 1 of Article XVI states that if any contracting party 'grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into its territory' it has the obligation to notify the other contracting parties of the 'extent and nature of the subsidization' and 'of the circumstances making the subsidization necessary'[10].

Paragraph 1 of Article XVI further states that if it is determined that any such subsidization causes or threatens 'serious prejudice'[11] to the interests of any other contracting party, then the party granting the subsidy shall discuss with other contracting parties, if requested, the possibility of limiting the subsidization.

Paragraph 2 of Article XVI recognizes that a 'subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may either, hinder the achievements of the objectives' of GATT. Paragraph 3 of Article XVI at the same time advises that 'contracting parties should seek to avoid the use of subsidies on the

10. *Id.*, Art XVI:1
11. 'Serious Prejudice' has not been defined in GATT. However, as to what constitutes 'Serious Prejudice' has been defined in one of the Panel Reports of GATT in European Communities- Refunds on Exports of Sugar, Complaint by Brazil, Report Adopted, 10 November 1980, GATT, BISD 27th supp. at 69,97(1981). The reports included the following passages:
The Panel found that the Community system of exports refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of exports refunds and constituted a permanent source of uncertainty in world sugar markets. It therefore concluded that the community system and its application constitutes a threat of prejudice in terms of Article XVI:1 BISD 26th supp. at 319
The Panel concluded that in view of the quantity of Community sugar made available for export with maximum refunds and the non-limited funds available to finance exports refunds, the Community system of granting export refunds on sugar had been applied in a manner which in the particular market situation prevailing in 1978 and 1979 contributed to depressed sugar prices in the world markets and this constituted a serious prejudice to Brazilian interests in terms of Article XVI:1 BISD 27th supp. at 97

export of primary products[12].

If, however, export subsidies on primary products are granted by a contracting party, its obligation is set out in paragraph 3, which states that export subsidies on primary products, shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product[13]. With respect to subsidies on non-primary products, paragraph 4 requires that, 'contracting parties shall cease to grant either directly or indirectly any form of subsidy which results in the sale of such products for export at a price lower than the comparable price charged for the like product to buyers in the domestic market[14].

B. Subsidies Code: The Tokyo Round

The Director-General of GATT summarized the economic backdrop to the Tokyo Round Subsidies Negotiations as under:

Subsidies have become one of the most frequently used and controversial instruments of commercial policy. In the industrial sector the use of subsidies has greatly increased. Particularly under the impact in recent years of recessionary world economic conditions, slackening demand and high employment under the influence of political and social necessity, governments have embarked on massive financial commitments in order, among other things, to prop up ailing industries, to support depressed areas, to stimulate consumer demand or to promote exports. Subsidies have become an important instrument of protection. In some sectors – shipbuilding is good example – more trade is being conducted less in response to normal market forces than on the basis of competitive subsidization.

A principal difficulty is to draw a distinction between subsidies granted by governments in pursuit of valid economic and social policies and those, which, directly or indirectly, intentionally or unintentionally, have the effect of distorting world trade, and depriving other countries of legitimate trade opportunities[15].

The Tokyo Round Subsidies code was essentially a compromise between the United States and EEC countries for the reason that EEC

12. A 'primary product' is defined as 'any product of farm, forest, or fishery, or any mineral, in its natural form or which has gone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.' Interpretative Note to Article XVI of the GATT, Section B, paragraph 2.
13. GATT, Supra note 9, Art.XVI: 3
14. *Id.*, Art. XVI: 4
15. GATT, The Tokyo Round of Multilateral Trade Negotiations: Report by the Director General of GATT 53(1979)

granted subsidies to industry and agriculture whereas the United States domestic law lacked 'injury test' and the United States was interested in strengthening the international rules governing subsidies[16].

Accordingly, the subsidies code as stated in the preamble emphasized 'the effects of subsidies' and its purpose is to ensure that the use of subsidies does not adversely affect the interests of other signatories to the code[17]. 'The text of the code seeks to implement this purpose by directing that signatories shall not grant export subsidies on products other than certain primary products.'[18] The code also requires, in accordance with the provisions of Article XVI: 3 of the GATT, that signatories not grant, directly or indirectly, any export subsidy for 'certain primary products' (primary agriculture) to the extent that such subsidy results in the displacement of the exports of others (by having more than an equitable share) of the world market, or in the undercutting of the prices of other suppliers in particular markets[19]. The code further requires signatories to ensure that the use of countervailing duty measures comply with the requirements of Articles VI of GATT, which requires an injury determination[20].

The subsidies code further provides a mechanism for the resolution of complaints brought by signatories concerning the subsidies of other signatories, which are believed to be in contravention of GATT or the code. The code resolves such complaints through means of conciliation, dispute settlement, and authorized counter measures[21]. The code also establishes a two-track approach to disciplining subsidies. Track I deals entirely with countervailing duties, establishing international rules on what national governments can do in implementing their countervailing duty rules (including constraints on the procedures of those cases) and rather elaborate definitions of material injury.... Track II of the code is devoted to the substantive obligations under international law regarding how governments should refrain from granting subsidies that affect goods in international trade[22].

In practice, the "code has been characterized by numerous disputes and lack of agreement between signatories on various issues."[23] Track II

16. J. Jackson, The World Trading System 258(1989)
17. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT. Reprinted in GATT, BISD 26th supp. at 56(1980)
18. *Id.*, Art.9
19. *Id.*, Art.10
20. *Id.*, Art.1 & 6
21. *Id.*, Art 13
22. J. Jackson, *Supra* note 16.

of the code, i.e., government-to-government consultation and conciliation, is the normative option for most of the GATT signatories. The United States, on the other hand, has been the primary user of Track I, the imposition countervailing duties via national law[24].

The code does not prohibit all subsidies, or provide for direct enforcement of subsidy violations, Track II established a process designed to promote a "mutually satisfactory solution." If consultation does not resolve the problem within a short time, either party may refer the matter to the code committee for conciliation, whose purpose is to review again the facts and encourage the parties to reach a mutually acceptable solution[25]. The panel may submit findings as to facts and the application of the GATT and the code to the entire code committee, which may in turn make recommendations to the parties aimed at resolving the dispute, and, in the event that the committee's recommendations are not followed, the committee may authorize appropriate countermeasures[26].

Subsidies code in Track I, recognizes a country's right to impose countervailing duties on subsidized imports that cause injury to its domestic producers. The code outlines in detail the procedures for conducting subsidy-injury determinations. The code specifies that countries may only impose countervailing duties after having followed the procedures outlined and after having determined that the subsidized imports have caused injury to the domestic industry.

In addition to the code being concerned with export subsidies and countervailing duties, Art 11 of the code recognizes that signatories may use non-export or domestic subsidies for the promotion of social and economic policy objectives[27]. These subsidies, which are described as being granted normally by region or by sector[28], include subsidies aimed at the elimination of economic disadvantage of certain regions, the maintenance of employment, the encouragement of research, and the promotion of the economic and social developments of developing

23. R.Stern & B. Hoekman, *The Codes Approach, in the Uruguay Round*: in J.M. Finger and A. Olechowks, (ed). A Handbook for the Multilateral Trade Negotiations 59,61(1987)
24. Between 1980 & 1986, over ninety percent of the countervailing duty cases initiated were brought by the United States and Chile. During this time, only one case was initiated against the United States and one case initiated against Chile. In general, countervailing duties are brought against a different group of countries more than they are initiated by the same group.
25. See Subsidies Code, Supra note 2, Art. 17
26. *Id.*, Arts. 18(8) and 18(9)
27. *Id.*, Art.11
28. *Id.*, Art.11 (3)

countries[29]. The code also requires greater transparency regarding subsidy practices and in the administration of countervailing duty laws[30].

The subsidies code does not provide an explicit definition of 'subsidy' except an illustrative list of export subsidies, which should not be granted[31]. The interpretative notes to the subsidies code also does not provide any further assistance, so that other than the examples provided, the definition of 'subsidy' remained unclear. In 1975, United States, proposed that code should delineate all types of subsidy practices and set out the conditions on which offsetting measures could be taken against such practices. The United States proposed three types of subsidies such as:

(*a*) Prohibited (practices designed to increase the competitiveness of national producers, thereby distorting international trade);

(*b*) Conditional (practices directed towards domestic, economic, political or social objectives, but which may distort international trade);

(*c*) Permitted (practices with little or no impact on international trade against which offsetting measures could not be taken).[32]

Another issue prominently discussed during the Tokyo Round was the use of subsidies by the developing countries, and to what extent they should be afforded special and differential treatment while still maintaining some meaningful disciplines on the use of subsidies by developing countries. This same issue was a major concern of the Uruguay Round negotiations.

At the end of the Tokyo Round, the subsidies code represented compromise of 'fundamental policy differences among the participating governments'. Article VI and XVI of the GATT have been abbreviated, yet the subsidies code ultimately proved lacking in the clarity and effectiveness to resolve the problems posed by subsidies in international trade.[33]

C. Subsidies after the Tokyo Round

After the Tokyo Round the problems of subsidies in international trade were not resolved. The United States stressed the need to reduce the use

29. *Id.*, Art.1 (1)
30. *Id.*,
31. See GATT, GATT Activities in 1979 and conclusion of the Tokyo Round Multilateral Trade Negotiations (1973-1979) 21 (1980)
32. GATT, The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT 53(1979)
33. See J.Jackson Supra note 16 at 259

of trade-distorting subsidies and suggested;

(*a*) Persuading developing countries to make commitments that specify their obligations under the Agreement to reduce or eliminate export subsidies that are inconsistent with their development needs;

(*b*) Persuading Agreement signatories to report the extent, nature, and effect of subsidies, and

(*c*) Using the Agreement's conflict resolution procedures to help eliminate the effects of specific subsidy practices.[34]

The United States and European Union following the Tokyo Round were involved in a number of disputes involving EEC subsidizing of its agricultural products. GATT rules permit a number of non-tariff barriers in agricultural trade, particularly import quotas and export subsidies. In the 1980s, in response to EEC export and production subsidies, the United States initiated a number of section 301[35] cases involving the EEC agricultural policies. These disputes involved products such as sugar, poultry, meat, pasta, oilseed, and canned fruit. Similarly there were disputes between United States and Canada regarding the use of the subsidies. Also 1980s saw a great number of disputes between United States and Mexico concerning subsidization of imported Mexican products, although the disputes arose in the countervailing duty context.[36]

III. Subsidies Debate Before the Conclusion of the Uruguay Round

Before the conclusion of the Uruguay Round, 1994, the subsidies debates took serious twists and turns. The Ministerial Declaration of 1982 took note of the potentially detrimental trade effects of subsidies especially export subsidies, and has the commitment of the contracting parties to avoid their use[37]. The Leutwiler Report[38] which detailed the shortcomings of GATT also underlined the adverse affect of subsidies in international trade for the reasons that firms receiving subsidies from the governments

34. See U.S. General Accounting Office. Benefits of International Agreement on Trade-Distorting Subsidies not yet realized. GAO Doc. No. GAO/NSIAD-83-10 (August 15, 1983)
35. For an overview of these cases see Patrick J. McDonough in T.P. Steward (ed.) The GATT URUGUAY ROUND-A Negotiating History (1986-1992) V.I. Kulwer Publications 809 at 824-833(1993)
36. *Ibid*
37. See Ministerial Declaration. Adopted on 29 Nov. 1982. GATT Doc No. L/5424 reprinted in GATT. BISD 29th supp. at 9(1983).
38. See Trade Policies for a Better Future. The 'Leutwiler Report' 1987

gain an advantage which unsubsidized competitors regard them as powerful instruments for overcoming domestic and economic and social problems. Further, the Report maintained that GATT rules on subsidies are not as explicit or as fully accepted as its rules on tariffs, but the damage to trade from subsidies are tremendous. A major challenge facing the trading system is to define what a subsidy is, and when it is legitimate to use it. Industrial policy, natural resource policy, tax policy and many other kinds of subsidies can bestow unfair trade advantages. The Report suggested that the export subsidies on primary products should be allowed on the condition that they do not lead to acquisition of more than an equitable share of the world export trade. The Report argued that a more meaningful explanation for legitimacy of export subsidies on primary products would be necessary, and indeed that exemption from discipline of such subsidies may not be legitimate at all.[39]

Subsidies debate was further taken up in early 1987 in the subsidies negotiating group in the Uruguay Round.[40] The subsidies negotiating group in the backdrop of Uruguay Round declarations of September 1986 at *Punta del Este*, wherein subsidies and countervailing measures were kept as a separate subject for negotiations underlined the need that subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade.

In the Uruguay Round, the United States advocated for stronger and more effective subsidy disciplines (i.e. broadening the category of prohibited subsidies and strengthening GATT remedies) and a supporter of integration of the less developing countries into GATT discipline. It has been commented that U.S. policy has been guided by an economic and political philosophy, which presumes that subsidies distort resource allocation, and international trade flows, undercut economic efficiency, and distorts the law of comparative advantage by enabling the survival of otherwise uncompetitive industries.[41] The United States also cautioned that subsidies have not increased trade or opened new markets, but instead have precipitated matching subsidies and countermeasures under the

39. *Ibid.*
40. See Generally, Problems in the Area of Subsidies and Countervailing Measures. Note by the Secretariat. GATT Doc No. MTN.GNG/NGIO/W/3 (March 17, 1987)
41. See R.K. Lorentzen, Antidumping and Countervailing Duty Issues in the Uruguay Round of Multilateral Trade Negotiations in The Commerce Department speaks: 1990. The Legal Aspects of International Trade, 459(1990))

GATT Article VI by other governments.[42] As against the United States, the other negotiating participants viewed countervailing measures in need of reform. Their basic premise was subsidies are legitimate instruments of social and economic policy. 'A Necessary Safety Net' to ease industries and geographic regions through periods of economic transition, more specifically EEC advocated a definition of subsidy which would permit regional and structural adjustment assistance.[43] Some participants while acknowledging the necessity for subsidy discipline in general, seek to protect certain types of subsidies from discipline (e.g., Canada has an interest in seeing that regional subsidies are non-actionable, and Canada and Mexico have an interest in seeing that the price of natural resource products is not considered to constitute a subsidy).[44]

The developing countries had expressed an interest in using subsidies as tools for economic development and demanded increased special and differential treatment. The developed countries who viewed subsidies as a necessary safety net and developing countries who viewed as a major governmental instrument for furthering their economic development sought to focus on strengthening the countervailing measures.[45]

IV. WTO And the Agreement on Subsidies and Countervailing Measures

The WTO Agreement on Subsidies and Countervailing Measures is intended to build on the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII, which were negotiated in the Tokyo Round. Unlike its predecessor, WTO Agreement on Subsidies and Countervailing Measures defines subsidy and introduces the concept of 'specific' subsidy for the most part, a subsidy available only to an enterprise or industry, or group of industries or industries within the jurisdiction of the authority granting the subsidy. Only specific subsidies would be subject to the disciplines set out in the Agreement.

For the purpose of the Agreement, a subsidy shall be deemed to exist if, there is:-

(*i*) Financial contribution by a government or any public body within the territory of a member;

(*ii*) Government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion).

42. *Ibid*
43. *Ibid* at 476
44. *Ibid*
45. *Ibid*

(*iii*) Potential direct transfers of funds or liabilities (e.g. loans, guarantees); government revenue that is otherwise due, is foregone or not collected (e.g. fiscal incentives such as tax credits); a government provides goods or services other than general infrastructure, or purchase goods;

(*iv*) A government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (I) and (II) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or there is any form of income or price support in the sense of Art. XVI of the GATT, 1994; and a benefit is thereby conferred. However, a subsidy defined above shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V of the Agreement only if such subsidy is specific in accordance with the provisions of Art. 2 of the Agreement.[46]

In order to determine whether a subsidy is defined above is specific to an enterprise or industry or group of enterprises or industries or certain enterprises within the jurisdiction of the granting authority, the specificity has to be determined by applying the following principles:

(*a*) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises;

(*b*) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions (objective criteria or conditions, as used herein, mean criteria or condition which are neutral, which do no favour certain enterprises over others, and which are economic in nature and horizontal in application such as number of employees or size enterprise) governing the eligibility for, and the amount of, a subsidy, specifically shall not exist, provided that the eligibility is automatic and such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, or other official document, so as to be capable of verification.[47]

Notwithstanding any appearance of non-specificity resulting from the application of the principles as laid down in (a) and (b) above of Art.2, if there are reasons to believe that the subsidy may in fact be specific, other

46. Art. 1 and 2 of the Agreement on Subsidies and Countervailing Measures; see. Arun Goyal (ed.) WTO in The New Millennium, 4th ED. 342 (2000).
47. Art. 2. *Ibid*

factors may be considered. Such factors are the use of a subsidy programme by a limited member of certain enterprises, predominant use by certain enterprise and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. Further, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[48]

A. Export Subsidies

Annex I of the WTO Agreement on Subsidies and Countervailing Measures provides an illustrative list of export subsidies which are prohibited such as: governmental direct subsidies to a firm or an industry contingent upon export performance; currency retention schemes or any similar practices which involve a bonus on exports; internal transport and freight charges on export shipments, provided or mandated by the governments on terms more favourable than for domestic shipments; the provision for governments or their agencies either directly or indirectly through government mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms and conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

The full or partial exemption, remission, or deferral specifically related to exports, or direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base of which direct taxes are charged.

The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

The exemption, remission or deferral of prior-stage cumulative in direct taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production

48. *Ibid.* Art. 2.1 (e) of the Code.

of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years.

The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.[49]

All the above subsidies whether contingent in law or in fact solely or as one of the several other conditions and subsidies, contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods are covered under prohibited subsidies.

The Agreement denominates certain specific types of programmes as prohibited subsidies. Parties to the Agreement pledge not to grant or

49. Supra note 16 at PP 358-359.

maintain these types of subsidies at all. If a signatory country fails to abide by this requirement, then the country may face formal retaliation, as other countries could bring a (non-product specific) case in the GATT based on the use of a prohibited subsidy. The prohibited subsidies constitute the 'red light category' within the 'traffic light' framework and contracting parties are required to cease using them. This approach reflects the broad consensus of the contracting parties that certain types of subsidies by their very nature distort trade flows and impede the efficient allocation of resources.[50]

B. Trade Related Subsidies

During the Uruguay Round Negotiations participants suggested that certain trade related subsidies should be prohibited and the general consensus as reflected in the Agreement is that subsidies which are contingent 'upon export performance' as well as subsidies contingent upon the use of domestic over[51] imported goods are prohibited.

C. Domestic subsidies

The question of domestic subsidies whether by providing grants to cover operating losses, direct forgiveness of debt, loans at interest rates which are less than the government's cost of obtaining the funds plus any cost in administering the loans, provision of equity capital where the expected return is less than the government's cost of obtaining the funds plus any costs incurred in administering the equity investment, loan guarantee programmes where the premium rates are inadequate to cover the long-term operating costs and losses of the programme, and subsidies contingent upon production performance were discussed in the Uruguay Round Negotiations,[52] however, the Agreement does not reflect directly prohibiting any domestic subsidies other than prohibiting subsidies contingent on the use of domestic goods over imports.[53]

D. Remedies

The Agreement in Art.4 provides for remedies against prohibited subsidies that if a signatory to the Agreement has reason to believe that a prohibited subsidy is being granted by another signatory, consultation may be requested, the purpose of which shall be to clarify the facts of the

50. See also subsidies code, Supra note 3 Art. 9.
51. Art. 3(1) (a) and (b) of the Agreement, Supra note 46.
52. Proposals submitted by U.S see: Elements of the Negotiating Framework : Submission by the United States, GATT Doc. No. MTN. GNG/NG.10/W/39 (Sept 27, 1990).
53. See Supra not 46, Art. 3.

situation and to arrive at a mutually acceptable solution.[54] If the consultation does not result in a solution, within a period of 30 days, any member party may refer the matter to the Dispute Settlement Body (DSB) for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel. Once the panel is established, the panel may request the assistance of the Permanent Groups of Experts (PGE) to see whether the measure in question is a prohibited subsidy. The PGE shall have all the powers of reviewing the evidence of the existence or otherwise of the measure in question and PGE has to afford an opportunity to the opposite party to justify that the measure is not a prohibited subsidy. The PGE report is time bound and its conclusions whether or not a measure is a prohibited subsidy is final. If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing member withdraw the subsidy without delay. The report of the panel is adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[55]

If the panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. In case the Appellate Body fails to provide its report with 30 days the Appellate Body has to inform the DSB in writing of the reasons for the delay together with an estimate of the period within which the Appellate Body shall submit its report and the submission of the report cannot exceed 60 days.[56]

Once the appellate report is submitted to the DSB, the DSB has to adopt the same and is binding on the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[57]

In the event the recommendations of the DSB is not followed within the time-period specified by the panel, which commences from the date of adoption of the, panel's report or the Appellate Body's report, the DSB is competent to grant authorization to the complaining Member to take appropriate counter measures, unless the DSB decides by consensus to reject the request.[58]

54. *Ibid.*
55. *Ibid* Art. 4.3 to 4.8.
56. Art. 4.4 *Ibid*
57. Art. 4.5 *Ibid*
58. Art. 4.9 *Ibid*

E. Actionable Subsidies

The Code does not strictly define actionable subsidies, although Art. I of the Code defines 'subsidy' as a financial contribution by, or at the direction of, a government or public body, or as a form of income or price support which conferred a benefit on the recipient, the determination of whether a subsidy is actionable focusses on the trade effects, including injury, nullification or impairment of benefits, and serious prejudice, resulting from the subsidy in particular the benefits of concessions bound under Article II of the GATT, 1994.

F. Serious Prejudice

The Code addresses 'serious prejudice' in two ways. One, by setting criteria for a presumption of serious prejudice and second, by identifying conditions or trade effects under which serious prejudice may arise. The presumption of serious prejudice as provided in Art. 6(1) of the Code are:

(*a*) Where the total ad-valorem subsidization of a product exceeds 5 per cent;

(*b*) Where subsidies are used to cover operating losses sustained by an industry;

(*c*) Where subsidies are used to cover operating losses sustained by an enterprise (other than one time measures which are non-recurrent, cannot be repeated for that enterprise, and which are given to provide time to develop long-term solutions and to avoid acute social problems); and where there is 'direct forgiveness of debt', i.e. (government held debt), and, 'grants to cover debt repayments' [59].

The subsidies as contemplated in the category of serious prejudice are considered to be the dark amber category of subsidies. They are presumed to give rise to serious prejudice. However, the presumption of serious prejudice established by Art. 6(1) may be rebutted if the subsidizing country can demonstrate that the subsidy has not resulted in any of the conditions or trade effects that are enumerated in Art. 6(3) [60].

Art. 6(3) of the Code enumerates four cases in which serious prejudice may arise:

(*a*) Where the "effect of the subsidy is to displace or impede the imports of like products into the market of the subsidizing signatory."

59. *Ibid.* Art. 6.
60. *Ibid.*

(*b*) Where the "effect of the subsidy is to displace or impede the exports of like product of another signatory from a third country-market".

(*c*) Where the "effect of subsidy is a significant price under cutting by the subsidized products as compared with the price of a like product of another signatory in the same market or significant price suppression, price depression or lost sales in the same market," and

(*d*) Where the effect of subsidy is an increase in the world market share of the subsidizing signatory in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of 3 years and this increase must follow a consistent trend over a period of when subsidies have been granted.

Succeeding provisions of Art. 6 of the Code especially Arts. 6(4) and 6(5) further explain the meaning and scope of 'displacing or impeding' imports and exports and price undercutting, while Art. 6(7) lists six circumstances where 'displacement or impedance' shall not give rise to serious prejudice. These circumstances, which must not be isolated, sporadic or otherwise insignificant, are:

(*a*) Where there is a prohibition or restriction on exports of the like product from the complaining signatory or on imports from the complaining signatory, into the third market concerned;

(*b*) Where there is a 'decision by an importing government operating a monopoly of trade or state trading in the, product concerned to shift, for non-commercial reasons, imports from the complaining signatory to another country or countries;

(*c*) Where, there are 'natural disasters', 'strike', transport disruption or other *force majeure*, substantially affecting production, qualities, quantities or prices of the product available for exports from the complaining signatory;

(*d*) Where there exist arrangements limiting exports from the complaining signatory;

(*e*) Where there is a voluntary decrease in the availability for export of the product concerned from the complaining signatory (including, *inter-alia*, a situation where firms in the complaining signatory have been automatically reallocating exports of this product to new markets); and

(f) Where there is a failure to conform to standards and other regulatory requirements in the importing country[61].

G. *Injury*

The Code establishes a '*de-minimus*' threshold standard regarding subsidy amount and import volume. Art.11 (9) of the Code states that there shall be immediate termination of in cases where the amount of a subsidy is *de-minimus* or where the volume of subsidized imports, actual or potential, or the injury is negligible. The amount of subsidy shall be considered negligible if the subsidy is less than one per-cent *ad-valorem*. In contrast to the one per cent *de-minimus* standards Art. 27(10) of the Code requires that any countervailing duty investigation of a product originating in a developing country signatory shall be terminated where the level of subsidies is less than two per cent *ad-valorem*, and the volume of the subsidized imports represents less than four per cent of the import total, "unless imports from developing country signatories whose individual share of the total import represent less than four per cent collectively account for more than nine per cent of the total imports for the like product in the developing country".[62]

H. *Cumulation*

The Code adopts the view that a subsidy must exceed a *de-minimus* threshold before its effect may be cumulatively assessed with the subsidized imports from the other countries. Art. 15(3) of the Code provides that cumulation may be applied only if the investigating authorities determine that (a) the amount of subsidization established in relation to the imports from each country is more than *de-minimus* as defined in Article 11.9 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition, between imported products and the conditions of competition between the imported products and the like domestic product.[63]

I. *Subsidies by Developing Countries*

Article 27 of the Code and its Annexes VII and VIII deal with the special and differential treatment of developing countries were highly controversial when they were released. Both developed and developing

61. *Ibid.*
62. *Ibid.* Arts. 11 and 27
63. *Ibid.* Art. 15.

countries were dissatisfied with the substance of these provisions.[64]

Art. 27 of the Code begins with a recognition that subsidies may play an important role in economic development programmes of developing countries and then specifies which developing countries shall be exempt from the prohibition of Art. 3 (1)(a) against the use of export subsidies and subsidies contingent on export performance:

(a) developing country signatories referred to in Annex VIII and;

(b) Other developing country signatories for 8 years from the date of entry with force of this Agreement subject to compliance with the provision in paragraph 4.

Paragraph 4 states that any developing country referred to above shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. In that period, the developing country may not increase the current level of its export subsidies, and actually shall eliminate them within a period shorter than that provided for in this provision when the use of such export subsidies is inconsistent with its development needs.[65]

The Code further provides that if any developing country believes it is necessary to maintain its export subsidies beyond the eight-year period that country must so inform, and consult with, the committee at least one year, before the end of eight-year period.[66]

For those developing countries which have 'reached export competitiveness in any given products', the Code requires that the export subsidies for such products be phased out over a period of two years.[67]

However, for those countries listed in Annex VII, if they reached export competitiveness in one or more products, the phase-out period for export subsidies on such products shall be eight-years.[68]

Art. 27(6) of the Code establishes the criteria for determining whether export competitiveness in a particular product exists. It specifies that export competitiveness in a product exists if 'a country's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calender years. Further, the Code defines a

64. See Minutes of the Meeting of 6 Nov. 1990. Note by the Secretariat, GATT Doc. No. MTN.GNG/NG 10/24 (Nov. 29, 1990.
65. See *supra* note 46.
66. *Ibid.*
67. *Ibid* Art. 27(4).
68. *Ibid* Art. 27(4).

product as a section heading of the Harmonized System Nomenclatures. This section also establishes that export competitiveness shall be shown to exist either:

(*a*) on the basis of notification; or

(*b*) on the basis of a computation undertaken by the GATT Secretariat at the request of any signatory.

Art. 27(7) of the Code provides that the remedies specified in Art.4 (remedies for prohibited subsides) shall not apply to a developing country's export subsidies as long as they are in conformity with Arts. 27(2)-27(4), and the applicable remedy provision shall be Art. 7 (remedies for actionable subsidies). There shall be no presumption that a developing country subsidy results in serious prejudice, as that term is defined in Art. 6(1) of the Code and if serious prejudice exists, it must be demonstrated by positive evidence.

Art. 27(9) of the Code goes further and states that no action may be taken against a developing country's actionable subsidies (other than those referred to in Art.6 (1) unless nullification or impairment exists so as to 'displace or impede' imports of like products, or unless injury to the domestic industry occurs.[69]

The Code in Arts. 27(10) and (11) add specific *de minimus* percentage and provides:

> Any countervailing duty investigation of a product originating in a developing country signatory shall be terminated as soon as authorities concerned determine that :
>
> (*a*) the overall level of subsidies granted upon the product in question does not exceed two per cent of its value/calculated on a per unit basis; or
>
> (*b*) the volume of the subsidized imports represents less than four per cent of the total imports for the like product in the importing signatory, unless imports from developing country signatories whose individual shares of the total imports represent less than four per cent collectively account for more than nine per cent of the total imports for the like product in importing country.

Art. 27(13) of the Code provides that direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment

69. See *supra* note 46. Legal Text. Agreement on Subsidies And Countervailing Measures. 343-365.

of government revenue and other transfer of liabilities between such subsidies are granted within and directly linked to a privatisation programme of a developing country signatory provided that both such programme and the subsidies involved are granted for a limitated period and notified to the Committee and that the programme results in eventual privatisation of the enterprise concerned.

Finally, the Code empowers the Committee which upon request and depending upon the nature of the request, undertake a review of either (a) a specific export subsidy of a developing country to determine whether it conforms to that country's development needs, or (b) a specific countervailing measure against a developing country's subsidy in order to determine whether the measure is consistent with the provisions of Arts. 27 (10) and 27(11).

J. Calculation of the amount of a subsidy

Art. 14 of the Code provides that any method used to calculate the benefit conferred by a subsidy must be provided in each signatory's national legislation and be adequately transparent. In addition, it provides the following guide lines for calculating the amount of a subsidy :

(*a*) government-provided equity does not confer a benefit unless the investment is inconsistent with the usual investment practice of private investors;

(*b*) a government loan does not provide a benefit unless there is a difference between what the firm receiving the loan pays and what it would pay for a comparable commercial loan which the firm could obtain on the market; if different, the benefit conferred is the difference between the two amounts;

(*c*) a government loan guarantee does not confer a benefit unless there is a difference between the amount the receiving firm pays on the guaranteed loan and the amount the firm would pay for a comparable commercial loan without the government guarantee; if different, the benefit conferred is the difference between the two amounts, adjusted for any difference in fees;

(*d*) the provision of goods or services or the purchase of goods by a government do not confer a benefit unless provided for less than adequate remuneration or purchased for more than adequate remuneration, determined in relation to prevailing market conditions (including price, quality, availability, marketability, transportation, etc.).

V. Countervailing Measures

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[70]

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of Art VI of GATT, 1994, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another:–

(*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(*b*) in the absence of such domestic price, is less than either

(*i*) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(*ii*) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of Art. VI, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.[71]

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting

70. For the Legal Text. See *supra* note 46 at 375.
71. *Ibid.*

party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bountry or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.[72]

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.[73]

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.[74]

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

The Contracting Parties may waive the above requirement so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping of subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The Contracting Parties shall waive the above requirements so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.

72. Ibid. Art. VI (3).
73. Ibid. Art VI (4).
74. *Ibid.* Art VI (5).

In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the Contracting Parties: Provided that such action shall be reported immediately to the Contracting Parties and that the countervailing duty shall be withdrawn promptly if the Contracting Parties disapprove.[75]

A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that :

(*a*) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(*b*) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.[76]

Determination of Dumping

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[77]

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country of when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by

75. *Ibid*. Art VI (6).
76. *Ibid* Art. VI (7).
77. For the Legal Text of the Agreement on Implementation of Article VI of GATT, 1999 see *supra* note 46 at 377.

comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[78]

Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices, which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[79]

Costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations, costs shall be adjusted appropriately for those non-recurring items of cost, which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operation.[80]

The amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of :

(*i*) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the

78. *Ibid* Art 2(1) and (2) of Art. VI.
79. *Ibid*. Art 2.2.1 of Art. VI.
80. *Ibid*. Art. 2.2.1.1 of Art. VI.

domestic market of the country of origin of the same general category of products;

(*ii*) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(*iii*) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.[81]

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as importer, on such reasonable basis as the authorities may determine.[82]

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect prices comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to above allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[83]

When the comparison requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale,

81. *Ibid.* Art 2.2.2 of Art. VI.
82. *Ibid.* Art. 2.3 of Art. VI.
83. *Ibid.* Art. 2.4 of Art. VI.

provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.[84]

Subject to the provisions governing fair comparison the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.[85]

In the case where products are not imported from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.[86]

Throughout this Agreement the term "like product" ("product similaire") shall be interpreted to mean a product, which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[87]

This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.[88]

84. *Ibid.* Art. 2.4.1 of Art. VI.
85. *Ibid.* Art. 2.4.2 of Art. VI.
86. *Ibid.* Art. 2.5 of Art. VI.
87. *Ibid.* Art. 2.6. of Art. VI.
88. *Ibid.* Art. 2.7. of Art. VI.

Determination of Injury

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[89]

With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.[90]

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimus* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.[91]

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not

89. *Ibid.* Art. VI.
90. *Ibid.*
91. *Ibid.* Art. 3.3. of Art. VI.

exhaustive, nor can one or several of these factors necessarily give decisive guidance.[92]

It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[93]

The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available date permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.[94]

A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as :

(*i*) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(*ii*) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially

92. *Ibid.* Art. 3.4. of Art. VI.
93. *Ibid.* Art. 3.5. of Art. VI.
94. *Ibid.* Art. 3.6. of Art. VI.

increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(*iii*) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(*iv*) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with the special care.[95]

Conclusion

Form the above discussion, it is clear that the WTO Agreements on Subsidies and Countervailing Measures represents the culmination of five years hard work of negotiators and their negotiating skills. The Ministerial Declaration which launched the Uruguay Round stated the objectives of the subsidies negotiations as follows:

Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with these issues.

Thus the primary goal of the subsidies and countervailing measures negotiations was to improve GATT disciplines that relate to all subsidies and countervailing measures.

The perusal of the view points put forward by various countries in the negotiations were characterised by a conflict between two points of view – one, being the view that saw subsidy discipline as the primary goal of negotiations, while the other view emphasised the objective of greater discipline over the use of countervailing measures. The Uruguay Round of Negotiations dwelt on both subsidies and countervailing measures

95. *Ibid.* Art. 3.7. of Art. VI.
96. *Ibid.* Art. 3.8. of Art. VI.

aiming in discipline both, it is obvious that the WTO success in negotiating the Multilateral Agreements on subsidies and countervailing measures is susceptible to the competing view points as outlined above.

The essence of the Multilateral Agreements on Subsidies and Countervailing Measures is the increase in disciplining the both subsidies and countervailing measures. The WTO Agreement on subsidies as explained in the beginning of this Article categorises subsidies as either prohibited, actionable or non-actionable; establishes a rebuttable presumption of serious prejudice based on, *inter alia*, a quantitive standard; articulates a benefit to the recipient standard for calculating particular types of benefits and requires public notice of other types of calculation methodologies; establishes measures to prevent circumvention of countervailing duty orders; and institutes a programme of phase-out of the use of export subsidies by developing countries.

The WTO Agreement on Countervailing Duties provides, *inter alia*, a quantitative definition of *de-minimus* subsidies below which a countervailing duty investigation would be terminated. It also establishes that imports may be cumulatively assessed only if subsidies are not *de-minimus* and volumes not negligible; provides that a petitioner in a countervailing duty case must show positive evidence of industry support before an investigation is initiated; recommends that the public interest (including the interest of consumers) be considered in determining whether the imposition of countervailing duties is appropriate; and establishes a mandatory review provision under which a countervailing duty order would lapse "(sunset)" after five years unless good cause were shown for its continuance.

In conclusion, it can be said that the WTO Agreement on Subsidies and Countervailing Measures meets the stated goals of *Punta-de-Este* Declaration for the negotiation on subsidies and increase disciplines on both subsidies and countervailing measures. However, as with anything new in the law (be it domestic or international), it is ripe for fresh interpretations as its limits are explored by those with a vested interest in doing so.

JUDICIAL RESPONSE TO THE RIGHT TO INFORMATION IN INDIA

*A. David Ambrose**

Generally speaking right to information or right to freedom of information refers to an individual's right or freedom to seek public information where information means any material relating to the affairs, administration or decision of a public authority. To build up a society of free people, information must flow freely without any hindrance. It is indisputable that in a democratic polity to ensure and facilitate the continued participation of people in the effective functioning of the democratic process, the people mus be kept informed of the vital decisions taken by the government and the basis thereof. Therefore, right to seek and receive public information becomes a pillar of democratic setup. Many countries such as Sweden, Australia, Canada and U.S.A. have expressly reocgnised this right.

At international level right to information has been recognised as a human right. Universal Declaration of Human Rights in Article 19 included free flow of information as human right essential for peace and development. Article 19 runs as follows:

"Every one has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

The International Covenant on Civil and Political Rights reinforced this provision: Article 19 (2) of the Covenant states: — Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other, of his choice".

Further the UNESCO Declaration 1978 provided for "the exercise of freedom of opinion, expression and information, recognised as an integral part of human rights and fundamental freedoms".

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If that is so, whether right to information has been recognsied in India? As the culture of the Indian governance has so far been one of secrecy, apart from the Official Secrets Act 1923, taken from Britain no other central statute touching on this field exists.[1] The Official Secrets Act, 1923 without defining what constitutes an 'official secret' created a climate of confidentiality around all governmental activity thereby making it difficult for an individual to obtain any information regarding the functioning of the government.

However, the Indian judiciary acknowledging that the participatory role of the public can be fulfilled in any democracy only if it is an open government, where there is full access to information in regard to the functioning of the government, has to some extent, recognised the right to information. A host of decisions of Indian judiciary clearly acknowledge the existence of the right of freedom of information in India. It is proposed to discuss in this short paper the positive role-played by the Indian judiciary in developing and recognising the right to information in India.

The Concept of Privileged Document

The post independence period in India witnessed the emergence of many new constitutional rights including the right to clean environment, right to education, right to privacy etc. the right to information is one such right that has been accorded Constitutional recognition in this period by the Indian judiciary.

However, right to information did not get itself graduated directly to a constitutional (fundamental) right. The Indian courts had to first break open the privilege shield that clothed all the governmental actions.

The privilege shield owes its origin to the "crown privilege" which can be traced to 'crown prerogative right' to prevent the disclosure of state secrets. It has been established well that 'crown privilege" refers to the rule that certain evidence is inadmissible on the ground that it's adduction would be contrary to the public interests and the important aspect of this crown privilege, is that it cannot be waived. With the growth of democratic government, the prerogative right developed into and became

1. Though a bill to provide Freedom to every citizen to secure access to information under the control of public authorities called Freedom of Informations Bill, 1997 was introduced in the Lok Sabha, it is yet to see the Light of the day. However, there are two State Acts; the State of Goa passed the Right to Information Act in 1997 followed by the State of Tamil Nadu, Right to Information Act 1997 passed by the Tamil Nadu Government in May 1997 (Act 24 of 1997).

identified with public interest and therefore we find the 'privilege Documents' recognised on the public interest.[2]

State privilege shield in India is embodied in the "state privileges' found in the Indian Evidence Act. Section 123 and 124 of the Evidence Act protect from disclosure, documents and communication which are considered to be privileged.

Under section 123, no one is permitted to give evidence derived from:

(1) Unpublished official records

(2) Relating to "Affaris of state"

(3) Except with the permission of the departmental head,

(4) Who may either give or withhold the permission.

Under section 124, no public officer can be compelled to disclose communications:

(1) Made to him in Official confidence,

(2) If he considers that public interest would suffer by such disclosure.

Section 162 of the Evidence Act deals with the powers of the court regarding admissibility of documents. It states that the court, if it thinks fit, may:

(1) Inspect any document, unless it refers to matters of the state, or

(2) Take other evidence to enable it to determine its admissibility.

The first response of the Indian judiciary in upholding the right to freedom of information is to dilute the state privilege concept to the possible extent.

Ruling on the relevant provision of India Evidence Act, the Supreme Court way back in 1961 in *State of Punjab* v. *Sukhdev Singh*[3] laid down the following propositions of law:

(1) Disclosure of information to privileged documents was a private interest whereas the protection of such interest was a public interest.

(2) The courts could decide whether the documents related to "Affairs of State".

2. Generally see "*Documents Privileged in public interest*", Law Quarterly Review, Vol. 39 p. 476. Cf. *State of U.P.* v *Raj Narain* AIR 1975 SC 865 at 879-880.
3. AIR 1961 SC 493.

(3) Such documents relating to "Affairs of State" could either be noxious (causing public injury) or not noxious (not causing public injury).

(4) The courts could not decide whether documents relating to "Affairs of State" were noxious or not noxious. This could be decided only by the departmental head.

In *State of U.P.* v *Raj Narain*[4] the main issue was whether or not privilege under secion 123 of Indian Evidence Act can be claimed in respect of the unpublished blue book *viz.*, the circulars regarding the security arrangements of the tour program of Shrimati Indira Nehru Gandhi and the instructions received from the government of India and the Prime Minister's secretariat on the basis of which police arrangements for construction of rostrum, fixation of loud speakers, and other arrangements were made and the correspondence between the state government and the government of India regarding the police arrangements for the meeting of the minister.

The majority judgment of the Supreme Court delivered by the Chief Justice Ray, while elaborating the scope of sec 123 and sec 164 of Indian Evidence Act, held that the foundation of law behind sections 123 and 164 of Indian Evidence Act is the same as in English law. The court further held that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material, which would be damaging to the national interest to divulge but rather that the documents would be of class, which demands protection.[5]

However Justice Mathew who delivered separate judgment to some extent, watered down the "privileged documents" concept by saying that

4. *Supra* note 2.
5. See Chief Justice Ray's judgment delivered on behalf of himself and three other Judges.. *Ibid*, at p. 871-876.

"I am not satisfied that a mere label given to a document by the executive is conclusive in respect of the question whether it relates to affairs of state or not. If the disclosure of contents of the documents would not damage public interest, the executive cannot label it in such a manner as to bring it within class of documents, which are normally entitled to protection".[6]

Justice Mathew further held that 'If on inspection, the court holds that any part of the blue book or other document does not relate to affairs of state and that the disclosure would not injure public interest, the court will be free to disclose that part and uphold the objection as regards the rest provided that this will not give a misleading impression. The principle of the rule of non-disclosure of records relating to affairs of state is the concern for public interest and the rule will be applied no further that the attainment of that objective requires.[7]

The *Raj Narain's Case* in effect diluted the rigid privilege document concept and the non disclosure rule by stating that the privilege status should be accorded to any documents of the government not merely because they are labeled as government documents but according to the contents of the documents. If the contents of the documents do not relate to any affairs of the state then the documents are not entitled to protection and the rule of non disclosure will not be applicable to those documents.

Right to Know

Apart from diluting the privileged concept, Justice Mathew in *Raj Narain's Case* recognised the existence of right to know as derived from the concept of freedom of speech and expression. The Supreme Court held that in a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. *They are entitled to know the particulars of every public transaction in all it's bearing.*[8] Thus the Supreme court not only acknowledged the citizen's right to know but also found that it emerges from freedom of speech and expression.

Right to Information

The right to know was further elaborated by Justice Bhagwati (as he then was) in the *S.P. Gupta and other* v. *Union of India and others*

6. *Ibid.* at p. 866.
7. *Ibid.* para 87 at p. 886-887.
8. *Ibid.* para 74 at p. 884 (emphasis supplied).

famously known as *Judges Transfer Case,*[9] which involved the question of whether the correspondence between Chief Justice of India and the Union Law Minister ought to be disclosed. In this case, a fundamental change in the conception of the right of disclosure of information took place. The Court while adding a afresh liberal dimension to the need for increased discloser in matters relating to public affairs, held that the concept of an open government is the direct emanation the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19 (1) (a). Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as mush as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.[10]

In the *Judges Transfer Case* overruling the earlier *Sukhdev Singh's Case* it was decided firstly that the right to disclosure is not a private interest but public interest. Secondly, whether or not the disclosure of documents relating to "affairs of the state" would injure public interest could be decided by the courts. Thirdly, the court also decided that the documents relating to the "affairs of the state" could be ordered to be disclosed even though they would cause injury to public interest, if the court came to the conclusion that the competing public interest of disclosure was superior in the facts and circumstances of the case.

The propositions of law that have been laid down by the *Judges Transfer Case* can be summed up in the following manner:

(1) Disclosure of documents relating at to "Affairs of State" involves two competing public interest viz., the right to disclosure of information competing with the right to protect information relating to "Affairs of the State".

(2) The court can decide not only whether the document relates to "Affairs of State' but also whether or not the disclosure of document relating to "Affairs of State" would be injurious to public interest.

(3) Certain types of documents would be protected, those for example which:

9. AIR 1982 SC 149.
10. *Ibid.* para 66 p. 234.

(*a*) Endanger national safety, or

(*b*) Endanger diplomatic relations with other countries, or

(*c*) Result in disclosure of State secrets.

(4) Whether or not other documents relating to "Affairs of State" and which may result in injury of public interest ought to be disclosed would depend on the balance of the two competing public interests, the right to protect disclosure of documents relating to "Affairs of State" and the right to freedom of information.

The right to know or information was jsutified by the court by saying no democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them, and make democracy a really effective participatory democarcy.[11]

The Court further said that today it is common ground that democracy has a more positive content and the orchestration has to be continuous and pervasive. This means *inter alia* that people should not only cast intelligent and rational votes but also should exercise sound judgment on the conduct of the government and the merits of the public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes continuous process of government-an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is an open government *where there is full access to information in regard to the functioning of the government.*[12]

The apex court thus made it clear that in a democratic country like India, right to information is a must for the smooth functioning of the democratic process and the right to information flows from the right to freedom of speech and expression.

In 1986, the Bombay High Court applied this ruling in *Bombay Environmental Action Group* v. *Pune Cantonment Board*, and observed that the right of inspection of documents as claimed by the petitioners must flow freely from the said fundamental right, i.e., the right to free speech and expression under Article 19 (1) (a).[13]

11. *Ibid* para 63 at p. 232.
12. *Ibid.* para 64 at p. 232-233 (emphasis supplied).
13. *Lawyers Collective*, vol. 5 No. 2, pp. 24-25.

The Supreme Court in *Indian Express (Bombay) Pvt. Ltd* v. *Union of India*[14] held that fundamental principle invested in freedom of speech and expression is peoples right to know. While emphasizing the importance of freedom of press as included in Art. 19 (1) (a) which guarantees freedom of speech and expression and non-interference in the freedom of press, the Supreme Court observed that over the years government in different parts of the world have used diversified methods to keep press under the control. The court equated the interference of the government with the freedom of press with that of interference with free flow of information and said that it is with a view to checking such malpractices which interfere with *free flow of information*, democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression laying down the limits of interference with the freedom of press.[15] Thus, the apex court through its three Judges bench made a connection between free flow (freedom) of information and freedom of speech and expression by saying that interference with the freedom of press (which is included in the freedom of speech and expression) means interference with free flow of information.

Similarly, in *L.K. Koolwal* v. *State of Rajasthan*[16] the Rajasthan High Court while considering the public interest petition by a citizen seeking protection against the neglect of sanitation by the state which led to pollution hazards held that the citizen has right to know about the activities of the state, the instrumentalities, the departments and the agencies of the state. The privilege of secrecy, which existed in the earlier times that the state is not bound to disclose the facts to the citizens or the state cannot be compelled by he citizens to disclose the facts, does not survive now to a great extent guaranteed under Article 19 (1) (a) of the Indian constitution the right of freedom of speech is based on the foundation of the freedom of right to know.[17]

Recently, the Supreme Court, when it was asked to give directions the details of the reports and events mentioned in the Vohra Committee Report be fully and completely disclosed, held in *Dinesh Trivedi* v. *Union of India* that to ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and the basis thereof. Democracy therefore, expects openness and openness is a concomitant of free society. Sunlight is the best disinfectant.[18]

14. AIR 1986 SC 515 para 31 at p. 527.
15. *Ibid.* para 31 at 527 (emphasis supplied).
16. AIR 1988 Raj 2.
17. *Ibid.* at p. 4.
18. (1997) 4 SCC p 306 at p 314.

Some New Developments

Having been established that right to information is very much included in the freedom of speech and expression guaranteed in Art. 19 (1) (a) of our Constitution, the Indian Judiciary has started giving new dimensions to the right to freedom of information. In *Secretary, Ministry of I & B Government of India* v. *Cricket Association of Bengal and others*[19] which involved the cricket association's right to telecast cricket match, the Supreme Court has taken the view that the freedom of speech and expression includes right to acquire information and disseminate it, and broadcasting is a means of communication, and sport is an expression of self.

The Supreme Court held that right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed, entertained. The former is the right of the telecast and latter that of the viewers. The Court further held that the freedom guaranteed by Art 19 (1) (a) does include the right to receive and impart information.[20]

While deciding on a prayer for direction to the electricity board not to apply power cut during the telecast hour of the Wills World Cup Cricket 1996, the Karnataka High Court in *K. M. Nataraj* v. *State of Karnataka* followed the *Secretary, Ministry of Information and Broadcasting Case* and held that so far as the contention of the right to information and right to acquire knowledge about the game of cricket through electronic media is a right guaranteed to the petitioners under Art. 19 (1) (a) of the Constitution of India is concerned, there cannot be any dispute on this proposition.[21]

It should be noted that the right to information developed to ensure public access to the so called privileged documents has been slowly extended to other informations, pertaining to the enrichment of one's knowledge.

Limitations on Right to Information

No right including a fundamental right is absolute and without any limitations. This general principle of jurisprudence even applies to right to information. While recognising the right to information, the Indian courts have indeed taken pains to strike a balance between individual right to information and the public security and thereby identifying certain limitations on this right.

19. AIR 1995 SC 1236 at para 17 p 1250.
20. *Ibid.* at p 1307.
21. AIR 1997 Kant 36 at 43 para 14.

In *Raj Narain's case* the Supreme Court held that the right to know which is derived from the concept of freedom of speech, though not absolute is a factor which should make one worry, when secrecy is claimed for transaction which can at rate have no repercussions on public securty.[22]

In *S.P. Gupta* v. *Union of India* the court held that the disclosure of documents relating to the affairs of the state involves two competing dimensions of public interest, namely, the right of the citizen to obtain discloser of information, which competes with the right of the state to protect the information relating to it's crucial affairs. It was frutgher held that, in deciding whether or not to disclose the contents of a particular document, a judge must balance the competing intrest and make his final decision depending upon the particular facts involved in teach individual case. It is important to note that it was conceded that there are certain classes of documents, which are necessarily required top the protected, e.g., cabinet minutes, documents concerning the national safety, document which affect diplomatic relations or relate to some state secrets of the highest importance, and the like in respect of which the court would ordinarily uphold Governments claim of privilege. However, even these documents have to be tested against the basic guiding principle which is that wherever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure.[23]

The Rajasthan High Court in *Koolwal* v. *State of Rajasthan*[24] held that under Art.19 (1) (a) of the Constitution there exists the right of freedom of speech. Freedom of speech is based of the foundation of the freedom of right to know. The state can impose and should impose the reasonable restrictions in this matter like other fundamental rights where it affects the national security and any other allied matter affecting the nation's integrity.

Very recently, the Supreme Court in a case involving disclosure of medical information, envisaged a clash between person's "right to be alone" and another person's "right to be informed, in *Dr. Tokugha Yepthomi* v. *Apollo Hospoital Enterprises Ltd.*[25] while holding that the disclosures by hospital concerned (Respondents) that a patient (Appellant) was HIV Positive would not be violative of either the rule of "confidentiality" or the appellant's "right to privacy" observed, "Doctors are morally

22. *Supra* note 2 at p 884.
23. Cf (1997) 4 SCC 306 at 314.
24. *Supra* note 16 at p 4.
25. 1998 (6) *Scale* p 230 para 26 at p 238.

and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true facts may amount to an invasion of the right to privacy which may sometimes lead to the clash of a persons right to be let alone with another persons right to be informed".

Thus, it becomes clear that the freedom of information is subject to certain limitations. If the public interest warrants the non-disclosure of information, then freedom of information cannot be exercised. Further, freedom cannot be exercised if it affects nation's integrity and security. Apart from these limitations, since right to information is included in the right to freedom of speech and expression the restrictions that are applicable to right to freedom of speech and expression enumerated in Art. 19 (2) will also be naturally applicable.

Evaluation and Conclusion

From the above dissuasion it is evident that though the right to freedom of information or the right to know is not a specified fundamental right under our Constitution, the Indian Judiciary, by holding that it flows from freedom of speech and expression under Art. 19 (1) (a) of the Constitution, has accorded to the freedom of information, the constitutional that too fundamental rights status.

In the olden day when information technology was not so well developed and the welfare state concept was not followed, it was thought it is better to have secret government. It was thought that all the Government documents are privileged irrespective of their contents. Then the culture of governance was one of secrecy and a climate of "confidentiality" was around all governmental activity. However, the development of democratic process, the fundamental right to freedom of press and the development of information technology jointly have highlighted the need for an open Government, the need for having full access to information in regard to the functioning of the government. Inadequacy of legal framework facilitating flow of information was badly felt. Under the old Official Secrets Act 1923, and the sections 123, 124 and 162 of Indian Evidence Act it was not possible to compel the government to become one of openness.

First, as a general response the Indian Judiciary diluted the "privilege concept" and held that the privilege status should be given only according to the matter of substance of the documents and not to all government documents irrespective of their contents.

Secondly, the Indian judiciary well established the citizen's right to know or right to freedom of information. The right to freedom of

information once considered as a private right was recognised as a public right.

Thirdly, the right to information was found to flow from the citizen's fundamental right to freedom of speech and expression guaranteed under Art. 19 (1) (a) of our constitution. The Indian judiciary was quick to point out that only information whose disclosure would affect public interest and integrity and security of India can be with held. This, the Judiciary termed as restrictions on freedom of information.

It is pertinent to note that the judiciary developed and established the right to freedom of information referring only to Governmental Information i.e. information about the functioning of the government, its decision making and about other like activities. By information it meant only governmental information clothed by the secrecy veil. It stressed the need for openness in governmental functioning and developed the concept of right to information as embodied in Art 19 (1) (a) of our Constitution. Since the Judiciary thought that freedom of information is very much essential for the smooth and successful functioning of democratic governments, it included right to information in the fundamental right to freedom of speech and expression. Thus the Indian Judiciary successfully made right to information as a fundamental right.

The State and Central Bills on right to information, to supplement the Judicial response to information refer only to governmental information. Freedom of Information Bill, 1997 introduced in the Lok Sabha in Section 2 (d) defines information as follows "information means any material relating to the affairs of the public authority". Similarly, the Tamil Nadu Right to Information Act 1997 as introduced in the State Assembly in Sec. 2 (3) says that "Information" includes copy of any document relating to the affairs of the state or any local or other authorities constituted under any act for the time being in force for a statutory authority or a company, corporation or a co-operative society or any organization owned or controlled by the government.

Thus the right to information is guaranteed against governmental action withholding informations relating to the functioning of the government in the guise of privilege or official secrecy. Any judiciary in a democratic country can be proud of this great achievement.

However, of late the Judiciary knowingly or unknowingly, by information, also tends to mean information relating to enrichment of knowledge or dissemination of knowledge. The recent two decisions, *the Secretary Ministry of Information and Broadcasting case* decided by the Supreme

Court and the *K.M. Nataraj's Case* decided by the Karnataka High Court discussed above, prove this point very much.

Further more, even though the right to information has been recognised by the Indian Judiciary, it's scope and extent has yet to be fully explained by the Indian Courts.

It must be remembered that using the right to information to have access to government documents is more important than using it for acquiring knowledge etc. As the Bible says - *"And ye shall know the truth and truth shall make you free"* the right to information must be largely used to remove the cloud of secrecy over the governmental actions and thus enabling the citizens to lead a free and unfettered life.

THE CONSTITUTIONAL RIGHT TO EQUALITY IN GOVERNMENT CONTRACTS: JUDICIAL EXPOSITION

*J.K. Chauhan**

I. INTRODUCTION

The modern State is a dispenser of social welfare measures. This has resulted in proliferation of government largess in the form of jobs, contracts, licences, quotas, etc. New sources of wealth are being created in the nature of privileges of rights.[1] The government is the custodian of the finances of the state and has to protect its financial interests.

Contracts have been indispensable tools for carrying on business amongst private parties. They have now become almost equally important in conducting the affairs of the state. Construction of public works, procurement of defence material, the giving of largess, and vital research and development take place to a substantial extent under the terms of contracts entered into between the government and private persons or organisations. As the requirements of the state are extensive and wide ranging, the government has to purchase from small items like brooms to big items like aeroplanes. There is no doubt that some of the goods and services are also provided by the government owned factories, corporations, dockyards, workshops and research establishments. But most of the state requirement are met through contracts whereby rights and duties are created, not by the exercise of power that is peculiarly governmental, but by voluntary acts of the parties.[2]

The state can carry on its executive functions through or without legislation. The exercise of such functions is subject to the fundamental rights guaranteed in Part III of the Constitution of India. Article 14 in this Part guarantees equality before the law or the equal protection of the laws to all persons. The doctrine of equality does not, however, mean universal application of the same law to all persons in all circumstances. Some kind of classification is, therefore, permissible. What is forbidden is class

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1. Charles A Reich, "THE NEW PROPERTY", 73 Yale L.J. 733 (1983-64).
2. Turnip Collins, "GOVERNMENT CONTRACTS", 28 (1972).

legislation, not classification which must be founded on an intelligible differentia distinguishing certain persons or things, that are grouped together from others, who are left out of the group and that the differentia must have a rational relation to the object of the law. In order to be unconstitutional, the law must not only create inequality but also such inequality should be unreasonable and arbitrary.[3] This is a matter for the courts to decide. There is no set formula of classification. Its extent, range and kind depends on the subject matter of the legislation. The prevailing conditions, including the social, economic and political factors at work at a particular time are all taken into consideration.

Thus every state action of the executive government must be informed with reason and be free from arbitrariness. That is the very essence of the rule of law and its bare minimum requirement. When the government is trading with the public, the doctrine of equality demands absence of arbitrariness and of discrimination in contractual transactions. Its activities have a public element and, therefore, there should be fairness and equality. It need not enter into a contract with anyone. Whenever it enters, it must act without discrimination and by adopting a fair procedure. This proposition would hold good in all cases, where the interest sought to be protected is a privilege.[4] Where the government is dealing with the public, whether by way of giving jobs, entering into contracts issuing quotas or licences, or granting other forms of largess, it cannot act arbitrarily at its sweet will and cannot, like a private individual, deal with any one it pleases. Its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

The purpose of this paper is to examine judicial pronouncements on the allegations of the violation of the doctrine of equality in the matters of government contracts.

II. Judicial Approach to Government Contracts

(a) Earlier view

The contractors have often invoked the provisions of article 14. Their grievances have been numerous. They have alleged that their lowest tenders have been wrongfully and arbitrarily rejected and that this has not only resulted in discrimination but also in loss of revenue or public money. Their grievance is that a contract, already awarded to a particular contractor, has been arbitrarily cancelled to prefer another contractor. This has led

3. See J.K. Mittal, "*Right to equality and the Indian Supreme Court*", 14 An. J. Comp. L 422 at 431 (1965).
4. *R.D. Shetty* v. *International Airport Authority of India*, (1979) 3 S.C.C. 489 at 507-8.

to unequal treatment. Moreover, in some cases it has been alleged that a particular contractor has been wilfully and arbitrarily black-listed, so as to deprive him from entering into contracts with the government causing discrimination. When such cases came before the courts, the view taken by the government is that there is no discrimination involved in such actions. It has been argued that, like an individual, the government is free to decide with whom it would like to have contractual relationship. Further, when it makes a contract, it does not act in exercise of its sovereign functions but is performs mere commercial functions. The making of a contract is a commercial function and not a government function.

The view taken by the courts is that like a trader the government has to act in its best interest. No person has a fundamental right to insist that the government must enter into a contract with him in doing its business or work. Like a private person, it has a right to choose or to enter into a contract with any particular person, It has also a right to decide on the terms of the contract like the amount of earnest money and income tax clearance certificate, alongwith the submission of tender.[5] The government also enjoys unrestricted right to determine the persons with whom it will deal. It can reject the lowest tender of the person who has been blacklisted.[6] The constitulional right under Article 14 does not extend to compelling any third party including the government to enter into a contract with any particular individual. The duty to act fairly may include duty to act judiciously. There would be cases where vested rights exist. In the matter of contracts, there is no vested right in any person. In *C.K. Achutan* v. *State of Kerala*,[7] the petitioner entered into contracts for the supply of milk to the government hospital at Cannanore since 1946. Previous to this, his brother was in the same business and had similar contracts from 1936. In 1957, he and a cooperative milk suply society submitted their respective tenders for supply of milk. After scrutiny his tender was accepted. Later, however, the district medical officer cancelled his contract and gave it to the society. In a petition under Article 32, the Supreme Court upheld the action of the district medical officer as non-discriminatory. The Court was of the view that it was perfectly open to the government to choose a person of its liking. The Court said that where one person was preferred to another, the aggrieved party could not claim the protection of Article 14, because the choice of a person to fulfil a particular contract must be left to the government. The government contract stood on no different footing from

5. *Vedachala Mudalier* v. *Divisional Engineer*. Highway, A.I.R. 1959 S.C. 490.
6. *K. Bhaskaran* v. *State of Kerala*. A.I.R. 1958 Ker 333 at 334.
7. A.I.R. 1959 S.C. 1081.

a contract of a private party.[8] This case was followed by a Kerala High Court in *V. Punnen Thomas* v. *State of Kerala*,[9] wherein the petitioner was blacklisted as he commited irregularities in connection with the tender. On this account, the government had to suffer considerable loss. The grievance of the petitioner was that he was not heard before the passing of impunged order. The High Court observed that although every citizen has the right to carry on trade or business, he has no fundamental or other right to insist upon the government to enter into business with him. When a person is excluded from entering in to business with the government in accordance with the law, there is no question of invasion of civil rights and rules of natural justice. Article 14 cannot, therfore, be invoked.[10]

But as would be seen presently, the government cannot enter into a contract which may benefit any individual at the cost of the public finance. Such contract would be both unreasonable and against public interest. For the first time the Supreme Court in *Rasbihari Panda* v. *State of Orissa*[11] decided that Article 14 had been violated in case of government contracts. In this case, the validity of Section 10 of Orissa Kendu Leaves (Control of Trade) Act 1961 was questioned. This section vested power in government to dispose off Kendu leaves as it likes. In pursuance of this power, firstly, the government invited the tenders from those licensees who had done work satisfactorily during the previous year. This act of the government was challenged on the ground of violation of Articles 14 and 19 (1)(*g*). The court observed that original scheme of entering into contracts with the old licensees and to renew their terms was open to grave objection. It sought arbitrarily to exclude many persons interested in the trade. The new scheme under which the government restricted the invitation to make offers to those traders who had carried out the contracts in the previous year without default and to the satisfaction of it was also objectionable. The right to make tenders for the purchase of Kendu leaves being restricted to a limited class of persons, it effectively shut out all other persons from carrying on trade in Kendu leaves. The new entrants into that business were barred and it was ex-facie discriminatory. It enabled the existing contractors to carry on the business. Both the schemes evolved by the government were violative of Articles 14 and 19 (1)(g) because they gave rise to a monoply in the trade in the hands of certain traders and singled out other traders for discriminatory treatment.[12]

8. *Id.* at 1492.
9. A.I.R. 199 ker. 81.
10. *Id.* at 84.
11. A.I.R. 1969 S.C. 1081.
12. *Id.* at 1088.

The government has a right to reject a higher tender and accept a lower tender. It can do so where it is satisfied that an offer of a lower tender is, on an overall consideration, preferable to the higher tender, The Supreme Court applied this principle in *Trilochan Mishra* v. *State of Orissa*.[13] In this case, the government invited tenders. On the receipt of the tenders, the highest tender was not accepted. The lowest tenderer was asked to raise the amount to the highest offered before the same were acepted The court observed that there was no loss to the government and merely because the government preferred one tender to another, no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, government is not bound to accept the highest tender but may accept the lower one in case it thinks that the person offering the lower tender is, on an overall consideration, to be prefered. Similarily in *State of Orissa* v. *Harinarayan Jaiswal*[14] the discretionary power of the government to accept or reject the tenders without assigning any reason under Section 29 (2) of the Bihar and Orissa Excise Act, 1915 was challenged as violative of Articles 14 and 19 (1) (g). The respondents were the highest bidders but their bid was rejected. *Hegde, J.* speaking on behalf of the Court observed that the government is the guardian of the finances of the state. It is expected to protect the financial interest of the state. Hence quite naturally, the legislature has empowered the government to see that there is no leakage in its revenue. It is for the government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. The Court observed that the plea of contravention of Articles 14 or 19 (1) (g) does not arise in these cases.[15]

The Supreme Court reaffirmed the above porinciple in *P.R. Quenim* v. *M.K. Tandel* [16] saying that the government shall be at liberty to accept or reject any bid without assigning any reason. Therefore, it is not violative of Article 14. In matters relating to contracts with the government, the latter is not bound to accept the tender of the person who offers the hightest amount.

13. (1971) 3 S.C.C. 153.
14. (1972) 2 S.C.C. 36.
15. *Id.* at 44.
16. (1974) 2 S.C.C. 169.

(b) Contemporary View

Where state is dealing with individuals in transactions of sale and purchase of goods, the two factors are important for consideration, *Firstly*, an individual is entitled to deal with the government. *Secondly*, individual is entitle to fair and equal treatmment. A duty to act fairly means a duty to observe certain aspects of rules of natural justice. The blacklisting of contractors without hearing is not valid. This view was taken by the Supreme Court in *Erusian Equipment and Chemicals Ltd.* v. *State of West Bengal*[17]. In this case, the petitioners had been bidding at the sale of cinchona by the state government. After a certain date, all the offers of theirs were rejected even when they were highest. The government in the meanwhile, learnt from a secret letter from the Collector of Customs of the firm's practices which were under investigation. Therefore, the government had blacklisted the firm without giving it any notice. The petitioner challenged the action of the government. The court allowed the appeal and held that equality of opportunity applies to matters of public contracts. The government cannot choose to exclude anyone by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matters of public contracts.[18] The court further explained that blacklisting has effect of prevening a person from the privilege and advantage of entering into lawful relationship with the government for purpose of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.[19]

Once again, the Supreme Court in *R.D. Shetty* v. *International Air Port Authority of India*[20] got an opportunity to examine the question of availability of the right ot equality guaranteed by Article 14 to the contractors. In this case, the terms and conditions of tender were changed after opening the tenders. The petitioner had not submitted the tender, since he did not fulfil the required qualifications. The change effected relaxed the terms and conditions, qualifications, experience, etc. The petitioner filed the petition challenging the action of the Airport Authority on the ground that he did not know that the terms and conditions would be changed, otherwise, he too would have submitted the tender earlier. By relaxing the terms and conditions contract was given to Mr. Kumaria (respondent No.

17. (1975) 1 S.C.C. 70.
18. *Id.* at 74.
19. *Id.* at 77.
20. *Supra* note 4.

4). The court, holding the act of the authority *ultra-vires*, observed that though it is inappropriate to speak of a person as a 2nd class hotelier, the expression when used in the tender was not meaningless or purposeless. It was inapt but it meant to denote a person conducting or running a 2nd class hotel or restaurent and having 5 years such experience. It was a requirement meant to be objectively satisfied and respondent number 4 did not satistfy this requirement.[21] In this case the court explained the discretionary powers of statutory authorities in accepting or rejecting the tender and observed that there was no statutory requirement of awarding the contract by inviting tenders. The International Airport Authority of India did not reject all the tenders and then negotiate with respondent 4. The contract was given in response to the tenders of respondent 4. Action of respondent No. 1, therefore, cannot be justified on ground that the same could have been achieved by rejecting all the tenders and entering into direct negotiation with the respondent no. 4[22]. While expressing the need to follow the standard of norm by the state, the court observed that it is a well settled rule of Administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards.[23]

The Supreme Court laid down two limitations in *Kasturi Lal Reddy* v. *State of Jammu and Kashmir*[24] which structure and control the discretion of the government in regard to the grant of largess. The first is in regard to the terms on which largess may be granted and the other in regard to the persons who may be recipients of such largess. As regards the first limitation, it is imperative that if the government awards the contract, or leases out or otherwise deals with its property or grant any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness which has to be applied in order to determine the validity of government action. In this case, the court observed that the government is not bound to advertise and invite offers to enter into a contract. The government is entitled to negotiate with any one it likes.[25] But it is submitted that this position may hold good as offers are not invited by advertisements. If offers are invited through advertisements, then it cannot deal with anyone it likes. The government has to justify its action in not accepting the highest tender.

21. *Id.* at 500.
22. *Id.* at 502.
23. *Id.* at 503.
24. (1980) S.C.C. 1 at 11.
25. The court reiterated the same view in *State of M.P.* v. *Nand Pal* A.I.R. 1987 S.C. 251.

The concept of public interest must as far as possible receive its orientation from the directive principles. They embody par excellence the constitutional concept of public interest. If, therefore, any governmental action is calculated to implement or give effect to the directive principles, it would ordinarily, subject to any other overriding considerations, be informed with public interest. The government cannot act in a manner which would benefit a private party at the cost of the state. Such an action would be both unreasonable and contrary to the public interest.

The government cannot give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it. Of course this can be done in case where there are other considerations which render it reasonable in the public interest to do so. Such considerations may be that directive principles are sought to be achieved or implemented. There can be that the contract or the property is given out with the view to earn revenue or for the purpose of carrying out welfare schemes for the benefit of particular group or section of people deserving it. Moreover, the person who has offered a higher consideration may not otherwise be fit to be given the contract or the property. Whether the action of the government is reasonable and in the public interest, it is to be seen from the proper and adequate material available. The court is duty bound to examine such material and satisfy itself whether it is reasonable or unreasonable or it is in the public interest or against it.

The second limitation on the discretion of the government in the grant of largess is in regards to the persons to whom such largess can be granted. It is now well settled law, as a result of the decision of the Supreme Court,[26] that the government is not free, like an ordinary individual, inselecting the recipients for its largess. It cannot choose to deal with one it pleases in its absolute and unfettered discretion. Moreover, in a democratic society it is a duty of the state to do what is fair and just to the citizens. It should not seek to defeat the legitimate claim of the citizens by adopting a legalistic attitude but should do what fairness and justice demand.[27] If in the opinion of the government, the highest tenderer lacks sufficient experience or is inefficient or is blacklisted, the contract can be given to the next highest tenderer.[28] But in this case also, the reasonable opportunity must be given to the highest tenderer before the rejection of his tender is effected.

26. *Supra* note 4.
27. *Hindustan Sugar Mills* v. *State of Rajasthan*, A.I.R. 1981 S.C. 1681.
28. *Sri Ranga Engineering Contractors* v. *Deptt. of Space, Government of India*, A.I.R. 1981 A.P. 165.

The Supreme Court again struck down the decision of the state in *Om Parkash and others* v. *State of Jammu and Kashmir*[29] as arbitrary and violative of Article 14. In this case, the allotment of quotas of resin for the Jammu region in accordance with the state industrial policy was challenged. Three industries of the petitioners and five of the respondents state were registered and qualified the conditions required for allotment of resin. The state allotted the resin to respondents industries as well as to other industries which were not registered. The applications of the petitioners for allotment of resin were rejected. The petitioners challenged the orders of allotment on the ground of violation of Article14. The court observed that it is true that rule of equality does not mean mathematical equality and it permits of practical inequalities. But what is needed is that the selection of quota seekers should have a rational relation to the object sought to be achieved the industrial policy decision of the state. If the selection or differentiation is arbitrary and lacks a rational basis, it offends Article14.[30] The court further observed that in the present case, the state has not explained as to how and on what basis, if any, the allotments were made by the impugned orders in favour of the new allottees whose industries were located in the Jammu region.

Although, the state has taken the reliance on the state industrial policy decision, it had not followed it in practice, except in the case of five respondents. In fact, no reasonable basis had been adopted in making the allotments in favour of the new allottees and denying allotments to the petitioners. Therefore, the impugned order of allotment except in favour of five respondents must be quashed, being violative of Article 14,[31] the Court opined.

The right of an individual springs not only from statutes conferring rights, but also from a scheme formulated by the government. With the widening functions of state action, the state can no more be permitted to say that no citizen has any claim upon its favours. If the state is distributing favours, it can do so only by treating every citizen equally. Every action of state public authority must conform to reason and orderliness. This implies that there must be a rationale of its action taken and the object to be achieved. If these are not satisfied, if there is no rationale of the action of the public authority, it would be nothing but an aribitarary act. Arbitrariness is the vice which the law of our land does not countenance. If there is no rationale behind the act, it must be struck down. The Patna

29. (1981) 2 S.C.C. 270.
30. *Id.* at 274.
31. *Id.* at 277.

High Court in *Shriram Refrigeration Industries Ltd.* v. *State Bank of India*[32] has held that directive by the bank officials to finance the scheme was arbitrary. In this case, a scheme for financing of sales of diesel pumps to farmers in collaboration with State Bank of India was started. It was agreed to finance upto 50% of cost of diesel pumps on detecting fake sales. Consequent defalcation of its money by dealers of manufacturers of certain pump sets at a certain place to whom outright sale used to be made by the manufacturers, in complicity with bank officials, the tank directed its branches to stop financing of sales of pump sets of manufacturers of the brands in question. The directive was arbitrary and liable to be quashed when no evidence of complicity of manufacturers themselves was produced and ban continued even after a period of one and half years.

In the case of issue or tender forms, if conditions are prescribed for issue of such tender forms and a person fulfils those conditions, he is entitled to have the tender forms. Non issue of tender forms to one person and issue of the same to another, where both are similarly placed, would amount to violation of Article 14. Thus, the Calcutta High Court in *N.K. Chatterjee* v. *State of West Bengal*[33] observed that where the ground for non-supply of tender forms is nothing but flimsy, baseless and irrelevant, thereby depriving a citizen from participation in respect of public works, it is malafide, patent on the face of order itself. The court further explained the nature of discretionary power of the public authority and observed that merely because some terms of the tender notice confer on an Executive Engineer the discretion to supply tender forms and accept the same, it does not mean nor it is implied that as a public authority he can exercise his discretion arbitrarily without following the principles of reasonableness and fairness. Every public officer must conform to the rule of law.[34] Similarly, the *Madras High Court in Doss Associates* v. *Tamil Nadu Electricity Board*[35] quashed the notification which was issued for inviting tenders. The court observed that there was no adequate arrangements for supply of tender documents to intending bidders. This resulted in denying the issue of tenders to some bidders which is arbitrary and liable to be quashed. Renewal of licences of some persons and denial of this opportunity to others would also amount to violation of Article 14. Thus, the Madras High Court observed in *A.K. Thangaduri* v. *D.F.O. Madurai*[36] that if the state could grant renewal before the issuance of said government

32. A.I.R. 1983 Pat. 203.
33. (1985) 89 C.W.N. 196 at 211.
34. *Id.* at 212.
35. A.I.R. 1995 Mad.424.
36. A.I.R. 1985 Mad. 104 at 112-3.

orders, there is no reason why the same treatment should not be meted out in the case of similar others. The refusal to renew in the case of petitioners who have paid the renewal fee as well as the premium in full is clearly discriminatory. The action of respondents in denying the renewal of the lease relying on the orders of the state government, cannot legally be sustained.[37] The government is justified in prescribing the necessary qualification for the award of the contract. A person must have submitted highest tender but if he does not fulfil the laid down necessary qualifications, he has no claim for the award of the contract. The qualifications are prescribed to evaluate the relative suitability of the intending contractors. The government can reject the tender at the pre-qualifications stage and such rejection shall be valid.[38] But where tenders submitted by the contractor are of equal qualifications, then acceptance of the lowest tender and rejection of the highest is not justified. Such rejection on the ground of unascertained and variable one, shall be illegal.[39]

Conclusions

The first thing that strikes is the strange and painful fact of inequalities in equality of ranks, of culture, of opportunity and unequal distribution of goods. This fact of inequalities with all its social consequences is the central problem of out society. The demand for equality is the very basis of democratic development. Failure to satisfy the craving for equality in an adequate way prevents the emergence of equilibrium in society. What a man makes of his life depends upon two things, namely, his qualities and opportunities. Mathew Arnold,[40] who believed profoundly in equality as an essential foundation of any good society, thought that excessive inequality, incompatible with the spirit of humanity and of the dignity of man as a man, promotes hatred and discontent among the people. To infuse life and more vigour to the equality principle, social conventions or socio-economic institutions which hamper the growth of the individual must be modified or wiped out through persuation or by legislation. In this context, the instructive observation of Friedman[41] is relevant.

"Democracy is certainly based on the deal of equality, but no democratic state has serioulsy attempted to translate this ideal into the absolute equality for all. There are numerous inevitable inequalities of function and status between adults and infants, between same persons and insane,

37. *Id.* at 123.
38. *S.M. Quadri* v. *Spl. Officer, Hyderabad, Municipal Corporation*, A.I.R. 1987 A.P. 6.
39. *D.P. Kumar* v. *State of West Bengal*, A.I.R. 1987 Cal 39.
40. D. Jay, *Socialism in New Society*, 5 (1903).
41. W. Friedman, *Law in Changing Society* (rabidged ed. First edition reprint, 1970).

between civilians and military, between private citizens and officials. We can still not formulate the principle of equality in more specific terms than Aristotle who said that justice meant the equal treatment of those who are equal before the law".[42]

In all the cases discussed above[43], it is nowhere mentioned that government can act arbitrarily in accepting or rejecting a tender. There is no condition contained anywhere that the government may or can enter into contract arbitrarily and without reasons. The Calcutta High Court in *Palutra Kumar* v. *State of West Bengal*[44] has disapproved the act of arbitrariness on the part of the state. It accepted the tender without taking into consideration the relevant facts involved regarding requirements of the acceptance. It allotted the work orders to other respondents ignoring the claim of the petitioners. On the contrary, it postulates that the government may reject a higher tender and accept a lower only when there is a valid reason to do so, as for example, where it is satisfied that the person offering the lower tender is on an overall consideration preferable to the higher tenders. There must be some relevant reason for preferring one tender to another. If there is so, the government can certainly enter into contracts with the lower tenderer but cannot do so arbitrarily or for extraneous reasons. The question of violation of article 14 by the state or its agencies arises at the time of entering into contract with individual citizens. At this stage, the act of the state is purely executive and is bound by the obligations stipulated in the Constitution. It is, however, a different matter that after the state has entered into the field of ordinary contract, the relations are governed by the law of contract.[45] But at the stage of giving contracts, the state or its instrumentalities are bound to follow the principle laid down in Article 14. It cannot exclude persons by discrimination.

The government has got immense capacity to confer economic benefits on individuals. It is necessary to develop some norms to regulate exercise of its discretion. It has always to act as a government and not as a trader. Even if a person may not claim a fundamenal right to do business with it he can certainly claim to be treated in a fair and non-discriminatory manner. The courts have started showing the trend that government has not got unlimited power to enter into contracts with anyone it likes. They have imposed restrictions and have struck down the act of the government or public authority whenever the need has arisen. It is under an obligation

42. *Id.* at 375.
43. *Supra* notes 8 14, 15, 17, 26, 29, and 36.
44. A.I.R. 1987 Cal. 243 at 248.
45. *Radhakrishan Aggarwal* v. *State of Bihar* A.I.R. 1977 S.C. at 1500.

to follow the discipline as laid down in the Constitution, the specific statutes or as stipulated in its own executive schemes. Commercial matters so far as the government is concerned are now an integral part of state activity. This important field of state activity cannot and should not be disconnected from the fundamental scheme of the Constitution.

VIOLENCE AND THE INDIAN PENAL CODE OF 1860 - AN OVERVIEW OF CHANGING FACETS OF CRIMINAL AND PENAL POLICIES REFLECTED IN INDIA DURING 1860-1999*

*K.I Vibhute***

1. Introductory Remarks

Crime is a social phenomenon. Crime and society co-exist and are dynamic concepts. Society, in its quest to preserve social order and solidarity, not only recognises certain social and individual values through criminal law but also prescribes a set of social norms and forbids human conduct that actually threatens (or poses threat to) these values and social norms. It also stipulates 'sanction' to prevent the outlawed conduct.

However, the kind of conduct to be 'forbidden' and of the formal 'sanction' considered as best calculated to prevent the officially outlawed conduct depend upon the 'social set-up' and 'moral and social ethos' of a community.[1] Nature and contents of criminal law and societal reaction (i.e. punishment) to its violation, therefore, vary with changes in socio-politico-economic settings and legal ethos. It is generally said (and rightly so) that criminal law is a mirror of the society in which it operates. Criminal law of a country, therefore, need to be appreciated and understood in the backdrop of its social, moral & cultural values and political ideologies

It is, however, interesting to note that the Indian Penal Code, 1860 (hereinafter the IPC) enacted during the British Rule and enforced in

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1. See Generally Wolfgang Friedmann, 'Law in a Changing Society (First Indian Reprint, 1970); Hart, H. M., *the Aims of the Criminal Law*, 23 Law and Contemp. Prob. 405 (1958); Friedland, M.L., *Pressure Groups and the Development of the Criminal Law*, in Glazebrook, PR., (ed.), Reshaping the Criminal Law (Sevens, 1978) 202, and Nigel Walker, Sentencing in a Rational Society (Penguin, 1972), and Sutherland and Cressey, *op. cit.*, pp. 4-15 & 253-309.

British India for more than eight decades, still operates in India as a major substantive criminal law. Nevertheless, during the post-independent period, it is supplemented by a very few statutes.

2. The Indian Penal Code of 1860 – A Historical Glimpse

IPC was prepared by the Indian Law Commission, under the leadership of T. B. Macaulay. It was an outcome of the concerted efforts of T.B. Macaulay and his colleagues since 1835. It came into effect in January 1862. It is still in force.[2] It, unlike other Acts enacted during the British *Raj*, hardly witnessed any major amendments in the post-independent India. It, by necessary implication, thus evinces legislative appreciation of Macaulay's understanding of, and insight into, the Indian 'social setting' and 'ethos'.

The IPC enumerates a set of offences (primarily modelled on the then prevailing common law and statutory offences) and prescribes 'punishments' therefor.

Sanctions in the IPC range from sentence of death to fines depending upon gravity of the offences. It is believed that the punitive model embodied in the IPC is greatly influenced by the Benthamite principle of 'pain and pleasure'.

3. Criminal and Punitive Polices in India — An Overview of Constitutional Restrictions and Limitations

Part III of the Constitution of India captioned 'Fundamental Rights' guarantees a set of rights and accords them constitutional supremacy by prohibiting the 'State' from making a 'law' that either takes away or abridges these (fundamental) rights. 'Law' inconsistent with the fundamental rights is unconstitutional. A law (or a part thereof) in force in India immediately before the commencement of the Constitution is also void to the extent of its inconsistency with these Fundamental Rights.[3]

Articles 20, 21 and 22 of the Constitution, figuring in Part III of the Constitution, have a direct bearing on, and nexus with, the criminal law system and criminal process in India. Articles 20 and 22 provide a set of constitutional safeguards to a person accused of a crime, while article 21

2. Article 372 of the Constitution provides for the continuance of all the laws in force in the territory of India immediately before the commencement of the Constitution until altered or repealed or amended by a competent legislature or authority. By virtue of this provision laws enacted prior to the coming into force of the Constitution are still in force.
3. Art. 13.

confers on every person the fundamental right to 'life and personal liberty'.

Article 20 incorporates a prohibition against 'ex post facto' penal law and against 'double jeopardy'. It also assures an accused the protection against 'self incrimination'.[4]

Clause (1) of article 20, which embodies the prohibition of 'ex post facto ' penal law, in ultimate analysis, puts a limitation on the legislature. It also accords a constitutional recognition and significance to the principle of non-retroactivety of penal laws and to the well known maxim *nullum crimen* sine lege, *nulla poene sine lege*, one of the fundamental principles of criminal liability. It lays down that a person can only be convicted of an offence if the act charged against him was an offence under the law in force at the time of commission of the act. It is ostensibly premised on the constitutional perception that a law which retrospectively creates an offence and punishes it is not only bad in law but also inequitable and unjust in reality. The second part of the clause prohibits retrospective increase of penalty for an offence in vogue.

Article 20 (2), which is grounded on the common law maxim *nemo debet proeadem causa bis vexari* (a man shall not be brought into danger for one and the same offence more than once) and the consequential doctrine of *autrefois acquit and autrefois convict*, bars prosecution and punishment after an earlier punishment for the same offence.

The protection against compulsion against self incrimination, which is one of the fundamental principles of criminal jurisprudence, is guaranteed in clause (3) of article 20.

Article 22, by virtue of its clauses (1) and (2), confers four (fundamental) rights upon a person who has been arrested. First, he can not be detained in custody without informing him, as soon as may be, the grounds of his arrest. Secondly, he has the right to consult and to be represented by a lawyer of his choice. Thirdly, he has the right to be produced before the nearest magistrate within 24 hours of his arrest, excluding the time spent on journey from the place of his arrest to the court of the magistrate. Fourthly, he can not be detained in custody beyond the said period of 24

4. Art. 20. *Protection in respect of conviction for offences*- (1) No person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
(2) No person shall be prosecuted and punished for the same offence more than once.
(3) No person accused of any offence shall be compelled to be a witness against himself.

hours without the authority of the Court.[5]

Article 21 guarantees the right to life and personal liberty to individuals. It mandates the State not to, except according to procedure established by law, deprive a person of his right.[6]

During the recent past, the expressions 'life', 'personal liberty' and 'procedure established by law', appearing in article 21, have been judicially scanned to attribute them to the widest possible meanings to add to the right to life and personal liberty a variety of new positive dimensions and significant humanitarian contours and to make the right more effective and meaningful.[7]

On more occasions than one, the Supreme Court of India has echoed and reasserted that right to life and personal liberty guaranteed under article 21 not only assures every one the right to live with human dignity but also includes all those aspects of life that make 'life' meaningful, something more than 'mere animal existence' and worth living.[8] The court also relied heavily upon article 21, *inter alia*, to hold that a convicted prisoner can not be subjected to unwarranted physical or mental restraint; to declare a punishment which is too cruel or torturesome unconstitutional;[9]

5. Art. 22. *Protection against arrest and detention in certain cases- (1)* No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
The Criminal Procedure Code, 1973, (CrPC) also contains analogous provisions, see ss. 50, 57 and 303. Nevertheless, the founding fathers of the Constitution-wanted to make these safeguards an integral part of the fundamental rights.

6. Art. 21. *Protection of life and personal liberty*- No person shall be deprived of his life or personal liberty except according to procedure established by law.

7. See, Seervai, H.M., Constitutional Law of India (Tripathi, 1991), vol. ii; Tope, T.K., Constitutional Law of India (Eastern, Lucknow, 1992) pp. 172-194, and Nishatha Jaswal, Role of the Supreme Court with regard to the Right to Life and Personal Liberty (Ashish, New Delhi, 1990).

8. See *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, AIR 1981 SC 746; *PUDR* v. *Union of India*, AIR 1982 SC 1473; *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802; *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180; *Suk Das* v. *Union Territory of Arunachal Pradesh*, AIR 1986 SC 991; *Centre for Legal Research* v. *State of Kerala*, AIR 1986 SC 1322; *State of Himachal Pradesh* v. *Umed Ram*, AIR 1986 SC 847; *Delhi Transport Corpn.* v. *DTC Mazdoor Congress*, AIR 1991 SC 101; *Unni Krishanan* v. *State of Andhra Pradesh*, (1993) 1 SCC 645, and *Visakha* v. *State of Rajasthan*, AIR 1997 SC 3011.

to award compensation for illegal incarceration;[10] to allow public spirited citizens to interview prisoners;[11] to stay public hanging;[12] to avoid unjustifiable delay in execution of death sentence;[13] and to declare the mandatory sentence for murder committed by a life convict unconstitutional.[14]

It is pertinent to note that the Constitution also devises a comprehensive mechanism for the effective enforcement of these fundamental rights. Article 32 guarantees the right to move the Supreme Court for the enforcement of a fundamental right and mandates the Supreme Court to issue an appropriate direction, order or writ, for the enforcement of the fundamental right.[15] Article 226, *inter alia*, also empowers the High Court of a State to issue an appropriate direction, order or writ against 'any person, authority or government' for the enforcement of the fundamental rights.[16]

9. *Inderjeet* v. *State of UP*., AIR 1979 SC 1867.
10. *Rudul Shah* v. *State of Bihar*, AIR 1983 SC 1086. For comments see, K. I. Vibhute, *Compensatory Jurisdiction of the Supreme Court of India - A Critique*, 21 Jr. of Constitutional & Parliamentary Studies 136 (1987). Also see *Bhim Singh* v. *State of J&K*., (1985) 4 SCC 677 and *M.C.Mehta* v. *Union of India*, (1987) 1 SCC 395.
11. *Sheela Barse* v. *State of Maharashtra*, (1987) 4 SCC 373.
12. *Attorney General* v. *Lacma Devi*, AIR 1986 SC 467.
13. See *T V Vatheeswaran* v. *State of Tamil Nadu*, AIR 1983 SC 361; *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465; *Javed Ahmed* v. *State of Maharashtra*, AIR 1985 SC 23; *Triveniben* v. *State of Gujrat*, AIR 1989 SC 1335, and *Madhu Mehta* v. *Union of India*, AIR 1989 SC 2299. Also see K. I. Vibhute, *Delay in Execution of Death Sentence as an Extenuating Factor and the Supreme Court of India: Jurisprudence and Jurists' Prudence*, 35 Jr of the Indian Law Institute 122 (1993).
14. *Mithu* v. *State of Punjab*, AIR 1983 $C 473.
15. Art. 32. *Remedies for enforcement of rights conferred by this Part*- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto and certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) ----
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."
16. Art. 226 (1) runs asunder: "(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose".
However, the constitutional nature of article 32 and of 226, which are almost identical in phraseology, is of worth noting. Article 32 , unlike article 226, is a fundamental right. It provides for a speedier remedy to an individual for the violation of his fundamental rights from the highest court of land as a matter of fundamental right.

It is also equally pertinent to recall, as mentioned earlier, that a (criminal) law (or a part thereof) which is inconsistent with the Fundamental Rights is *ultra vires* the Constitution and criminal law & criminal process in contrary to the above mentioned constitutional canons of criminal jurisprudence, therefore, would obviously be void.

4. The Indian Penal Code : An Outline of Punitive Policies

Chapter III of the IPC entitled "*Of Punishments*", which exhibits punitive policy, provides for a wide range of 'punishments'. It enumerates the categories of the punishments to which offenders are liable' under the IPC. They are: (*i*) death; (*ii*) imprisonment for life; (*iii*) imprisonment; (*iv*) forfeiture of property, and (*v*) fine.

IPC provides for death sentence, as an alternative to other forms of punishment, for : (*i*) waging war against the Government of India, attempting or abetting thereof;[17] (*ii*) abetting mutiny by a member of the armed forces;[18] (*iii*) fabricating false evidence leading to conviction of an innocent person and his execution;[19] (*iv*) committing murder;[20] (*v*) abetting suicide of a child, an insane person or intoxicated person;[21] (*vi*) attempting murder by a person under sentence of imprisonment for life if hurt is caused,[22] and (*vi*) cominitting dacoity accompanied with murder.[23] Premised on 'vicarious' liability, IPC also provides for the death sentence for the acts done in furtherance of common intention;[24] or common object;[25] abetment;[26] criminal conspiracy,[27] and dacoity with murder, if any one of the five persons commits murder while committing dacoity.[28]

It is, however, significant to note that there is not a single offence in IPC that attracts a mandatory death penalty and in the above mentioned categories of offences the sentence of death only prescribes the upper limit of punishment.

17. Sec. 121.
18. Sec. 132.
19. Sec. 194.
20. Sec. 302.
21. Sec. 305.
22. Sec. 307.
23. Sec. 396.
24. Sec. 34.
25. Sec. 149.
26. Ss. 109-115.
27. Sec. 120-B.
28. Sec. 396.

The sentence of 'imprisonment for life' is provided for a number of serious offences created under the IPC.[29] Imprisonment for life, though technically hints at a sentence of imprisonment running throughout the remaining period of a convict's natural life, has to be reckoned as equivalent to imprisonment for 14 years.[30] And the 'imprisonment for life', as interpreted by judiciary, is a 'rigorous imprisonment for life' and not a 'simple imprisonment'.[31]

'Imprisonment', determinate or left to judicial quantification of the period of incarceration in the range of stipulated period, has been further sub-categorised into 'rigorous imprisonment' and 'simple imprisonment'. The former is explained as 'imprisonment with hard labour'. The latter, on the other hand, is a sentence of imprisonment without any compulsory prison labour. A person sentenced to simple imprisonment, therefore, is not required to work in prison unless he volunteers himself to do work.[32] The IPC empowers a sentencing Court to award 'wholly rigorous imprisonment' or 'wholly simple imprisonment' or 'any part of such imprisonment' be 'rigorous and the rest simple'.[33]

A sum of 'fine' to be imposed is either indicated in the respective provision or is left to the discretion of the court concerned. However, the IPC makes it clear that where no sum is expressed to which a fine may extend , the amount of fine to which the offender is liable, should not be 'excessive'. It also empowers a Court to award sentence of imprisonment for non-payment of fine.

5. The Indian Penal Code : Response to 'Violence' — A Framework of Legislative & Punitive Policies

IPC, like any other criminal law, enumerates a catalogue of 'offences' and provides for 'punishments' (of course, subject to the 'General Exceptions' mentioned therein) in case of their violations. It, in addition

29. See ss. 121, 121-A; 122, 124-A, 125, 128, 130-132, 194, 222, 232, 238, 255, 302, 304 Part 1, 305, 307, 311, 313, 314, 326, 329, 363-A, 364, 371, 376, 388, 389, 394-396, 400, 409, 412, 413, 436, 438, 449, 460, 467, 472, 474, 475, 477, 489-A, 489-B, 489-D, and 511 (in case of attempts to commit offences punishable with imprisonment for life). For suggested reforms see Law Commission of India, *Report on the Punishment of Imprisonment for Life* under the Indian Penal Code (39th Report, Government of India, 1968).
30. Sec. 57, IPC r.w. sec. 55, IPC & sec. 433 (b), CrPC.
31. Ssc. *G. V. Godse* v. *State*, AIR 1961 SC 600; *Naib Singh* v. *State of Punjab*, AIR 1961 SC 855, and *Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605.
32. Section 374, IPC, makes imposition of work on an unwilling person as an offence and subjects the person who compels to do work to imprisonment up to one year or fine or imprisonment with fine.
33. Sec. 60, IPc.

to explanatory and definitional chapters, classifies the offences into different categories depending upon their nature and, probably, the target of the offence concerned.

The major categorises of offences are: (*i*) 'offences against': the State; the Public tranquillity; Public justice, and Property, (*ii*) 'offences relating to': Armed Forces; Public servants; Elections; Decency and morals; Religion; Coins & Government stamps; Weights & measures; Documents & Property marks, and Marriage, (*iii*) 'offences affecting': the Public health, decency & morals, and the Human body, and (*iv*) 'offences of': Contempt of the lawful authority & public servants; Defamation; Criminal intimidation & insult, and Attempts to commit offences.

From the above sketch it is clear that the IPC has not categorised crimes into 'violent' and 'non-violent crimes'. Therefore, it gives scope for one's own judgement for classifying them into 'violent' and 'non-violent' crimes. Interestingly, drafters of the IPC have not even employed, expressly or by necessary implication, the expressions 'felonies' and 'misdemeanours' familiar to the then British Common law on which the IPC is modelled, to hint at violent crimes.

Nevertheless, taking clues from historical antecedents of the IPC; criminal law statutes in vogue in other jurisdictions, and the 'gravity' of 'injury' that can be caused by committing an 'offence' and the punishment(s) provided therefor, one can convincingly, and hopefully without sharp disagreement, equate the term 'violence'[34] (used in the context of criminal law) with 'violent'[35] crimes'. Invariably, violent crimes not only associate with violence but also exhibit a pattern of coercive behaviour having potentials of severe physical, psychological, social, sexual, emotional, or economic 'harm' to the targets of the crime.

Assuming that the above equation and explanation is convincing, 'Violent crimes' figured in the IPC may be categorised into three broad categories: (1), violent crimes affecting human body (including life). (2) violent crimes against property, and (3) inter-community violence.

Most of these offences are punishable with the sentence of death or (alternatively) with imprisonment for life or with a determinate (minimum or otherwise) term of imprisonment.

34. The term violence, according to the Oxford English Dictionary, is characterised by ' the exercise of physical force so as to inflict injury on, or cause damage to, person or property: action or conduct characterised by this; treatment or usage tending to cause bodily injury or forcibly interfering with personal freedom'.
35. The term violent as spelled out in the Oxford English Dictionary hints at an act done 'by means of physical strength or violence; by the exercise of improper or unlawful force'.

(A) Violent Crimes Affecting the 'Life' & 'Human Body'

The first category of offences mentioned above may further be sub-divided into two: (*i*) non-sexual violent crimes, and (*ii*) sexual violence against women. The distinguishing factor between the two is self explanatory.

A careful glance at the IPC enables one to characterise and include a set of serious offences as 'non-sexual' violent crimes. They are: homicides (murder; culpable homicide not amounting to murder; abortion and infanticide); abetment of suicide, and kidnapping. The category of violent crimes associated with sexual violence and which would come in its fold are: sexual offences such as rape and unnatural offences.

(i) Non-sexual violent crimes:

IPC, like any other criminal law, accords importance to sanctity of human life and thereby criminalises acts posing (or likely to pose) threat to 'life'. It accordingly prohibits intentional homicides; abortions & infanticides; attempted suicides, and abetment of suicide by child or insane person.

IPC, for the purpose of punishment, however, makes a distinction between 'murder' and 'culpable homicide' not amounting to murder. The former warrants 'death, or imprisonment for life and fine'. While the latter invites 'imprisonment for life, or imprisonment of either description for a term which may extend to 10 years and fine'. It, thus, provides for death sentence as an upper limit for murder and enables a Court to exercise its judicial discretion to opt either for death penalty or imprisonment for life.

The exercise of power to award death sentence is, however, circumscribed by section 354(3) of the Criminal Procedure Code, 1973 (CrPC). It mandates a judge called upon to exercise his judicial discretion to choose between the death penalty and the alternative imprisonment for life to record 'special reasons' for the death sentence awarded. Further, the CrPC also requires confirmation of the death sentence by the High Court if it was awarded by its subordinate court.[36]

The Supreme Court of India, upholding the constitutional validity of death penalty, also advised courts to award capital sentence only in the 'rarest of rare' cases only when the 'alternative option is unquestionably foreclosed'.[37]

36. Sec. 366, CrPC.
37. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898. Also see *Kehar Singh* v. *Union of India*, AIR1988 SC 1883 & AIR 1989 SC. 653; *Madhu Mehta* v. *Union of India*, AIR 1989 SC 2299; *Jumman Khan* v. *State of UP*, AIR 1991 SC 345, and *Mahendra Nath Das* v. *State of Assam*, (1999) 5 SCC 102.

The legislative and judicial policy in vogue, thus, in ultimate analysis, makes the punishment of death an exception and an imprisonment for life a rule in intentional homicides.

A forced or violent foeticide, with or without the consent of the woman, [except done in good faith and for the purpose of saving the life of the woman] warrants an imprisonment for a term up to 7 years as well as fine. However, if such an abortion is caused by a person without consent of the woman (without good faith & not for the purpose of saving the life of the woman), he may be sentenced to imprisonment for life or an imprisonment for a term up to 10 years & fine. And if death of the woman is caused while carrying miscarriage with the woman's consent, punishment provided under the IPC is an imprisonment for a term up to 10 years & fine. An imprisonment for life or imprisonment for a term up to 10 years & fine is provided if death of the woman is caused while causing miscarriage without the woman's consent.[38] While preventing a child being born alive or causing it to die after its birth (done without good faith & not for the purpose of saving the life of the woman) and causing death of a quick unborn child warrants an imprisonment for a term up to 10 years or fine or both.[39]

IPC, though premised on the inviolability of human life, does not, for obvious reasons, criminalise suicide, self killing. However, it exhibits its serious condemnation to an abettor of suicide per se and of suicide of a child, insane person and an intoxicated person by providing respectively for an imprisonment for a term up to 10 years & fine and death or life imprisonment or an imprisonment for a term up to . 10 years and fine.[40] Nevertheless, it makes an attempt to commit suicide an offence and prescribes, presumably on humanitarian considerations and compassion, simple imprisonment for a term up to 1 year, or fine, or both.[41]

IPC also reacts with severe punishments (ranging from an imprisonment from a term of 7 years to 10 years with or without fine) to kidnapping

38. See ss.312, 313, and 314, IPC. However, the Medical Termination of Pregnancy Act, 1971, notwithstanding these provisions of IPC allows a termination of pregnancy [not exceeding 12 weeks and of exceeding 12 weeks but not more than 20 weeks], if, (respectively, in the opinion of a registered medical practitioner and of two registered medical practitioners the continuance of the pregnancy involves a risk to the life of the pregnant woman or of grave injury to her physical or mental health or involves a substantial risk to the child, if born, or it would suffer from serious physical or mental abnormalities. (*vide* sec. 3 r.w. 4).
39. Ss. 315 & 316, IPC.
40. Ss.305 & 306.
41. Sec. 309, IPC. For details see K. I. Vibhute, *the Right to Die and Chance to Live - A Fundamental Right in India : Some Reflections*, 24 Ind. Bar Rev. 65-96 (1997).

of a minor (a boy under 16 or a girl under 18) for purposes of begging; of a minor girl for forced or seduced illicit intercourse; of a woman with intent to compel her to marry; and of a person in order to: commit murder, wrongfully confine him; cause grievous hurt; make him a slave or subject him to unnatural lust.[42]

(ii) Sexual violent crimes:

Amongst all the crimes against woman, rape is the most heinous and inhuman act of sexual aggression and violence against a hapless woman. It not only amounts to a brutal attack on integrity and dignity of a woman but also unjustifiably disregards her legitimate control over her body. It, in essence, involves a sexual assault on a woman 'without her consent' or 'against her will'

IPC, like any other overseas penal law, criminalises a non-consensual (as well as consensual in a set of specified circumstances) sexual intercourse and it subjects a rapist to severe punishment.

The Criminal Law (Amendment) Act, 1983 has not only made some significant changes in the Indian law relating to rape but also enhanced the punishment for rape & curtailed the hitherto judicial discretion in quantifying criminal liability of a rapist by stipulating a minimum sentence for him. A comparative glance at the legislative and punitive policy pertaining to rape reflected in relevant provisions of the IPC prior and subsequent to the 1983 Amendment, therefore, becomes essential.

The pre-1983 section 375 of IPC, criminalising non-consensual as well as consensual sexual intercourse, says:

> A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:
>
> *Firstly* - Against her will.
>
> *Secondly* - Without her consent.
>
> *Thirdly* - With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
>
> *Fourthly* - With her consent, when the man knows that he is not her husband, and that her consent is given because he believes that he is another man to whom she is or believes herself to be lawfully married.

42. See ss. 363-367, IPC.

> *Fifthly* - With or without her consent, when she is under sixteen years of age.
>
> *Explanation* - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception* - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The pre-1983 section 376, IPC, reflecting punitive policy pertaining to rape runs asunder:

> Whoever commits rape shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

However, frequent liberal and pro-accused judicial interpretations of provisions of sections 375 and 376, leading to minimal convictions and/or convictions with lighter punishment, led to strong lobbying by pro-women activists and organisations in the corridors of the higher judiciary and of the Parliament for drastic attitudinal changes, legislative as well as judicial. The Criminal Law (Amendment) Act, 1983 ultimately changed the law.

Similarly, IPC prohibits consensual as well as non-consensual unnatural carnal intercourse (such as sodomy, buggery, bestiality & oral sex) and treats it at par with 'rape' by providing for equivalent punitive sanctions (*viz.* life imprisonment or an imprisonment for a term up to 10 years and fine) for the individuals indulged in sexual activities against the order of nature.[43] However, these crimes differ from 'rape'. Here 'consent' of the victim is immaterial and therefore consent of the victim does not alter liability of the perpetrator.

(B) Violent Crimes Relating to Property

The second category of violent offences against property, obviously, includes: robbery and dacoity. The chapter entitled *'Of Robbery and Dacoity'* [ss. 390-402] of IPC deals with these two serious property offences and stipulates punishments therefor.

43. Sec. 377, IPC.

Robbery,[44] which recognises its affinity to two other cognate offences of theft and extortion, in essence, as defined in the IPC, involves use of violence by the offender for committing either theft (or for removing any article of theft) or extortion. It requires that either death or hurt or wrongful confinement is caused to the victims put in fear of instant death, instant hurt or instant wrongful confinement.

Theft amounts to 'robbery', if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint; or fear of instant death or of instant hurt, or of instant wrongful restraint. While extortion, on the other hand, amounts to 'robbery', if the offender, at the time of committing the extortion, in the presence of the person, intimidates him and puts the intimidated person in fear of instant death, or of instant hurt, or of instant wrongful restraint and thereby induces the person (put in fear) to deliver up the thing extorted.

IPC, recalling the quantum of violence associated with robbery, provides for different punishments. Robbery per se warrants rigorous imprisonment for a term up to 10 years and fine. While robbery committed on the highway between sunset and sunrise attracts rigorous imprisonment for a term up to 14 years.[45] And robbery (or an attempt thereof) with hurt is subject to life imprisonment or to rigorous imprisonment for a term up to 10 years and fine.[46] If a robber uses a deadly weapon while committing robbery or causes grievous hurt or attempts to cause death or grievous hurt, he will be imprisoned for a period not less than 7 years.[47]

'Dacoity', on the other hand, is commission of 'robbery' (or an attempt thereof) conjointly committed by five or more persons.[48] The gravity of the offence here is measured by the terror presumed to be caused by the force of number of individuals. IPC, accordingly, provides for life imprisonment or rigorous imprisonment for a term up to 10 years and fine for dacoity per se, and for death sentence or imprisonment for life, or rigorous imprisonment for a term up to 10 years & fine, if murder is caused while committing dacoity. If an offender has used a deadly weapon while committing dacoity or caused grievous hurt or attempted to cause death or grievous hurt, he warrants imprisonment for a term not less than 7 years.[49]

44. Sec. 390, IPC.
45. Sec. 392, IPC.
46. Sec. 394, IPC.
47. Sec. 397, IPC.
48. Sec. 391, IPC.
49. Sec. ss. 395-397, IPC.

(C) Inter-Community Violent Crimes

This category of offences, ostensibly, includes the acts which promote feelings of enmity or hatred between different communities or groups, *inter alia*, on the grounds of religion, race, caste or community. Repercussions of such acts in a multi-religious and multi-ethnic Indian society are highly detrimental to national integrity; communal harmony and peaceful coexistence. Acts (or attempts) promoting the inter-communal enmity or hatred and communal riots fall in this category.

However, rationale and significance of the criminalisation of these acts need to be appreciated in the backdrop of the peculiar stratified Indian social 'setting', premised on the centuries old deep-rooted caste-system and religious praxis, and the constitutionally proclaimed ideologies of 'secular' polity and fraternity.

The Constitution of India, through its Preamble, *inter alia*, solemnly declares 'to constitute' a 'secular' India. It also resolves 'to secure' to its citizens 'fraternity and unity of the nation'. It, in its quest for secularism, also, of course, subject to certain restrictions, guarantees to every person a (fundamental) right 'to profess, practice and propagate' and to every religious denomination 'to establish, and maintain' religious institution as well as 'to manage' religious affairs.[50]

The Constitution also abolishes 'untouchability', a social evil emanated from, and justified on, caste system in India. It also forbids the practice of untouchability in any form.[51] It is equally pertinent to note the Protection of Civil Rights Act, 1955, enacted in pursuance of the constitutional zeal for a caste-less society, criminalises different forms of untouchability and prescribes punitive sanctions therefor. And the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 criminalises atrocities against the members of the Scheduled Castes and Scheduled Tribes, erstwhile untouchables, and also provides for severe punishments for these offences.

Section 153-A, IPC, prohibits words (oral or written); signs and/or visible representations intending to promote (or attempting to promote) disharmony or feelings of enmity, hatred or ill-will between different castes; communities; religious, racial groups, on the grounds of religion, race, place of birth, language, caste or community. It also criminalises acts prejudicial to the maintenance of harmony between different religious or racial groups; castes or communities and also detrimental to public

50. Sec. arts. 25-28, Constitution of India.
51. Art. 17, Constitution of India.

tranquillity. It condemns an activity associated with the use of criminal force or violence against any religious, racial, lingual group or against a caste or community that intentionally causes fear (or a feeling) of insecurity amongst members of such religious, racial, lingual group or a caste or community.

IPC, in pursuance of its criminal and penal policy, provides for an imprisonment for a term up to 3 years or fine or both for promoting enmity between different groups on the grounds of religion, race, or language. Assertions prejudicial to communal harmony and public tranquillity also warrant an imprisonment for a term up to 3 years or fine or both. Further, communal acts committed in a place of worship or of religious ceremony attract an imprisonment for a term up to 5 years & fine.

Section 505, IPC, which prohibits the publication or circulation of false and mischievous statements, rumours or reports, with intent to create public disturbance, exhibits a close affinity to section 153-A, IPC. It, *inter alia*, provides for an imprisonment for a term up to 5 years as well as fine for making, publishing or circulating such a statement or a report containing rumour, in a place of worship or in an assembly engaged in the performance of religious worship or religious ceremony, with intent to create or promote, on the grounds of, among other things, religion, race, caste or community, feelings of enmity, hatred or ill-will between different religious, racial groups or castes or communities.

5. Violent Crimes and criminal Law System in India : Some Emerging Legislative Trends in the Post-IPC Era

It is interesting to note that the Indian Parliament, in spite of a quite increasing incidences of violent crimes in the recent past, has hardly either disturbed the criminal policy reflected in the IPC or resorted to escalating deterrent punitive devices to combat the above mentioned violent crimes. Further, the Supreme Court of India, in pursuance of its humanitarian approach to administration of criminal jurisprudence, has almost made it impossible for a Court to award death penalty, the highest punishment provided in the IPC for violent crimes. The death sentence is permissible only in the 'rarest of rare cases' and if a Court resorts to death punishment, it has to give reasons for treating that particular case as one of the 'rarest cases' warranting death sentence.

During the post-IPC period the Parliament has either amended or inserted a couple of sections in the IPC or enacted a few separate comprehensive statutes to tackle some of the emerging violent crimes known to the IPC and their emerging facets.

A panoramic view of these legislative responses becomes imperative to have a deeper insight into the criminal law system in vogue and to assess its response to violence.

A careful glance at the post-IPC legislative instruments responding to violent crimes exhibits that the Indian Parliament has reacted to two major offences, namely, offences affecting 'life', and 'rape'. Dowry deaths and the practice of sati, known to, and associated with, the Indian society since a couple of centuries, can conveniently be put under the former category.

(a) The criminalisation of dowry death:

It is significant to note that the Dowry Prohibition Act, 1961 penalises the centuries old dowry system, essentially involving giving or taking property in consideration of a marriage and as a condition of the marriage taking place. However, the ant-dowry Act miserably failed to achieve its legislative goal and to combat the dowry system. The post-anti-dowry Act period, on the contrary, witnessed inhuman and cruel treatment to compel a bride to bring money or property from her parents. Incidences of bride-burning for getting dowry have, unfortunately, been frequent. The Criminal Law (Amendment) Act, 1983, primarily incorporating recommendations of the Law Commission of India,[52] *inter alia*, added 'dowry death' to the IPC. Section 304-B, inserted in the IPC by the 1983 Amendment Act, which defines 'dowry death' and prescribes punishment therefor, reads:

> 304-B. *Dowry death.*- (1) Where death of a woman is caused by any burns or occurs otherwise than under normal circumstances within seven years of her marriage, and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called " dowry death", and such husband or relative shall be deemed to have caused her death. —
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Further, the 1983 Amendment Act, departing from the hitherto established canons of criminal jurisprudence that an accused is presumed to be innocent until contrary is proved beyond reasonable doubt by the prosecu-

52. See, Law Commission of India, *Forty-second Report : Indian Penal Code* (Government of India, 1971) and Law Commission of India, *Eighty fourth Report : 'Rape and Allied Offences : Some Questions of Substantive Law, Procedure and Evidence* (Government of India ,1980).

tion, inserted section 113-A in the Indian Evidence Act of 1872. It, in ultimate analysis, shifting the burden of proof on the person accused of dowry death to prove his innocence, says:

> 113-A. *Presumption as to dowry death.*- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.
>
> *Explanation.*- For the purpose of this section, "dowry death" shall have the same meaning as in section 304-B of the Indian Penal code (45 of 1860).

(b) Ban on the practice of sati:

One of the centuries old traditions known to the Hindu religion has been the practice of sati i.e. self immolation by the widow on the burning pyre of her deceased husband.

However, the IPC does not incorporate a provision preventing the commission of *sati*. It was considered that the provisions dealing with murder, attempt to commit suicide and abetment to culpable homicide not amounting to murder and to suicide could adequately deal with the practice of *sati*. If a widow becomes successful in her endeavour and dies with her deceased husband, she, obviously, is beyond reach of the IPC. But if she fails in self killing, she can be prosecuted for attempt to commit suicide, an offence under the IPC. Liability of the persons assisted a widow in her self extinction is determined according to the law relating to abetment. And persons burning her on her deceased husband's pyre or burying her with her deceased husband, even though with her consent, come within the purview of (exception 5 to section 300) IPC. They would be liable for committing a culpable homicide not amounting to murder.

However, the infamous commission of sati by one Ms. Roop Kanwar in 1987 and the consequential wide spread protest and an urge for a specific legislation to prevent the practice of *sati*, have prompted the Parliament to enact the Commission of Sati (Prevention) Act, 1987. Recalling the continuance of the practice of *sati* and its glorification in the recent years, in spite of the provisions in the Indian Penal Code forbidding of self extinction of life, it criminalises the commission of sati and its glorification. 'Sati ' for the purpose of the Act means: 'an act of burying alive of a widow along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or

such relative; or any woman along with the body of any of her relatives, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the woman or otherwise'.[53]

The *sati* Act, notwithstanding the relevant provisions of IPC, provides for severe punishments for: an attempt to commit sati; abetment of *sati* , and glorification of *sati*.

An attempt to commit *sati* warrants an imprisonment for a term up to 6 years or fine or both. While an abettor to such an attempt is subjected to a mandatory sentence of imprisonment for life and fine.[54] The Act stipulates the sentence of death or of life imprisonment and fine for an abettor abetting directly or indirectly, the commission of *sati* [55] And acts glorifying sati attract an imprisonment for a term not less than 1 year but may be extended to an imprisonment up to 7 years and fine between Rs. 5000 & 30,000.[56]

(c) Overhauling of the law of rape:

In the recent past, the inadequacy of the law of rape was highlighted in a number of judicial pronouncements of the Supreme Court of India.[57] It was also a focus for attention of, and attack by, women activists and of voluntary organisations working for women's cause. The Parliament, probably as a response to an intensive lobbying for, or an impulsive public opinion urging, immediate changes in the rape law, has amended the existing provisions dealing with rape. It also inserted a few clauses in it (IPC) to criminalise a few more acts and to provide for stiffer punishments to perpetrators thereof.

The Criminal Law (Amendment) Act, 1983, *inter alia*, overhauled the law relating to rape.

It redrafted the thitherto section 375, IPC. It inserted the words "*or any person in whom she is interested in*" in between the words "her" and "*in fear*" of *thirdly* of section 375, obviously, to expand the definition of rape. The revised *thirdly* of section 375 says:

> *Thirdly.*- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

53. Sec. 2 (i) (c).the Commission of Sati (Prevention) Act, 1987.
54. Ss. 3 & 4 (2).
55. Sec. 4 (1).
56. Sec. 5.
57. See Vasudha Dhagamwar, *Law, Power and Justice*, (Sage, 1992).

It also added the following clause *Fifthly* to it and renumbered the then existing *Fifthly* as Sixthly. The clause *Fifthly*, the ambit of which is self evident, runs as under:

> *Fifthly*.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

The 1983 Amendment Act made a drastic change in section 376, IPC, dealing with punishment for rape. Section 376 (1) now provides a minimum sentence of 7 years' imprisonment and a maximum of imprisonment for life. And clause (2) of section 376, IPC, makes gang rape; custodial rape and rape on a pregnant woman an offence and provides for a rigorous imprisonment for a term not less than 10 years for these newly created categories of rape. A court may alternatively award life imprisonment. However, both the clauses allow a court, for 'adequate and special reasons', to impose a sentence of imprisonment for a term lesser than 7 years and rigorous imprisonment for a term lesser than 10 years, respectively. Relevant part section 376 reads:

> 376. *Punishment for rape*- (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :
>
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years.
>
> (2) Whoever,
>
> (*a*) being a police officer commits rape
>
> (*i*)---
>
> (*ii*) in the premises of any station house whether or not situated in the police station to which he is appointed; or (*iii*) on a woman in his custody or in the custody of a police officer subordinate to him;

> (*b*) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or
>
> (*c*) being on the management or on the staff of a jail, remand home or other space of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or
>
> (*d*) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital ; or
>
> (*e*) commits rape on a woman knowing her to be pregnant; or
>
> (*f*) commits rape on a woman when she is under twelve years of age; or
>
> (*g*) commits a gang rape,
>
> shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine;
>
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment of either description for a term of less than ten years.

Preceding paras unequivocally convey that the gist of offence of rape, as outlined in the IPC, is a sexual intercourse against the will or without the consent of the woman. The 1983 Amendment Act, probably recalling minimal convictions in rape cases prominently due to lack of proof and the consequential failure of the Prosecution to discharge its onus of proof, inserted section 114-A in the Indian Evidence Act of 1872. It, like in 'dowry death', shifts the burden of proof on the person charged with custodial rape, gang rape, or rape on a pregnant woman, to prove that the sexual intercourse was with the consent of the woman or was not against her will. Section 1 14-A of the Indian Evidence Act, 1872, which is self explanatory, is worded as:

> 114-A. *Presumption as to absence of consent in certain prosecution for rape*.- In a prosecution for rape under clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) or clause (*e*) or clause (*g*) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved

and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

A simple reading of this section reveals that a Court is obliged to presume that the alleged act of sexual intercourse was without the consent or against the will of the woman, who testified in the Court that it was either against her will or without her consent, unless the contrary is proved by the person charged for committing rape. It, thus, shifts the burden of proof on the accused to prove his innocence.

It is equally pertinent to note the Supreme Court of India , recognising the right to live with dignity of victims of rape, has not only awarded compensation for violation of their constitutionally recognised the right to life and personal liberty but also mandated the Union Parliament to prepare a comprehensive scheme for compensating victims of rape.[58]

7. Concluding Remarks

From the preceding pages it is evident that the basic framework of the criminal policy and societal (punitive) reaction has hardly changed in the post-independent era. However, the 1983 amendment Act overhauls the rape law and subjects it (rape) to mandatory minimum sentence. It also reflects a rejuvenated criminal and penal policy, though akin to the existing framework of 'punishments' incorporated in the IPC, for dowry deaths, a two-three century old social evil.

Similarly, one notices an enactment of a comprehensive statute to combat the practice of untouchability and of Sati.

58. See, *Bodhisattwa Gautam* v. *Subhra Chakraborty*, (1996) 1 SCC 490; *Delhi Domestic Working Women's Forum* v. *Union of India & Ors.* (1995) 1 SCC 14 and *State of Punjab* v. *Gurmit Singh and others*, AIR 1996 SC 1393. For comments see, K. I. Vibhute, Victims of Rape and their Right to Live with Human Dignity and to be Compensated : Legislative and Judicial Responses in India, *Jr. of the Ind. Law Inst.* (Forthcoming).

ABOLITION OF CHILD MARRIAGE UNDER HINDU LAW: A PLEA FOR PROTECTION OF REPRODUCTIVE RIGHTS OF THE GIRL CHILD

*Vandana**

Child marriage means a marriage to which either of the contracting parties is a child[1] i e., a male who has not completed 21 years of age or a female who has not completed 18 years of age[2] It is a matter of great shock and concern that even after 50 years of independence , the instances of child marriages in India are quite rampant. Child marriage manifests itself as a grave social evil which not only infringes upon the rights of the child cherished and provided for in the various UN instruments[3] but also violates the constitutional commitment contained in the directive principle embodied in Art. 39(f) that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.

Child marriage is both a cause and effect of woman's low status in society[4] and onsets the disturbing consequences for reproductive health of the girls involved. It leads to a vicious circle of early pregnancy, malnutrition and maternal mortality which rose to as high as 324 per one lakh live births and high infant mortality rate of 80 per one thousand live births in 1990[5]. Child marriage not only denies the girl child her reproductive rights but also hampers her chances of getting opportunities for education and employment drastically which-further affects her development detrimentally. In early maternity there are great chances of foetal deformities in case

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1. *The Child Marriage Restraint Act* 1929, S-2(b).
2. *Id.*, S-2(a) .
3. *Universal Declaration of Human Rights* (1948), *International Covenant on Civil and Political Rights (1966), Convention on Elimination of Discrimination Against Women, 1979, Convention on the Rights of the Child, 1989.*
4. *Gender and Policy in India- A World Bank Country Study*, The World Bank, Washington D.C (1991), para 9.56.
5. *Commitment to the Child—National Plan of Action for the SAARC Decade of the Girl Child (1991-2000)*, Department of Women and Child Development, Government of India (1992) reprinted in (1996) at p-2.

of its survival and high risk is posed to the mother's life. Thus, the health and development of two generations of children - the child mother and the newborn baby, suffer consequently. At the national level , child marriage contributes to a major extent in population explosion.

The Incidence and Causes

Despite the evil consequences which child marriage causes for the individuals and the society at large, its occurrence is widely prevalent in India particularly in the states of Rajasthan, M.P, Gujarat and Karnataka. Thousands of children are married off on auspicious days like Akshaya Tritiya[6] and in few cases marriages are reported to be made in the womb also[7].

The Government sources maintain that the mean age of marriage for females has risen from I 3.2 years in the beginning of the century[8] to 15.4 years in 1951 to 19.4 years 1994[9] but it is pertinent to point out here that these sources do not take into account the marriages of children aged below 10 years of age. Perhaps it is the blissful assumption of the Government of India that marriages of children below 10 years of age are not at all occurring in India[10]. Studies conducted by the private individuals reveal that nearly 60% of girls were married before reaching 14 years of age in Rajasthan in 1997[11] and in four selected slums of Delhi , 77% of women have been married before the stipulated statutory age of 15 years[12]. In some northern states infact a number of household surveys suggest that between 20-40% of all girls were married by the age of 15 years.[13]

6. A Day of Child Marriages in Rajasthan, *Hindu*, 12.5.97; A Tale of Baby Bride in Bayana, *Statesman*, 29.3.98; a New Look at Child Marriages in Rajasthan, *Hindu*, 4.8.97; 7000 Children married Off in M.P, *Telegraph*, I 1.5.97; Brides at Ten- Tribals Defy Law, *Indian Express*, 10.3.97; Child Brides, *Deccan Herald*,12.10.97.
7. Here Marriages are made in the Womb, *Telegraph*, 12.3.97.
8. Children and Women in India—A Situation Analysis, UNICEF, (1991) at p- 82.
9. *Women and Men in India, 1996-97 (combined)*, Central Statistical Organization, Department of Statistics, Ministry of Planning and Programme Implementation, Govt. of India (29. 1.98) at p- 9.
10. This flaw in the Govt. statistics was pointed out way back in 1974 by the Committee on the Status of Women in India, Government of India in their report- *Towards Equality* but no improvement has been made to rectify this flaw in the last 26 years.
See Towards Equality- Report of the Committee on the Status of Women in India, Government of India , Ministry of Education and Social Welfare (1974) at p- 25.
11. A Tale of Baby Bride of Bayana, *Statesman*, 29.3.98.
12. S.C.Gulati and Rama Patnaik, *Women's Status and Reproductive Health Rights*, (1996) at p- 64.
13. Shireen J. Jejeebhoy and Saumya Rama Rao, *Unsafe Motherhood : A Review of Reproductive Health Rights in Women's Health in India* — Risk and Vulnerability (1995) at p-133 ed. by Monica Das Gupta, Lincoln C.Chen, T.N. Krishnan.

Marriage being a cultural decision and not individual one is essential for everyone, particularly, indispensable for females. Several socio-cultural factors like low status of women and applicability of rule of endogamy[14] in marriage are the compelling precursors for child marriages. The low age of marriage is related with the near universality of marriage in India The girl child in India is unwanted and is considered a liability on the parental family and the first charge on her life appears to be marriage followed by reproduction. The more mature a girl gets, more are the chances that she will apply her mind in the choice of her partner and might go against the parental authority by not conforming to the traditional norms and rules of the society which is not desirable. To rule out any such embarrassing situations, child marriage provides an easier way-out to the parents.

The Indian society attaches a great value to the virginity and chastity of women. The desire to preserve the purity of girls forms another major cause of marriages at young age. Moreover the religious scriptures also sanction that a girl can be married with proper rites only when she is a virgin. Among Brahmins, a father who could not marry his daughter before pre puberty was believed to commit a sin[15]. It is also considered that mature unmarried girls are prone to voluntary and involuntary sexual relations including rape. So to protect the girls from indulging in promiscuity and motherhood before marriage, there appears to be a tendency on the part of the parents to transfer their liability of guarding the girl, to the other family as early as possible by giving her in marriage.

In the lower strata of society, bride price of the girl is taken by her parental family and the groom's family is happy to have an extra pair of hands in return, to earn for the family.

Lack of education remains the eternal cause of child marriage as the parents are not in a position to segregate the concepts of puberty and preparedness to have sex and are unable to realize the dire health consequences of early reproduction.

Over the last century , there has been improvement in the mean age for marriage but its pace is so slow that generations of girls continue to marry young and reproduce early.[16]

14. The rule of endogamy suggests that marriages of individuals belonging to a particular community should be solemnized within that community only.
15. *Supra* n- 10 at p- 81
16. *Supra* n -8 at p-81.

THE HISTORICAL PERSPECTIVE

The origin of the custom of child marriage remains obscure and there is uncertainty about the time period in which this social evil manifested itself initially.[17] Under the uncodified Hindu Law, as per Mitakshara, the capacity to marriage was attained on the completion of the sixteenth year and as per Dayabhaga, on the completion of fifteenth year[18]. During the british period, the , british customs and thoughts inspired the reformist movement against the child marriage. It was infact the first Law Commissioners who drafted the Penal Code in 1846, who had first conceived the idea of making sexual intercourse between the husband and the wife, below I 0 years , an offence[19]. After the notorious case of *Queen* v. *Haree Mohan Mythee*[20], in which an eleven years old girl died due to the injuries received by the sexual intercourse with his 35 years old husband, the movement against child marriage picked up its due velocity. In 1891, the age of consent to sexual intercourse was raised from 10 years to 12 years by the Criminal Law (Amendment) Act, 1891[21] to ensure that female children are protected from immature cohabitation[22]. Towards the end of last century, public attention was increasingly directed towards the improvement of the physique of nation and the reduction of causes for abnormal mortality[23]. As a consequence thereof, in 1929, the Criminal Law (Amendment) Act[24] further raised the age of consent from 12 to 13 years in case of married girls.

In 1927, Dr. Hari Singh Gour had introduced a bill to raise the age of consent to 14 years, in case of married girls. The Age of Consent Committee[25] was appointed to consider the Bill and to analyse the societal impact, which the earlier amendment had brought about. The Committee recommended that the enactment of a law penalizing marriages below a

17. It is believed that when Aryans came first came to India, they were strangers to the concept of child marriage. In the Vedic period, marriages were effected only when the couple reached a mature age. In the smriti period, 8-10 years of age was considered to be appropriate for girls to enter into matrimony. It is alleged that the custom of child marriage is a development which took place after the muslim invasions as it was conceived that the married women were less prone to being the subject of capture by the invaders. See *Report of Age of Consent Committee*, Government of India (1929) at p- 92.
18. MAYNE'S HINDU LAW AND USAGE, revised by Alladi Kuppuswami,J.,(14th ed.) (1996) at p-186.
19. *Supra* n-10 at p-9.
20. ILR 1891 Cal 49.
21. Act 10 of 1 891.
22. *Id.*, Statement of Objects and Reasons
23. *Supra* n- 10 at p- 10.
24. Act 29 of 1925.
25. *Supra* n-17.

certain age[26] and also made a very confusing suggestion that the validity of marriages in contravention to such marriage law should be left unaffected[27]. In the same year, Rai Sahib Harbilas Sarda introduced a bill to restrain the solemnization of child marriages among Hindus, by declaring such marriages invalid when either of the parties was below the prescribed age. The bill finally culminated into the Child Marriage Restraint Act, 1929[28], which is popularly called 'Sarda Act', an Act named after the person who had introduced the bill.

THE LEGISLATIVE PROVISIONS

(a) The Child Marriage Restraint Act, 1929.

There are several instances in the world history where the law has been used to bring about social reforms. The Child Marriage Restraint Act. 1929 is also a step towards this direction and applies not only to hindus but to all citizens of India[29]. The Act purports to restrain the solemnisation of marriage between two individuals when they are below the age limit prescribed in the Act. Initially the age limit was 14 years for girls and 18 years for boys. The age limit for girls was raised to 15 years by an amendment to the Act in 1949[30]. Another important change was brought about in 1978[31] when the age limit for both girls and boys was raised to 18 and 21 years respectively, primarily with a view to check the population growth in the country. It was also envisaged that rise in the age of marriage will lead to better health of the mother and the child[32].

The Act penalizes an adult male for marrying a minor girl. If the adult groom is over 21 years of age[33], he is liable to be punished with up to 3 months SI with fine and in case, he is between 18-21 years of age[34], a punishment of a maximum of 15 days SI or a fine upto Rs. 1000/- or both can be imposed on him. No similar provision, however, exists for a female adult who marries a minor boy. A punishment of a maximum of 3 months SI with fine can be imposed on the parent or guardian[35] for promoting or

26. *Id.*, at p-144.
27. *Id.*, at p- 181.
28. Act 19 of 1929.
29. *Id.*, S-1 .Initially the bill was meant for Hindus only but the Select Committee, which reviewed the bill, recommended its application to all communities.
30. Act 41 of 1949.
31. The Act was amended in 1978 by the Child Marriage Restraint (Amendment) Act (Act 2 of 1978).
32. *Id* . Statement of Objects and Reasons.
33. *Id.*, S-4.
34. *Id.*, S-3.
35. *Id.*, S-6.

permitting the marriage to be solemnized or negligently failing to prevent it. It is interesting to note that no woman can be punished under the relevant section[36]. Similar punishment can be imposed on a person who performs, conducts or directs any child marriage to be solemnized.[37]

There are two peculiar features of the Act - first is the limited cognizable nature of the offences . The offences are cognizable for the purposes of investigation but the police officers can not make any arrest without warrant[38]. Secondly, the court can not take cognizance of any offence under the Act, after the expiry of one year from the date of its commission[39].

The court is empowered under the Act to issue the injunction[40] against the people involved in the solemnization of child marriage. This power of the court is fettered as prior to the issuance of such an injunction a notice is to be given to the person concerned and an opportunity to show cause against the injunction is to be given to him.[41] The disobeyance of such injunction can entail the maximum of imprisonment of 3 months SI with fine to men only[42] as no woman can be punished under the section.[43]

The Act, though penalises, does not affect the validity of the child marriage[44] and the provisions are drafted in such a manner that true and effective implementation of the Act is rendered extremely difficult due to the socio- cultural set up of Indian society. There are too many procedural lacunae e.g., no cognizance of offence after expiry of 1 year from the date of commission of offence, limited cognizable nature of offences which allows time to the culprits to stop solemnizing marriage well in time to escape punishment, and no punishment to women etc. For the teethless provisions of the Act, it is also referred to as a non-performing piece of legislation[45].

36. *Id.*, Proviso to s-6(1).
37. *Id.*, S-5.
38. *Id* , S-7.
39. *Id.*, S-9.See *Krishna Pillai* v. *T. A. Rajendran* [1990 Supp SCC 121]
40. *Id.*, S-12.
41. Id., S-12 (2).
42. *Id.*, S-12 (5).
43. *Id.*, Proviso to S- 12 (5).
44. *Ram Baran Upadhiya* v. *Sital Pathak* [AIR 1939 All 340]; *Sivanandy* v. *Bhagsvathyamma* [AIR 1962 Mad 400]; *William Rebello* v. *Jose Agnelo vaz* [AIR 1996 Bom 204]; *Gajara Naran Bhura* v. *Kanbi Kunverbai Parbat* [AIR 1997 Guj. 185]
45. Manu N. Kulkarni, *Child Marriages and the State*, (1994) 29 EPW 1884.

(b) The Hindu Marriage Act, 1955 (HMA)

The Act constitutes the major marriage law in India as it applies to the majority of citizens who are Hindus . The Act lays down certain conditions for solemnization of valid marriage among Hindus . The clause (*iii*) of s-5 requires that the bridegroom should have completed 21 years of age and the bride , the age of 18 years at the time of marriage. Initially the ages prescribed for the bride and the groom were 15 years and 18 years respectively. Before 1978, marriage below the prescribed ages could be solemnized with the consent of the guardian[46]. With the Amendment Act , this provision became infructuous as the age for marriage was raised and the guardianship is not required in case of a person aged 18 years. So, the clause was deleted by the Amendment Act.

Apart from a valid marriage , which is solemnized in compliance with all the requirements as laid down in s-5 of the HMA, the Act contemplates void marriage[47] (*void ab initio*) and voidable marriage[48] (which can be declared null and void at the instance of the aggrieved party).A marriage solemnized in contravention of s-5 , is either void or voidable depending upon the specific clause of s-5, which is not complied with.

It is quite peculiar that in the provisions of the Act, no particular fate has been assigned to the marriage which contravenes the requirement of age as laid down in s-5(*iii*). Thus, on a plain reading of the Act the child marriage is neither void nor voidable as it is not covered by either of the categories[49]. This omission to take care of the violation of this provision appears to be deliberate on the parts of the legislators[50]. However the Act contemplates penal consequences for the children whose marriage is solemnized. The punishment can extend up to 15 days SI or with fine which can go up to Rs 1000\- or both[51].

VALIDITY OF CHILD MARRIAGE

The legislature as well as the judiciary recognizes the validity of the child marriage.

46. Repealed clause (vi) of s-5.This clause was repealed by the Child Marriage Restraint (Amendment) Act,1978(Act 2 of 1978).
47. The Hindu Marriage Act, 1955, S-11.
48. *Id.*, S-12.
49. Contravention of clauses (*i*), (*iv*) and (v) of s-5 is accounted in s-11 dealing with void marriage whereas non compliance of clause (*ii*) is one of the grounds contained in s-12 dealing with voidable marriage.There is no mention of non compliance of clause (iii) of s-5 in either of the provisions.
50. *Supra* n-18 at p- 186.
51. *Supra* n- 47, s-18.

(a) The Legislative Endorsement.

It is distressing to note that white on the one hand the law provides for penal consequences for solemnization of child marriage, on the other hand, a number of legislative enactments contain provisions, which in essence incorporate and endorse the notion of validity of child marriage. A few glimpses of such provisions are as follows.

The Hindu Marriage Act,1955 contains a provision[52] pertaining to a special ground of divorce for a girl who gets married before attaining 15 years of age and who repudiates the marriage between 15-18 years . It is immaterial whether the marriage is consummated or not. The existence of such provision relating to divorce is clearly indicative of the fact that the legislators have clearly accepted the validity of child marriage as only then they could have contemplated divorce in such a case. It is pertinent to point out that if the child bride does not exercise the option of puberty before she completes 18 years of age , her marriage would be valid[53]. It remains a debatable issue whether the right to repudiate the marriage can be exercised by the child bride at all as it is nearly impossible that she can exercise her choice in a socio -cultural milieu that does not even acknowledge the need of her consent to the marriage, in the very first place.

Another legal anomaly is created, in this context, by the operation of s-9 of the HMA. The position of the child bride is further worsened by the fact that in case of her withdrawal from the matrimonial relationship, her husband is legally entitled to claim restitution of conjugal rights against her and it would be no excuse that she was minor at the time of solemnization of marriage[54].

The preamble to the *Indian Majority Act* 1875 contains the objective of attaining uniformity and certainty with respect to the age of majority. The Act lays down 18 years as the age of majority but the non-obstante clause,[55] which saves certain matters from the applicability of the Act, paves the way for lots of ambiguities. The clause saves the matters of great importance in an individual's life like marriage, adoption, divorce, and dower from the operation of the Act and consequently the age of majority of an individual in these matters is governed by the personal law to which he is a subject.

52. S-13 (2) *(iv)*, HMA.
53. *Laxmi Devi* v. *Ajit Singh* 1995 (2) HLR 299 (P&H).
54. *Mohinder Kaur* v. *Major Singh* [AIR 1972 P& H 184).
55. S-2 of *Indian Majority* Act,1875 reads- Nothing in this Act affects
1 . The capacity of a a person to act in the following matters- marriage, divorce, dower and adoption.

The *Indian Penal Code*, 1860 contains another stark illustration of legislative endorsement and sanction to the child marriage, in section 375 which defines rape. The exception to this section clearly lays down that the sexual intercourse of a man with his wife , the wife not being under 15 years of age is not rape, thus ruling out the possibility of marital rape when the wife is over 15 years. The law presumes the man's right to have sexual relationship with his wife under all circumstances, even when she is a girl child of 15 years of age[56] and does not accord any immunity to her from the forcible intercourse by her husband. By keeping a lower age of consent for marital intercourse, the legislature has legitimized the concept of child marriage. A special relaxation is given to the husband who rapes his wife, when she happens to be between 12-15 years and a lesser punishment of a maximum of 2 years or fine or both can be imposed[57]. The rape provisions in the Penal Code not only approve the husband's authority over the body of his wife but also give relaxation to the husband when he rapes his wife who may be as young as 12 years of age.

Yet another instance of legislative endorsement of child marriage is contained in the *Hindu Minority and Guardianship Act*, 1956 that explicitly declares that in case of a minor married girl her husband is her natural guardian[58]. The section does not contemplate the consequences when the husband of such minor girl also happens to be a minor himself.

The *Dowry Prohibition Act*,1961, also incorporates the validity of occurrence of child marriage and provides that the dowry of a minor wife shall be held in trust for her benefit , by any person who receives it and it shall be transferred to her within one year after she attains 18 years of age[59].

The *Criminal Procedure Code*, 1973, makes it obligatory for the father of the minor bride , to provide maintenance to her in case her husband lacks the sufficient means to maintain her[60].

The above analysis of a few provisions is only illustrative and not exhaustive. Such legislative endorsement and acceptance of occurrence of child marriage certainly diminishes the loud mandate of the Child Marriage Restraint Act to discourage the solemnization of child marriages. The various above mentioned provisions provide an assurance to the parents

56. It may be noted that as per s-375 IPC, the age of consent in other than marital cases is 16 years so the sexual intercourse with an unmarried girl below 16 years of age amounts to rape.
57. S-376 (1) IPC.It may be noted that the minimum mandatory punishment which can be imposed in a rape case is 7 years and fine.
58. *The Hindu Minority and Guardianship* Act .1 956. s-6 (c).
59. The Dowry Prohibition Act,1961. s- 6 (1) (c).
60. *The Code of Criminal Procedure*. 1973. Proviso to s-125 (1) (d).

and guardians that the legal rights of the minors are secured. Acknowledging such legal rights itself and leaving the validity of child marriage intact defeats the legislative desire to curb the social evil of child marriage.

(b) The Judicial Response

The spirit of legislative policy of leaving the validity of the child marriage untouched is carried out in the judicial decisions as well. Barring a few exceptional decisions, the judiciary has by and large put its seal of approval upon the validity of child marriage.

Few aberrate high court decisions in which the validity of child marriage has not been upheld have created ripples in the more or less consistent judicial approach that the child marriage is a valid marriage. In *Naumi* v. *Narottam*[61] , the H.P High Court held that the child marriage is valid as it is neither void nor voidable. In *Mohinder Kaur* v. *Major Singh*[62], upholding the validity of child marriage on the same logic, the P & H High Court observed that the solemnization of child marriage is no defence to the claim of restitution of conjugal rights. However in *Budhan* v. *Mamraj*[63], the Court preferred the diametrically opposite approach and remarked while considering the issue of restitution of conjugal rights that a marriage may not be valid if performed in contravention of age requirement but invalidity cannot be pleaded as an answer to a petition of restitution of conjugal rights[64]. Such a judicial interpretation was in sharp contrast to the earlier judicial trend and the general mass opinion in the society . This case was discussed in the *59th Report of the Law Commission*[65] and the Commission tried to do away with the ambiguity created by this judgment by stressing that the general understanding was that the child marriage is valid marriage.[66] The same approach was adopted by the P&H High Court in *Krishni Devi* v. *Tulsan*[67] also and the validity of child marriage was not recognized. The A.P. High Court decision in *P.A Sarramma* v. *G.Ganpatalu*[68] is considered to be a revolutionary decision as it was explicitly ruled by the court that a child marriage is *void ab initio* and in such an event, the parties need not go to the court for getting it declared null and void.

61. AIR 1963 HP 15.
62. *Supra* n- 54.
63. 1970 PLR 102.
64. *Id*., at p-104.
65. Law Commission of India- 59th Report on Hindu Marriage Act, 1955 and Special Marriage Act, 7954 , (1974), Ministry of Law, Justice and Company Affairs, Government of India.
66. *Id*., at p-50.
67. AIR 19.72 P&H 305.
68. AIR 1975 AP 193.

Unfortunately, the full bench of the same High Court dissented from its earlier decisions in *P. Venkataramana* v. *State of A.P* [69] and upheld the validity of child marriage fearing that declaring such marriage null and void will render the innocent children of such marriages bastards[70] as the HMA confers legitimacy to children[71] born of void and voidable marriages only. The Patna, Calcutta and P&H High Courts[72] have followed this decision of A.P. High Court in their recent decisions. However, the A.P High Court has again deviated from the settled trend of holding child marriage valid, in *Katari Sttbba Rao* v. *Katari Seetha Mahalakshmi*[73] and held that if there is a marriage of a girl who is below 12 years, it is a void marriage and cannot be treated as a marriage at all[74].

It is noteworthy that while upholding the validity of child marriage, the tendency of the courts is to recognize its evil effects and recommend harsher punishment for the commission of this offence so that it might generate the deterrent impact[75].

The Supreme Court in *Smt Lila Gupta* v. *Laxmi Narayan*[76] has made a reference to child marriage while dealing with the issue of validity of second marriage solemnized before the period prescribed under the HMA[77], which should expire after the divorce. Taking example of child marriage, the Court remarked on the scheme of the Act that certain instances of marriage though punishable are not void under the Act[78]. The Court further observed that being below the prescribed age is a personal incapacity for a period as the person grows every day and would acquire the necessary capacity some day[79]. It is pertinent to point out that the Supreme Court has given an *obiter* only and the ratio of the case is not on the validity of child marriage but the proposition can not be challenged that in the absence of a Supreme Court decision specifically deciding the fate of child marriage the *obiter* retains the due force.

69. AIR 1977 A.P 43
70. *Id* , p- 47
71. S-16, HMA.
72. *Rabindra Prasad* v. *Sita Devi*, AIR 1986 Pat 128; *Biswanath Das* v. *Maya Das*, [AIR 1994 N.O.C 356(Cal)]; *Harwinnter Kaur* v. *Gursewak Singh* [1998 *AIHC 1013*].
73. AIR 1994 A.P 364.
74. *Id*., at p- 366.
75. *Harwinder Kaur* v. *Gursewak Singh*, AIR 1998 NOC 356(Cal).
76. AIR 1978 SC 1351.
77. S-1 S.HMA.
78. *Id*., at p- 1354.
79. *Ibid*.

The legislative endorsement and the judicial recognition of the validity of child marriage make it extremely difficult to effectuate the loud mandate of the Child Marriage Restraint Act, 1929 and the penal provision of the Hindu Marriage Act, 1955, to curb the occurrence of the social evil of child marriage.

Child Marriage and Reproductive Rights

The marriage of a girl in childhood severely infringes upon her reproductive rights and profusely damages her reproductive health. *The 1994 International Conference on Population and Development* spelled out the contents of sexual and reproductive rights

> Reproductive rights ... rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children ... It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents:[80]

All human beings have a right to exercise reproductive self determination, which involves the right to marry voluntarily and to form a family and to be free from sexual violence and coercion[81]. *The Universal Declaration of Human Rights (1948)* and the *International Covenant on Civil and Political Rights (1966)* spell out clearly the right to marry and found a family[82] and emphasize that no marriage shall be entered into without the free and full consent of the intending spouses[83]. *The Convention on the Elimination of All Forms of Discrimination Against Women (1979)* further makes it obligatory for the States Parties to ensure that the same right to choose a spouse, to enter into marriage only with free and full consent and to decide freely and responsibly on the number and spacing of children is available to men and women both[84].

The practice of child marriage and the validity accorded to it by the legal system extinguish the reproductive rights of the children involved, particularly that of the girl child. The child bride is exposed to serious consequences of child marriage like marital rape and sexual abuse by the

80. *Programme ofAction- The 1994 International Conference on Population and Development (1994)*, para 7.3.
81. *The State of World Population- The Right to Choose: Reproductive Rights and Reproductive Health*, UNFPA (1997) AT P- 36.
82. *Universal Declaration on Human Rights (1948)*, At 16.
83. *International Covenant on Civil and Political Rights*, At 23.
84. *Convention on Elimination of All Forms of Discrimination Against Women (1979)*, at 16.

husband, thereupon consequent undesirable pregnancies and early maternity. The plightful situation of the child bride is quite opposed to the notion of human rights enshrined in various human rights instruments.

It is relevant to recall that the *Fourth World Conference on Women* in Beijing in 1995 explicitly declared that the human rights of the women include their right to have control over and to decide freely and responsibly the matters relating to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence[85]. The child marriage deprives the girl not only of her reproductive decision making but also nullifies her right to have the capacity to exercise control over her body[86]. The child bride who has been brought up in a culture where numerous social restraints operate on female children and who has been given in marriage by her near and dear ones is hardly left with any choice but to succumb to the consummation of marriage. Early marriage and child bearing impede the girl's educational and employment opportunities drastically[87]. Sometimes child marriage can be used as a disguise and may culminate into trafficking of the girl child across the national borders for prostitution[88]. The practice of child marriage violates the human rights of the girl child by hampering her development as a whole.

To protect the welfare of the children, the human rights mainstream called for the declaration of a minimum age for marriage when the *Convention on Consent to Marriage, Minimum age for marriage and Registration of marriage (1962) was* opened for signature on 10th November, 1962[89]. The Convention contemplates full and free consent of the parties to the marriage[90] and requires the State Parties to take legislative action to specify a minimum age for marriage[91], which will not be less than 15 years[92]. No legal status shall be accorded to a marriage solemnized in contravention to the specified age limit. The Convention emphasizes on the importance of the registration of marriage and recommends it to be

85. *Platform for Action*, Fourth World Conference on Women (4-15~' Sep. 1995) , para 96.
86. Reed Boland, *Promoting Reproductive Rights :A Global Mandate*, (1997) at p- 14.
87. *Fourth World Conference on Women, Beijing 1995-Country Report, Government of India* Department of Women and Child Development, Ministry of Human Resource Development (1995), para 9.1 at p- 19.
88. *The Best Interests of Child Towarcfs A Synthesis of Rights and Cultural values*, UNICEF (1996) at p19.
89. There are 17 signatories and 49 parties to the convention.
90. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962)*, At I.
91. *Id.*, At 2.
92. *Recommendation on the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* (1965), principle 2.

made compulsory in all cases[93]. It is significant to note that India has neither signed nor ratified this Convention. Explaining the position of India on ratification. The Indian delegate stated- "the Convention would impose an obligation to introduce a legislation and since that might not be feasible at the present time, he must reserve his Government's position on the question of ratification"[94]. It is amazing to note that almost 40 years have passed but the Indian Government is adhering to the same stand. By not signing this Convention, the Indian Government is faltering in its obligation which it has already undertaken under Cairo and Beijing instruments, CEDAW and CRC, which protect the rights of girls and mothers[95].

Human rights activists have long argued that the governments must be held accountable for violations of reproductive rights[96] as they are under an obligation to protect the human rights of the inhabitants of their States. The duty of the Government of India to eliminate coercive practices which go against the welfare of the children, is long overdue, particularly in the light of the National Policy for Children (1974) under which the Government has undertaken to provide for adequate services to all children for their full physical, mental and social development.

Conclusions and Suggestions

Child marriage is a grave social evil which violates the reproductive rights that form the major chunk of human rights of the girl child. Early marriage and early motherhood infringe upon the girl's right to have control over her own body and curtails her opportunities for education and employment apart from causing lots of problem to her and her progeny. Thus the human rights of the girl child are violated at that stage of her life when they need to be protected the most.

Child marriage creates a complex legal anomaly that despite there being penal sanctions for the commission of this criminal offence, the marriage so solemnized retains the validity in the eyes of law[97]. On the one hand, there are penal provisions enacted to curb this menace, while on the other hand the other legislative enactments and judiciary recognize and endorse the factum of validity of child marriage. That is how child

93. *Id.*, At 3.
94. UN Doc. A/ C3 / SR.1148 (1961) quoted in *Supra* n- 14 at p-115.
95. *Convention on the Rights of the Child* (1989), At 24.
96. *Women- The Right to Reproductive and Sexual Health*, UN Paper; UN Department of Public Information, (1997).
97. *J. Duncan M. Derrett, Essays in Classical and Modern Hindu Law- Current Problems and Legacy of the Past*, vol. iv (1978) at p- 109.

marriage remains a criminal offence - a phenomenon which is both illegal and punishable but still valid.

A strange proposition of law[98] is contained in the HMA that the children are entitled to punishment for the child marriage, which is solemnized by their parents and guardians. It is pertinent to point out that even the civil law relating to contracts requires that the contracting party must be of age or the transaction entered by him is no contract at all[99]. When it comes to marriage under Hindu law the legal approach changes and unlike in the case of a contract, the consent of the children to their marriage is presumed and they are held liable for the penal consequences. To this extent, the legislature has treated child marriage as an offence of strict liability as far as culpability of children is concerned. The situation is somehow better under the Child Marriage Restraint Act, 1929 as it does not penalize the children but others who are responsible for the solemnization of child marriage.

It is suggested that the penalty for children parties to the marriage, should be removed and a deterrent punishment to their parents and guardians should be provided, who are actually responsible for the solemnization of child marriage. The offences under the Child Marriage Restraint Act should be made cognizable so that the police will be vested with more powers and can contribute effectively to the checking of the menace of child marriage by taking the required action in time.

Infact, the most effective approach to tackle this menace will be to abolish the concept of validity of child marriage and to render such marriages void ab initio[100]. It is true that some unfortunate girls will suffer as a consequence but the parents and guardians will soon learn a salutary lesson[101]. After a few shocks, the parents/ guardians will desist from marrying off their children at early age[102]. The 59th Law Commission considered whether an unconsummated child marriage should be rendered voidable at the instance of the underage party, within one year from the date of marriage. The Commission felt that the change was desira[ble] but at that time, in 1974, India was not ready for such a change as it mig[ht]

98. S-18, HMA.
99. S-11, *The Indian Contract Act, 1872*.
100. P.M. Bakshi, *Age of Marriage in Hindu Law*, in Indira Jasingh, (ed) Justice for Women- Personal Laws, Women's Rights and Law Reform, (1996) at p-106; V. Venkat Kanna, *Myth and Reality of Child Marriages- A Historical Perspective of Legislation and Implementation* 1992 (2):69 AnLT 52 at p- 58; *Supra* n- 10 at 113.
101. Vasudha Dhagamwar, *Common Tale of Ameena, Chotu and Countless Other Children*, 1993;31 (50) Mainstream, 25 at p-26.
102. Vasudha Dhagamwar, *Marital Rights and Wrongs*, Hindu, 2.3.97.

create serious difficulties in practice[103] Even after 25 years, the legal position in this context remains the same. It is high time that the . legislative changes abolishing the child marriage must be brought about[104] and perhaps law can be used to infuse social changes.

As a void marriage entails no marital rights, the courts should be prohibited from granting any legal relief in respect of a marriage solemnized in violation of the age requirement. Regarding the legitimacy of offsprings born of child marriages, which have already been solemnized, it is suggested that the remedy can be obtained from the Special Marriage Act, 1954[105]. When a marriage celebrated in any form is registered under this Act and the certificate of the marriage is entered in the Marriage Certificate Book, the names of the children who are born after the first ceremony of marriage are also entered into the book and they are considered to be the legitimate children[106].

Another measure that can go a long way in eradicating the practice of child marriage is the compulsory registration of births and marriages, the registration not being allowed in the cases of child marriage. The fact of registration should be considered a pre- requisite for deciding the validity of the marriage. The efforts of the National Commission for Women in drafting the Marriage Bill, 1994 are to be appreciated and admired[107] .The Bill provided fcr the compulsory registration of marriages among adults, on the lines of the Convention on the Consent to Marriage; Age of Marriage and Registration of Marriage, and sought the repeal of personal laws of all communities. The Government did however, not accept the Bill as it sought to interfere in the personal and religious matters of the minorities[108]. It is suggested that the Government should seriously consider the ratification of the Convention on Age of Marriage and to incorporate the required infrastructural changes in the legal system to make registration of marriages cornpulsory. The legislative enactments that sanctify the marriage of children and recognize the legal rights flowing from it need to be amended. For instance, the penal law in India does not recognize marital

103. *Supra* n- 65, para 3.23.

104. It may be noted that under the *Special Morriage Act*,1954, a marriage solemnized in contravention of age requirement is void. It is desired that a similar provision must be inserted in the *Hindu Marriage* Act,1955.

105. Act no-43 of 1954.

106. *Id*.s-18.

107. The NHRC , in its annual report demanded prompt action on this Bill as it would help in checking human rights violations.See NHRC Notice to Rajasthan Chief Secretary on Child Marriages. *Times of India*, 19.6.98.

108. Government Rejects Draft Bill on Curbing Child Marriage, *Indian Express*, 19.9.96.

rape and the relevant provision on rape in the Indian Penal Code clearly excepts the sexual intercourse between the husband and wife from its ambit[109]. Some limited relief is there for the child brides who are between 12-15 years as in that case the husband is liable to a mild punishment[110] which can extend to a maximum of 2 years or fine or both but for a minor girl who is over 15 years, there is simply no remedy to stop cohabiting with the husband as no punishment is prescribed for him for raping the wife when she is over 15 years of age. This traumatic situation of girls married at an early age requires immediate legislative attention.

Generating public awareness regarding the evil consequences of child marriage and the consequent legal repercussions constitutes an important preventive measure. The Government should recognize its obligation to make people aware of the grave consequences; which are caused by child marriages and there should be an effort to raise the general literacy rate in the country, as ignorance remains the root cause of all social evils. The role of NGOs and the statutory institutions like the NHRC and NCV can be of great importance in helping the Government to realize its agenda of eradicating the occurrence of child marriage

The vast prevalence of the practice of child marriage has intricate nexus with the low status of women in permissive Indian society, which tolerates and encourages the discriminatory practices violative of human rights of women. Over a century there have been a number of reformist endeavors by the social and political activists to have the legal age for marriage raised. Unfortunately in due course of time, the initial focus on the health and status of girls has got shifted to the issues of secondary nature, which constitute immediate evils like population growth in the country. Favouring a later age of marriage does not necessarily mean commitment to modifying the social position of women[111]. Unless the precursor of a social evil is removed. its synthesis cannot be stopped. For the abolition of child marriage, apart from the legislative changes, attitudinal reforms are needed and a healthy social environment is necessary where the reproductive rights of women are respected and not violated.

109. Exception to S-375, IPC.

110. S-376 (1), IPC.

111. Geraldine H. Forbes, *Women and Modernity : The Issue of Child Marriage in India*, Women's Stuclies International Quarterly, 407 (1979).

SUSTAINABLE AGRICULTURAL DEVELOPMENT IN THE PERSPECTIVE OF LEGAL ORDERING OF AGRARIAN STRUCTURE IN INDIA

*Vijay Kumar**

Man's development through various stages has been centred around economic activities. Such activities of the vast rural population in various countries have mainly been confined to agriculture and have generated peculiar relations and way of life around it. Though the industrial development changed the character of agricultural sector in western countries on capitalistic lines, the South Asian Countries with less industrial development having individual property relations could not break the feudal relations. The hold of feudal interests on law-making and implementation in such countries has not allowed significant changes in agrarian relations through land reform laws. Quite obviously the effect of the uniform applicability of free trading system in order to promote sustainable agricultural development has to be analysed in view of the systemic characteristics in less developed countries.

I. SUSTAINABLE AGRICULTURAL DEVELOPMENT

The term "sustainable development" gained currency with the publication of World Conservation Strategy by the World Conservation Union in 1980 and the Brundtland Report in 1987. Brundtland defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their needs".[1] This is, however, a generalised definition and lacks clarity. It is, indeed, difficult to define the contours of development. It may be pointed out that sustainable development being related with man's interaction with nature, denotes carrying out of developmental activities by man in consonance with the carrying capacity of the natural resources. This way, it links man, environment and natural resources and limits the issue of sustainable development basically to national periphery. Sustainable

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1. See IUCN/UNEP/WWF (1991) CARING FOR THE EARTH, A STRATEGY FOR SUSTAINABLE LIVING, GLAND, Switzerland, p. 10; and David Reed, SUSTAINABLE DEVELOPMENT, AN INTRODUCTORY GUIDE (1995), p. XV.

agricultural development may, thus, connote harmonious relationship between land, farming and the people in an individual country. This, in turn, means proper living and working conditions of the people dependent on agriculture for their livelihood. However, in a bid to promote sustainable agricultural development, the Dunkel Agreement and the Agenda 21 advocate the policy of free-trading in agricultural sector. It would be worth while to view the repercussions of such a policy.

(i) The Dunkel fallout

Agriculture came under the General Agreement on Tariffs and Trade (GATT) in the eighth Uruguay round. The reason why an association ~ GATT (now World Trade Organisation) had to seek wider areas both in terms of subjects and territories is not far to seek. GATT came to be controlled by industrially developed countries led by U.S.A. who needed newer markets for supply of their goods. Inclusion of agriculture in GATT opened for trade the vast agricultural sectors of the less developed countries full of bio-diversity which may be used by the developed countries to their fullest advantage by using provisions regarding patents in the Dunkel Agreement.[2] The tenor of Dunkel Agreement is to allow free play to market forces in the international sphere by reducing tariffs and subsidies and taking other preventive measures such as anti-dumping, non-application of technical regulations creating unnecessary obstacles to international trade and conformity of import licencing procedures to GATT principles, thus ensuring free flow of international trade.[3] The inclusion of agriculture in GATT puts it on a par with industry so far as trading is concerned which may have broader repercussions in international and intra-national spheres.

The implications of such a free market mechanism at the global level would obviously be free competition allowing, in turn, people to people trade competition among the member countries. The effect of Dunkel Agreement in agricultural sector will, therefore, basically depend upon the land-people relationship and the character of farming in a particular country. The role of the legal system in shaping land-people relationship becomes important in this respect. Obviously, in a country like U.S.A. having developed capitalistic set-up and the legal system and modern improved agriculture with big farms, the agreement will have a different fall out than in a less developed country like India having less developed

2. See Dunkel Draft (Final Act) of Uruguay Round of GATT negotiations (Dec. 1991). Patent rights under the Agreement can be enjoyed without discrimination as to the place of invention, the field of technology and the products imported or locally produced.
3. *Ibid.*

capitalism and the legal system, semi-feudal rural set-up[4] with small farms and old unimproved agricultural methods and a large population depending on subsistence agriculture. In the former, per land unit yield and marketable surplus will obviously be more and will give rise to more competitiveness than in the latter. It was found that of the total value of agricultural gross domestic product of the world in 1988, the share of all developed countries was 53.1%, while it was 46.9% of all developing countries. Among the developed countries, the share of Western Europe and North America was 19.4% and 11.4% respectively.[5] It may be mentioned that farming in Western Europe and North America became machinery-based much earlier, supplemented by chemical fertilizers pesticides and herbicides and breeding of improved varieties of crops. Besides, agriculture came to be highly subsidised by the state[6]. All these factors enabled the western farmers to come out of subsistence farming long back. The smaller farms which could not face competition from the larger farms, came to be merged with the larger ones and, thus, the farming came to be controlled by a small number of big producers. Subsequently, the control of agricultural sector by transnational companies through the supply of not only technology and inputs (like seeds, fertilizers, pesticides and machinery) but also credit, made trading in agricultural products, dependent on these companies[7]. The fact that 500 Corporations control 70% of all world trade (the Canadian Corporation Cargill alone controlling 60% of the World Trade in cereals)[8] shows that the nature of world trading has become oligopolistic. Free-trading is, therefore, a misnomer. Needless to say the individuals and corporations of the less developed countries like India and others of South Asia lack capacity to compete with the multinational giants of the western countries.

The Dunkel Agreement[9] in seeking to reduce agricultural support and protection and to correct and prevent restrictions and distortions in world agricultural markets does not take into account the varying agrarian

4. See Pradhan H. Prasad, *Poverty and Agricultural Development*, Economic and Political Weekly, Dec. 14, 1985, p. 21. Also see Ajit Kumar Ghosh (ed.), AGRARIAN REFORM IN CONTEMPORARY DEVELOPING COUNTRIES, 1983, pp. 9-11.
5. See Grigg D.B. (1992), *World Agriculture, Production and Productivity* in the late 1980's, GEOGRAPHY, Vol 77, pp. 97-108 quoted in David Grigg, *World Agriculture, Productivity and sustainability*, in Philip Sarre and John Blunden (ed.), , ENVIRONMENT, POPULATION AND DEVELOPMENT (1996), p. 55.
6. See David Grigg, *Supra note* 5 at 46.
7. See Annie Taylor, *World Trade and its environmental impacts*, in Philip Sarre and John Blunden (ed.), *Supra note 5* at 217-218.
8. THE ECOLOGIST, 1993, pp. 79-80, quoted in Annie Taylor, *supra note* 7 at 218.
9. See *supra note* 2.

relations operating in different countries. Some preferential treatment given to developing countries has been negated due to circumvention of the subsidy reduction provisions by the United States of America and the European Union. The Marrakesh round "peace clause" and other provisions introduced for agricultural support by these countries have made the issue of farm subsidy lop-sided[9a]. The countries in an advantageous position (like the European countries) want to retain the subsidies in agriculture as was evident in the W.T.O. Seattle Conference which ended with no fruitful results.

(II) THE RIO REPERCUSSIONS

The Rio Conference evolved an integrated approach to environment and development issues by promoting sustainable development through trade liberalization and making trade and environment mutually supportive[10]. The documented outcome of this conference, Agenda 21, links free trade with sustainable agricultural development and thus, lends support to the Dunkel Agreement. However, in making free trade as the uniform basis for sustainable development in agriculture[11], the Agenda negates the fact that the sustainable development being basically a national issue has to be concomitant with varied agrarian relations in different countries. The Agenda remains status quoist in overlooking the agrarian relations while setting forth its objectives, inter alia, of reviewing and developing policies to support the best possible use of land and the sustainable management of land resources[12]. In promoting sustainable agriculture and rural development the prevailing agrarian relations in developing countries appear to have been taken for granted in that the thrust of the Agenda for satisfying the needs of the growing population in developing countries for food and other agricultural commodities and ensuring employment and income generation to alleviate poverty and natural resource management and environmental protection is on increasing production on land already in use mainly by utilizing economic incentives and developing appropriate and new technologies[13]. The direction to the Governments for implementing policies to influence land tenure and property rights positively with due recognition of the minimum size of land holding required to maintain production and check further fragmentation[14],

9a. See Devinder Sharma, *Farm Subsidies multiply in West*, The Hindustan Times, New Delhi, June 19, 1995, p. 12.
10. See Agenda 21, United Nations Conference on Environment and Development (Rio de Janeiro, Brazil, June 3-14, 1992), pp. 1-2.
11. *Id.* at 3.
12. *Id.* at 106.
13. *Id.* at 56.

can only be in line with such an approach.

Indeed, introduction of free trade in agriculture through the Dunkel Agreement and Agenda 21 amounts to giving of industry status to agriculture which means adoption of free competition, profit and capital oriented (accumulating approach in agricultural sector. It also suggests introduction of the same type of controls, regulations, incentives and taxes etc. in agriculture as are applicable in industry. The Draft Agricultural Policy of Government of India framed in the past putting agriculture on a par with industry as a consequence of Dunkel Agreement , was the national effort for application of such a policy. However, the peculiar characteristic of the Indian rural economy with feudal base, a large number of scattered agricultural holdings together with a small number of big holdings[15], old methods of production, subsistence agriculture depending on nature, less yield, peculiar working conditions and wage structure and non-availability of capital militate against competitive and profit oriented approach in agriculture. The interaction of the legal system with the agrarian setup in India has not been smooth and could not correct the distortions, as the following analysis reveals.

II. Legal Ordering of Agrarian Relations

The peculiar characteristics of the rural set-up which took shape gradually, form the basis of agrarian relationships. Since the land-people relationship is basically determined by the character of economic, social and political relations operating in a society, the kingship, having solid feudal base, became the determinant of the relations which the cultivators were to have with the land in the past. The actual tillers of the soil obviously were relegated to the bottom in the hierarchy of three tier interests developed during such period. The other two interest-holders in land above the cultivators were the revenue collectors and the king. During the reign of Moghul Kings, these revenue collectors known as zamindars virtually enjoyed proprietary rights in land[16]. This institution of zamindari was used by the British for their own benefit by making the zamindars proprietors of the soil (which they never tilled) and permanently fixing the

14. *Id.* at 161.
15. It may be mentioned that while 42.71 million hectares out of the total area of 162.76 million hetares of agricultural land in India is covered by 66.68 million holdings being marginal and small holdings below 2 hectares, out of 89.39 million holdings, 37.17 million hectares land is covered by only 2.15 million holdings being 10 hectares and above. See Government of India, Agricultural Situation in India (Aug. 1985, vol, XL No. 5), p. 406.
16. See S. Nurul Hasan, *Zamindars under the Mogluls* in Frykenburg, R.E. (Ed.), Land Control and Social Structure in Indian History (1979), p. 27.

settlement of land in 1793[17]. With zamindars becoming proprietors of the soil, a hierarchy of intermediary relations came to be developed above the actual cultivators since everyone of them wanted to earn profits without labour. This position obtained not only in zamindari[18] areas but also in ryotwari[19] and mahalwari[20] areas of settlement. The tenancy laws passed at the time with a view to collecting land-revenue smoothly, merely regulated such relations. Quite obviously, the tenurial benefits under these laws did not reach the actual tillers who were doubly exploited. On the one hand, they were the persons who ultimately had to bear the burden of capricious and heavy rent demands, and on the other, having no security of tenure, they were arbitrarily evicted, from their tenanted lands. Since the right of occupancy under the tenancy laws vested in the tenants who had held the land for a certain number of years[21], the actual cultivator was obviously not in a position to prove such a possession over land.

After 1947, land-relations came to be ordered mainly through the zamindari abolition and ceiling laws. But such an ordering followed the pattern laid by the British. Thus, the zamindari abolition laws, though brought the tenants into direct contact with the state with the land-revenue becoming directly payable to the state, yet, kept the intermediary interests alive by allowing the intermediaries to retain 'self cultivated land'[22] and conferring superior rights on them as also by paying compensation. The ultimate effect of these provisions was the forcible eviction of actual cultivators from their tenanted lands on a large scale at the time of zamindari abolition[23] since the intermediaries wanted to retain as much

17. See mainly Articles II and III of the Bengal Regulation 1 of 1793.
18. This system of land-tenure was prevalent in Bihar, Orissa, Assam (Goalpara and Cachar), U.P., Madras (1/3rd), Madhya Bharat, (1/2 Gwalior), Rajasthan, Bhopal and Saurashtra. See G.D. Patel, The Indian Land Problem and Legislation (1954), p. 403.
19. Prevalent in Madras (Southern 2/3rd), Bombay, Bihar, Mysore, Hyderabad and Assam, this system sought to exclude intermediaries by making direct settlement with the ryots. See G.D. Patel, *Supra Note* 18.
20. This settlement prevalent in Agra, Oudh and Punjab made village as a whole responsible for payment of land revenue but also recognised the individual revenue liability. See G.D. Patel, *supra note* 18.
21. For instance, see The Bengal Tenancy Act, 1885, The Bihar Tenancy Act, 1885, The Punjab Tenancy Act, 1885, The Punjab Tenancy Act, 1887, The Oudh Rent Act, 1886, The Agra Tenancy Acts of 1901 and 1926 and The U.P. Tenancy', Act 1939.
22. The words like 'khudkasht', 'khas possession' or 'private land' were used for 'self cultivated land' or ' land under personal cultivation' of the intermediary. These terms were defined to include cultivation by hired labour. For example, see sction 2 (h) of the Assam State Acquisition of Zamindari Act, 1951, section 2(k) of the Bihar Land Reforms Act, 1950, Section 2 (j) of the Orissa Estates Abolition Act, 1951, and sections 2(i) and 2(k) of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952.
23. For instance, see A.M. Khusro, Social Effects of Jagirdari Abolition and Land Reforms in Hyderabad (1958), p. 48.

area in the name of ' land under personal cultivation'[24] as possible. These evicted tenants having no resource base, had no option but to become agricultural labourers. The net result was that the agrarian relations as obtaining before 1947 basically continued to operate afterwards also in that the status conferred by the British in respect of the lands was made the basis of the zamindari a bolition laws.

After the zamindari laws, the other measures intending to change the agrarian relations so as to do distributive justice in terms of Articles 38 and 39 (b) and (c) of the Constitution, were adopted in the form of ceiling laws in two phases. The first phase of ceiling started in 1960 at a time when the implementation of the zamindari laws was still operational. The utter failure of these laws containing high ceiling limits and a large number of exemptions led to their modification in the second phase. But even these laws, providing for high ceiling limits[25], could not deliver the goods. Since the ceiling limit varies according to quality, irrigation facility and growing capacity of the land in different states, manipulations on part of the land-holders fetched them a larger limit. A large number of exemptions also helped in this regard[26]. Needless to say, most of the intermediaries continued to retain a large quantity of land inspite of the ceiling measures. The choice given to landholders for retaining the land of their liking[27] after it has been declared surplus, made available for distribution only unproductive land requiring massive investment. The fact that this land was acquired by paying high amount of compensation, payable ultimately by

24. In respect of such land either no limits were fixed or if fixed, they were kept very high. For instance, the Assam State Acquisition of Zamindaries Act, 1951, permitted a proprietor to retain 'private land' upto 400 bighas. If a proprietor or tenure holder had undertaken large scale farming on a cooperative basis or by the use of power driven mechanical appliances, this maximum limit could be further enhanced.
25. These laws allowed extra limit for families having members in excess of five and for major sons. For instance, in Bihar, the prescribed ceiling limit for a family of five members varies from 15 to 45 acres according to quality of land and the availability of facilities for irrigation. An area equal to 1/10 to 1/2 of the ceiling area may be added to it if the family exceeds five members. See sections 4 and 5(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961.
26. For instance, see section 6 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960; section 29 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961; and section 23 of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holding Act, 1973. The most common exemption in different states is the land held by religious and charitable institutions of a public nature.
27. See section 10(2) of the A.P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1972, and section 9 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961.

the prospective allottees[28] puts a question mark before the whole exercise of ceiling and the policy of distributive justice in respect of the rural land. Even on viewing the total effect of these laws, we find that the implementation of the modified ceiling laws in the rural society could give rise to about 72.2 lakh acres of surplus land out of which only 46.5 lakh acres could be distributed by the end of the Seventh Plan[29]. In view of the huge number of agricultural labourers and other priority categories for distribution of such meagre land, it could hardly be sufficient. Giving of such surplus land of the villages in common to these persons was never thought of. The irresistible conclusion is that the aforesaid measures have not been able to affect the basic agrarian relations which remain uneven and contain factors which limit the developmental process.

The foregoing analysis makes it evident that the agricultural sector marked by wide contradictions in agrarian relations thrown open for competition in agricultural produce in the international and national spheres can generate only an uneven competition. In the absence of enough resource base, the agriculturists falling in small and middle category will not be able to invest sufficient money on inputs and will hardly be able to earn profits as a consequence of less yield. The small and marginal farmers tenants, sharecroppers, artisans and agricultural labourers will be the worst sufferers in such an oligopolistic competition. Free trade is, thus, not conducive to sustainable agricultural development in India and other less developed countries.

The policy of sustainable agricultural development through free trade requires separate consideration of its effect on agricultural labour forming the lowest rung of the rural ladder with minimal and ineffective legal protection. The agricultural labourers have legally distant relationship with the land on which they work so far as entitlement over it is concerned. Their entitlement is mainly limited to minimum wage and working conditions. Quite obviously their interests were neglected during the phase of Zamindari Abolition. Subsequently distribution of the limited quantity of surplus land acquired by the state through the implementation of ceiling laws among the agricultural labourers has been marred by unproductive quality of land needing heavy investment, litigation and payment of

28. For example, in Madhya Prad esh, in terms of section 35 of the M.P. Ceiling on Agricultural Holdings Act, 1960, the allottees were required to pay a premium equivalent to the compensation payable in respect of land for acquiring Bhoomidhari rights. In Bihar such amount payable to the State Government was Rs. 50/- per acre of class I land per annum for 30 years as required by section 27(3) of the Bihar Land Reforms Act, 1961 read with head (iii) Part-IV and the Schedule to the Act.
29. See Government of India, Eighth Five Year Plan (1992-97), Vol. II, p.34.

purchase price by the allottees. The pertinent question is - can free trading in agriculture and giving of industry status to it extend enough benefits and protection to the labouring class given the structure of rural economy? The factual situation of the agricultura, labour in the rural set-up indicates otherwise. The working conditions of agricultural labourers are quite different and their wages are low in comparison with their industrial counterparts. The work in agriculture is seasonal and the agricultural labourers are mostly employed on casual basis though they may also be attached to cultivating households working on regular basis. In fact the agricultural labourers do not form a distinct class but are intermingled with small and marginal farmers, tenants and share-croppers. It is not only the persons without land who work as agricultural labourers but also those with land who work as such. The agricultural labourers have to work at different places against all the oddities of nature in the open fields. The hours of work are usually longer and may vary according to seasonal needs particularly during sowing, harvesting and threshing. The Central Government being authorised to fix working hours in agriculture under the Minimum Wages Act, 1948, has fixed the number of hours of a normal working day as 9 in respect of an adult and 4½ in case of child[30]. But it is the customary working hours which mostly prevail due to the peculiar working conditions.

In view of the small scattered holdings, subsistence agriculture, small number of big land holders, less yield, low paying capacity of most of the employers, low bargaining power of agricultural labourers due to their weak position and lack of organisation, the wages in agriculture are quite low compared to those in industry. Although minimum wages payable to an agricultural labourer are fixed by the Government under the Minimum Wages Act, 1948, they are not revised for years in view of the liberal provision for revision[31]. More over, in view of the peculiar relationship between the landowners and agricultural labourers, payment of wages in kind, providing of meal and the built-in-hurdles of the rural set up, administration of minimum wages is a difficult task. Even assuming that the wages are properly paid and that they may go up in competitive conditions, there being lack of employers of huge labour force, the ultimate beneficiaries will be the big land holders. The middle and small class farmers can hardly compete with big farmers in employing labour on higher wages.

30. See section 13(1) of the Act and Rule 24(1) of the Minimum Wages (Central) Rules, 1950.
31. Section 3(1)(b) of the Act empowers the Government to revise minimum wages within an interval of five years. But under the proviso they can be revised even after five years.

Another question which arises in this respect is the applicability of the social security laws, protecting the industrial workers, to agricultural labourers. Most of these laws such as Workmen's Compensation Act, 1923, Employees' State Insurance Act, 1948, the Employees Provident Fund and Miscellaneous Provisions Act, 1952, and The Maternity Benefit Act, 1961 mainly apply to Industrial labourers and have a very limited applicability in agriculture[32]. The Industrial Disputes Act, 1947 applies to such operations which fall in the category of 'industry' as defined in the Act. Judicially, a company formed for the purpose of carrying on agricultural operations for making profits by employing workmen, has been held to carry on trade or business and hence, an 'industry' within the purview of the Industrial Disputes Act[33]. In determining the scope of 'industry' the emphasis of the Supreme Court has been on systematic and organised activity by cooperation between an employer and employees for the production and/or distribution of goods and services calculated to satisfy human wants and wishes[34]. The Industrial Disputes (Amendment) Act, 1982, largely asserts this view of the Supreme Court, in excluding agricultural operation from the purview of industry except where such agricultural operation is carried on in an integrated manner with any other predominant activity. However, given the nature of agricultural work, the seasonal and casual emloyment of labour and peculiar characteristics of the rural set-up and the difficulty in administration, these laws, even if made applicable to agriculture, can hardly protect the agricultural labour in the same way as they protect the industrial labour. Thus, industry status of agriculture does not benefit the agricultural labour .

III. Dismal credit scene

It may be noticed that credit, though being a supplementing factor to land reform measures, could not affect the agrarian relations positively. Rural credit scene in India has been marked by traditional dependence of the rural population on money lenders and landlords and failure of institutional agencies. According to the All India Debt and Investment Survey, 1981-82, nearly 39 percent of the cash debt of the rural households was against the non-institutional money lenders viz. the professional money lenders, agriculturist money-lenders, landlords and traders, rela-

32. For instance, the Workmen's Compnesation Act, 1923 applies to workmen employed in farming by tractors or other contrivances driven by the steam or other mechanical power or by electricity and the Employees Provident Fund, and Miscellaneous Provisions Act, 1952 applies to the agricultural farms and fruit orchards were 20 or more persons are employed.
33. Hari Nagar Cane Farm v. State of Bihar (A.I.R. 1964 S.C. 903).
34. Bangalore Water Supply and Bewerage Board v. A. Rajappa (A.I.R. 1978 S.C. 548).

tives and friends and other sources[35]. It came to light that about 30 percent of the rural debt was taken for unproductive purposes including over 22 percent for household expenditure. In case of non-cultivators, however, the percentage of household expenditure was much more being 51 as against 20 percent of the cultivators[36].

The institutional credit structure being not geared to meet the requirements of the poor farming community, the neglect of the credit needs of the rural poor - the small farmers, tenants, agricultural labourers and the artisans by the institutional credit agencies - mainly cooperative and commercial banks became quite obvious. Cooperatives have been dominated by the rural rich and have virtually failed to provide credit to small and marginal farmers, tenants, share-croppers, landless agricultural labourers and rural artisans[37]. Region-wise there has been lack of production loans and investment credit by the cooperatives in most of the tribal and hill areas[38]. The commercial banks lacking rural touch have mainly been guided by the land-based norms of security in giving credit. The laws enacted in this respect generally provide for creating mortgage or charge on land and crop or other movable property as security in favour of the banks[39]. The All India Debt and Investment Survey 1981-82 revealed that out of total percentage of 61.2 of cash dues outstanding against institutional agencies in respect of rural households, the share of cooperatives was 28.6 percent and that of commercial banks including regional rural banks was 28.0 percent. However, it is the cultivators who appear to be benefitted more by cooperative and commercial bank credit in comparison with the non-cultivators as the dues against the cooperatives and commercial banks in respect of cultivators were 29.8 percent and 28.8 percent respectively while in case of non-cultivators they were only 13.9 and 17.3 percent respectively[40]. Thus the cultivators depend less on non-institutional agencies compared to non-cultivators as the outstanding dues

35. See Report of the All India Debt and Investment Survey, 1981-82: Assets and Liabilities of House holds as on 30 June, 1981, Bombay, R.B.I. Department of Statistical Analysis and Computer Services (1987), p.38.
36. *Id.* at 57.
37. See Government of India, Sixth Five Year Plan, 1980-85 p. 177. The percentage share of cooperative credit in respect of tenants, share-cropers, landless agricultural labourers and rural artisans was only about 3 to 5 percent.
38. *Ibid.*
39. See the Haryana Agricultural Credit Operations and Miscellaneous Provisions (Banks) Act, 1973; The Punjab Agricultural Credit Operations and Miscellaneous Provisions (Banks) Act, 1978; The West Bengal Agricultural Credit Operations Act, 1973; and The Gujrat Agricultural Credit (Provision of Facilities) Act, 1979.
40. *Supra note* 35.

against the non-institutional agencies account for 36.8 percent in case of the former and 63.3 percent in case of the latter[41]. Even the regional rural banks, established with the avowed aim of providing credit specially to the small and marginal farmers, agricultural labours, artisans and small entrepreneurs could not help much in this regard. The establishment of the National Bank for Agriculture and Rural Development (NABARD) at the apex level in 1982 could also not improve the rural credit situation since it provides credit by way of refinance to the cooperatives, commercial banks and regional rural banks and , therefore, it is the performance of these institutions in this regard which matters 'most. Thus, besides the basic limiting factors of the rural set-up as discussed above, non-availability of capital is another limiting factor for the vast rural population engaged in agriculture for promotion of sustainable agricultural development.

IV. Summing up

Trade liberalisation in agriculture introduced through Dunkel Agreement and Agenda 21 making it the basis of sustainable agricultural development will be operational in India with uneven agrarian relations developed in the past as a consequence of hierarchy of intermediary interests in land above the cultivators of soil. With the laws abolishing intermediary tenures being status quoist in nature and the haphazard exercise of ordering land relations through ceiling laws being peripheral, the continuance of such relations came to be maintained. Since these relations have generated built-in hurdles, thus maintaining the status quoist character of the rural society, bringing agriculture on a par with industry through free-trading system, can not give rise to different consequences. It will simply facilitate the utilisation of such relations by the persons controlling the capital for their benefit. Sustainable agricultural development will, therefore, be limited by systemic hurdles generated through the agrarian set-up over a period of time.

41. *Ibid.*

WTO-REGIONALISM AND SAPTA : TRANSFORMING SAPTA INTO SAFTA

*Surendra Bhandari**

INTRODUCTION

The underlying assumption in participating in any international or regional trade is that such participation will ensure and enable the most efficient use of resources and will raise the real income in each country. It is advantageous in ensuring specialization in specific area of endeavour basing on one's own comparative advantage and facilitation of accessibility to technology on fair commercial terms.[1] International economic law, unlike classical international law, finds its foundation not on the concept of traditional state sovereignty, but on the notion of economic interdependence.[2] It is also being said that 'all politics is local'[3] and 'all economics is international'.[4]

Today, we are experiencing two recurrent but synchronized streams, i.e. globalization or multilateralism and regionalism. In terms of classic customs-union theory, the trade-off between globalization and regionalism is meeting the tension between trade creation and trade diversion.[5] The Uruguay Round results including the Agreement Establishing the WTO is one important effort to face up the problems associated with interdependent international economic activity. It requires uniformity in laws, rules,

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1. *See*, Peter B. Kenen, THE INTERNATIONAL ECONOMY, Cambridge University Press, 3rd ed., at 1-2, (1994). Jack Harvey, MODERN ECONOMICS, Macmillan Business, 7th ed., at 452-454, (1998).
2. *See*, E.U. Petersmann, *Settlement of International and National Trade Disputes Through the GATT: The Case of Anti-Dumping Law*, in Petersman & Jaenicke, (eds.), ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND ECONOMIC LAW, Detlev Chr. Dicke, at 77-88, (1992).
3. Tip O'Neil & Gary Humel, ALL POLITICS IS LOCAL, (1994) excp. from, Steven P. Croley & John H. Jackson, *Alternative Approaches for Implemeting Competition Rules in International Economic Relation*, 2 SWISS REV INTS ECON. REL.,2, at 2-25, (1994). *See*, Peter B. Kenen, THE INTERNATIONAL ECONOMY, Cambridge University Press, 3rd ed., at 1-2, (1994)./ Jack Harvery, MODERN ECONOMICS, Macmillan Business, 7th ed., at 425-454, (1998).
4. Peter F. Ducker, *Trade Lessons from the World Economy*, FOREIGN AFFAIRS at 99, Jan-Feb., (1994).
5. Jeffery A. Frankel & *et. al.*, *Regional Trading Arrangements: Natural or Supernatural?* 86 THE AMERICAN ECONOMIC REVIEW, 2, at 52, (1996).

regulations and government policies among Member states.[6] Thus the 'world society'[7] of today occupied with the surge to both globalism / multilateralism and regionalism aspires for complementarity between these surges.[8]

Regionalism is recognized under the UN system[9] as well as under WTO.[10] Although a fundamental principle of the WTO is non-discrimination in the application of trade policy by member countries, both Art. XXIV of the General Agreement on Tariff and Trade [GATT][11] and Art. V of General Agreement on Trade in 'services [GATS][12] which allow regionalism impose conditions that must be met for an agreement to be permissible and provide for an examination of regional schemes by WTO Members. AT present, WTO Committee On Regional Trade Agreements is examining 62 regional trade agreements (RTAs).[13]

Except Nepal and Bhutan, all other SAARC members are members to WTO.[14] They are affirmed to adopt a uniform approach on issues of common concern in the context of specific WTO negotiations and agreed on the establishment of a Coordinating Group of SAARC Permanent Representatives at the WTO.[15] Recognizing that critical issues would be decided at the Third WTO Ministerial Meeting in USA 1999, the Heads of

6. Surendra Bhandari, WORLD TRADE ORGANISATION (WTO) AND DEVELOPING COUNTRIES, Deep & Deep Pub., India, at 13, (1998).
7. A.J.R. Groom, *The Setting in World Society*, in A.J.R. Groom & P. Taylor, (eds.), FRAMEWORKS FOR INTERNATIONAL COPERATION, Printer Publisher, London, at 3-11, (1994).
8. *See*, Nagesh Kumar, *Regional Trading Blocs, Industiral Reorganisation and Foreign Direct Investment*, 18, WORLD COMPETITION 2, at 35, (1994)./ Stephen J. Kobrian, *Regional Integration in a Globally Networked Economy*, 4 TRANSNATIONAL CORPORATION 2, at 15, (1995).
9. Article 52, 53 & 54 of the *UN Charter*.
10. Art. XXIV of GATT and Art. V of GATS. The Art XXIV of GATT allows Free Trade Agreement s and custom unions to exist as long as: (*i*) trade barriers after integation do not rise on average (*ii*) agreements eliminate all tariffs and other trade restrictions on 'substantially all' intra-regional exchanges of goods within a reasonable length of time, and (*iii*) they are notified to the GATT which may decide to establish a Working Party to determine if these conditions are satisfied. Article V of GATS covers (*i*) provision implying movement of the counsumer to the location of the suplier, (*ii*) services sold in the territory of a member country by entities origianting in other Members through a commercial presence, and (*iii*) provision of services requiring the temporary movement of sercice suppliers who are nationals of a Member.
11. *General Agreement On Tariffs and Trade, 55, UNTS 194/ Agreement On Trade in Goods*, 33 ILM at 28, (1994).
12. *General Agreement On Trade in Services*, 33 ILM at 44, (1994).
13. WTO, *Report (1998) of the Committee on Regional Trade Agreements to the General Council*, WT/RE/7, 30 Nov. (1998).
14. WTO, FOCUS NEWSLETTER No. (1998) Bangladesh, India, Pakistan, and Sri Lanka are Mambers to WTO since 1st January 1995 . Maldives became Mamber from 31st May 1995. Nepal has applied for Membership and in near future is going to get Membership.
15. SAARC, *SAARC Documents Milestones in the Evolution of Regional Cooperation in South Asia*, Vo. VI, SAARC Secreatariat, Mass Printing Press, Kathmandu, at 352, (1998).

the State or Government urged SAARC Commerce Ministers to work closely with a view to evolving better co-ordinated positions on all issues.[16]

As mandated by the Sixth SAARC summit in Colombo in 1991 the Agreement on SAARC Preferential Trading Arrangement (SAPTA) prepared on 11 April 1993, came into force on 7th December 1995.[17] Third Round. Negotiations have been completed in enabling the trade regime of SAARC under SAPTA and the Fourth Round was mandated to take place in July 1999 in Nepal.[18] The Ninth SAARC Summit, Male in 1997 endorsed transforming SAPTA into South Asia Free Trade Agreement [SAFTA][19] and the Tenth SAARC Summit, Colombo has mandated to prepare a comprehensive treaty regime for SAFTA by 2001.[20]

In this context, the SAARC countries are expected to formulate their laws, policies and trade practices in conformation to the WTO under Article XVI.4 of WTO.[21] SAARC member countries have also realized the

16. *Tenth SAARC Summit Colombo Declaration*, July 29-31, (1998).
17. SAARC, *SAARC Documents Milestones in the Evolution of Reginonal Cooperation in South Asia*, Vo. VI, SAARC Secratariat, Mass Printing Press, Kathmandu, at 352, (1998).
18. SAARC, X NEWSLETTERS 2, February, (1990).
19. Para 14 & 15 of the *Declaration of the Ninth SAARC Summit*, Male, May 12-14, (1997). The Pare 14 states " The Heads of State or Government noted with satisfaction the entry into force of the Agreement on SAARC Preferential Trading Arrangement (SAPTA) on 7 December 1995. They recognised the impotance of Achieving a free trade area by the year 2001 A.D. and reiterated that steps towards trade liberalistion must take into account the special needs of the smaller and the Least Developed Countries and that benefits must accrue equitably." The Para 15 states" While expressing satisfaction at the conclusion of the two Rounds of Trade Negotiations under SAPTA, the Heads of State or Government welcomed the decision to launch the Third Round of Trade Negotiations shortly. They agreed that preferential concessions should cover products which are being actively traded amongst Member States. They further agreed that the Third Round shoul deepen tariff concessions along with the removal of non-tariff abarriers and structural impediments in order to move speedily towards the goal of SAFTA."
20. para 23 of the *Declaration of the Tenth SAARC Summit*, Colombo, July 29-30, (1998). The Para 23 states " The Heads of State or Governement reiterated the impotance of achieving SAFTA as mandated by the Ninth SAARC Summit. To this end they decided that a Committee of Experts, in consultation with Member States, be constituted with specific Terms of Reference (TOR) to work on drafting a comprehensive treaty regime for creating a free trade area. The Heads of State or Government expressed theView that such a treaty must incorporate, among other things, binding time-frames for freeing trade, measures to facilitate trade, and provisions to ensure an equitable distribution of benefits of trade to all states, especially for smaller and least developed countries, including mechanisms for compensation of rvenue loss. They emphasised the importance of finalising the text of the regulatory framework by the year 2001."
21. *The Agreement Establshing MTO [WTO]*, 33 ILM at13, (1994), the ArticaleXVI.4 states that 'Each Member shall enure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

need of evolving a common mechanism to meet the legal needs arising out of the WTO.[22] The SAARC Secretary General has drawn specific attention in respect of intellectual property rights, international monetary, financial and investment matters.[23] However, SAPTA / SAFTA and each member country of SAARC is required under WTO to comply with the Uruguay Round Agreements, such as Agreement on Trade in Goods, Agreement on Trade Related Aspects for Intellectual Property Rights and Agreement on Trade in Services. Preparation of SAFTA Agreement calls for considering the need of SAARC region as well as complying with the WTO regime.

INTERFACE BETWEEN THE PRINCIPLES OF REGIONALISM AND MULTILATERALISM

It seems indubitable that the world trading system must have a means of accommodating regional economic integration schemes within the multilateral framework, however contradictory the two systems appear to be. The essential point is that the system should be able to cope with the inherent problems raised by regionalism without causing political conflict.[24] However, the phenomenon of trade 'blocs' pose interesting challenges for the international trading system, it is in the interest of both trade blocs themselves and the rest of the international community to facilitate an international trading order conducive to peaceful co-existence, as mush between trading blocs as in relation to individual states, within the WTO framework.[25]

The basic principles of regional economic blocs are; removal of trade restrictions between member states, building common external trade policy towards non-members, allowing free movement of factors of production between member states and harmonization of economic policies under supranational control.[26] Adoption of these principles depends on the nature of the regional blocs. Article XXIV of the GATT 1994 does not permit any regional organization except 'custom union', 'free trade areas' and 'interim agreements leading to the formation of a customs union or free trade area'.[27] The permitted regional blocs and their principles can be explained as such:

22. *See*, THE KATHMANDU POST, April,3rd (1990).
23. SAARC, X NEWSLETTER 2, February (1999)/ SAARC, X NEWSLETTER 1, January, (1999).
24. Jan Tumilir, PROTECTIONISM : TRADE POLICY IN DEMOCRAIC SOCIETIES, American Enterprise Institute, Washington DC, at 228, (1985).
25. Asif H. Qureshi, THE WORLD TRADE ORGANISATION : IMPLEMENTING INTERNATIONAL TRADE NORMS,, Manchester University Press, Manchester & New York, at 148-149, (1996).
26. Peter Dicken, GLOBAL SHIFT : TRANSFORMING THE WORLD ECONOMY,, Paul Chapman publishing Ltd., London, at 101-102, (1998).
27. *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, 33 ILM at 28, (1994).

	FTA	CU	CM	EU
Removal of Trade Restrictions Between Member States	✓	✓	✓	✓
Common External Trade Policy Towards non-Members		✓	✓	✓
Free Movement of Factors of Production Between Member States			✓	✓
Hormonization of Economic Policies Under Supranational Control				✓

FTA = Free Trade Area CU = Customs Union
CM = Common Market EU = Economic Union

Source : Piter Dicken, Global Shift, at 102, (1998).

The table shows that 'Free Trade Area' is the lowest level of regionalism, while 'Economic Union' is the highest level of regionalism. It is explicit that the GATT article XXIV does not permit any regional block in contradiction to this Article such as ' Preferential Trading Blocs'. Therefore, SAPTA seems not confirming to the Article XXIV. Not, only SAPTA but regional trading blocs are essentially discriminatory in nature.[28] WTO is based on the principle of non-discrimination, which has two dimensions, namely 'Most Favored Nation Treatment' and 'National Treatment',[29] while SAPTA is grounded on the principle of 'reciprocity' and 'mutuality of advantage'.[30] The principle of reciprocity endorsed by SAPTA is not combined with MFN but glossed over with General System of Preference (GSP).[31]

Similarly, SAPTA exchanges concessions among the Contracting States negotiated step by step.[32] Three Negotiations have already been completed covering over 5,500 items for preferential tariff concession ranging from 5-75 percent.[33] The fourth round is expected to focus on the

28. *Supra note* 26, at 102-104.
29. Article I & III of the GATT *Agreement 1994*, 33 ILM at 28, (1994) / Article II of the *General Agreement of Trade in Services* , 33 IL, at 44, (1994)/ Article III & IV of the *Agreement on Trade related Aspects of Intellectual Property Rights*, 33 ILM at 81 , (1994) . See also, Bernard Hoeckman & Michael Kostecki, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM FROM GATT TO WTO, Oxford, at 23, (1993).
30. Article 3 (a) of the *Agreement on SAARC Preferential Trading Arrangement (SAPTA)*, (1993), came into force from 7th Dec. 1995. The Article 3 (a) states "SAPTA shall be based and applied on the principles of overall reciprocity and mutuality of advantages in such a way as to benefit eqiitably all Contracting States, taking into account their respoective levels of economic and industrial development, the pattern of their external trade, trade and tariff polcies and systems."
31. See also, *Supra note* 6, at 66-72.
32. *Supa* note 30, Article 2 (1) & 3(b).
33. SAARC, IX NEWSLETTER , 12, December (1998).

strategy for SAFTA.[34] Vulnerability of SAPTA expressed in its rule of non-application. Contracting State is permitted to grant greater trade concession to non-contracting state,[35] On the other hand the rules of origin are not trade creative rather trade distortions.[36]

When a regional arrangement becomes less open, less liberalized, more protective and more restrictive than the WTO regime, then such a regional arrangement obfuscates trade creation role. SAPTA resembles to this model, as there is not uniform tariff rates within the region. Again there are still thousands of items protected or having high tariff rates. The intra-SAARC regional trade staggers at 3.5 percent,[37] while intra-regional trade between EC covers around 64 percent and itra NAFTA trade occupies around 38 percent. Anachronism in SAPTA is clearly manifested on the account of tariffs rate. Under WTO the tariffs rate for exporting from developing and least developing countries to developed countries is reduced in average to 3.8 percent while intra-regional tariffs rate within SAPTA is excessively higher in comparison to this, which generally results in obstructing market access process.[38] Stringent regulation within a regional bloc fails to promote the growth and secure success of the economic objectives of the bloc as the Contracting States receive comfortable trade environment out of the bloc, especially, within multilateral regime.

The considerable paradox and obsession of incompatible regionalism to WTO strikes a blow at the multilateral trading system in ways that are

34. *Ibid.*
35. *Supra* note 30, Article 11.
36. *Id.* Art. 16, state that, "Products contained in the National Schedules of Concessions annexed to this Agreement shall be eligible for preferential treatment if they satisfy the rules of origin, including special rules of origin, in respect of the Least Develped Contracting States, which are set out in Annex - III." Rule 3 (*a*) prescribes "Within the meaning of Rule 1 (*b*), products worked on or processed as a result of which the total value of the materials, parts or produce originating from non-Contracting States or of undermined origin used does not exceed 50 percent of the f.o. b. (free of board) value of the products produced or obtained and the final process of manufacture is performed within the territory of the exporting Contracting State shall be eligible for preferential concessions subject to the provisions of Rule 3 (c) and Rule 4. The Rule 4 on cumulative rules of origin, states "Products which comply with origin requiresments provided for in Rule and which are used by a Contracting State as input for a finished product eligible for preferential treatment by another ontracting State shall be considered as a product originating in the territory of the Contracting State where working or processing of the finished product has taken place provided that the aggregate content origiating in the territory of the Contracting State is not less than 60 percent of its f.o.b. value."
37. Shyam K. Shrestha, PREFERENTIAL TRADING ARRANGEMENT IN SOUTH ASIA : NEPALESE PERSPECTIVE, Vidyarthi Pustak Bhandar, Kathmandu at 11 & 39, (1999).
38. *See. Supra note* 6, at 69-72/ *See also*, Philips Evans, UNPAKING THE GATT : A STEP BY STEP GUIDE TO THE URUGUAY ROUND, IOCU London, at 26, (1994).

either ill-understood or deliberately discounted, disregarded and distorted by politicians and lobbyists.[39] Regional markets are, at best, national markets writ large. A future restricted or closed reorganization is therefore not a likely scenario for the world economy.[40] Whatsoever, regionalism is taken as a positive or negative development vis-a vis an open global economy depends on the assumptions about the motivation for, and character of, the blocs.[41] Now, the issue crops up that how the transformation of SAPTA into SAFTA takes place and how we plan our strategy in synchronizing SAFTA with WTO.

STRATEGY FOR SAFTA

Considerably, two basic strategies for SAFTA seem striving. The first is promoting intra-regional trade and second forming regional strategy not less liberal and open than the multilateral regime.

The most significant actor of SAARC intra-regional trade is India. India alone covers 64.6 percent of the total South Asian exports and 57.6 percent of the total South Asian imports, followed by Pakistan, she covers 19.0 percent & 19.1 percent, respectively. Sri Lanka accounts 8.3 percent and 10.2 percent intra-regional export and input respectively, Bangladesh occupies for 6.9 percent of South Asian exports and 10.1 percent of imports. Nepal's intra-regional export and import account 0.9 percent and 2.5 percent, respectively. Maldives has 0.1 percent of exports and 0.4 percent of imports within this region.[42] The trend of intra-regional trade is very much steady.

The table show that the intra-regional export in 1989 was 3.7 percent of SAARC countries total export to the world and this ratio is 4.5 percent after eight years i.e. in 1996. In a decade, the intra-regional trade has not increased even by 1 percent, while the intra-MERCOSUR[43] group trade has grown by 17 percent per annum. So, the SAFTA as free trade area is expected to increase the intra-regional trade removing trade restrictions between Contracting States. The experiences of different regional blocs.

39. Jagadish Bhagawati, *The High Cost of Free Trade Areaas*, FINANCIAL TIMES, at 13, 31st May, (1995).
40. Stephen J. Kobrin, *Regional Integration in a Globally Networked Economy*, 3 TRANSNATIONAL CORPORATION 1, at 17-18, (1994).
41. *Id.*, at 21.
42. *Supra* note 37, at 11-18.
43. MERCOSUR group is based on the principe of common market in which not only are trade barriers between member staes removed and a common external trade policy adopted but also the free movement of factors of production (capital, labor, etc.) between member states is permitted. Argentiana, Brazil, Paraguay and Uruguay are member of this regional bloc which was established in 1991.

Intra-regional Export of SAARC Countries [in Million of US]

Year	Total SAARC Export	Total World Export	Export within SAARC as % of World Export
1989	862.5	23607.6	3.7
1990	862.7	27480.3	3.1
1991	1010.5	28237.3	3.6
1992	1215.3	31846.6	3.8
1993	1187.0	33797.0	3.5
1994	1410.0	38670.0	3.6
1995	1941.8	45726.7	4.2
1996	2327.0	51628.0	4.5

Source : IMF, *Direction of Trade Statistics*, 1989-1997

especially common markets and customs union show that they are more efficient in creation of trade in comparison to the free trade areas.[44] As far as the regional bloc bases on higher level of regionalism as much as, it is expected beneficial for the growth of trade of the region,

For a successful trade regionalism for SAFTA it requires to focus on removal of three major sets of barriers as focused by other major regional blocs.[45] The three barriers are:

44. UNCTAD, *Trade and Development Report*, at 13, (1997). The report states that, "... Trade among countries of the region has grown rapidly, on account of both unilateral trade liberalisation and the strengthening of trade groups, such as MERCOSUR, the Andean Group, the Latin American Integration Assoication (LAIC), the Central American Common Market (CACM), and the Caribean Community (CARICOM). During 1994-1996, intra-MERCOSUR exports grew on an average by about 17 percent per annum.
45. Some other major regional blocs are ANCOM, AFTA, CARICOM, ECOWAS, EFTA, EU, MERCOSUR, and NAFTA. Andean Common Market (ANCOM) formed by Bolivia, Colombia, Ecuador, Peru and Venezuela in 1969 and revived in 1990 is based on the principle of Custom Union. ASEAN Free Trade Agreement (AFTA) is free trade agreement between ASEAN Countries finliise in 1992, yet to be achieved by 2003. Brunei, Indonesia, Malaysia, Philippines, Singapore, Thiland and Vietnam are the Conracting States of AFTA. Caribbean Community (CARICOM) formed in 1973 is a Commom Market comprising Antigua & Barbuda, Bahamas, Barbados, Belize, San Cristobal, Dominica, Grenada, Guyana, Jamaica, Monsterrat, St. Kitts &Nevis, St Lucia, St Vincent & the Grenadines, Trinidad & Tobage. Economic Community of West African States (ECOWAS) concluded on May 28, 1975, aiming to promote co-operation and development in all fields of economic activity, particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and finacial questions and in social and cultrual matters. The role of ECOWAS is heightened after intervention and restoration of democratic government in Sierra Leone, in 1997. For a detailed account, See, Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International legal Implications of the ECOWAS Intervention in Sierra Leone*, 14, AM. U. INTL L.REV.

Physical Barrier: it covers custom and excise requirements and movement of people.

Technical Barrier: it covers difference in national product standards and specifications, differences in national business laws, differences in degree of protection of public procurement markets and differential controls on movement of capital.

Fiscal Barrier: it includes differences in indirect taxation e.g. VAT and differences in excise duties.

In this connection the recently held 21st Session of the SAARC Council of Ministers authorized the Secretary-General to negotiate in accordance with approved guidelines, acceptable programmes under the SAARC-EC MOU in areas related to economic matters, such as facilitating access to the Single European Market, implementation of the EC-GSP scheme, cumulative rules of origin, drawing on the EU experience for the SAFTA process, evolving common SAARC standards and harmonization with international obligations.[46] Another positive symptom for providing grounds for effective SAFTA is the recent downward revision or relaxation of the rules of origin,[47] as the rule of the origin if formulated in an upward trend exceeds the MFN treatment and restricts market access.[48]

Another major startegy for SAFTA is to concentrate on the system of dispute settlement. The existing system of settlement of dispute under SAPTA does not provide any access to business houses and individuals. Under a liberalised and open trading system disputes between business houses or companies and government or state authority found a special concern, therefore, their access in a dispute settlement mechanism and process must not be ignored. So, SAFTA requires to pay special attention

2, at 321, (1998). European Free Trade Association is a free trade area between Iceland, Norway, Lichtenstein and Switzerland concluded in 1960. European Union first established in 1957 as European Common Market transformed into Economic Union between 15 Member European Countries after the Maastricht Treaty in 1991. EU is the highest level of existing regional blocs. North American Free Trade Agreement (NAFTA) is a free trade area between Canada, Mexico and United States. NAFTA negotiated between 1992-1994, signed on 17 December 1992 and entered into force on 1 January 1994.

46. SAARC, C NEWSLETTER 3 & 4, (1999).

47. Id., at 8. "... As a result, the domestic content requirement of the exportable products from the member Countries of SAARC has been reduced from 50% to 40%. In keeping with the special criteria percentage for Least Developed Contracting States, Bangladesh, Bhutan, Maldives and Nepal, the domestic content requiement in the case of expectable products emanating form these Countries has been reduced from the earlier 40% to 30%.

48. For the significance and negative impact of the 'rule of origin' in international trade, See, William E. James, *APEC & Preferential Rules of Origin: Stumbling Blocks for Liberalisation of Trade?*, 31 J.W.T.3, at 113, (1997).

providing effective mechanism of dispute settlement. Similarly, compatibility of SAFTA dispute settlement mechanism as well as other areas of trade with WTO regime is considerably significant for smooth operation and growth of intra-regional trade regime. For this reason following issues are advantageous to take into consideration in transforming SAPTA into SAFTA:

(*i*) Regionalization for free flow of trade and investment within regions withoput diverting exsting external trade. It should enhance, rather than detract from the trend towards liberalization of conditions for entry of FDI.

(*ii*) The level of SAFTA must not be lower than trade rules and regime facilitated under WTO or multilateralism as lower level of regionalism hardly increases market access and boosts intra-regional trade.

(*iii*) Harmonization of regional and national trade laws is the most essential part of promoting and strengthening regionalism.

(*iv*) Development of fromal mechanism to encourage inter-regional cooperation.

(*v*) Formulation of effective disput settlement mechanism and procedure with providing access to the private sectors also, and

(*vi*) Formulation of SAFTA not with restrictive perspective but for realization of virtuous circle of trade growth in this region.

ENVIRONMENTAL PROTECTION AND PRESERVATION : INTERNATIONAL CONCERN AND EFFORTS

*Mrs. B. Aruna Venkat**

International concern for the protection and improvement of environment became prominent only at the close of the present century. Today, any act of omission or commission of a member of international community affecting its national environment, may have far-reaching adverse consequences on the global environment and could even threaten the very existence of living organisms, affecting global ecology. This fear of extinction has now prompted the people of the family of nations to rise from hibernation and slumber. The Journey from Stockholm (1972) to Rio (1992) has activated the efforts to protect the global environment from pollution and degradation.

Until 1940s the World order used to be dominated by most powerful nations which used to exploit the physical and natural resources of their captive colonies. Industrial, scientific and technological development was unseen and limited to a few nations. After the Second World War two major developments had put in motion a New World order. The first was the establishment of the United Nations and the second was the gradual grant of political freedom and independence to a large number of the nations in the world. The newly emergent nations, in a bid to attain the level of the developed countries, started exploiting all their available physical and natural resources in all possible ways unmindful of their side effects, as also their possible depletion. During this period, in many nations, the population also rose very rapidly and there was also a natural migsation of population to the larger cities in the wake of industrialisation which opened new challenges of conservation and protection of environment.

During the earlier centuries when some countries of the North achieved rapid industrialization, they had not faced such enormous environmental problems. But it is indeed an irony that now the developing countries of the world are not in a position to pursue their economic and materialistic

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policies with the similar disregard of the environmental concerns. They have come to realise the grim reality that unprecedented advancement of science and technology has also brought in its wake the deleterious effect of ecological imbalance. It has also become clear, in any case, that the natural wealth of nations is not unlimited and indiscriminate exploitation of the same is liable to generate not only serious environmental pollution problems but also a risk of depletion of the very wealth itself.

The idea that one generation has no moral, legal or equitable right to exploit the physical and natural wealth of a nation to the detriment of its future generation has now gained recognition and acceptance in the world. So, it has been realised that the exploitation of the natural resources has to be judicious. The man has come to realize that ultimately the real object of all development is his right to live in peace in a safe and secure environment. And this is a right which relates to his very existence. This right knows no geographical barriers, since it is basic human right, an inalienable right available to every human being throughout the world.

There have been a cetena of international instruments before the Stockholm Conference of June 1972. But they did not primarily relate to the environmental protection issues as they were negotiated for the achievement of some other primary objects. Some of these instruments may be mentioned here as they do affect the preservation of the global environment. These instruments are:

1. The Nuclear Weapons Tests Ban Treaty 1963; 2. The treaty for the prohibition of Nuclear Weapons in Latin America of 1967; 3. The Treaty laying down the Principles Governing Activities of States in the Exploration and Use of Outer Space Including the Moon and celestial Bodies of 1967; 4. The Treaty on the Non-proliferation of Nuclear Weapons of 1968; and 5. The Treaty of the prohibition of the Emplacement of Nuclear Weapons on the Seabed, ocean Floor and Subsoil thereof 1971.

During the 1980s the world was rocked by a few ecological disasters. In December 1984 methyl isocyanate gas leaked from a plant of the Union Carbide at Bhopal, India. Two thousand five hundred people were killed and 200,000 injured in the worst industrial disaster in human history. In 1986, an explosion at Chernobyl nuclear reactor in the Soviet Ukraine caused the first officially reported radiation death in a nuclear power plant accident.[1] It may be noted in this context that the radio-active material that was released by the explosion had drifted as far as the United States. Later that year, fire hoses used to combat a Swiss warehouse blaze washed thirty

1. See Sand's "*Introduction*" in "CHERNOBYL : LAW AND COMMUNICATION (2nd ed. 1988).

tones of chemicals into the nearby Rhine River, an event decried as one of Europe's most serious environmental catastrophes. The Bhopal accident, the Chernobyl fire, and the Swiss spill announced with apocalyptic fury that states couldn't seal their borders from environmental disasters.[2]

Meanwhile, long-term global environmental effects such a Ozone depletion, climate change and acid rain pose new potentially incalculable danger to human survival. The recent discovery of "Ozone hole" in the stratosphere above Antarctica heightened concerns about evidence linking the destruction of Ozone layer to increased incidence of Skin Cancer and cataracts, suppression of the human immune system and crop destruction.[3] Massive deforestation and the continued release of industrial by-products into the atmosphere have led to the predictions of dramatic global change and accompanying rise in sea levels, permanent inundation of coastal plains and wide-spread heat waves.[4] Finally acid rain is suspected of contaminating water supplies and fish with dangerous metals and of posing great threat to human health.[5]

Faced with enormity and urgency of such international environmental problems, the world has experienced a political awakening. International conferences and conclusion of treaties regarding global warming and Ozone depletion are but a few signs that world has shown awakening in the field of protection of environment.

The problem involved in this environmental crisis and the various causes and factors which it brought about were analysed in detail some Thirty-two years ago by the Secretary-General of the United Nations in a Report on the problems of the Human Environment, Dated 26 May, 1969 (Document E/4667).[6] The Report was prepared in relation to the summoning of the Stockholm conference of June 1972 on the Human Environment,[7] pursuant to a Resolution of United Nations General Assembly of 3 December 1968. In a subsequent Resolution of 15 December 1969, the United Nations General Assembly endorsed the Report, assigning to the Secretary-General overall responsibility for organising and preparing the conference and established a 27 member preparatory Committee to assist him.

2. "Developments In the Law : - International Environmental Law", 104, Hav. L.R. 1487 (1991).
3. *Id.* at 1488.
4. *Ibid.*
5. *Ibid.*
6. Hereafter called *the Report*.
7. See *infra* note 10.

The Report identified three basic causes responsible for the deterioration of the environment, namely, accelerated population growth, increased urbanisation, and an expanded and efficient new technology with their associated increase in demands for space, food, and natural resources.[8]

As was stressed by the Secretary-General, the subject of environmental protection had been dealt with by international law making conventions in only a fragmentary manner, with room for much improvement. The report contains many illustrations of such piecemeal measures. Some of them are : Article IX of the Treaty" of 1967 on the Principles Governing the Activities of States in Exploration and use of Outer space including the Moon and Celestial bodies, which obligates the states parties to conduct space studies and exploration in such manner as to avoid adverse changes in the environment of the earth on account of the introduction of extra-terrestrial matter; the African Convention on the Conservation of Natural Resources adopted by the Organisation of African unity (OAU) in 1968 and the two Brussels conventions of 29 November, 1969, relating to Intervention on the High Seas in cases of Oil Pollution Casualties and on Civil Liability for Oil pollution Damage. Also paragraph 11 of the General Assembly's Declaration of 17 December 1970, on principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof beyond the Limits of National Jurisdiction, affirmed that states were to take appropriate measures for and co-operate in establishing a regime to govern the prevention of pollution and contamination to the marine environment, and of interference with the ecological balance of this environment, and to govern also the protection and conservation of natural resources of the seas and prevention of damage to flora and fauna of the marine environment. The Secretary-General's Report also detailed various activities of the specialised agencies of the United Nations, bearing upon the human environment.[9]

(A) Stockholm Conference of 1972 on the Human Environment

The historic United Nations Conference on the Human Enviornment which was held at Stockholm[10] from 5-16 June 1972, pursuant to the United Nations General Assembly's above mentioned Resolution of 3 December 1968, represented the first major effort to tackle the global problem of protection and improvement of the human environment by international consensus.

8. See *the Report*.
9. See Annex to *the Report*.
10. See Stockholm Declaration on Human environment, UN, DOC. A/CONF. 4q/14 and Corr. 1, Reprinted in I.L.M. 1416 (1972) [hereinafer Declaration].

The main work of the Conference was done through committees, open to all participating states. The First Committee was concerned with human settlements and noneconomic aspects. The Second and Third Committees were concerned with natural resources and development aspects and with pollutants and organisational aspects, respectively. The Conference approved a number of recommendations in plenary session. Also governments and organisations were able to present their views and explain their policies in the general debates held during the Conference.

The Conference marked a watershed in international relations and placed the issue of protection of biosphere on the official agenda of international policy and law. The Conference was a remarkable accomplishment, for, 114 participating nations agreed to a declaration of principles and an action plan.

The principal decisions, resolutions and recommendations of the conference were as follows:

1. A resolution in plenary session condemning nuclear weapons tests, especially those carried out in the atmosphere, and calling on the states intending to carry out such tests to refrain from doing so, as these might lead to further contamination of the environment.

2. A unanimous recommendation that a World Enviornment Day be observed on 5 June each year.

3. A so-called 'Action Plan' for protection and enhancement of the environment. This plan was, in effect, a grouping in a more or less logical fashion of all the recommendations for international action adopted by the Conference. The rearrangement comprised three parts which were : first, an 'Earthwatch' programme to identify problems of international significance so as to warn against environmental crisis; second, recommendations concerning 'environmental management' or, in other words, the application in practice of what was shown to be desirable or necessary in regard to the environment and third, supporting measures' such as education, training, public information and finance. The main contribution of the 'Action plan' consisted in its emphasis on national and international action and co-operation for the identification and appraisal of environment dangers and problems of global significance.

4. The adoption of the Declaration of the Human Enviornment. This Declaration may be regarded as doing for the protection of the environment of the earth what the Universal Declaration of Human Rights of 1948 accomplished for the protection of fundamental freedoms and human rights, that is to say, it was essentially a manifesto, expressed in the form of an ethical code, intended to govern and influence future action and programmes, both at the national and international levels.[11]

The text represted an odd mixture of political declarations, scientific generalities, banalities, propositions of international law and well-phrased environmental guidelines. It was divided into two parts, a preamble proclaiming certain truths about man in relations to his environment - a number of these may quite fairly be regarded as platitudes such as the statement in paragraph 3 that 'man has constantly to sum up experience and go on discovering, inventing creating and advancing' - and an operative parts enunciating 26 principles to govern international and national action in the environmental guidelines or truths. For example, principle[12] 2, stated that the natural resources in earth be safeguarded for the benefit of present and future generations through careful planning and management, Principle[13] 3 declared that the capacity of the earth to produce vital renewable resources must be maintained and wherever practicable, restored or improved, and principle 18, that science and technology, as part of their contribution to economic and social development must be applied to the identification, avoidance and control of environmental risk, to the solution of environmental problems and for the common good of mankind. There was, perhaps, some value in codifying these principles by general consensus. States were not committed in a legally binding manner to observe any of these principles, however, much the corresponded to the consensus of the conference. The main value of the Declaration consisted in its future educational effects.[14]

5. Recommendations were made to the united Nation General Assembly for the creation of new international machinery. The conference did not approve of the establishment of a new major

11. J.G. Starke, INTRODUCTION TO INTERNATIONAL LAW, 4066 (Co 115 ed 1988)
12. Principle 2 declared:
"The natural Resources of the earth including the air, water, land, flora and fluna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate".
13. See, *supra* note 10, Principle 3.
14. See, *supra* note 11 at 407.

international organisation, but favoured, instead the setting up of a Governing Council for environmental programmes: The Governing Council was supposed to be elected triennially by the General Assembly on the basis of equitable geographical distribution and was supposed to act as a central organ with its operation annually reviewed by the Economic and Social Council and the General Assembly. The proposed council would promote environmental cooperation among governments and guide and coordinate the existing environmental work being done by the various international organisation, which would continue to carry on as before within the ambit of their responsibilities. The council would be supported by a small Environment Secretariat, which would coordinate United Nations programs, advise international organisations, secure the cooperation of world scientists and submit plans, both medium range and long term, for United Nations action.

6. It was recommended that United Nations would establish a voluntary environment fund of $ 100 millions for a five years period and called upon states for voluntary contributions.

7. It was also recommended that the General Assembly should decide to convene a second United Nations Conference on Human Environment, preparations in respect of which should be carried out by the environment machinery referred to above.

Two of the most pressing problems confronting the international community at the present time are those of development, and of the protection and improvement of the human environment. The link between the enviornment and development found expression in two recitals in the preamble to the Declaration on Human Environment[15] and in no less than nine principles in the second part of the declaration, namely principles 8 to 14, 20 and 23, of the Declaration.[16] These principles declared, *inter-alia* that environmental policies should enhance the development in the developing countries, and be integrated with development planning, and that the environment standards might not be appropriate for developing countries. In principles 21 and 22 of the Declaration[17] on the Human Environment, three principles of international law were proclaimed:

15. See recital 4 in the preamble to Declaration on Human Environment, adopted by the Conference, which affirms that environmental problems are caused by underdevelopment. See also recital 7 which advocates international cooperation to raise resources to help developing countries to meet their environment responsibilities.
16. See, *supra note* 10.
17. *Ibid.*

1. States have a sovereign right to exploit their own resources pursuant to their own international policies.

2. States are responsible for ensuring that activities within their jurisdiction or control do not cause damage to the environment of other states, or of areas beyond the limits of national jurisdiction.

3. States are under a duty to cooperate to develop further the international law as to liability and compensation for the victims of pollution and other environmental damage caused by such activities to areas beyond their national jurisdiction.

It is clear that apart from all its worthwhile results the Stockholm Conference served to identify those areas in which rules of international environmental law, acceptable to the international community as a whole, can be laid down, as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles. To that extent, it provided foundations for the development of international environmental law.[18]

Some of the principal decisions and recommendations of the Conference were implemented subsequently by resolution of the United Nations General Assembly at its 27th session later in 1972.[19] By the main resolution 2997 (XXVII) adopted on the same day, i.e. 15 December 1972, bearing the title 'Institutional and Financial Arrangements for International Environmental Co-operation', the General Assembly broadly gave effect to the organisational recommendations made at Stockholm.

The executive body of the United Nations Environment Programme (UNEP) was, as proposed at Stockholm, to be a representative Governing Council, with a mandate 'to keep under review the world environmental situation', having global jurisdiction with Nairobi (Kenya) as its headquarter and with Environment Secretariat and Enviornment Fund.

After the Stockholm Conference in 1972, there have been a series of international conventions and declarations for preservation and protection of environment.[20] The United National General Assembly adopted, in

18. See *supra* note 11 at 409.
19. *United Nations General Assembly Official Records*, 27th Session, 15 Dec 1972, Resolutions 2994 to 3604.
20. Some of these are : World Charter for Nature, 1982; Hague Declaration on Enviornment, 1989; Convention on the Confervation of Antarctic Marine Living Resources, 1980; Vienna Convention for the Protection of the Ozone Lawyor, 1985; Convention on International Trade in Endangered Species of Wild Fanna and Flora, 1973 and Basal Convention on Control of Transbowndary Movement of Hazardous Wastes and their Disposal 1989.

October 1982 "the World Charter for Nature". This Charter lays down the general principles of environment protection, action plan and implementation of the same.[21]

The World Commission of Environment and Development was created as a consequence of UN General Assembly Resolution 38/161 in 1983 for suggesting and recommending legal principles based on Stockholm Conference and Nairobi Conference and many other existing international conventions and General Assembly Resolutions. Mrs. Gro Harlem Bruntland, Chairman of the World Commission on Environment and Development submitted the Report, "Our Common Future" in 1987 with a foreword by late Shri Rajiv Gandhi, the then Prime Minister of India. The Report showed that politicians, industrial leaders, and environmental groups around the world had endorsed sustainable development - "meeting the needs of the present without compromising the ability of future generations to meet their own needs"[22] ... as a guiding principle for the future of their countries. The practical application of this vision would require profound changes in institutions and in the decision making processes of industrialised countries.

(B) VIENNA CONVENTION OF 1985 FOR THE PROTECTION OF OZONE LAYER :

After Stockholm Conference of 1972, a Convention, under the auspices of United Nations, was held at Vienna on March 22, 1985, for the protection of Ozone layer.[23] The Convention provide a foundation for global multilateral undertakings to protect the environment and public health from the potential adverse effects of depletion of Stratospheric Ozone. The Convention addresses this important environmental issue primarily by providing for international cooperation in research and exchange of information. The Convention was the product of more than three years of negotiations under the auspices of UNEP. Articles 2-4 are the most significant substantive provisions of the Convention. Article 2 sets out the general obligations of parties to the Convention, including a requirement to take appropriate measures for the protection of Ozone Layer and the obligation to cooperate in research and information exchange. Artlcle 3 specifies that parties will cooperate as appropriate, in conducting the research and scientific assessments in a wide variety of areas, including

21. The *World Charer for Nature* adotped by general Assembly was a supplement of the "Nairobi Declaration" which was adopted on 18 May 1982 by 105 states assembled at Nairobi from 10-18 May to commemorate the tenth anniversary of the Stockholm Conference.
22. See World Commission on Environment and Development, *"Our Common Future"* (1990).
23. See *Vienna Convention for the protection of Ozone Layer* Reprinted in 26 ILM page of 1516 (1987) (hereinafer "Convention").

chemical, biological, health and climatic effects. Article 4 provides for the exchange of socio-economic, commercial and legal information.

Article 8 of the Convention provides for the possible adoption of future protocols. It is through such protocols that any coordinating regulatory measures that might in future, be considered necessary for the protection of Ozone Layer would be implemented. The Executive Branch would examine the environmental impact of such measures in connection with the negotiations and conclusions of any future protocols.

Part II of the Convention concerns itself with settlement of disputes. Various provisions of the Convention, including Articles 1-15, deal with participation by regional economic integration organisation (REIOs). Two annexes to the conventions delineate areas of cooperation, activities and procedures for exchange of information.

The Conference could not achieve its original goal of producing a draft protocol. However, it was an important step towards protecting and enhancing public health and global environment. And, it also served as a framework for the Montreal protocol.[24]

(C) MONTREAL PROTOCOL

The Conference of Plenipotentiaries met in Montreal, September 14-16 1987 under the auspices of the UNEP. The Final Act was signed by 47 participants including USA and EEC.

The Protocol established specific obligations to limit and reduce the use of chlorofluro carbons and possibly other chemicals that deplete ozone. The substances that the Protocol currently addressed were listed in Annex-A.[25]

The Ozone negotiations culminating in the Montreal Protocol seemed to show that the Convention created a framework of cooperation in which states can reach agreement quickly when new scientific evidence becomes available, thus enabling them to respond to environmental problems before the damage becomes much worse or irreversible.

Although the Montreal Protocol sets reduction schedules for ozone-depleting chemical production, the Protocol allows member-states to overshoot the imposed limits by ten to fifteen percent if they do so for purposes of "industrial rationalization"[26], or "to meet the basic needs of the

24. *Montreal Protocol on Substances that deplete Ozone Layer,* opened for signature on september 16 1987, 26 ILM 1541 (entered into force January 1, 1989).
25. *Ibid.* 26 ILM at 1541.
26. The Protocol defines Industrial Rationalization as "the transfer of all or a portion of calculated level of production of one party to another" which is permitted if it increases economic efficiency or it anticipates shortfalls caused by plant closures.

developing countries".[27] Developing countries may defer compliance for up to ten years and may even increase production and consumption of ozone-destructive chloroflurocarbons (CFCs) above 1986 levels.[28] The protocol provides for a multiple-step freeze and percentage reduction of CFC levels.[29]

The Protocol attempts to ensure enforcement through an incentive system of trade barriers and side money payments. It corrects trade barries on three types of products, i.e., Control Substances in bulk form, CEC products made with CFCs. Although protocol requires signatories to ban import of bulk CECs with one year of Protocol's entry into force, it postpones the determination of the time of ban on CEC-products. Products made with CFCs such as electronic equipment, cleaned with CFC solvents, may be subject to a future ban if the parties deem such a ban feasible.[30] Countries not party to protocol are disadvantaged by the trade barriers and do not have access to environmental technologies related to CFCs development by parties.[31]

The incentive structure has gaps, however, because certain products produced with CFCs may be imported by the party without violating the Protocol and in fact, may have an incentive to augment or create new CFC-using industries. Moreover, developing countries can join the Protocol, of effectively out put in order to meet "Basic Domestic Needs".[32]

The Protocol also provides for money payments by developed countries to underdeveloped countries to refrain from using CFCs and to purchase CFC substitutes. The Protocol exacerbates the inadequacy of the incentive structure and the side money payments because it does not provide any monitoring of enforcement mechanism. Instead, it leaves these issues for resolution at the first meeting of the parties.[33]

In spite of the relatively strong system of trade barriers and side money payments incorporated into the Montreal Protocol, there are reasons to suspect that states may not honour their commitments. In the Ozone Layer regime, there are strong economic incentives for such defections. The tremendous pressure on development countries, however, to build and modernize their infrastructures and to provide services for their citizens,

27. See *Id.* Article 2(1)-(4), 26 ILM at 1552-53.
28. See *Id.* Article 5(1) at 1555.
29. *Supra* Note 18.
30. See *Ibid* Article 4(4).
31. See *Ibid.* Article 4(5)-(6).
32. *Ibid.* Article 5 at 1555-56.
33. See *Ibid.* Article 8.

inevitably creates a demand for CFCs. Payment by development countries can help offset these economic pressure, but they cannot completely compensate for the incentives to produce and use CFCs caused by the deficiencies in the Protocol itself which is turn were left due to the need to address sovereignty concerns. Moreover, developed countries may especially be unwilling to pay the much larger amounts required to compensate for refraining from the activities such as those responsible for producing global warming gases. India has acceded to the Montreal Protocol on the phase out of Ozone depleting substances (ODSs) on 19 June 1992. This implies that the production and consumption of ODSs such as various CFCs, methyl chloride, carbon tetrachloride, holons etc. have to be phased out completely by the year 2010.[34]

Although the Montreal Protocol has serious shortcomings, its potential for success is relatively enhanced because only a small number of corporations produce CFCs and atleast one of them, Du Pont, is, perhaps, actively pursuing production of an Ozone friendly substitute.

(D) The UN Conference on Enviornment and Development

The second landmark event in the process of the development of international concern for global environment was the Rio Conference. From 3-14 June 1992, United Nations Conference on Environment and Development, after 20 years of Stockholm Conference, was held at Rio-de-Janeiro (Hereinafter termed the Rio Conference). Rio Conference was a spectacular event with 178 nations trying to evolve plans to save this planet from ecological degradation. The results of Rio Conference are fourfold. There was a treaty on climate change with a general recognition of the importance of curbing emission of greenhouse gases. There was also a treaty on bio-diversity aiming at the preservation of flora and fauna. There was a "Statement of Principles on Forests" - a non-binding agreement for conseration of forests. Besides these, a massive, 800 page document titled as 'Agenda 21' was adopted. It is supposed to be an action plan attempting to deal comprehensively with all aspects of environment. Though it is non-binding, it may serve as the yardstick against which actions taken by each government in the following years is likely to be measured.[35]

The Rio Conference has been unanimously described as a resounding success both by official delegation and non-government organizations

34. See an advertisement in Hindustan Times 12 Jul 1993.
35. See K. Srinivasan, "*Keeping pace with Law*". Eighth Co-operative Law Advisor 73-74 (1992).

attending the event. When it comes to content, however, things are not so rosy.

The Rio Declaration, a pompous document, was a result of a downgrading of what was supposed to be an Earth Charter, and became a rhetorical piece.[36] It contains 27 "Commandments" on Environment. Its principal legacy is the *Sustainable Development Commission,*[37] to be set up on the lines of Human Rights Commission. It will monitor the records of all the countries on environment protection and probably exercise "Peer group pressures" on the laggards. Precise details are expected to be worked out in due course. The importance of the Rio Declaration is that it recognises, for the first time, that the measurement of national development in terms of mere increase in GDP will be unrealistic and that the viability and efficiency of a model cannot be evaluated without taking its true ecological costs into consideration. The expression "Sustainable Development " merely implies that the growth of economy should not impoverish the future generations. The Rio Declaration enshrines the principle that the polluter has to pay. It underlines also the obligation of every country to ensure that its actions do not harm the environment of others, while admitting its rights to exploit its resources.

Agenda 21 was criticized as being too vague and exaggerated. To the surprise of many, it was approved by consensus, which is due to the fact that implementation was not taken seriously. The estimated costs, around $ 125 billion per year, is just not consistent with available international funds. All offers of additional funds made by developed countries in Rio amounted to no more than $ 5 billion per year.

The *Climate Convention* was signed by 154 countries, including the USA. It was watered down version of earlier versions, which in effect established a "freezing" of CO_2 emission levels at those of 1990. This target was to be reached in the year 2000. The Convention presents a clear progress and the secretariat to be established will be powerful and might pay a significant role in reducing greenhouse gases emissions in next few years. The Climate Convention will be, if all goes well, the basis of further negotiations to respond to the threat of the warming of earth as defined by the overwhelming consensus of the global scientific community. It was a big step forward. There would be continuing pressure to develop protocols under this Convention. The European nations are already discussing an independent agreement among themselves to take steps far in advance of

36. Jose Goldemberg, "The Rio Conference, Success or Failure", 3 Tislglow 55, (1992).
37. The Commission has since been established.

the treaty. The steps are widely seen not only as essential in stabilizing climates but also as economically advantageous.

The Biodiversity Convention was signed by 153 countries but not by the USA. This seeks to ensure that animals, plants, and micro-organisms as well as the genetic variety and ecosystem, water, land and air, in which they live, are properly protected. Humanity depends on this "living wealth" for its essential supply of food as also many of its medicines, But, what is known about is much less than what is still to be discovered. The subject of biodiversity was potentially overriding in importance but was reduced to the recognition of the economic interest of nations where unusual biotic resources of species are exploited for specific commercial purpose, especially medicine and agriculture.[38]

While results of the Rio Conference were far less than what had been anticipated, the issues raised now are clearly on *international agenda,* forced to the top level of political considerations, urgent in the minds of the public and many of their leaders, and will become topics of further negotiations starting immediately. The implications are profound, both for the humanity's future through government's actions and for science. Acute concern about the habitability of earth as a whole has become equivalent to, even intrinsic to the more or less concern for national security, including the range of tradition, economic and military interests of governments.

(E) The Cairo Conference

Following close of the earth Summit was another global conference held at Cairo. The International Conference on Population and Development (ICPD) was held in September 1994 in Cairo. Many environmentalists, especially those from the North, regarded over-population as the leading cause of environmental destruction around the world. They hoped that the lack of emphasis on population stabilization at the Earth Summit would be more than compensated by the issues commanding preference in Cairo. For one thing, the Cairo Conference changed the framework of debate from conventional issues of family planning to broader questions of reproductive health, empowerment of women and integration of population policy with environmental policy and development strategies. Representatives from 183 nations declared their consent to a programme of action that aimed to stabilize human population by the year 2020, provide greater equality for women along with improved reproductive health care and control of AIDS as part of population policy.

38. G.M. Woodwell, "The New World Order", at 57.

The Cairo Conference, like the Earth Summit, largely failed to integrate demographic, environment and economic development issues. The World Human Rights Conference in Vienna in June 1993, the World Social Development Summit in Copenhagen in March 1995, have all failed to highlight the importance of the linkage between environment, population and development.

(F) Other Recent Developments

Hand in hand with the global efforts, there have been regional efforts also to improve and protect environment at regional level. Thus a Conference of SAARC (South Asian Association for Regional Cooperation) was held at New Delhi, on 2-4 May 1995. The SAARC countries, through Delhi Declaration,[39] expressed their deep concern at the unabated degradation of the environment and recurrence of devastating natural disasters. They have underscored the risks and dangers involved in overlooking the challenges posed by these problems. They expressed their commitment to implementing at all levels - national, bilateral, regional and global programmes for the protection and preservation of environment and prevention of its degradation.

They recalled the decisions expressed in the Dhaka Declaration on April 1993 on the outcome of the UN Conference on Environment and Development of June, 1992 and reiterated the urgent need to ensure the flow of new and additional resources that are adequate and predictable to successfully implement the programmes of Agenda 21. They also noted that international actions in the area of environmental protection should be based on partnership and collective endeavors and should reflect the principle enunciated in the UNCED, of common but differential responsibilities. They also noted that the Commission on Sustainable Development set up to monitor the implementation of the Rio agreements has met thrice since their earlier meeting and expressed the hope that the commission would be able to facilititate the necessary flow of resources and technology.

Again, at the Ninth SAARC Summit held at Male (Maldives) on 8-12, May 1997, the SAARC Countries reiterated their resolve to initiate collective endeavors for international action in the area of environmental protection. To review the progress of the implementation of the decisions taken at the Rio Conference, the UN Earth Summit was held from 24 to 27 June 97 at New York, USA.[40] At the summit the UN Conference Chairman

39. IJI p.p. 162-63 (1994).
40. See for a Report on the UN New York Conference, Times of India 24-25 June 1997.

Mr. Razali Ismail said that the progress since the Rio Conference has been "paltry". The Malaysian delegate said "we continue to consume resources, pollute, spread and entrench poverty as though we are the last generation on the earth". The European countries have made a strong plea for cutting back on greenhouse gases like carbon dioxide, methane, and nitrous oxide to 15% below 1990 levels by 2010. American policy came under attack at this summit, in particular, its go-slow approach to reducing gases that may cause planetary warming came for severe criticism. The "Earth Summit plus 5" noted with concern that since the Rio Summit annual emissions of greenhouse producing gases have risen to 6.2 billion tones a year, that the fresh water is going scarce, and that the amount of forest loss each year is 55,000 square miles. Hundreds of environmentalists who attended the "Review Summit" were grim and frustrated over the dying "Spirit of Rio".[41] It may be recalled that at Rio (Brazil) the world leaders declared that they would change their ways and pursue the Policy of "Sustainable Development".

At the Conference there was a move to propose the establishment of an independent organization known as "World Environment Organisation" to function within the framework of United Nations System.[42]

41. See Times of India, Page 12 dated 27 June 97.
42. See *supra* note 40.

JUDICIAL REVIEW OF POWER, POSITION AND ROLE OF CHANCELLOR IN STATE UNIVERSITIES (A CASE LAW STUDY WITH SPECIAL REFERENCE TO THE U.P. STATE UNIVERSITIES ACT)*

*A.K. Avasthi***

Article 153 of the Constituiton of India lays down that there shall be a Governor for each state while Article 154 vests all executive powers relating to administration of the state in him, to be exercised either directly or through officers subordinate to him. Unlike the President who is elected by an electoral college, Governors are appointed by the President.

The Governor-Chancellor : The office of the Governor has an important role to play as Chancellor of the universities in a state. In almost all the states, the Governor is the *ex-officio* Chancellor of all the universities established in that state. The practice of making Governor, *ex-officio* Chancellor of the State universities, was started by the Britishers and was developed with the intention to ensure that the higher education was in conformity with broad governmental policy and also that university finances remain under strict governmental care and control.

Brief History : The universities in England were established with the sole object of imparting religious instructions and the Chancellor used to be their ecclesiastical head. In the beginning the Chancellors of the universities were named in the charter or statute itself,[1] promulgated by the Crown but subsequently a convention was developed to the extent taht the Chancellor used to be elected by a convocation which consisted of all the Masters of Arts and holders of some high degrees who had kept alive their membership of university by paying the prescribed dues. The Chancellor who was the titular head of the university[2] was a non-resident officer. The executive power was exercised by his deputy, the vice-chancellor, whom

* This is epitome of the thesis submitted by the author for the award of the degree of LL.D. of Lucknow University.

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1. Stat. (1571) 13 ELIZ C29 incorporating Oxford and Cambridge University named the Chancellor in itself.
2. Quoted from the judgment of Jeevan Reddy J (*M. Kiran Babu v. Govt. of A.P.* AIR 1986, A.P. 275).

the chancellor nominated from amongst the senior heads of the departments who had not held that position previously. He presided over the convocation of the university and was empowered to settle doubts arising in the interpretation of university statutes, if the matter was referred to him.

The visitor[3] : The power to settle disputes and correct abuses, however, vested in the visitor who was none else than the crown himself. The crown as *parens patriae* was recognized as the constitutional custodian of all property belonging to such trusts and corporations including universities and acting through the Lord Chancellor exercised a visitatorial jurisdiction over them.

Indian Position : In India the institution of the Chancellor is a blending of the institutions of the visitor and the Chancellor as they existed in England. The first university here was established at Calcutta on the pattern of University of London which itself was modeled on the pattern of Universities of Oxford and Cambridge. In order to plant their native pattern in India, they vested the powers of Chancellor as well as those of visitor in the Governors of provinces who were direct representatives of the Crown and answerable to him only. The objective behind this vesting was to keep a constant supervision and control over the administration and finances of the University. Time rolled on and when the Britisher's started functioning with the help of legislatures in India itself, they found the old practice handy and after every establishment of a university, its Chancellor was either the Governor of the State in which it was established or a person of eminence who had allegiance and loyalty with the Raj.[4]

With the advent of independence and coming into force of the Constitution of Inida, the subject of 'education including universities' was put in state list[5] while 'the institutions known at the commencement of the Constitution as B.H.U., A.M.U. and Delhi University' were retained in the union list[6]. In pursuance of the education policy various individual universities' Acts were amended and the Governors of the states were made *ex-officio* Chancellors of their universities and the President of Inida was named as visitor. In central universities visitor was given visitatorial powers whereas in case of state universiteis this power was retained by the state government for itself.

3. *Halsbury's Laws of England* (iv edition), vol. 5 : Charities : Paras 871 to 883, The Visitore.
4. e.g. Nizam of Hyderabad was Chancellor of Osmania University; Rajmata Vijaya Raje Scindia was Chancelor of University of Saugar.
5. Entry 11 of List II (state list) of VII Schedule of the Constitution of India.
6. Entry 63 of List I (union list) of VII Schedule of the Constitution of India.

The visitor and chancellor both were vested with the powers to appoint vice-chancellor, nominate members to various university bodies and to settle disputes and correct abuses in the internal management of the university. Detailed provisions were made in the Acts and the extent and scope of these powers of visitor and Chancellor varied both in content and form.

In order to bring uniformity and clarity, the laws relating to state universities were codified in early seventies. The individual university Acts were replaced and a new comprehensive code with a nomenclature of 'state universiteis Act' was enacted[7]. To safeguard the autonomy and distinctive characters of the universities, they were left free to have their individual first statutes and prescribe courses they wanted to run. The powers of the Chancellor were expanded and made more explicit and clear. The manner of their exercise was also provided.

Position and Role of the Chancellor : The Chancellor is a part and parcel of the university and he along with the vice-chancellor, members of the executive council, the court and the academic council constitutes a body corporate by the name of the particular university. He is the first officer of the university and the President of the court. He is obligated to preside over the meetings of the court in any convocation of the university. Apart from the above, the Chancellor has been entrusted with certain other powers which are enumerated in varius state universities Acts:

1. Power of Appointment :

The Chancellor appoints the vice-chancellor and *ad hoc* vice-chancellor in emergency. This power includes the power to remove / suspend and to accept his resignation.

He has the power to appoint *ad hoc* executive council if the executive council has failed to carry out its functions or has abused its powers.

2. Power of Nominaiton

The Chancellor has the power to nominate the following persons:

(*a*) One member to the search committee constituted for the purpose of making recommendations for the appointment of the vice-chancellor.

7. For example The U.P. State Universities Act, The Bihar State University Act etc. Some of the states have not yet made comprehensive Act bringing different universities in that state under one Act and individual university Acts have been allowed to exist but suitable amendments have been incorporated in them so as to bring uniformity in their structure and scheme of administration.

(*b*) Certain number of members in the executive council/senate/ syndicate/court and / or academic council.

(*c*) Two/three experts to sit in the selection committee constituted for making recommendations for appointment of teachers in the university

(*d*) To nominate one member to a Tribunal of Arbitration appointed for resolution of a dispute arising out of a contract with regard to the appointment of a teacher.

3. Power with Reference to Affiliation/recognition

(*a*) Prior sanction of Chancellor is required for granting/curtailing or withdrawing the privileges of affiliation/recognition to any degree/post graduate college of the universities.

(*b*) Prior sanction of Chancellor is required for opening of post-graduate classes in any associated college of residential universities.

4. Rule making Poser : The assent of Chancellor is required if any amendment is required in the First Statutes of the university. He may by order make such adaptations and modifications of the ordinance also.

5. Power to decide the reference in respect of the Appointment of Teachers:

The Chancellor has the power to decide the reference regarding appointment of teachers in university:

(*a*) When there is disagreement between the selection committee and the executive council, or

(*b*) When the executive council fails to take a decision on the recommendaton of selection committee within four months of meeting of the selection committee.

6. Power to settle disputes and correct abuses:

The Chancellor has *quasi*-judicial power to finally decide the reference pertaining to the appointment or election of any person as a member of any authority or body of the university or when the validity of any statute, ordinance or regulation is in question or where any decision of any authority or officer of the university is disputed for not being in conformity with the provisions of the Act or the statutes or the ordinances made thereunder.

7. Chairman of Policy Planning Body:

Recently, the U.P. State University Act has been amended and a co-ordination council with the Chancellor as its Chairman has been constituted which consists of all the vice-chancellors, the Chairman of the U.P. State Council of Higher Education, and Secretaries of Higher Education, Finance and Judicial departments of the State Government.

Governor as Chancellor of State University

The position of Chancellor *vis-a-vis* Governor and *vice-versa* has been a subject of animated discussion and judicial scrutiny in several cases and the following propositions have emerged from the pronouncements made in those cases.

(i) The Governor is a high constitutional authority and is not an employee of either the central or state[8] government.

(ii) The Governor of a state acting as the Chancellor is neither required to seek the aid and advice of the Council of Ministers of state nor is he bound by that[9].

(iii) The Governor exercises constitutional functions with the aid and advice of the Council of Ministers while the Chancellor discharges satutory functions even without such advice, under the relevant university Act. If there is any conflict between these functions, the constitutional authority shall prevail.[10]

Power with Reference to Vice-Chancellor

One of the paramount powers of the Chancellor is the appointment of the vice-chancellor[12] who weilds enormous powers in the scheme of the Act and is the real executive head of the university.[13] He is appointed by the Chancellor through a panel prepared by a high powered Search Committee appointed for that purpose. This Committee consists of three eminent persons, one nominated by the Chancellor, who acts as the Convenor of the Committee and the other two are nominated by the executive council of the university and the Chief Justice of the High Court, respectively, A panel of three to five names in alphabetical order is

8. *Hargobind Pant* v. *Raghukul Tilak*. AIR 1979 SC. 1109.
9. *Hardwari Lal* v. *G.D. Tapase*. AIR 1982 P & H 439 (F.B.).
10. *Vice-Chancellor, Allahabad University* v. *A.P. Misra* 1997 II AD SC 22.
11. *Jyoti Prasad* v. *Kalka Pradas* AIR 1962 All 128.
12. S. 11 of the U.P. State University Act.
13. S. 12 of the U.P. State University Act.

submitted by the committee and the Chancellor is obligated to appoint any one from amongst them.

In case the Chancellor does not consider any one or more of persons recommended by the Committee to be suitable for appointment as vice-Chancellor or if one or more of the persons recommended is/or are not available for appointment and the choice is restricted to less than three persons[14], he may require the Committee to submit a list of fresh names[15]. Excepting in either of the two situations the panel of names recommended by it is binding on the Chancellor and he can not bypass it. In fact the role of the said Search Committee is not merely advisory but mandatory in nature.

While appointing the vice-chancellor the Chancellor is neither required to seek nor is he bound by the advice of the council of ministers if tendered in this regard. He is free to act according to his own dictates[16]. Before offering the post it is incumbent on him to ensure that the Search Committee was duly constituted[17] and that the members of the same were not connected with the university[18] or its colleges[19]. The courts have repeatedly held that any defect in the composition of the Committee whether in form or in contents would make it *non est*. The Committee is liable to be quashed and the Chancellor is obligated to appoint a fresh Committee for that purpose[20].

The power of the Chancellor in case of appointment of ad hoc/ interim vice-chancellors is, however, unfettered and he can even make successive appointments[21]. He can promise another term to an incumbent[22] and in such a case he would not be required to repeat the entire exercise of selection.[23]

The term of the vice-chancellor is fixed for three years and it could be renewed for another term but would not be extendable even if the occupant could not exhaust it due to reasons beyond his control[24]. At the same time

14. He is, however, at liberty to appoint even if the choice falls short of three persons : *Zaheer Ahmad* v. *Kuladhipati*. AIR 1984 M.P. 26.
15. *Kanti Lal Chaturbhuj* v. *Chancellor, North Gujrat University* (1995) (i) ESC 57.
16. *M. Kiran Babu* v. *Govt. of A.P.* AIR 1986 MP 275.
17. *Kashi Nath Misra* v. *Chancellor, University of Allahabad AIR* 1967 All 101.
18. *Het Ram Kalia* v. *H.P. University* AIR 1977 NOC 146 (M.P.)
19. *S.C. Bharat* v. *H.V. Pataskar* AIR 1962 MP 73.
20. *V.C. Pandey* v. *Chancellor, University of Allahabad* AIR 1998 All 173.
21. *The Chancellor* v. *J.N. Pandey* 1968 ALJ 132.
22. *Hardwari Lal* v. *G.D. Tapase* AIR 1982 P&H 439 (F.B.)
23. *S.B. Chaturvedi* v. *G.C. Chatterjee* AIR 1959 Raj 260.
24. *Balbir Singh* v. *G.D. Tapase* AIR 1985 p&h 244.

this term cannot be determined either by an executive order or by a legislation enabling the Chancellor/ state government to do so.

Earlier, there were no provisions in the universities' Act regarding termination/determination of the tenure of the office of the vice-chancellor. In the absence of such provisions, the supreme court, for the first time in 1967, was called upon to determine the validity of an order of termination of vice-chancellor passed by the then Chancellor of Kurukshetra University[25]. Upholding the order of the Chancellor, the apex court relied upon its own ruling and the provisions of the General Clauses Act, providing that power to appoint ordinarily carried with it the power to terminate the appointment also.

It was held that the Chancellor being the appointing authority, had an inherent power to terminate/dismiss/suspend an incumbent in a suitable case. Later on, a provision was added whereby the Chancellor was empowered to suspend/ terminate the vice-chancellor if in the opinion of the former, the later willfully omits or refuses to carry out the provisions of the Act or abuses the powers vested in him or if it otherwise appears to the Chancellor that the continuance of the vice-chancellor would be detrimental to the interest of the university[26] after making such inquiry as he deemed proper.

The Chancellor has power to suspend a vice-chancellor where grave and serious allegations of misconduct, corruption or immorality have been labelled, which if proved on inquiry, could result in the removal of vice-chancellor[27]. However, considering the status of the vice-chancellor, power of suspension be exercised sparingly[28]. The inquiry is to be completed expeditiously and an unreasonable delay in arriving at the conclusion may incur the wrath of the courts.[29]

Power with regard to Appointmeet of Teachers on reference from the Executive Council

The executive council is the principal executive body of the university and is entrusted with the duty, among others, to appoint various categories of teachers after following the due procedure as laid down in the Act[30] from amongst candidates fulfilling qualifications laid down in the First Statutes. For this purpose, first, a selection committee is constituted which recommends the names of candidates who are found suitable for the appointment, The recommendations of the selection committee are placed before the executive council along with the bio-data of the candidates. Deliberations take place and if the executive council agrees with the recommendations of the selection committee, the candidate/s is/are appointed. However, if the executive council does not agree with the recommendations , the matter is referred to the Chancellor giving reasons for such disagreement . The matter may also, *suo motu* stand referred to the Chancellor if the executive council fails to take a decision within a period of four months from the date of meeting of the selection committee.

25. *Bool Chand* v. *Chancellor, Kurukshetra University*, AIR 1968 SC 292.
26. *R.B. Misra* v. *Chancellor, Avadh University*, (1992) 2 UPL BEC 900.
27. *Acharya P. Misra* v. *The Chancellor* AIR 1972 Pat. 393.
28. *Pratima Asthana* v. *The Chancellor, Gorakhpur University* (1991) 1 UPLBEC 448.
29. *B.S. Rajput* v. *The Chancellor* (1995) 2 UPLBEC818.
30. S.31 of the U.P. State Universities Act.

While studying the nature, scope, objective, application and limitations on the power of the Chancellor with regard to appointment of teachers on reference from the executive council, following propositions have emerged:

(*i*) The power of the Chancellor is purely of administration nature[31] and is neither judicial nor quasi-judicial.[32] The Chancellor is not required to observe principles of natural justice or give reasoned decision[33] while deciding, the reference.

(*ii*) While deciding the reference from executive council upon its disagreement with the statutory selection committee, the Chancellor is first required to ensure that the legal formalities with respect to advertisement[34], constitution of selection committee including its quorum[35] etc. were complied with. He is also obliged to ascertain about its fairness and impartiality[36] The Chancellor is obliged to see that the matter has been correctly and fairly reported to him by the executive council[37].

(*iii*) The Chancellor is bound in law to give due weight to the reasons of disagreement, as enumerated by the executive council, while arriving at a decision. If no reason has been cited by the executive council, the reference is not maintainable[38] and if the Chancellor fails to consider the same , his order will be quashed being unreasonable[39].

31. *Neelima Misra* v. *H.K. Paintal* AIR 1990 SC 1402.
32. *L.N. Mathur* v. *Chancellor, Lucknow University*, AIR 1986 All 273 (F.B.)
33. *Prabha Gupta* v. *Lucknow University*, 1984 UPIBEC 647.
34. *A.N. Vishnoi* v. *Chancellor, Lucknow University*, 1981 Ed. Case 1.
35. *Manbodh Pandey* v. *Chancellor*, Kashi Vidyapith (1991) UPLBEC 234.
36. *V.K. Anand* v. *A.D. Sharma* (1989) 1 UPLBEC 238.
37. *UN Roy* v. *G.D. Tapase* 1981 UPCBEC 309.
38. *D.D. Tewari* v. *Chancellor S.S.V.V.* 1978 AIR 409.
39. *Sia Ram* v. *Lucknow Unviersity* 1981 UPLBEC 276.

(*iv*) The Chancellor is free to agree or disagree with the recommendations[40] of the selection committee. He can accept or reject or partly accept and/or partly reject any such recommendation[41].

(*v*) This executive council does not have power to refer the matter to the Chancellor after it had once accepted the recommendations of the selection committee. Similarly it can not reconsider the recommendations of the selection committee[42] after it had referred the matter to the Chancellor[43].

(vi) No reference is permissible before the Chancellor against his own decision given under the above provision[44]. The high court does not sit in appeal over the decision of the Chancellor. It has limited jurisdiction to point out the defect and/ or error of law apparent on the face of the record and remand the matter to the Chancellor for decision in the light of the law laid down by it, but in no case it could substitute its own decision and direct the appointment on its own[45].

(vii) The Chancellor is not necessarily obliged to decide the reference himself if the matter automatically stood referred to him due to statutory limitation of four months. He can remand the matter to the executive council for taking a decision[46] within a stipulated time frame.

Power to decide Reference :

Various state university Acts confer *quasi*-judicial power on the Chancellor to settle disputes and correct abuses in the day to day functioning of the university The relevant section[47] provides that any question (*i*) whether any person has been duly elected[48] or (*ii*) appointed[49] as or is (*iii*) entitled to be a member of any authority or body of the university[50], or (*iv*) whether any decision of any authority[51] or officer[52] of

40. *M.P. Singh* v. *Chancellor, Allahabad University* 1983 Ed. Cases 300.
41. *Nirmala Nautryal* v. *Chancellor, Lucknow University* 1985 Ed. Cases 265.
42. *Prahlal Ran Chandra Rao.* v. *Univeristy of Goa* (1950-91) (4) AIE (50).
43. *B.B. Singh* v. *Executive Council BHU* (1950-91) (3) AIEC 345.
44. *T. Ramesan* v. *The Chancellor, Bangalore University* (1980) 23 SLR 60.
45. *Berhampur University* v. *Sailbala Padhy* AIR 1997, SC 2257.
46. *Raj Pal Verma* v. *Chancellor, Meerut University*, AIR 1997 SC 2708.
47. Section 68 of the U.P. State Unviersities Act.
48. *Cherukuri Fitchaih* v. *Andhra University*, 1961 Andh LTR 371.
49. *G. Sarna* v. *Lucknow University*, AIR 1976 SC 2428.
50. *Registrar, University of Allahabad* v. *Ishwari Prasad*, AIR 1956 All 603.
51. Selection committee for appointment of teachers in a degree college is not an authority of the University (*Ranjana Saxena* v. *V.C. Rohilkhand University*, 1980 UPLBE 225).
52. The decision of Vice-Chancellor as patron of students Union is not covered (*Raghunath Dwivedi* v. *V.C. Allahabad University*, AIR 1996 All 52).

the university is in conformity with the Act or statutes[53] including (*v*) any question as to the validity of a statute or ordinance or regulation could be referred to the Chancellor and his decision thereon has been made final[54].

The Chancellor can be activated by any person including an aggrieved person[55]. A limitation period of three months has been prescribed to file the reference. He has been empowered to act *sou motu* and/or entertain a reference even after the expiry of the period of limitation[56] where reasonable cause has been shown for the delay[57].

The Supreme Court has held that the provision empowering the Chancellor to decide reference does not confer uncanalised power on him and as such it is not liable to be struck down as discriminatory under article 14 of the constitution[58]. The power to decide a reference is an established quasi judicial power[59] and the Chancellor constitutes a domestic tribunal[60] white exercising it. He is required to observe principles of natural justice[61] before arriving at a decision. The Chancellor is required to supply all the material to the delinquent which might be necessary for his explanation[62]. However, there is no right of oral hearing[63] or cross-examination[64] or to engage a counsel. The Chancellor does not sit as an appellate authority over the university decisions and has only supervisory jurisdiction to see that the impugned order/action was in conformity with the provision of the Act and Statutes framed thereunder, but he can not substitute his own decision i.e. he cannot say that A was better qualified than B and ought to have been appointed while deciding a reference relating to appointment of

53. *S.C. Verma* v. *Chancellor, Nagpur University*, AIR 1990 S.C. 2023.
54. *Chandra Bhusan* v. *The Governor as Chancellor*, 1985 UPLBEC 737.
55. Senior teachers of University can file reference challenging the constitution of search committee for Vice Chancellor (*V.C. Pandey* v. *Chancellor, University of Allahabad* AIR 1998 All 173). The head of department can file representation alleging the manipulation in the selection committee for appointment of teachers (*Krishnanand* v. *The Chancellor* 1983 Ed. Cases 84), however, a superseded managing committee can not file reference against the order of the vice-Chancellor disapproving the termination of the Principal of the college (Sri *Agaral Hitkari Nyas* v. *The Chancellor* 1986 UPLBE 538).
56. Proviso to S. 68.
57. *R.K. Mittal* v. *V.C. Meerut University* 1983 UPLBEC 99.
58. *Jagdish Prasad* v. *Chancellor, Bihar University*, AIR 1968 SC 323.
59. *Ishwari Prasad* v. *Registrar, University of Allahabad*, AIR 1955 All 131.
60. *S.N. Shukla* v. *Chancellor, Lucknow University*, AIR 1961 All 401.
61. *B.K. Gupta* v. *Chancellor, Lucknow University* 1962 ALJ 289.
62. *B.B. Pandey* v. *Chancellor, Lucknow University* (1993) unreported.
63. *Kunwar Suraj Autar* v. *Chancellor, Rohilkhand University*, 1981 Ed. Cases 86; However, if directed by High Court, oral hearing be given : *Atul P. Pathakji* v. *V.C. South Gujrat University* (1950-91) 2 AIEC507.
64. *Kamal Singh Yadav* v. *Chancellor Allahabad University*, 1981 Ed. Cases 289.

a teacher[65]. However, he is bound to give reasons for his decision[66].

In the course of judgments, the courts have validated the orders of the Chancellor passed while exercising his power to decide the reference :

(*i*) Where the Chancellor had restrained the examination committee to declare the result of a Ph.D candidate who was alleged to have manipulated the things in such a way that his thesis is not sent to an inconvenient examiner for evaluation;[67]

(*ii*) Where the Chancellor had restrained the university to make appointment of teachers as they were made without observing the norms of reservation policy,[68]

(*iii*) Where the Chancellor had quashed the appointment of teachers as they did not possess the master's / doctor's degree in the subjects they were appointed to teach[69];

(*iv*) Where the Chancellor had quashed the appointment of a teacher who had got it on the basis of a forged mark sheet;[70]

(*v*) Where the Chancellor had refused to grant the seniority from the retrospective effect as the same violated the specific provisions of statutes[71],

(*vi*) Where the Chancellor had cancelled the election of the petitioner to the senate as he was connected with the university in as much as he was working as a laboratory assistant in one of its colleges[72];

(*vii*) Where the Chancellor had allowed the reference and had found that the procedure adopted by the returning officer in counting of votes for senate, was not in conformity with election statutes[73]; and

(*viii*) Where the Chancellor had quashed the order psssed by the vice-chancellor according approval to an election of the management committee of a college held despite a stay order from the court[74].

65. *K.K. Srivastava* v. *Chancellor, Meerut University*, 1984 Ed. Cases 301.
66. *Gyanwati Trivedi* v. *Sajojini Varshney* 1970 ALJ 1015.
67. *Nrusingha Charan* v. *Chancellor, Utkal University*, AIR 1987 Ori 88.
68. *Suresh Chandra* v. *Chancellor, Nagpur Unviersity*, AIR 1990 SC 2523.
69. *Paras Nath Dwivedi* v. *Chancellor*, 1982 Ed. Cases 155; Sh yam Narain v. Chancellor, 1982 Ed. Cases 313.
70. *Asha Upadhyay* v. *Chancellor, Gorakhpur Unviersity* 1987 UPLBEC 167.
71. *Banvir Singh* v. *Chancellor*, Lucknow University (1995) (unreported).
72. *Dipak Kumar Parija* v. *Chancellor, Utkal University*, AIR 1983 Ori 109.
73. *M. Gopi* v. *A. Shamsuddin AIR* 1988 Ker. 22.
74. *C.O.M.* v. *Chancellor, Gorakhpur University* 1983 UPLBEC 349.

Since the orders of the Chancellor made under the above mentioned sections are quasi judicial, they are amenable to the writ jurisdiction of High Court under Article 226 of the Constitution. In such matters the court too does not sit as a court of appeal but nevertheless keeps the Chancellor within bounds of his jurisdiction and authority. Broadly speaking, the decision of the Chancellor can be interfered with by the High Court on three main principles:

(*i*) Want or excess of jurisdiction;

(*ii*) Breach of principles of natural justice; and/or;

(*iii*) Error of law apparent on the face of record.

Following are some of the cases where the courts have quashed the orders of the Chancellor on one or more of the above mentioned grounds:

(*i*) Where the Chancellor had directed for the appointment of a teacher, on compassionate grounds, though she did not have minimum qualifications prescribed for the post[75];

(*ii*) Where the Chancellor had quashed the appointment of a Professor of Law, due to alleged defect in the composition of the selection committee, without giving him any opportunity of hearing to defend himself[76];

(*iii*) Where the Chancellor had quashed the appointment of three Lecturers in Law without supplying them the copy of additional representation to the appointees so that they could offer their explanation[77];

(*iv*) Where the Chancellor had quashed the appointment of five Readers in Hindi on the ground that since the names of experts of their selection committee had got leaked out before the interview and therefore, there was every likelihood of the recommendations being vitiated[78];

(*v*) Where the Chancellor had wrongly interpreted the terms viz; "Good academic record'; 'high second class' and master's / doctor's degree in 'relevant' subject[79].

75. *Patna University* v. *Amita Tewari* AIR 1997 SC 3456.
76. *B.K. Gupta* v. *Chancellor, Lucknow University*, 1962, ALJ 289.
77. *A.K. Gupta* v. *Chancellor, Allahabad University* 1984 Ed. Cases 124.
78. *P.D. Shukla* v. *Chancellor, Lucknow University* 1985 UPLBEC 1571.
79. Good academic record *D.C. Pandey* v. *Chancellor, Allahabad Unviersity* 1982 UPLBEC 660, High second class : *J.P. Kulshreshtha* v. *Chancellor, Allahabad University* AIR 1980 S.C. 2141; Masters'' degree in relevant subject : *Mohd. Ismail* v. *State of U.P.* (1994) IUPLBEC 312.

(*vi*) Where the Chancellor had wrongly evaluated the facts with respect to a charge of alleged use of unfair means in the examination and had exonerated the delinquent[80].

(*vii*) Where the Chancellor had acquiesced with the decision of the vice-chancellor who had accepted the resignation of an employee before the expiry of three months[81] notice as required under the statutes; and

(*viii*) Where the Chancellor had quashed the inter-se seniority of teachers by wrongly interpreting the relevant law.[82] In course of their judgments, the courts have required the Chancellor to decide the controversy on merit and not on technicalities[83]. The courts have desisted themselves from interfering in purely academic matters[84] and especially where the universities or the Chancellor had acted bonafide to save the academic standards, purity of examinations[85] and reputation of the institution being sullied by manipulations and back door *maneuverings*[86]

In Eagtand, courts refrain from interfering in the matters in which the visitor is empowered to take cognizance as they do not have jurisdiction to deal with them[87]. This is the consistent practice being followed there for the last more than three centuries. In India , normally, before a petition under Article 226 is entertained, the High Court would insist[88] that the party aggrieved by the orders of university authorities, should have recourse to the statutory authority viz; the Chancellor who has ample power to provide relief but this is a rule of practice and not of jurisdiction.

While entertaining a writ impugning the orders of the Chancellor, many technical pleas viz.; locus standi ; necessary parties, laches and res judicata etc. have been raised as preliminary objections. The courts have been very discreet in this regard and have taken a pragmatic view while

80. *AUTA* v. *Chancellor, Allahabad University* AIR 1982 All 343.
81. *Rahmat Ullah* v. *Chancellor, Bundelkhand University* 1984 Ed. Cases 287.
82. *Subhash Chandra Bose* v. *Chancellor, Gorakhpur University* (1995) IUPLBEC 534.
83. *Arun Kumar* v. *Chancellor, Gorakhpur University* 1987 UPLBEC 1156.
84. *Rajesh Kumar* v. *Chancellor* v. *G.B. Pant University* (1992) 2 UPLBEC 657.
85. *Chitrakala Sharma* v. *Chancellor*, Agra University 1988 UPLBEC 274.
86. *Nrusungha Charan* v. *Chancellor Utkal University* AIR 1987 Ori 88.
87. *Thomson* v. *University of London* 33 LJ Ch. 625; *R* v. *Dunsheath* exp. Meridith (1951) 1 KB 127; *Thorn* v. *University of London* 33 LJ Ch. 625; *R* v. *Hull, University Visitor* exp. Page (1992) 3 WLR 1112 (H.L.); *Patel* v. *University of Bradford Senate* (1979) 2 All ER 582 (CA).
88. *J.P. Sharma* v. *Vice Chancellor* 1982 Ed. Cases 279; *Satya Prakash Singh* v. *The Vice Chancellor* (1997) 3 UPLBEC 2096. *Gujrat University* v. *N.U. Rajguru* AIR 1988 SC 66.

deciding the matter. Normally, the person applying for a prerogative writ must have some interest in the property, franchise or personal right in the subject matter to qualify to be person aggrieved. However, since the controversies pertaining to university may have wider ramification and far reaching repercussions, the courts have deviated from the normal rules and allowed bonafide and genuine parties to agitate before it even if they fail to satisfy the opposite parties of any personal injury to them'[89].

Thus, members of executive council, court, academic council, registered graduates[90], senior teachers[91], a practicing advocate[92] and even a resident of the locality[93] have been held to have *locus standi* to challenge the appoint of a vice-chancellor. In the case of appointment of teachers, a candidate who had applied and appeared before the selection committee has every right to challenge the appointment. Likewise, head of the department complaining the illegalities, manipulations, and extraneous considerations leading to the appointment of a professor in his department was held to be person aggrieved to file the writ[94].

The university Act provides that the Chancellor, the vice-chancellor, members of the court, executive council and academic council would constitute a body corporate in the name of that university which has been given the cloak of legal personality aad the capacity to sue and be sued. Therefore, a writ agsinst his decision can not be dismissed merely on the gound that he himself was not made one of the opposite parties[95]. Though there is no such requirement but in several cases the Chancellor by name has been impleaded as a party[96].

In order to provide relief to the litigants, the High Courts have quashed the decision of the Chancellor, not sustainable in law, by appropriate writs. In many cases, particularly where complicated questions of fact were

89. *AUTA* v. *The Chancellor, Allahabad University*, AIR 1982 All 343, where the teachers association was held to have *locus standi* when the Chancellor exonerated an examinee of charges of unfair means in the examination and several similar examinees demanded reopening of their cases.
90. *S.C. Barat* v. *H.V. Patskar* AIR 1962 MP 73; *Kashi Nath Misra* v. *Allahabad Univeristy*, AIR 1967 All 101.
91. *V.C. Pandey* v. *Chancellor, Allahabad University*, AIR 1998 All. 173.
92. *M. Kiran Babu* v. *Govt of Andhra Pradesh*, AIR 1987 AP 275.
93. *Zaheer Ahmed* v. *Kuladhipati* AIR 1984 M.P. 26.
94. *V.K. Anand* v. *A.D. Sharma* 1989 UPLBEC 238.
95. *Malini* v. *Hansraj* AIR 1979 Bom. 230.
96. *N.P. Srivastava* v. *H.V. Patskar* AIR 1962 M.P. 73; Ishwar Chand v. S.N. Sihna AIR 1972, S.C. 181; *Hargobind Pant* v. *Raghukul Tilak* AIR 1979 S.C. 1109; *U.R. Rao* v. *G.D. Tapase* 1981, UPLBEC309; *Balbir Singh* v. *G.D. Tapase*, AIR 1985 P&H 244.

involved, the matter has been relegated to him for decision in the light of the observations made by the court. The Chancellor's decision is final and binding on the universities and if the same was not given effect to by university authorities, the Allahabad High Court has viewed it seriously and has taken it to be contempt of the authority of the Chancellor[97]. It can also impose exemplary fine in such cases.

Miscellaneous Powers of the Chancellor

The Chancellor is the First officer and a constituent part of a state university. In course of judgments the courts have scrutinized the extent and scope of these express or implied powers of the Chancellor:

(*i*) Power to frame rules

(*ii*) Power to nominate experts for selection committee of teachers

(*iii*) Power to nominate/supersede members in university bodies

(*iv*) Inherent powers

(*v*) Power with regard to affiliation/recognition of colleges

Power to Frame Rule : The university Acts provide the basic frame work with respect to the establishment, constitution and structure of the university and delegate the power to make ancillary rules through the first statutes, ordinances and regulations, However any change in them requires assent from the Chancellor who is obliged under the law to examine their validity and legality before signing them. The regulations are to be reasonable[98] and must pass through the prescribed formalities[99]. However, he will not have the power to issue transitory regulations in violation of the provision of the Act and statutes[100].

Nomination of Experts : So for as power to nominate experts for the selection committee of teacher is concerned, the Chancellor has been termed as an 'expert of experts' and he is free to nominate any one from the list prepared and maintained by him for the purpose but in no case a

97. A.P. Misra v. Chancellor, University of Allahabad (1996) 1 UPLBEC 587.
98. *Rajendra Agriculture University* v. *The Chancellor* 1995 AIEC 131 (Rules not effective without publication); *Thimmiah* v. *University of Mysore*, 1991 AIE C 296 (No amendment without consent); *P.K. Verma* v. *The Nagpur University* 1992 Ed. & Edl. Inst. (vi) 551 (No delegation without consent).
99. *Rajendra Agricultural University* v. *The Chancellor* 1995 AIEC 131 (Rules not effective without publication); *Thimmiah* v. *University of Mysore*, 1991 AIE C 296 (No amendment without consent); *P.K. Verma* v. *The Nagpur University* 1992 Ed. & Edl. Inst (vi) 551 (No delegation without consent).
100. *Nawadah Vidhi Mahavidyalaya* v. *State of Bihar* AIR 1994 Pat 3.

person from different specialization be nominated, otherwise the selection would be void and ineffective[101].

Nomination in University Bodies : The Chancellors have been given the power to nominate certain persons of academic eminence in the executive council and/or other bodies of the university. Some times, the Act itself provides the constituency[102] from which they are to be drawn white in others it is left to the wisdom and discretion of the Chancellor. Since the power of nomination is vested in the highest authority of the university, it could not be presumed that the same would be exercised arbitrarily in the absence of any guidelines[103]. The Chancellor is not obliged to consult the government[104] or the vice-chancellor before making a nomination unless specifically required under the Act.

Inherent and implied Powers : Apart from specific powers enumerated in the Act the Chancellor has inherent and implied powers to make these powers effective and real and to ensure the smooth exercise of those powers. He can restrain the university from making the appointment till further orders[105] and advise the vice-chancellor to place all papers before the executive council so that it may take a final decision regarding grant of affiliation to certain colleges[106] but he himself cannot cancel affiliation[107] or issue transitory provision allowing the student of an unrecognized institution[108] to sit at the examination nor he can direct the university to appoint an unqualified person as a teacher on compassionate grounds[109].

An Evaluation

An attempt has been made to make an appraisal of power, position and role of the Chancellor in the light of decisions given by various High Courts and the Supreme Court of India in exercise of their power of judicial review. Since the law in this regard was very sketchy and unsettled in the beginning, courts filled in the gaps and not only interpreted the legal position in its proper perspective but also evolved, developed , shaped and laid down the correct propositions of law so as to restore pristine glory of

101. *T.N. Singh* v. *Bahagwandin Misra* AIR 1990 S.C. 2063.
102. *M. Thunga Dorai* v. *The Chancellor*, Kerala University AIR 1996 Ker 55.
103. *Naginder Singh* v. *Panjab University* AIR 1990 P & H 157.
104. *Hardwari Lal* v. *G.D. Tapase* AIR 1982 P&H 439.
105. *S.K. Bhalla* v. *H.P. Krishi Vishwavidyalaya* 1950-91 (2) AIEC 17.
106. *Narayan Sahu* v. *V.C. Utkal University* AIR 1988 Ori 106.
107. *Meerut University* v. *Vaish College* (Spl appeal No. 998 of 1968) (Unreported).
108. *Mata Gujri Memorial Medical College* v. *State of Bihar* AIR 1994 Pat. 22.
109. *Patna University* v. *Amita Tewari*, AIR 1997 S.C. 3456.

the institution of Chancellor and to make it efficacious. In this respect courts frequently relied on English cases and conventions.

Governors occupy constitutional status while the Chancellor is the creation of statute. As governor, he is bound by the aid and advice of the council of ministers whereas as Chancellor he is neither required to seek nor is bound by such advice. In due course of time this twin status of the Governor-Chancellor gave rise to clashes and conflicts between the state executive and the personage of the Chancellor . Several Governors have tried to bypass and some times even ignored the advice tendered by the government especially while making appointment of the vice-chancellor and nominating members to the university bodies. While the Chancellor has claimed it to be his prerogative, the government adhered that the office of the Chancellor has been created with a tacit understanding that the Governor is always bound by aid and advice of the council of ministers and that the universities in the states are founded and funded by the government and not by the Chancellor.

Several states have amended their respective Acts and made the advice of the government binding on the Chancellor while appointing the vice-chancellor or nominating members to the different bodies, but these changes have been condemned by those who are sensitive about the autonomy and independence of universities. Indeed as far back as 1950, Dr. S. Radhakrishnan, who later became the President of India, in his celebrated 'Report of the University Education Commission 1950, had this to say;

"Executive control of education by the state has been an important factor in facilitating the maintenance of totalitarian tyranny.. We must resist, in the interests of democracy , the trend towards the governmental domination of the educational process.... Higher education is undoubtedly an obligation of the state but state aid is not to be confused with state control over academic policy and practice., Our universities should be released from the control of politics..."

The governmental control over university education in India was colonial innovation with an imperialist purpose. It was not an innovation conceived in the interest of Indian requirements; or of higher education. The autonomy of the university and the interest of higher education demand that there should be no political interference in the governance of the universities, as also in the appointment of vice-chancellors and in the nominations . The Kothari Commission Report, the recommendations of the committee of the Inter-University Board, Association of Indian Universities and most significantly the Sarkaria Commission Report — all

clearly lay down that the Chancellors should be allowed to function independently and should not be subjected to the advice of the executive. It may be suggested that the Constitution of India be suitably amended and the institution of chancellor be given a constitutional status and his powers as such be incorporated among the discretionary powers already mentioned therein . It will go a long way in making the institution of the Chancellor more pragmatic, dignified, effective and non-debatable.

The judicial review of cases relating to the exercise of *quasi*-judicial power by the Chancellor while deciding a reference reveals that he constitutes a domestic tribunal whose decision is final and would not be ordinarily disturbed by the court. This aspect of the matter has been the subject of repeated high judicial approval.

It could be regarded as a valuable institution in the present set-up and one which ought to be supported and maintained.

However, certain observations require a dispassionate thought before winding up this discussion. The Chancellor's jurisdiction has been treated at par with that of court while determining disputes between litigants. Since the Chancellor is the sole judge of all grievances within his jurisdiction and finality is attached to his decision, courts have been very technical and rigid in exercising their power of judicial review in his territory. The Chancellor has been enjoined to follow the strict judicial approach and technical pleas of *locus standi*, laches, necessary parties, procedural formalities comprising various elements of opportunity of hearing and *res judicata*, etc have been thrust on him as well. It is submitted that his jurisdiction extends in finding the facts and arriving at a decision in the light of various factors affecting the university functioning and its academic discipline. It is a pity that this aspect has not been given as much weight and recognition by courts as it actually deserved. While exercising the powers of judicial review, the courts have been very particular about the illegality, irrationality and procedural impropriety involved in the impugned action and the reasonableness of the action has not received that importance despite the verdict of the apex court that courts should be slow to interfere in matters pertaining to educational institutions.

In England the exclusivity of the visitor's jurisdiction is the rule and courts do not intervene in cases which are cognizable by the visitor unless there is want or excess of jurisdiction or violotion of principles of natural justice. The high courts in India too, have applied the doctrine of exhaustion of alternative remedy in many cases but this has been held to be a rule of policy, propriety and convenience and not a strict rule of law.

It is the result which is material and we have seen that the courts are still conscious of their creative role and are discharging it with vigour, enterprise and dedication. They act quite dispassionately while entertaining writs pertaining to Chancellor's powers. It is submitted that it would not be fruitful to create a university tribunal on the Gujarat model, since our educational law draws greater strength from being part of the ordinary law administered by judges of highest standing and enforced by very effective remedies. However, it would be desirable if the university cases are assigned to one division of the High Court, where the judges especially versed in educational and university matters may decide the cases to the satisfaction of one and all. And now when retired judges of the Supreme Court and High Courts are being appointed to gubernatorial posts, it can be earnestly hoped that the quality of orders emanating from Chancellor's office would improve and those of courts would render more weight to their worth as is the case with the visitor's decision in England where the visitatorial powers are exercised by the Lord Chancellor who in himself is a high judicial authority.

THE WOMEN'S RESERVATION BILL

*Roopa Sharma**

Rarely have we faced such a paradoxical situation. On paper (literally) the pre election manifestos of every political party - the Congress (I), the BJP, the CPI (M) and the Trinamul Congress have promised to reserve a third of the seats for women in State legislatures and National Parliament by a constitutional amendment. And, yet, when the WRB was being sought to be tabled in the Parliament, we witnessed unruly politicians ruggedly tearing it, and shouting it down. After two rounds of raucous rejection, first in 1996 under Deve Gowda and then in 1998 under Vajpayee chances are slim that the WRB will get passed in the present session.

Does this reflect a lack of serious debate on a Constitutional amendment move? Or does the reason lie in the political class's self serving instincts — a case of over 180 MPs in the Lok Sabha facing the prospects of permanently losing their seats to women? Or does the answer lie in Indian society being deeply patriarchal and the decision makers being predominantly male? A study by the National Commission for Women has revealed that when political parties supporting the Bill were in the process of finalizing their list of candidates for contesting the last elections, none was even close to fielding 1/3rd women candidates.[1] Why did such keen supporters of reservation for women in legislatures fail to reserve ticket distribution for women? The answer is that they dare not be politically incorrect enough to say that they do not want it, but they will fight to keep it out anyway because it is against their interests. Our country has such a well entrenched tradition whereby any party or politician who tries to bad mouth women in public or opposes moves in favour of women's equality is strongly disapproved of. Therefore, no party or politician likes to be seen opposing measures that claim to work for women's empowerment, no matter how opposed he personally many be to a particular measure.

WHETHER THE BILL IS A NATURAL COROLLARY OF THE PANCHAYATI RAJ ACT

Women's groups argue that reservation for women in the higher political echelons of power structure is considered a natural corollary to reservation of women in Panchayats and municipalities by the Panchayati

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1. Rashtra Mahila Vol. 3 Oct. 1999, p. 2.

Raj Act 1993. Given such a situation where, despite much skepticism, one million women in the country are holding positions at the Panchayat and Zilla levels and the municipalities and working effectively, the pressure to extend this representation in the State Assemblies and the Parliament is inevitable.

Somewhat like the Mandal Debate the public discourse on this issue has a pro and anti quality. Those against the move have the following tenable arguments :

(1) Reservations are unconstitutional.

(2) Why reservation? Women should not ask for special privileges as they are equally capable to compete with men. They are undemocratic.

(3) Reservations would benefit only the upper and middle class women. The OBC and minority women would remain backward an account of no special reservation for them.

(4) Reservation would usher in the biwi-beti brigade of politicians resulting in proxy control.

(5) Infirmity of the rotational principle.

(6) Why 33%?

Each one of these arguments deserve closer examination.

1. Reservations are Unconstitutional

Article 15 (1) categorically prohibits discrimination on grounds of religion, sex, caste, birth and a host of other factors, but Article 15(3) is vital since it encapsulates a specific constitutional derogation and dilution from the principle of equality by declaring: '*Nothing in this article shall prevent the State from making any special provision for women and children*'. Here, then, is the affirmative, substantial and specific constitutional mandate for reverse discrimination on the grounds of sex, tailored and focussed for the benefit of two disempowered segments of our society viz. women and children.

The insertion of cause (3) of Article 15 in relation to women is by way of recognition of the fact that for centuries women of this country have been economically handicapped. As a result, they are unable to participate in the socio economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) has been placed within Article

between men and women that Article 15(3) has been placed within Article 15. Its object is to strengthen and improve the status of women[2].

It is because of this constitutional protection that reservation for women in Lok Sabha or other elected bodies cannot be challenged as violative of the Constitution and any broad based challenge to the Bill is likely to fail.

2. Reservations are undemocratic

Those who argue that reservations are undemocratic work on this premise that political participation is a voluntary activity which embraces, among other things, the rights to vote, canvass and campaign for elections and also the right to contest an election. If women have made their presence felt in every field they should strive to create a niche for themselves in politics also. These people fail to see the factors that have resulted in the complete marginalisation of women in politics after independence. Prior to our independence, in the 30s and 40s there were more women leaders at all levels in the Congress alone than there are found today in all the parties together. Why were a whole generation of women leaders who were active at the forefront of our freedom struggle denied a substantial presence in Parliament and State Assemblies upon independence specially considering that the social opinion in India has been in favour of women's participation? Upon independence the women's front of the Congress (the Mahila Congress) began to be systematically sidelined as the party was taken over by power hungry politicians who turned it into an instrument of authoritarian rule. Jawahar Lal Nehru who became the first Prime Minister of India was committed to social transformation ,yet he could not free the machinery of governance from the colonial policy of political subjugation and allowed the bureaucracy to maintain its stranglehold over society. The constructive programmes of the Congress Party that evolved under Gandhi's leadership were transformed into the community development programmes run and controlled by bureaucrats. Thus the Nehru era set into motion widespread depoliticisation of our society by snatching away all power and initiative from local communities and providing bureaucrats and party politicians with several vicious levers of control and manipulation. The marginalisation of women in political parties was part of this process. Under this system dedicated social workers and elected representatives could survive only if they appeared before the bureaucracy as groveling supplicants and who entered into a nexus of loot and plunder with them.

2. Gender Just Laws Bulletin. No. 4 Dec. 1988, p. 10.

Indira Gandhi started the practice of nominations by the 'High Command' to party posts as well as distributions of party tickets for elections. At the same time the Congress systematically went about subverting fledgling institutions of democracy at various levels. With decision making bodies getting more and more remote from people's lives due to over centralization of power, the few women who were active in the party were further marginalised. Getting a party ticket was no longer easy for credible self respecting women political workers in villages, districts or cities. It became necessary to be close to power brokers with influence in the Delhi darbar in order to qualify for any post in the party or an opportunity to enter electoral politics which meant seriously jeopardising their reputation[3]. We all agree that most male politicians today insists on personal haziri before they decide to give a seat nomination. As a result, before each election, one comes across women being pushed from one politician's house to another as they try to get a nomination which keeps them in polities. The criteria in giving a ticket is always does she have the funds to fight the elections, is she of a numerically dominant class or caste of particular constituency, will she assert herself ? Many potential women aspirants have complained that lack of money , muscle power and the mafia have prevented party men from giving them the tickets.[4]

The factors that inhibit the entry of women into politics go beyond discrimination against them in the distribution of tickets. The regime of restrictions that most women live under, within their families and communities, their load of domestic responsibilities and lack of financial autonomy (given that very few women inherit or own propefty and most are prevented from even earning an indendent livelihood) make it virtually impossible for them to take an active part in politics even at the neighbourhood level. Therefore, only those few women who have the backing of their families, especially of prominent male members, can hope to gain a foothold in the political world.[5]

Any polity in which violence and crime dominate, women as a group become automatically marginalised - partly out of choice but largely due to the fact that barring exceptions, women cannot afflictively compete with men in gangsterism. Sooner or later they lose out and just as well.

In such a scenario unless a few seats are kept reserved for women, it would be very difficult for them to come into mainstream politics in good numbers.

3. Madhu Kishwar "*Women and Politics : Beyond Quotas*" Economics and Political Weekly, Oct., 1996.
4. Pramila Dandvate "*....like a flower pot in a drawing room*" The Times of India 21.7.96.
5. Madhu Kishwar "*Taking on the Challenge*" The Hindustan Times 16.5.96.

3. The Biwi - Beti Brigade

Another objection held by the anti group is that reservations would result in politicians fielding their wives, daughters and sisters as candidates for the reserved seats.. The objection certainly has substance and deserves to be considered, proceeding as it does on the apprehension that these politicians would use them as their agents of proxy control thereby exercising power without responsibility. If we take a long term view of it, initially, yes, all the gentlemen politicians will fill the quota this way, but eventually this proxy control would be shattered. Proxies do become principles over time. Today the women members are quiet, subservient to the male will, their contribution to the proceedings is minimal, their role in policy making negligible. Reservation will definitely change this situation. As women will get a sense of their own empowerment, they will break out of the mould into which they have been cast by the male politicians. After the Panchayati Raj Act, initially we were saddled with pati-Sarpanches and pati-Pradhans. Six years hence, we now come across women Sarpanches with a larger sense of their power.

4. The Demand for OBC women quota

Another eontention of the anti-reservation group is that since the WRB accepts the reservation of SC/ST women within the 33% that is set aside, it must also accept a cut off %ge for OBC women. They argue that with a blanket reservation, elitist upper caste women will comer all the party tickets; that upper cast men will use this to promote their caste interest, thereby regaining supremacy in Parliament. Like the SC and ST the OBCs are socially dominated and OBC women are patriarchally dominated, OBC women are doubly dominated and thus need a special quota within the 33%. On the same premise the politically correct secularists have launched a demand for a quota for women from the minority community on this reasoning that if OBC women are doubly oppressed women from the minorities are triply oppressed.

This demand by a section of our politicians as a virtual precondition to reservations for women in general is not only incorrect but would allow the use of an unrelated subject to sound the deathknell of the proposed bill itself.

Unlike for SCs and STs, there is no constitutional reservation for OBCs in Lok Sabha or Legislative Assemblies. Though after the Mandal Commission Report, reservation has been extended to OBCs, this is only in respect of employment and admission to educational institutions and not in respect of representative institutions. It was to determine the socially or educationally backward classes of citizens' that the Mandal Commission

was constituted and the commission gave a list of castes and subcastes which are known as the OBCs (Other Backward Classes). The Supreme Court, in the Mandal Commission Judgement[6] (*India Sawhney* vs. *Union of India*[6] has approved reservation for OBCs as permissible under Article 16(4). Though the Supreme Court was dealing with reservation in employment, the fact of the matter is that the Court has accepted the Mandal list as the valid list of OBCs and has also accepted the proposition that the expression backward classes in Article 16(4) would include OBCs. It is therefore possible to argue that reservation for OBCs even in Parliament and Assemblies is permissible.[7]

A strong argument against such reservation is that, in any case, even without reservation there are more than 200 MPs belonging to the OBC in the Lok Sabha and thus their representation is not inadequate. Besides, the issue was never raised at the time of reservation for women at Panchayat level. The vociferous demand of the Yadav faction has been made not to ensure OBC women's representation or participation but to maintain or strengthen the OBC nurnbers in Parliament. Merety because OBCs are recognised as educationally and socially backward, it is not necessary for the Government to provide reservation for them.

Those seeking reservation for religious minorities must look at Article 15(1). Special favours on ground of religion are barred, they are also barred on grounds of sex and caste but the same Article 15(3) and (4) protects reservation for women and SCs and STs. No such protective measure exists on grounds of religion or for religious minorities. Thus, reservation on grounds of religion would be clearly unconstitutional.

In the face of such demands of reservations with in reservations. We must keep in mind the purpose for demanding reservation in representative bodies. The major function of these bodies is to formulate the laws and policies governing the nation and its various sections. Representation to each section is an impossibility as taking it to its logical absurdity, each of more than 4000 castes and subcastes, apart from various other groupings like every dialect, culture and subculture would have to be given representation. This is not just chaotic but totally absurd.

5. Infirmity of the rotational principle

Another argument raised against the bill is the infirmity of the rotational principle. The Bill provides for rotation of the reserved

6. *Indra Sawhney* vs. *Union of India* 1992 (Supp 3) SCC 217.
7. Gender Just Laws Bulletin. No. 4 Dec. 98. p. 10.

determined through a draw of lots.

For SCs and STs, constituencies are reserved on the basis of population proportion. Constituencies with a high SC/ST population are selected for a period of time and are supposed to be delimited after some years. But since the population of women is evenly spread throughout the country, this formula cannot be applied to them. The draw of lots system will mean every time a new set of constituencies will be declared as reserved for women. A change of constituency every five years (and in the contemporary scenario of political instability, possibly for more than every five years) would snap that fundamental link between the electorate and the elected and completely eliminate all incentive and interest in the development nurturing and continued prosperity of the constituency which every representative must have.

6. Why 33% ?

A very strong argument against the move is why 33%? This is a very important' point. 33% is by no means a small figure. Presuming that the Bill gets passed in the coming session, our Parliament would have to accommodate 180 women candidates who may not necessarily have any political experience, who may be semi literate or unaware completely of the awesome task of policy making at the macro level. Doling out such a large percentage of seats to such candidates will definitely bring about a further lowering of our Parliament's standard. The Parliament ought to be a forum for the most seasoned, thoughtful and well informed individuals among us, it is no place for political novices to learn their first lessons in Parliamentary democracy.

In the wake of these arguments, it is suggested that instead of insisting upon 33%, we should give heed to Mulayam Singh's demand for 10% or at the most 15%, reservation and watch the experiment. Besides, it would be impractical to overlook the stand of the Janata Dal, the Samajwadi Party, the Indian Union Muslim League and the Shiv Sena who are jointly opposing the move. We would be shelving it again if we insist upon 33% only.

With a vast segment of our female population already into participatory politics in Panchayats, Blocks and Municipalities, a silent revolution is ushering in rural areas. A strategic shift has already taken place with sharper emphasis on education, health and financial transparency[8]. In a

8. "Empowering Women" Seminar 457 Sep 1997 p. 28.

sharper emphasis on education, health and financial transparency[9]. In a situation where courage comes from numbers, women have been able to find their voice.

To conclude, I'd quote Rabindra Nath Tagors, "At the present stage of history, civilisation is almost masculine, a civilisation of power, in which women have been thrust aside in the shade. The time has arrived when women must step in and impart her life rythm to this rackless movement of power.

9. Usha Narayanan *"Women's Political Empowerment : Imperatives and Challenges"* Mainstream Apr. 1999.

COMPASSIONATE APPOINTMENT (EMPLOYMENT): RIGHT OR SYMPATHY

*Rita Khanna**

I. INTRODUCTION

Appointments in the public services, as a rule, should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Government nor the public authorities are at liberty to follow any other procedure or relax the qualification laid down by the rulers for the posts.[1]

To the abovestated general rule which is to be followed strictly in every case, there are some exceptions carved out in the interest of justice and to meet certain contingencies. One such exception is in favour of dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian considerations, taking into account the fact that unless some assure of livelihood is provided for the family would not be able to make both ends meet, a provision is generally made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment.

Therefore, an appointment given to the dependant of the deceased employee after taking into consideration the suffering or misfortune of the family of the deceased is called compassionate appointment and the whole object of granting compassionate appointment is to enable the family to tide over the sudden crisis. It has been observed by the Supreme Court in *Umesh Kumar Nagpal Case*[2] that the favourable treatment given to such dependant of the deceased employee in lowest posts (i.e. class III and IV) has a rational nexus with the object sought to be achieved. viz relief against destitution.[3]

Many issues have been raised, discussed and decided regarding compassionate appointment by the Supreme Court, resulting in the

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1. *Umesh Kumar Nagpal* v. *State of Haryana* (1994) 4 SCC 138 at 140.
2. *Ibid.*
3. *Ibid.*

development of the legal principles. There issues are:

(1) Is appointment on compassionate ground an exception to the rights under Articles 14 and 16 of the Constitution?

(2) Do such appointees constitute a class in themselves apart from the general appointees?

(3) What kind of rules need to be framed to deal with these compassionate appointments and who is authorised to make such rules.

(4) What is the nature of compassionate appointment? Is it need based? Does it create a right to such appointments?

(5) Does it vest any right in the deceased heir?

(6) Is it an inheritable right irrespective of the services rendered by the deceased employee?

(7) Does the post held by the deceased or the qualification of his dependant has any relevance?

(8) Can it be demanded as a matter of course?

(9) Should the appointment be provided immediately after death or can there be a gap?

(10) Is availability of vacancy necessary for appointing a person on compassionate ground or can the supernumerary post be created to accommodate the applicant?

(11) Can the Court or Administrative Tribunal direct the appointment on compassionate ground?

Many of these questions have been decided by judicial decisions while some still need to be answered. In this paper, the discussion revolves around various judicial pronouncements relating to compassionate appointment, such as (*i*) its constitutional validity; (*ii*) legal principles; (*iii*) exceptions to these legal principle ; (*iv*) its nature; and (*v*) nature of the right.

II. Constitutional Validity

The right to compassionate appointment which is being extended to a dependant of the deceased employee is an exception to the right granted to the citizen under Articles 14 and 16 of the Constitution.[4] It cannot be

4. Article 14 is general equality clause. the Article guarantees to every person the right not to be denied equality before the law or the equal protection of the laws.

disputed that appointment on compassionate ground is an exception to the equality clause under Article 14 of the Constitution and can be upheld if such appointees can be held to form a class by themselves, otherwise any such appointment merely on the ground that the person concerned happens to be a dependant of an ex-employee of the State Government or the Central Government shall be violative of Articles 14 and 16 of the Constitution. The claim to compassionate appointment has been upheld as reasonable and permissible on the touchstone of Articles 14 and 16 of the Constitution by taking into consideration the sudden crisis occuring in the family of such employee who has served the state and dies while in service.[5]

The Supreme Court has held that if an employee dies while in service then according to rules framed by the Central Government or the State Government to appoint one of the dependants of the deceased employee shall not be violative of Articles 14 and 16 of the Constitution. It is so because it is to mitigate the hardship caused due to the death of the breadearner of the family and sudden misery faced by the members of the family of such employee who had served the Central Government or the State Government.[6]

For the above stated reasons the Supreme Court observed in *Rani Devi's case* that it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16 of the Constitution. And while framing any rule in respect of appointment on compassionate ground the authorities have to be conscious of the fact that this right which is being extended to a dependant of the deceased is an exception to the right granted to the citizen under Articles 14 and 16 of the Constitution. As such, there should be a proper check and balance.[7]

III. Legal Principles

The supreme Court in *Umesh Kumar Nagpal*[8] and various other cases has laid down certain legal principles to guide the public authorities in

Article 16 is an instance of the general rule of equality before law laid down in Article 14 and of the prohibition of discrimination in Article 15 (i) with respect to the opportunity for appointment or employment to any office under the State. It states that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

5. *State of Haryana* v. *Rani Devi*, AIR 1996 SC 2445 at 2446.
6. *Ibid.*
7. *Ibid.*
8. *Supra* note 1.

offering appointment on compassionate ground, The following are the factors which should guide the public authorities while giving appointment in public services on Compassionate ground:

1. *Financial condition of the Family* : Mere death of an employee in harness doesn't entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.[9]

2. *Lowest posts can be offered for Compassionate appointment* : The posts in classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate ground, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose, It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him. It also takes cognisance of the legitimate expectation, and the change in the status and affairs of the family which are suddenly upturned.[10]

3. *Compassionate appointments not to be made routinely* : It is legally impermissible to demand compassionate appointment as a matter of course.[11] The Supreme Court both in *Umesh Kumar Nagpal's Case*[12] and the *Hindustan Aeronautics Ltd. Case*[13] had observed that the decision in *Sushma Gosain Case* has been misinterpreted to the point of distortion and that the decision does not justify compassionate appointment as a matter of course. At the time when Mrs. Sushma

9. *Ibid.*
10. *Ibid.*
11. *Ibid.*
12. *Ibid.*
13. *Hindustan Aeronautics Ltd.* v. *A.Radhika Thirumalai* AIR 1997 SC 123.

Gosain applied for appointment on compassionate ground she had then a right to have her case considered under the Government Memorandum. She passed the trade test and the interview conducted by the Department of Direetor General Border Road (DGBR). Later on, a notification was issued by the Central Government which prohibited the appointment of ladies in the establishment. Having these facts in the consideration the Supreme Court held that there was absolutely no reason to make Sushma Gosain to wait till 1986 when the ban on appointment of ladies was imposed. According to the Supreme Court the denial of appointment was arbitrary and could not be supported in any view of the matter.[14]

4. *Compassionate appointment within reasonable time*: The compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules because the consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate appointment or employment cannot be offered or claimed after lapse of long time and after the crisis is over.[15]

5. *Relevance of post held by deceased/qualification of the dependant:* The only ground which can justify compassionate employment or appointment is the penurious condition of the deceased family. Neither the qualifications of his dependant nor the post which he held is relevant. If the dependant of the deceased employee finds it below his dignity to accept the post offered, he is free not to do so. The post is not offered to cater to his status but to see the family through the economic calamity. Any exception to provide compassionate employment or appointment in class II post on the spacious ground that the person concerned had technical qualifications such as M.B.B.S., B.E., B.Tech. etc. according to the Supreme Court, is illegal, since it is contrary to the object of making exception to the general rule of appointment.[16]

6. *Rules to be made for compassionate appointment*: The provisions for copassionate appointment or employment have necessarily to be made by the rules[17] or by the executive instructions issued by the

14. *Smt. Sushma Gosain and others* v. *Union of India and others*, AIR 1989 SC 1976.
15. *Supra* note 1 at 141-142.
16. *Id.* at 141.
17. And the courts should direct the consideration of the claim of the dependant of the deceased in accordance with rules. It was observed by the Supreme Court in *State of Haryana* v. *Naresh Kunar Bali* (1994)4 SCC 448.

Government or the public authority concerned. And the employment cannot be offered by an individual functionary on an adhoc basis.[18] As the appointment is for a specific purpose therefore there should be a proper check and balance.

7. *Right to compassionate appointment dependent on the nature of service rendered by the deceased*: The Supreme Court in *Rani Devi's Case*[19] had observed that if the scheme regarding appointment on compassionate ground is extended to all sorts of casual, adhoc employees including those who are working as apprentices, then such scheme cannot be justified on constitutional ground. It need not be pointed out that appointments on compassionate ground are made as a matter of course, without requiring the person concerned to face any selection committee. While considering the case of two widows for compassionate employment, the Supreme Court looked into the Punjab Civil Services Rules. The husbands of the Widows (two respondents) had been appointed on adhoc basis as Apprentice Canal Patwaris. The expression "employee" according to the Punjab Service Rules does not conceive casual or purely adhoc employee or those who are working as apprentices. The right to compassionate appointment (employment) is not the right of inheritance irrespective of the nature of services rendered by the deceased employee.[20]

8. *Restrictive power of High Courts/Administrative Tribunals regarding matters of compassionate appointment*: To avoid the directions of appointment on compassionate ground by judicial authorities, the Supreme Court has laid down the law in this regard in *Asha Ramchandra Ambekar's Case*.[21] It has been held by the Supreme Court that the High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic consideration. It is true that there may be pitiable situations but on that score, the statutory provisions cannot be put aside. There may be other cases waiting already for appointment on compassionate grounds, they may be even harder than that of the case before the court.

   The High Court and the Administrative Tribunals have restrictive power over the appointment of the dependant of the deceased employee on compassionate ground. According to the Supreme Court the

18. *Supra* note 1 at 142.
19. *Supra* note 5.
20. *Ibid.*
21. *Life Insurance Corporation of India* v. *Asha Ramchandra Ambekar*. AIR 1994 SC 2148 at 2150.

High Courts and the Tribunals can direct for the consideration of the claim of the deceased dependant in accordance with the rules. They cannot direct the appointment. To straight away directing the appointment would only put the appellant authority in piquant situation. The disobedience of this direction will entail contempt notwithstanding the fact that the appointment may not be warranted.[22] No mandamus can be issued directing to do a thing forbidden by law.

Judicial review is directed against the decision-making process and not against the decision itself and it is no part of the court's duty to exercise the power of the authorities itself. The direction of appointment does not fall within the scope of mandamus.[23]

9. *Availability of Vacancy*: One cannot insist of employment on regular, contract or part time basis, if there is no vacancy available. The Supreme Court observed in *Himachal Road Transport Corporation* case that it will be a gross abuse of the powers of a public authority to appoint persons when vacancies are not available. If persons are so appointed and paid salaries, it will be a mere misuse of public funds, which is totally unauthorised. In such cases the Tribunal should only direct the appropriate authority to consider the case of the particular applicant, in the light of the relevant rules and subject to the availability of the post. The Tribunal should not direct either the appointment of any person to a post or direct the concerned authorities to create a Supernumerary post and then appoint a person to such a post.[24]

   The Supreme Court supported the abovestated decision in *Hindustan Aeronautics Ltd. Case* where the appellant (Public Undertaking) made the rules for the appointment on compassionate ground and it was laid down in the rules that the General Managers are empowered to effect such appointment depending upon availability of vacancies in the respective staffing cadre/authorization.

   The respondent submitted an application for appointment on compassionate grounds. The name of the respondent was put on the

22. *Id.* at 2151.
23. *State of Haryana* v. *Naresh Kumar Bali* (1994) 4 SCC 448 at 453.
24. *Himachal Road Transport Corporation* v. *Dinesh Kumar*, AIR 1996 SC 2226 at 2227-8. The court dealt with two cases where applications had been submitted by the dependants of the deceased employees for appointment on compassionate grounds and both of them were placed on the waiting list. Later one of them was appointed on contract basis but the other was not. The lady approached the Himachal Pardesh Administrative Tribunal and the Tribunal directed the Himachal Road Transport Corporation to appoint both of them as Clerk on *regular basis*. Setting aside the said decision of the Tribunal the court had given abovestated observation.

wait list of candidates who had applied for employment on compassionate ground. Her name was at SI. No. 22 in the said wait list. On account of a ban having been imposed on further appointments in the various units of the appellant, no appointment could be made on compassionate ground.[25] The decision of the Supreme Court seems to be different in these two cases from its earlier decision in *Sushma Gosain's Case*. In *Sushma Gosain's Case*, it had held that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such cases pending for years. If there is no suitable post for appointment supernumenary post should be created to accommodate the applicant.[26]

However, there was a material difference of facts[27] due to which the Supreme Court gave different decisions. In *Hindustan Aeronautics Ltd.* the ban on fresh recruitment was in force when the respondent submitted the application for appointment on compassionate ground whereas in *Sushma Gosain's case* ban on recruitment of ladies was imposed after the submission of application and the clearance of written test and the interview. At the time of submission of the application she had a right to have her case considered for appointment

25. *Supra* note 13.
26. *Supra* note 14.
27. Facts of *Sushma Gosain* v. *UOI* AIR 1989 SC 1976 :
Sushma Gosain's husband was working as storekeeper in the Department of Director General Border Road (DGBR). In October 1982, he died in harness leaving behind his widow Susham Gosain and their minor children. In November 1982 Sushma Gosain sought appointment in DGBR as Lower Division Clerk on compassionate grounds. In January 1983, she passed the trade test (written test) and the interview. But she was not appointed. In 1985 she filed a writ in the Delhi High Court as she was entitled to appointment in terms of Government Memorandum O.M. No.14034/1/77 Estt. (d) dated 25.11.1978 issued by the Ministry of Home Affairs. DGBR relied upon the notification dated January 25, 1985 issued by the Central Government under Sub-Section (1) and (4) of Section 4 of the Army Act, 1950 whereby the appointment of ladies in the establishment became prohibited and the department wanted Sushma Gosain to nominate a male member of the family. But her son was a minor. High Court dismissed the Writ Petition as she did not Provide the name of a male relation to whom employment could be given.
On the abouestated facts the Supreme Court decided that Sushma Gosain made an application in November 1982 and at that time she had a right to have her case considered for compassionate appointment under the aforesaid Government Memorandum. She passed the trade test and the interview conducted by DGBR. There was also no reason to make her wait till 1985 when the ban on appointment of ladies was imposed.

on compassionate ground under the Government memorandum.

10. *Gainful employment of one of the members of the family*: Appointment on compassionate ground can be refused if one of the members of the family is gainfully employed. The rules and regulations framed by the Central, State Govts. and the other appointing authorities are relevant in this regard. In *Asharam Chandra Ambekar's* [28] case the respondent's application for appointment on compassionate ground was rejected by the Life Insurance Corporation. The Regulations of the Corporation did not contemplate appointment on compassionate grounds when one of the members of the deceased family was gainfully employed.[29] The order of the Corporation was justified by the Supreme Court as the Corporation acted bonafide and rejected the application of the respondent on the basis of regulation made for appointment on compassionate ground.

But a person's case may be considered for compassionate appointment ever if one of the members of the family is gainfully employed provided the rules and regulations contemplate such an appointment. In *M.C.D.* v. *Bhori Lal & ANR*[30] Bhori Lal's application for appointment on compassionate ground was rejected by the M.C.D. The Corporation based its decision on Government of India's Instructions 1980, adopted by the Corporation. According to the Instructions if no other member of the family was earning then only the employment was to be provided. The Delhi High Court directed the M.C.D. to consider the application of Sh. Bhori Lal taking into consideration all the relevant factors given under Part E "Eligibility Criterion", Govt. of India Instruction, 1987. Part E provides the "Eligibility Criterion" as "In deserving cases where there is an earning member in the Family a son/daughter/near relative of the deceased Government Servant, leaving his family in distress may be considered for appointment with the prior approval of the Secretary of the Department concerned who before approving the appointment will satisfy himself that the grant of concession is justified having regard to the number of dependants, the assets and liabilities left by the deceased Government Servant, the income of the earning member as also his liabilities including the fact that the earning member is residing with the family of the deceased Government Servant and whether he should not be a source of support

28. *Supra* note 21.
29. *Id.* at 2149. Clause 4 of Circular No. 2D/636/ASP/87 issued by the Central Office of the Corporation on January 20, 1987. Clause 4 is as under: Where any member of the family is employed no appointment may be made on compassionate grounds.
30. 81 (1999) DLT 61.

to the other members of the family". [31] Therefore, according to the "Eligibility Criterion" the balancing of the overall financial condition and the needs of the family is important.

11. *Compassionate appointments is need based*: Although the basis of the compassionate appointments is need, but it is given strictly according to the rules and regulations framed for the purpose of appointment. The Supreme Court has observed in *Asha Ramchandra's case*[32] that disregardful of law, however hard the case may be, it should never be done. There may be other cases waiting already for appointment on compassionate grounds, they may even be harder than that of the applicant. In *Himachal Road Transpoet Corp.* v. *Dinesh Kumar*,[33] the respondent Mrs. Parveen Kumari submitted application seeking employment under kith and kin policy, The Corporation settled the monetary compensation due to the deceased by way of family pension, gratuity, provident fund, leave encashment etc. Under the Scheme of appointment of kith and kins of deceased, the Corporation took a lenient view and approved the case of the respondent for employment for the post of Clerk, but her name was included in the waiting panel (of kith and kin policy) at serial No. 45. Since there were only limited posts the corporation was not in a position to accommodate all of them in the permanent post. As many as 35 candidates in waiting panel were absorbed on contract basis. Since there was not vacancy and her place was number 10 in the waiting list for being appointed even on part-time basis, she had to wait. The Supreme Court held that as and when vacancies arise for appointment to such posts, the Corporation shall conform to the priorities mentioned in the matter of filling up the posts, subject to the fulfillment of necessary qualifications by the candidates concerned.

4. Conclusion

From the above discussion, it is apparent that the question of appointment of one of the dependants of an employee of the State or Central Government who dies while in service has of late assumed importance. Many controversies arising due to differences in opinions of various High Courts have been decided by the Supreme Court. On the basis of these

31. Office Memorandum dated 30.6.1987 issued by the Govt. of India, Ministry of Personnel: Public Grievances and Pensisons, Department of Personnel and Training which lays instructions for compassionate appointment of son/daughter/near relative of deceased Govt. employee.
32. *Supra* note 21 at 2150, 2151.
33. *Supra* note 24 at 2227, 2228.

decisions the concluding remarks regarding the nature of the right of compassionate appointment can be made as under:

(*a*) The right to compassionate appointment is an exception to the right granted to the citizens under Articles 14 and 16 of the Constitution.

(*b*) The right to compassionate appointment is not a vested right and cannot be demanded as a matter of course.

(*c*) The right to compassionate appointment is not an inheritable right.

(*d*) Mere death of an employee in harness does not entitle his family to demand compassionate appointment. The financial condition of the family has also to be examined.

(*e*) An appointment on compassionate ground has to be made in accordance with the relevant rules and guidelines that have been framed by the concerned authority and no person can claim appointment on compassionate grounds in disregard of such rules or such guidelines.

(*f*) The High Courts and the Administrative Tribunals cannot issue directions on sympathetic considerations to make appointments on compassionate grounds. They can only direct the consideration of the case of the applicant in accordance with rules and regulations.

In the end one can conclude that right to compassionate appointment is not an absolute personal right of the dependant of the deceased employee. Any such right for appointment on compassionate grounds flows on the basis of rules, regulations or some administrative order issued in the form of office memorandum and no person can claim appointment on compassionate grounds in disregard of such rules and regulations. The object of providing such employment is to provide relief against destitution; therefore, this right can be called conditional sympathetic right.

THE PROBLEM OF ADMINISTRATION OF ACQUIRED TERRITORIES IN THE INDIAN UNION AFTER THE CONSTITUTION (SEVENTH AMENDMENT) ACT, 1956 : AN AVOIDABLE CONSTITUTIONAL LACUNA

*B Errabbi**

It is submitted, at the outset, that the Constitution (Seventh Amendment) Act, 1956 has left an unintended lacuna in the constitutional scheme meant for the administration of foreign acquired territories in the Indian Union. It may be noted that before this amendment was effected to the Indian Constitution in 1956, the territory of India, that is Bharat, comprised States and territories thereof as specified in Parts A, B and C as well as the territories specified in Part D of the Ist Schedule to the Constitution of India and such other territories as may be acquired by the Government of India in future.[1] While Part A included all the British Indian Provinces, Parts B and C embodied the Native Princely States and the Chief Commissioners Provinces (i.e., territories administrated by the President through Chief Commissioners) respectively. Part D of the Ist Schedule contained Andaman and Nicobar Istands. The Constitution (Seventh Amendment) Act, 1956 abolished the distinction between Parts A, B and C States as well as Part D territories and replaced it by a distinction between States and Union territories specified in the Ist Schedule to the Constitution. This amendment also deleted Article 243[2] which provided a provision for the administration

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1. Article 1 of the Indian Constitution before if was amended by the Constitution (Seventh Amendment) Art, 1956 read as follows :
   "(1) India, that is Bharat, shall be union of States.
   (2) The States and the territories thereof shall be States and their territories specified in Parts A, B and C of the First Schedule.
   (3) The territories of India shall comprise —
   (a) the territories of States;
   (b) the territories specified in Part D of the First Schedule
   (c) Such other territories as may be acquired.
2. Article 243(1) before it was deleted from the Constitution read:
   "(1) Any territory specified in Part D of the First Schedule and any other territory comprised with in the territory of India but not specified in that Schedule shall be administered by the President acting, to such extent as be thinks fit, through a Chief Commissioner or authority to be appointed by him."

of Part D territories and other acquired territories which became a part of Indian territory and which had not been specified in the First Schedule to the Indian Constitution. After its deletion from the Constitution, there is no provision in the Indian Constitution which can take care of the administration of the acquired territories which have not been specified in the first schedule of the Constitution. It is submitted that it is a serious lacuna which needs to be removed.

It may be appreciated that under international law, India, as a sovereign nation, has two sovereign rights which are : (1) the right to acquire foreign territories and (2) the right to code a part of its own territory to a foreign nation. Therefore, India, as a sovereign country, has a right to acquire a foreign territory under international law. This is not a constitutional right given to the Indian Government under Article 1(3) (c)[3] which has been judicially held not a source of power to acquire foreign territories but a source of a formal provision for an automatic absorption, into the Indian territory, of the acquired foreign territories.[4] India, as a sovereign country, therefore, continues to enjoy this right to acquire foreign territories. Again, under international law, acquisition of territories can be effected by various methods,[5] one of them being by way of transfer under a treaty of cession which involves several procedural steps. According to this process, the territory which is intended to be transferred is first given by a *defacto* transfer and this is followed by a *dejure* transfer under the treaty of cession after its conclusion and ratification by both the parties. If India seeks to acquire a foreign territory it has to go through all these processes.

It may also be appreciated that so long as the territory meant to be given is not transferred *de jure* under the treaty of cession after its ratification by both the parties, the territory which India, as a sovereign nation, seeks to acquire does not became acquired as contemplated under Article 1(3)(c) of the Indian Constitution and thus, does not became factually a part of Indian territory. It remains to be a foreign territory though administered by the Indian Government under sections 3[6] and 4[7] of the Foreign Jurisdiction

3. See *supra* note 1.
4. In re Berubari Union and Exchange of Enclaves, A.I.R. 1960 S.C. 845, at p. 856.
5. The traditional methods of acquisition of territory under international law are : (1) occupation, 2) accretion, (3) cession, (4) annexation and (5) preseription.
6. Section 3 of the Foreign Jurisdiction Act, 1947 reads:
   "(1) It shall be lawful for the Central Government to exercise foreign jurisdiction in such manner as it thinks fit.
   (2) The Central Government may delegate any such jurisdiction as above said to any officer or authority in such manner and to such extent as it thinks fit"
7. Section 4 of the Foreign Jurisdiction Act, 1947 reads :
   "(1) The Central Government may, by notification in the Official Gazette, make such orders

Act, 1947. It is only when the territory is transferred *de jure*, it becomes acquired territory within the contemplation of Article 1(3)(c) of the Indian Constitution and consequently, these provisions of the Foreign Jurisdiction Act, 1947 cease to be applicable.[8]

The important questions, in this context are : what happens to this territory after it becomes absorbed as part of Indian territory under Article 1(3)(c)? Who will administer this territory? It there any provision in the Indian Constitution to take care of its administration? Of course, one course open to the Government of India is to make the acquired territory a new State under Article 2[9] or to add this territory to the territory of an existing State in the Indian Union under Article3[10] (a) (b) of the Indian Constitution by initiating the necessary and appropriate legislative process envisaged under these provisions. However, this process being time consuming, there may be a long time gap between the time of the acquisition of the territory and its formation as a new state under Article 2 or its merger with the territory of an existing state under Article 3(a) and (b) of the Indian Constitution. That being the position, the crucial question is : is there a provision in the Constitution to take care of its administration during the interregnum? Unfortunately, the answer to this question is in the negative. It is submitted that this is the constitutional lacuna which has been created by the enactment of the Constitution (seventh Amendment) Act, 1956. It may be mentioned that prior to this amendment the Indian Constitution contained Article 243[11] which took care of this situation. Since its deletion from the Constitution in 1956 by the 7th Constitution Amendment there is no provision in the Constitution

as may seem to it expedient for the exercise of any foreign jurisdiction of the Central Government.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), any order made under that sub-section may provide—

(a) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force in any state or otherwise;

(b) for determining the persons who are to exercise jurisdiction, either generally or particular cases or classes of cases and the powers to be exercised by them ...."

8. This was the procedure followed when the territory of Chandranagore was acquired from France in 1952.
9. Article 2 of the Indian Constitution reads:
"Parliament may by law admit into the Union, or establish, new states on such terms and conditions as it thinks fit.
10. Article 3 of the Indian Constitution declares:
"Parliament may by law —
(a) form a new state by separation of territory from any state or by uniting two or more states. or parts of states or by uniting any territory to a part of any State;
(b) increase the area of any state; ....."
11. See, *supra* note 3.

to provide for the administration of acquired territories which have become a part of Indian territory and which are awaiting their absorption as a new state or a part of an existing State through appropriate legislative process.

It may be recalled that before the amendment in 1956, the then unamended Article 1(2) declared that the States and the territories thereof shall be as specified in Parts A, B and C of the First Schedule to the Constitution. These expressions, it may be noted, were not defined in the Constitution but were defined by items (58) and (41) section 3[12] of the General Clauses Act, 1897 which is made applicable under Article 367(1)[13] for the interpretation of the constitutional provisions. Pursuant to his power under Article 372(2)[14] of the Constitution, the President of India issued the Adaptation of Laws Order, 1950 which amended section 3 of the General Clauses Act, 1897 and added items 58 and 41 to it. Thus, section 3(58) of the General Clauses Act defined "State" as Part A state, Part B state and Part C State. Section 3(41), *inter alia,* defined, Part C State as a State for the time being specified in Part C of the First Schedule to the Constitution or a territory for the time being administered by the President under the provisions of Article 243 of the Constitution. This takes us to the scope of the then Article 243[16] which authorised the President of India to administer the acquired territories through chief commissioner or other authority to be appointed by him alongwith Part D territories. While the Indian Constitution no longer recognised the category of Part D Territories, it continues to provide for the factual absoption of acquired foreign territies into the territory of the Indian Union. However, with the deletion of Article 243 from the Constitution, there is no constitutional provision providing for the administration of acquired territories although they become factually a part of the territory of the Indian Union. This, it is submitted, is a serious constitutional lacuna which needs to be addressed by a suitable constitutional amendment.

12. See section 3 (58) and (41) of the General Clauses Art, 1897.
13. Article 367(1) states :
"Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies to the interpretation of an Act of the Legislature of the Dominion of India."
14. Article 372(2) stipulates:
"For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law."

THE APPLICATION OF INTERNATIONAL LAW BY DOMESTIC COURTS — AN INDIAN PERSPECTIVE

*Promod Nair**

Branded in one era as non-existent,[1] international law is exalted in the next era as the last hope of the atomic age. In spite of all the vexatiousness and nebulousness surrounding it, there seems to be an emergent inclination among varied legal systems to recognise that international law has a pressing responsibility towards the future—a responsibility which demands that practitioners, theorizers and judges discard antique disputation and take cognisance of the importance of international law in the reality of the modern world. This paper examines an important aspect of the debate— the question as to whether domestic courts should apply international law.

There are many jurists who opine that there is no reason as to why municipal courts should refrain from applying principles of international law. This opinion is premised on the argument that there could be no justification for a State to contract international obligations, and thereafter fail to bring municipal law in consonance with international obligations. An extension of this argument is that it would be futile to contend that it is none of the business of international law to worry about what a State does within its territory as long as it agrees to hold itself responsible for its failure to perform its international obligations. Therefore, according to those subscribing to this point of view, national courts must apply principles of international law.

On the other hand, the reluctance of States to receive international law directly within their respective national jurisdictions may be on account of :

> the uncertainty about the existence as well as interpretation of relevant principles of international law, especially coustomary international law, on any given issue; and possibly

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1. The reference is to the Austinian debate as to whether international law is really law 'properly so called'.

> the freedom they derive to engage in the auto — interpretation of the applicable principle of international law.[2]

While the principle that a State is internationally accountable for its international obligations is unchallenged, the glaring contemporary reality is that international obligations against States are virtually impossible to enforce.

Since a State is bound by its international obligations[3], the question does arise before national organs, especially the courts, whether, and if so, to what extent, such organs are required to give effect within the national sphere to principles of international law. In this regard, the conflicting jurisprudential doctrines of monism and dualism, are often invoked.

The theory of monism proceeds on the postulate of the unity of law and the hierarchical order of legal norms and asserts the supremacy of international law in both the national and international spheres. Therefore, the adherents to this view contend that national courts will have to enforce international laws since they are part of the law of the land. A logical corollary to this principle is that there is no need for a specific legislative incorporation of international legal norms for them to be enforceable within the domestic context and that they take effect *ex proprio vigore*.

On the other hand, the dualist school proclaims that international law and municipal law are separate and self-contained legal systems, that international law has no precedence over national law in the national sphere, and municipal law has primacy over international law in the municipal sphere. Therefore the application of international law within the municipal sphere requires an adoption or transformation of the principles of international law into municipal law.[4] Under the Indian Constitution, as in a host of other Constitutions when compared, international treaties, covenants and conventions are not self-operating in the country; they have to be specifically incorporated in the municipal law for enforcement and implementation. In other words, "international conventional law must go through the process of transformation into municipal law before the international treaty could become an internal law."[5]

2. This is based on the view that international law is impenetrable within national jurisdictions, except to the extent and in the manner expressly stipulated by sovereign States.
3. States are bound by such international obligations which have their consent or acquiescence. As observed by the PCIJ in 1927 in the *Lotus* case, "the rules of law binding upon States emanate from their own free will: 1927 P.C.I.J. Series A, No.9, p.18.
4. It is pertinent to note the both theories share the view that, in the international sphere, international law prevails over domestic law. See, *Greco-Bulgarian "Communities, Advisory Opinion*, 1930 P.C.I.J., Series B, No. 17, 32.
5. *Jolly George Varghese* v. *Bank of Cochin*, AIR 1980 SC 470.

The crux of the transformation theory is clearly expressed in the following speech of Lord Oliver.[6] "Treaties as they are sometimes expressed are not self-executing. Quite simply a treaty is not part of (domestic) law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *respondent inter alia acta* from which they cannot derive rights and by which they cannot be subject to obligations, and it is outside the scope of the Court not only because it is made in the conduct of foreign relations,.... but also because, as a source of rights and obligations, it is irrelevant."

In the common law tradition, international treaties do not automatically become part of the domestic law in India except to the extent that they are legislatively reincarnated as part of the domestic law, although it is settled law that they are an extremely persuasive factor in interpreting municipal laws.

Treaty-Making Under the Indian Constitution

Treaty making under the Indian Constitution is an executive Act. The executive power of the Union, which is co-extensive with the legislative power by virtue of Article 73[7] in the matter of entering into, and implementing of, treaties is derived from the legislative power incorporated in Articles 246 and 253, read with Entry 14 of List I of the VII Schedule. The executive power of the Union is co-extensive with the legislative power of the Union, Subject to the obvious requirement that Executive cannot act against the provisions of a law or cause prejudice to a person except by some legislative authority, and except where the Constitution itself provides that a particular act can be done only by legislation[8], the Union Executive is not debarred from exercising its executive power in the absence of authorising Parliamentary legislation.[9]

However, in exercise of the power conferred by Article 73, the executive authority is not competent to sanction invasion of the rights of

6. *J.H. Rayner Ltd* v. *Department of Trade*, [1989] 3 W.L.R. 969, 1002.
7.
8. Article 260.
9. Article 73 makes it clear that, in respect of any of the matters enumerated in the Concurrent List in the VII Schedule to the Constitution, the Union will not have executive power, unless
   (*a*) the Constitution itself; or
   (*b*) a law made by Parliament expressly provides to that effect. Further, in the absence of any law, the Union or its officers cannot, in exercise of executive authority, infringe the rights of the citizens merely because Parliament has the power to legislate with regard to the subject in respect of which the executive power is exercised. Every act done by the government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority. See, *State of M.P.* v. *Bharat Sigh*, AIR 1967 SC 1170, 1174.

citizens merely because Parliament has the power to legislate in regard to the matter on which the executive order is passed.[10] The executive authority cannot acquire new rights against the citizens merely by concluding treaties.[11] No new offences can be created by a mere treaty, without statutory sanction. No privileges or immunities can be conferred by a treaty without the need of confirmatory legislation if they involve exemption from the operation of local law. The fundamental rights guaranteed by Part III of the Constitution cannot be derogated from, on the ground that such derogation is necessary for the purpose of implementing the treaty obligations of India.[12] The detention of a person under the provisions of a treaty, and without legislative sanction is invalid, since it amounts to a deprivation of liberty without a procedure established by law. Similarly, an extradition treaty can only be carried into effect by an Act of Parliament, for the executive has no power, without statutory authority to decide whether extradition should be granted and, if so, on what terms.[13]

The Implications of Article 253

To understand the scope and extent of the implementation of a treaty, it is necessary to advert to Article 253 of the Constitution which reads as follows "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

This provision, which is in the nature of an enabling provision, confers power on Parliament to enact legislation for giving effect to international agreements. A clear reading of the provision indicates that the *non-obstante* clause that marks the beginning of the Article has the effect of conferring on Parliament an almost unbridled power to legislate on any aspect of the implementation of a treaty irrespective of whether the subject matter of the legislation falls within the ordinary legislative power of state legislature. The legislative aspects of Indian federalism are, thus, collapsed to secure the implementation of any treaty, agreement or convention or any decision at international conference, association or body: In fact, Article 253 was conceived primarily for conferring this power on Parliament.[14] It is not intended to override the other provisions of the

10. *State of M.P.* v. *Bharat Singh*, AIR 1967 SC 1170, 1173-74.
11. *Maganbhi* v. *Union of India*, AIR 1969 SC 783.
12. *Ajaib Singh* v. *State of Punjab*, AIR 1952 Punj. 309, 319.
13. *State of WB* v. *Jugal Kishore*, AIR 1969 SC 1171, 1175.
14. See, *Maganbhai* v. *Union of India*, AIR 1969 SC 783, 795.

Constitution, which impose limitations on the executive or legislative organs of the State. Entry 14 of List I[15] leaves it to Parliament to legislate in respect of treateies. It is, therefore, open to Parliament to impose limitations subject to which, or regulate the manner in which, treaties can be entered into on behalf of India.

While this much is clear, it is also improrlant to take note of a necessary implication of Art. 253, that is, unless the enabling statute envisaged by the provision is passed, the treaty, convention or agreement is incapable of being enforced *ex proprio vigore*. Article 253 does not address itself to the question as to which treaty requires legislative incorporation. A treaty is not law by its own force. The Constitution does not render treaties to which India is a party the law of the land. Consequently, obligations arising from treaties will not be judicially enforceable unless backed by legislation.[16] There is, however, no need to incorporate a treaty into law if its implementation is possible at the adminstrative level and without legislative endorsement.[17].

Treaties may take effect even without incorporating legislation in national legal system, but this is more in relation to the international sphere. There are certain international commitments whereby the committing instrument creates mechanisms of enforcement outside the sphere of the national legal system and operating within the domain of the international legal system. The treaty itself may create the mechanisms for collective institutional enforcement of the commitment including the imposition of

15. Entry 14 of List I reads: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with other countries."
16. *Jolly Verghese* v. *Union of India*, AIR 1980 SC, 70, 474.
17. The National Human Rights Commission is expected to apply principles of international law under The Protection of Human Rights Act, 1993.
Whether a treaty can be implemented by ordinary legislation or by constitutional amendment depends on the provisions of the Constitution itself. *Inre Presidential Reference*, AIR 1960 SC 845, 857. It is clear that treaties involving cession of territory require constitutional amendment since such cession would alter the territory of India under Art.1. *Union of India* v. *Sukumar Sengupta*, AIR 1990 SC 1692, 1704; *Maganbhai* v. *Union of India*, AIR 1969 SC 783.
Futher, treaties whose implementation requires addition to, or alteration of, the provisions of the Constitution may be effected only by means of constitutional amendment. Similarly, a treaty which requires for its execution, an alteration of Indian law or the enactment of a new law requires an act of Parliament. Legislation may be required where the express provisions of the Constitution provides that the act in question cannot be done save by authority of law. For instance, no tax can be collected save by authority of law (Art. 265); no moneys out of the Consolidated Fund shall be appropriated except in accordance with law and for the purposes and in the manner provided for by Articles 266(3) and 114(3); and, no person can be deprived of his property save by authority of law as stipulated in Article 300A.

punitive measures like sanctions. In fact, the UN Charter is based on such a premise. Other treaties may provide for unilateral action either directly or within the framework of prescribed procedures. Only one instance of this is the creation of dispute settlement mechanisms within the WTO. These procedures would come into effect in response to complaints about the failure of treaty commitments. The failure of a supreme legislature to enact legislation within its national legal system may well result in an exercise of sanctions under an international treaty. To quote a concrete illustration, India's failure to provide pipeline protection by granting exclusive marketing rights (EMR's) to foreign registered product patents for medicines and agro-chemicals have precipitated an American invocation of the dispute settlement mechanisms of the WTO.[18] This is also illustrative of executive assent to international commitments having deleterious impact on the entire country.[19]

Thus, as Lord Atkin in *Attorney-General for Canada* v. *Attorney-General for Ontario*.[20], observed: "... (T)here is a well- established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.... the stipulations of a treaty duly ratified do not....., by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law, they have to run the risk of obtaining the assent of Parliament."

The legal position so pithily put by the Privy Council appears to hold good on a clear reading of the provisions of the Indian Constitution. It is well-established that the provisions of an international treaty to which India is a party do not by themselves have the power of law unless it is incorporated as a law enacted by Parliament.

International Law as a Tool of Interpretation

The true position of law is to be found in one of the earliest decisions on the point in *Maganlal Ishwarlal Patel* v. *Union of India*,[21] wherein the Indian Supreme Court held that "...making of law.... is necessary when [international] treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or

18. Rajeev Dhavan, *Treaties and People: Indian Reflections*, 39 JILI, 1, 19-20 (1997).
19. It is necessary for Parliament to streamline the treaty-making power of the executive. Parliament, by virtue of the power conferred on it under Entry 14 of List I, Schedule VII can lay down the framework for the exercise of treaty-making power.
20. [1937] AC 326.
21. AIR 1969 SC 783.

other which are justifiable are not affected, no legislative measure is needed to give effect to the agreement or treaty." Thus, if the implementation of a treaty affects the rights of individuals, a law is required to give effect to the provisions of the treaty.

It is not strictly necessary that the principles of international law relating to treaty interpretation ought to be incorporated into municipal law before they are to be followed by national courts, for, treaties should be interpreted in the sense in which the parties to it are internationally committed to understand. With respect to interpreting treaty implementing statutes, the Supreme Court has held in a plethora of decisions that "there is a presumption that Parliament does not assume jurisdiction which goes beyond the limits established by the common consent of nations and statues are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with established principles of international law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law."[22]

Thus, the correct application of international law by municipal courts, as a tool of interpretation, would warrant Article 253 being read in conjunction with the Directive Principles.[23] One aspect of the Directive Principles[24] concerns the pursuit of peace and friendly international relations. This aspect, embodied in Article 51 has a bearing on the interpretation of Indian laws and the Constitution irrespective of whether the international law norms reflected in the general multilateral treaties have been incorporated into the Indian legal system or not. Article 51[25] is

22. *V/O Tractorexport* v. *Tarapore*, AIR 1971 SC 18; *Gramophone Co.* v. *Birendra Pandey*, AIR 1984 SC 667, 671; *Jolly Varghese* v. *Bank of Cochin*, AIR 1980 SC 470, 473.
23. These principles although not justifiable in a court of law are 'nevertheless fundamental in the governance of the nation' as per Article 37 of the Constitution. While in the early years of constitutional interpretation, Part IV of the paramount parchment was only considered to be aspirational declarations, after the *Basic Structure case* [(1973)4 SCC 225] this chapter has been given greater importance, both in terms of interpreting the Constitution and other laws as well as in using these Principles as an important source for reading substantive rights by incorporation in to the fundamental rights, especially Art. 21.
24. It is interesting to note that the original inspiration for making a distinction between justifiable fundamental rights and non-justiciable Directive Principles came from the international lawyer, Hersch Lauterpacht. *See*, Lautherpacht, *International Bill of the Rights of Man* (1945); Shiva Rao, The *Framing of India's Constitution* Vol.1 33 (1966).
25. Art. 51(c) obligates the State to foster respect for "international law and treaty obligations" in inter-state relations. The distinction drawn in the Article between international law and treaty obligations is unnecessary since treaties are nothing but an integral source of international law.

designed to serve the courts as a guide to interpretation of international agreements. It articulates India's attitude towards international law, but since it occurs in Part IV of the Constitution, is often dismissed as hortatory, However, it is necessary to dispel this misconception. Part IV of the Constitution, as states by Article 37, "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

In fact, the legislative history of Part IV clearly indicate, in unequivocal terms, its sacrosanct nature. As the Chairman of the Drafting Committee said: "It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles enacted in this part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the courtry."[26] In this context the observation of Chinappa Reddy, J., is relevant which is:

"The mandate of Article 37... is that while (they) shall not be enforceable by any Court, the principles are 'nevertheless fundamental in the governance of the country' and 'it shall be the duty of the State to apply these principles in making laws.' Addressed to courts, what the injunction means is that while courts are not free to direct the making of legislation, courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the constitution must ever be present in the minds of judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy... it follows (from Art. 37) that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. The Directive Principles should serve the courts as a code of interpretation."[27]

The Supreme Court observed that, when it was the Constitution which was being expounded, the expositor was to concern itself not with words and mere words, but as much, with the philosophy or "the spirit and the sense" of the Constitution, instead of the "austerity of tabulated legalism", and that inspiration and guidance might be sought and found by the expositor in, among other things, the Directive Principles of State Policy.[28]

It is on this rationale that the provisions of Article 51 have been used differently by judges to support juristic attempts to expand the scope of the

26. CAD, Vol. 7, 1948-49 p. 476.
27. *U.P.S.E. Board* v. *Hari Shanker*, AIR 1979 SC 65, 69.
28. *A.B.S.K. Singh* v. *Union of India*, AIR 1981 SC 298, 335.

fundamental rights[29] guaranteed by the Constitution.

There is no specific provision in the Indian Constitution which obliges the State to enforce and implement international treaties and covenants. However, the judicial attitude has been characterised by liberalism, which had led to giving the principle of comity of nations pride of place in interpreting the provisions of the Constitution dealing with matters relating to international law and treaty obligations. While holding that "the Indian courts will not enforce the terms of a treaty unless Parliament makes a law incorporating its provisions", the court also laid down the principle that "in interpreting a statute, the courts would construe it in such a way as to avoid conflict with the principles of international law."[30] Thus, if there is no conflict between international law and domestic law or in cases where two or more constructions of domestic law are applicable, Indian courts can give effect to international law by adopting the rule of harmonious construction.

According to Rajiv Dhavan, treaties are not just used as a *source of interpretation* in respect of the statutes which seek to implement that particular treaty. Under Indian law, treaties are also used as a *source of inspiration* to give meaning to legal rights and obligations within the legal system. The first of such uses consists of interpreting statutes in the light of international treaties. The second use is similar to that of the first in that it entails using human rights in the fundamental rights chapter of the Indian Constitution.[31]

The fundamental principle in treaty- implementing statutes is to be found in the decision of the Supreme Court in the *Tractor export Case*,[32] wherein it stated: "Once Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity..., they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol .... becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred."

29 The earlier judgements of the courts were unequivocal in stating that the clear provisions of the municipal law were to prevail: *Jolly George Varghese* v. *Bank of Cochin*, AIR 1980 SC 470; *Gramophone Company* v. *Birendra*, AIR 1984 SC 667.

30. *Gramophone Company* v. *Birendra*, AIR 1984 SC 667.

31. Rajeev Dhavan, *Treaties and People: Indian Reflections*, 39 JILI 1, 31 (1997).

32. AIR 1971 SC 1.

When there is a clear conflict between the law of India and a treaty, it is the national law that will prevail.[33] However, creative interpretation has lent itself to judges making fine distinctions to further purposive interpretation. Krishna Iyer, J. in a decision of the Kerala High Court, *Xavier* v. *Canara Bank Ltd.*[34], was influenced by Article 11 of the International Covenent on Civil and Political Rights, 1966, in interpreting the CPC to minimise imprisonment for non-payment of civil debts. But at the same time, he also emphasised that international treaties cannot override the law of the land to do away with such imprisonment altogether. "(International) resolutions and covenants mirror the conscience of mankind and insominate, within the member—States progressive legislation; but till that last step of actual enactment of law takes place, the citizen in a world of sovereign States has only inchoate rights in the domestic courts under these international covenants."[35]

Dealing with a similar situation in the Supreme Court, Krishna Iyer, J., re-emphasised that until, the municipal law was changed to accommodate the covenant, Indian municipal law would prevail.[36] Again, in *Gramophone Company* v. *Birendra*,[37] a case concerning the issue whether goods transiting through Calcutta to Nepal came under the Indian intellectual property regime, the Supreme Court reiterated the supremacy of municipal law within the Indian legal system but found substance in support of giving copyright protection to transiting goods from the Copyright Conventions and the Convention on Transit Trade of Land Locked States. Thus, while international conventions and international law, in general may be used for the purpose of statutory interpretation they are not necessarily credited without overriding infulence.[38]

In *Kesavananda Bharathi* v. *State of Kerala*,[39] Sikri, C.L., while referring to the provisions of the UN Charter on human rights, observed: "in view of Art. 51 of the directive principles, this Court must interpret

33. *Gramophone Company* v. *Birendra*, AIR 1984 SC 667; *Jolly George Varghese* v. *Bank of Cochin*, AIR 1980 SC 470.

34. (1969) K.L.T. 927.

35. (1969) K.L.T. 927.

36. *Jolly George Varghese* v. *Bank of Cochin*, AIR 1980 SC 470.

37. AIR 1984 SC 667.

38. The fact that there exists a norm of international law to a certain effect does not override the Indian purpose for which the legislation is enacted. This fact assumes greater importance in the context of multilateral treaties like the GATT which do not declare universal values, but simply devises arrangements so that signatory Statts can trade and inter-act with each other. Therefore, India's institutions of constitutional governance are free to give treaties a restrictive interpretation if the context and the purpose of the law which gives effect to them and the Constitution generally requires such an interpretation in the public interest.

39. AIR 1973 SC 1461, 1510.

languages of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

In *A.D.M. Jabalpur* v. *Shivakant Shukla*,[40] Khanna, J., in his minority judgement held that, while dealing with the provision of the Constitution, the Court should adopt such a construction as would, if possible, not bring it in conflict with the provisions of international law. In *Kubic Dariusz* v. *Union of India*,[41] the Supreme Court held that, "it is generally a well-recognised principle in the national legal system that in the event of doubt the national rule is to be interpreted in accordance with the State's international obligations.... there is need for harmonisation whenever possible bearing in mind the spirit of the covenants." However, the subsequent statement of the court is problematic when it said that the fundamental rights guaranteed under our Constitution were in conformity with the UDHR, ICCPR and the ICESCR. Although, there are many commonalities between the rights guaranteed by these international instruments and the Indian Constitution, it was inappropriate for the court to generalise and make a sweeping statement that the fundamental rights under the Constitution corresponded to the international instruments.

In *Mackinnon Mackenzie* v. *Audrey D'Costa*,[42] the Supreme Court considered the case of a lady stenographer who complained that she and other women stenographers who were in the service of a company were being paid lower emoluments than their male counterparts. The court considered the fact that India was a party to the International Convention concerning Equal Remuneration for Men and Women for work of Equal Value[43], and adopted a principle adopted therein to construe a law enacted by the Parliament, namely, the Equal Protection Act, 1976 to grant relief to the petitioner by holding the action of the employer to be an *unconstitutional*[44] violation of the principle of equal pay for equal work.

In *Sheela Barse* v. *Secretary, Children's Aid Society*,[45] the petitioner complained about the state of affairs in an observation home for children.

40. AIR 1976 SC 1207, 1260.
41. AIR 1990 SC 605.
42. (1987) 2 SCC 469.
43. In short, the Equal Remuneration Convention, 1951.
44. It is pertinent to note the use of word 'unconstitutional' which clearly indicates that although norms embodied in the international covenant were violated, the court only used these norms as supplementary aids in constitutional interpretation. The necessary implication of this is that violation of international conventions *per se* do not empower the courts to grant relief: there is need for a rule for municipal law to be violated as well.
45. (1987) 3 SCC 50, 54.

While issuing directions to the State of Maharashtra, the Supreme Court held that the conventions which had been ratified by India, and elucidate norms for the protection of children, cast an obligation on the State to implement their principles.[46] Thus, the Court in *Sheela Barse*, in a break from earlier judgements, came to the conclusion that treaties, even if unincorporated into national law, has binding effect.

In *C.E.S.C. Limited* v. *Subhash Chandra Bose*,[47] the minority judgement observed that in the light of Articles 22 to 25 of the UDHR and the ICESCR read with the principle of socio-economic justice assured in our Constitution, right to health is a fundamental human right to workmen. Thus, although the above-mentioned international legal instruments are not direct sources of legal rights and obligations within the municipal sphere, they are nevertheless vital aids in illuminating the scope and extent of Constitutional provisions to meet contemporary realities. The Supreme Court has thus forged new tools and methods to enlarge the range and meaning of the fundamental rights, which has resulted in a burgeoning human rights jurisprudence. In fact, the apex court has declared this to be its task.[49] It is heartening to note that the courts, committed as they are to advancing the human rights jurisprudence, have come to interpret the constitutional provisions on fundamental rights more broadly in the light of international instruments on human rights.

Treaties dealing with human rights are even more important in interpreting domestic laws. In *Keshavananda Bharati* v. *State of Kerala*,[49] it was held that even thought the Constitution does not explicitly provide for the implementation of certain principles of human rights, the constituitonal obligation of the judiciary to enforce these fundamental human rights may lead to it applying principles of international law, not as a source of law as such, but rather as a rule of interpretation that is to be utilised in progressively interpreting constitutional guarantees.

International Law and Domestic Non-Liquet

Non-liquet refers to a situation of the absence of legal rules to cover a certain situation. The question would then arise as to whether international

46. However, other decisions have held that if Parliament does not enact law, courts cannot compel Parliament to make such a law, and that, in the absence of such law, they cannot also enforce obedience of the Executive authority to the treaty obligations. *CRV Committee* v. *Union of India*, AIR 1983 Kant. 85,87.
It is submitted that this view is to be preferred as it is based on the clear implication of Article 253, as also , the principle of separation of powers.
47. AIR 1992 SC 573,585.
48. *Ajay Hasia* v. *Khalid Mujib*, AIR 1981 SC 487, 493.
49. (1973) 4 SCC 225.

law can be used to rectify the situation. In other words, are Indian courts competent to evolve legal principles to cover cases for which no provision is made either in the Constitution or other Indian statutes?

It is well settled that, in the absence of clear necessity, nothing is to be added to or taken from a statute. As the SC held that "*cases omissus* cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself"[50] , but at the same time, a *casus omissus* should not be readily inferred. The SC has held that, in deciding any case which may not be covered by authority, courts could evolve a new principle founded in public policy.[51]

Courts may apply rules of equity in such circumstances. As was held in *Roshanlal* v. *R.B. Mohan Singh Oberoi* [52], "equity is not anti-law but is a moral dimension of law." All systems of jurisprudence have a mitigating principle or set of principles, by the application of which substantial justice may be attained in particular cases wherein the prescribed or customary forms of ordinary law seem to be inadequate. From the point of view of general jurisprudence, "equity" is the name which is given to feature or aspect for the law in general.[53] While applying various laws, courts can and must ameliorate unwitting rigours inflicted by legalisms, by recourse to principles of equity. Therefore, if in a given situation, principles of equity are reflected in a certain principle of international law, courts may apply the rule, not as a rule of international law, but as a principle of equity.

Recent Developments: A Break From The Past

While in the past, international law was used only as a tool of interpretation, recent judgements of the Supreme Court signal a new trend- the use of international law as a *source of law* by itself.

In *D.K. Basu* v. *State of West Bengal*,[54] the court was faced with the question as to whether Article 19(5) of the ICCPR which provides for payment of compensation to victims of unlawful arrest and detention, could be enforced by the court. The difficultly before the court was that at the time of ratifying the treaty in 1979, the Government of India had made an explicit reservation to the effect that since the Indian legal system did not recognise a right to compensation, that provision would not be enforceable in India. However, in an unprecedented display of judicial

50. *I.T. Commissioner* v. *NTT*, AIR 1980 SC 485,489; *Sub-Committee on Judicial Accountability* v. *Union of India*, AIR 1992 SC 320.
51. *DTC* v. *DTC Mazdoor Congress*, AIR 1991 SC 101 , 193.
52. AIR 1975 SC 320.
53. American Jurisprudence, Edn. II, Vol.27, p.516.
54. AIR 1997 SC 610.

over activism, the Indian Supreme Court overrode that reservation by declaring that "the reservation has lost its relevance in view of the law laid down by this court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen." Thus, the court enunciated the principle that so long as an international convention is consistent with the fundamental rights enshrined in the Constitution as interpreted by the judiciary, that can be enforced by the Indian courts notwithstanding the fact that the same has not been specifically incorporated in the domestic law. The court clearly departed from the earlier judgements of the same court binding on it.

A virtual judicial incorporation of treaty-law into the *corpus juris* has been the Supreme Court decisions in *Vishaka* v. *State of Rajasthan*,[55] wherein the court held that international conventions and norms were to be read into fundamental rights in the absence of enacted domestic law occupying the field. The court held that it could rely on international conventions in case of a void in the domestic law.

Judicial Application of Customary International Law

Kuldip Singh, J., speaking for the Apex Court in *Vellore Citizens Welfare Forum* v. *Union of India*,[56] held that customary international law would be enforceable by municipal courts since it constituted a part of the domestic law. "It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law."[57]

The relationship between customary international law and municipal law has always remained a subject matter of differing opinions and judgments in States whose laws do not contain express provisions on such relationship. It is beyond controversy that States are bound by its obligations arising under the rules of customary international law. The contentious issue is whether Indian courts would give effect to principles of customary international law if they are not in conflict with the Constitution and laws of India.

Under the Indian Constitution, there are no provisions expressly dealing with the relationship between Indian municipal law and customary

55. JT 1997 (7) SC392.
56. (1996) 5 SCC 647.
57. In support of this proposition, the Learned Judge referred to Justice Khanna's opinion in *A.D.M. Jabalpur* v. *Shivakant Shukla*, AIR 1976 SC 1207, *Jolly Varghese's Case* AIR 1980 SC 470 and the *Gramophone Co. Case* AIR 1984 SC 6678.

international law. Nor have the courts propounded any legal theory consistent with the provisions of the Constitution. It must be understood that a national court applies, if at all, its own version of what the rule of international law is, and that, as pointed out by Brierly, "however objectively it may try to approach a question which raises an issue of international law, its views will be influenced by national factors."[58] It is also well known that not all countries or international lawyers are unanimous in their perceptions as to what constitute principles of customary international law.

The question still remains as to whether Indian courts are obliged to apply customary international law in areas where there is no controlling statute. In spite of the Supreme Court's obiter observations to the contrary in the *Gramophone* case there is no support in the Constitution for upholding that doctrine of incorporation.

A municipal court, being a tribunal of municipal law, cannot also be deemed to know as to what the customary international law on a certain point is. In the *Buttes* case, the House of Lords held that there are "no judicially manageable standards" by which to judge issues of international law,[59] and that the English courts cannot examine the "validity, under international law, or some doctrine of public policy, of an act or acts operating in the area of transactions between states", and that this principle of limitation of powers is "not one of discretion, but is inherent in the nature of the judicial process."

It is submitted that Indian courts should not assume the function of arbiters of issues of international law, partly on account of the evidentiary and jurisprudential difficulties for them to determine such issues and partly on account of the need to allow the executive wing to represent the State in all international matters without judicial interference with respect to conducting foreign relations.

The formation of customary international law may not always be a democratic process-a classic example of this position is provided by the principle of freedom of the seas which the major maritime powers elevated to a norm of customary international law.[60] It is but natural the States with world-wide interests exert a greater influence on the development of customary law than other States, and that, whenever their interests are affected, their responses would have an impact on the development of

58. Brierly, *The Law of Nations*, 1963.
59. [1982] AC 888, 938.
60. P.C. Rao, *The Indian Constitution and International Law* 17 (1993).

rules of law.[61]

Another important point to be noted with respect to recent judicial decisions that have applied customary international law is the fact that courts have made uncritical references to a certain norm qualifying as a norm of customary international law without actually ascertaining as to whether such a norm exists, and determining its extent and scope, As was observed by the ICJ in the *North Sea Continental Shelf Cases*[62], for a new rule of customary international law to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by *opinion juris sive necessitates*. Either the States taking such action, or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must, therefore, feel that they are confirming to what amounts to a legal obligation."

Courts cannot depend on the writing of eminent publicists to determine the existence of customs which are only a subsidiary source of ascertaining a rule of international law. The courts must ascertain a rule of customary international law by examining State practice, and also determine the psychological element. This has not been done.

A Study of Comparative Jurisdictions:

In the United States, the US Courts, inspired by the Blackstonian doctrine, have held that "international law is part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination"[63], provided it is not in conflict with the US Constitution.[64]

It is also necessary to advert to the British practice in this regard, especially since it appeals to the *amour propre* of the Indian court saddled

61. Akehurst, *Custom as a Source of International Law*, 47 BYIL 1, 28 (1974-75).
62. ICJ Rep. 1969 ICJ Rep.3, 44.
63. *The Paquete Habana*, 175 U.S. 677, 700 (1900).
64. However, this principle cannot be universalised since it is explicitly provided for by the American Constitution, which states, in Art. VI(2): "all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any States to the contrary notwithstanding. "Therefore, a treaty has the force of a national statute, without the need to resort to incorporation within the national law. Further, a treaty supersedes national law, except provisions of the Constitution, but it may subsequently be repealed by the Congress.

as they are with notions of shared common law perceptions. It has been consistently held by the English courts that a treaty concluded by the UK does not become a part of the English law, except and insofar as, it is made so by Parliament, since, under the English Constitution, an Act of Parliament is paramount over any other source of law and even English common law bends to it.[65]

A couple of Australian decisions-*Mabo* v. *Queensland* (No. 2)[66] and *Minister of State for Immigration and Ethnic Affairs* v. *Teoh*[67] are of special importance since they have exerted great influence on the recent judgements of the Supreme Court and have been extensively quoted.

In a much quoted passage in *Mabo*, Justice Brennan stated: "...the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law especially when international law declares the existence of universal human rights. A common law doctrine founded in unjust discrimination in the enjoyment of civil and political rights demand reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.[68]

While these statements describe a very close relationship between international and domestic law, it is also necessary to heed Justice Brennan's note of caution:

> ".....this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[69]

The issues in the *Teoh Case* was the significance of Austalia's ratification to the Convention on the Rights of the Child for administrative decision-makers. As in *Mabo*, the majority of the High Court held that a ratified, non-implemented treaty could be used as a guide to the development of the common law, Chief Justice Mason and Justice Dean emphasised that they were not developing a rule of law from the unimplemented treaty, but simply a legitimate expectation:

65. *J.H. Rayner Ltd.* v. *Department of Trade*, [1989] 3 W.L.R. 969. The House of Lords held that, in making the treaty as also in performing it, the Government of UK was beyond the control of municipal law and its acts were not to be examined in its own court.
66. (1992) 175 CLR 1.
67. (1995) 183 CLR 283.
68. (1992) 175 CLR 1, 42.
69. (1992) 175 CLR 1, 29.

> "the existence of a legitimate expectation that a decision maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door."[70]

Conclusion

".... judges cannot meddle with unincorporated treaties."[71]

While this is an extreme opinion, the prudent approach for courts would be to reach a constitutional middle ground.

Many international treaties come into force on signature. Others expressly provide that the signatory States in accordance with their internal constitutional procedure shall ratify them before binding obligations are assumed. Ratification[72] in such cases involves the confirmation of prior signatures in compliance with constitutional requirements. For entering into a treaty, or bringing it into force in India, it is not an essential constitutional requirement that the executive should have the support of Parliamentary legislation,[73] or the approval of Parliament in any other manner. In the form of government envisaged by the present Constitution, Parliament is capable of exercising control over the Executive. It may refuse to enact legislation to implement a treaty to make it internally operative. As Jawaharlal Nehru

70. (1995) 183 CLR 283, 292.
71. The view succinctly put forward by Lord Templeman in *J.H. Rayner* v. *Department of Trade* (1989)3 W.L.R. 969, 989.
72. Ratification under the Scheme of the Indian Constitution is a power vested in the Executive, i.e., the President of the Union. See, Lok Sabha Debates, 10.8.1950, p.736. Ratification is the confirmation of the consent of a State given by signature of a treaty for the purpose of giving it binding force. Whatever be the role of the legislature in respect of treaty- making ratification is an executive act. P.C. Rao, *The Indian Constitution and International Law* 133 (1993).
73. *Maganbai* v. *Union of India*, AIR 1969 SC 783, 807.
As pointed out by the Privy Council, it may be that "to make themselves as secure as possible, (the national executive) will often, in such cases, before final ratification, seek to obtain from Parliament an expression of approval." *A-G for Canada* v. *A-G for Ontario*, [1937] AC 326,347. However, it is important to note that an expression of approval to a treaty by Parliament does not in itself operate as law; nor does it preclude the assenting or subsequent Parliament from refusing to give its sanction to any legislative proposals that might subsequently be brought before it. *A-G for Canada* v. *A-G for Ontario*, [1937] AC 326, 348.

said in Parliament, "the treaty-making power under the Constitution rests with the executive government. Of course, to give effect to the treaty, one has to come to Parliament.... the Government of India, if it does a wrong thing may be punished for it."[74] In other words, "to give effect to treaty, one has to come to Parliament"[75]

However, ratification of a treaty under the Indian constitutional scheme to validate a treaty has an *ex post facto* effect as distinguished from providing for prior approval. A ratification under these circumstances entails the approval of a virtual fait accompli[76] and is therefore a weak form of democratic accountability. Thus, the only possibility of democratic disapproval of an executive act of treaty making lies in the legislature not passing enabling legislation to 'incorporate' the obligations created by any particular treaty within that country's legal system so as to give rise to enforceable rights, duties, powers and responsibilities within that country's national legal system.[77]

Therefore, it is left to Parliament to decide as to at what point of time, and to what extent India's obligations under international treaties are to come into force, and this is to be achieved by the modus procedendi of legislation. Also, Parliament may determine that before treaties are to be incorporated as part of municipal law, certain institutional machinery is to be set in place, and courts must place deference to the judgement of Parliament and not substitute its judgement for that of the legislators.

On the other hand, the judiciary is obliged to forge new tools and methods in safeguarding the rights of the citizens, and can draw on international law as a key instrument in interpreting domestic law. Also, in

74. P.C. Rao, *The Indian Constitution and International Law* 131 (1993).
75. As stated by Jawaharlal Nehru in the Lok Sabha: *See*, L.S.D. Col. 6265 (19 Dec.) (1960).
76. The Constitution has given extremely wide powers to the executive to enter into international treaty obligations. This has the potential to collapse the legislative aspect of Indian federalism in order to ensure and accommodate the implementation of international obligations. It is to be remembered that the Constitution has conferred on Parliament the final say in determining as to whether and what laws would be enacted to implement the country's international obligations. However, the practice thus far has been that the executive has an unfettered power to enter into treaties, and by the time Parliament reflects on the desirability of implementing legislation, it is already faced with a *fait accompli*.
77. Rajeev Dhavan, *Treaties and People: Indian Reflections*, 39 JILI 1 (1997). It is necessary to understand the full implications of the main criticism against reading international conventions and covenants into national laws. As pointed out by Mason, C.J., in *Minister for Immigration and Ethnic Affairs* v. *Teoh*, [(1995)69 ALR 430] the signing and the ratification of these conventions is done, in most jurisdictions by the Executive action alone. The requirement that Parliament has to enact laws to give effect to these treaties would act as a bulwark against any lapse on behalf of the executive.

the case of *non-liquet*, courts are obliged to apply principles of equity, and in appropriate cases, where equity is reflected in rules of international law, courts may take recourse to such principles.

Today, constitutional law can no longer be thought of in isolation from international developments. International law has acquired a dangerous aura in Indian Constitutional jurisprudence-dangerous in the sense that it unsettles and challenges many of the rigidities and limitations of Indian law. The higher judiciary seems to have developed romantic and licentious images of the international legal order. Recent decisions have painted international law in romantic terms. International law is being viewed as a treasury from which principles can be adopted and made part of national law by judicial decisions. It has been described as something that every self-respecting nation would want to embrace. International law has been described as making up for the deficiencies in the Indian legal system. The overall judicial assumption seems to be that there is a natural marriage between international and domestic law, which was hitherto put asunder by an obsession with sovereignty. A host of decisions have also been influenced by the need for India to be seen to be taking its international obligations seriously in order for it to be able to hold its head high on the international stage.[78] The concern with adhering to international commitments has led to the judges interpreting the Constitution to support India's international obligations. This is not to negate the importance of international law, which must inform domestic actions and policies. India is an active, independent member of the international community, and the focus of international law has been transformed from one on inter-state relations to one "penetrate[ing] formerly sacrosanct national borders and concern[ing] itself with domestic affairs and individual human rights within nation-States."[79]

It is necessary for the courts to act with circumspection in reading into municipal law, the requirements of various international instruments. When Parliament itself has not deemed it appropriate to incorporate the provisions for an international convention into the domestic law, judicial legislation must not effect a backdoor incorporation of an unincorporated treaty into municipal law. A treaty that has not been incorporated into municipal law cannot operate as a direct source of individual rights and

78. This has also been the trend in Australia, as can be gauged from Justice Murphy's dramatic warning in *New South Wales* v. *Commonwealth* (Seas and Submerged Lands Case), (1975) CLR 337 at 503, that Australia would become an 'international cripple' if it does not perform its international obligations.
79. Stephen, "Foreword" in Opeskin and Rothwell (Eds.), *International Law and Australian Federalism* v (1997).

obligations. If the judiciary resorts to such indirect incorporation of treaties, the distribution of powers as provided for by the Constitution could in time, be completely obliterated. Then, there would be no field of power that the judiciary would be unable to invade. There is need for positive action by way of legislative measures as envisaged by Art. 253 of the Constitution to make international law enforceable by the courts. It is not for the judges to arrogate to themselves unbridled legislative power, encroaching on the powers of the legislative branch. This has led to a situation wherein the very organ that improvised the basic structure doctrine and located the principle of separation of powers to be inherent therein, being seen to be violating its own dictum. The organ to which the power to interpret and ensure conformity with the Constitution has been conferred is itself guilty of violating the *suprema lex*.

Making law is the prerogative of the legislature, and the judiciary cannot compel the legislature to make law. As the Supreme Court has rightly observed "If in respect of any principle of international law the Parliament says 'no', the national court cannot say 'yes'.[80] The task of the judiciary is only to apply and interpret the law as found in the statute book. This limitation on the judicial power was recognised by the Court in its earlier judgements. As was aptly observed by the SC in *Monteiro* v. *State of Goa*,[81] "... if there is no provision of law which the court can enforce, the court may be powerless and the court may have to leave the matter to what Westlake aptly described as the indignation of mankind."

80. *Gramophone Company* v. *Birendra*, AIR 1984 SC 667.
81. AIR 1970 SC 329.

MAKING THE SANCTION REQUIREMENT SOCIALLY RELEVANT: A CRITIQUE OF *MANSUKHLAL VITHALDAS CHAUHAN* V. *STATE OF GUJARAT*[1]

*Amaresh Kumar Sinha**

Corruption in the higher echelons of power has becomes a serious menace in India. It is eating into the vitals of our body-politic. Moral crusades against corruption in high places have only contributed in changing the rhetoric, while the social reality remains largely pro-corruption oriented. The reasons for such corruption-oriented climate are diverse and complex, but the most-talked about reason is glaring lacunae in the legal framework and their still weaker implementation. One such lacuna can be located in Section 197 of the Code of Criminal Procedure that mandates that before a civil servant is prosecuted, sanction ought to be obtained from the highest executive. The Law commission of India explained the purpose of such a provision in these words: the provision enables "the senior categories of public servants performing onerous and responsible functions to act fearlessly by protecting them from false, vexatious or malafide prosecution."[2] Differently put, the idea is to see that official acts do not lead to needless or vexatious litigation.

Section 197 deals with the prosecution of public servants for offences alleged to have been committed by them while acting or purporting to be acting in discharge of their official duty. The section lays down that no court shall take cognizance of such offences except with the previous sanction of either the central government, or the State government as the case may be. So, in order to invoke the protection under Section 197, the accused:

(*i*) must be a public servant,

(*ii*) must be one removable by or with the sanction of the government and

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1. AIR 1997 SC 3400.
2. 41st report.

(*iii*) must have committed the alleged offence while acting or purporting to be acting in the discharge of his official duties.

Under the provisions of Section 197, the discretion to grant sanction vest in the administrative authorities. These authorities may be the central government or the state government, or any other authority, depending upon the category of the public servant. Similar measures have been there in the Prevention of Corruption Act, 1947 (now lapsed) and in the Prevention of Corruption Act, 1988.

These provisions have been re-examined by the supreme court in the case of *Mansukhlal Vithaldas Chauhan* v. *State of Gujarat*. In this case the supreme court addressed three important questions pertaining to sanction. These are as follows:

(*i*) What is the nature of sanction?

(*ii*) Does the court have the legal authority to direct the government to grant the sanction for prosecution?

(*iii*) Can a judicial authority substitute its own discretion in the place of the discretion of the administrative authorities to grant sanction?

In this case, the accused demanded and in fact received Rs. 20,000/- as illegal gratification. The accused was caught re-handed. The investigation agency found sufficient evidence to proceed against the accused. The vigilance commission of Gujarat requested the state government to grant sanction. While the request was pending with the government, the complainant filed a petition before the Gujarat High Court for a mandatory direction to the state government to grant sanction. The High Court allowed the petition and gave the directions as prayed. Subsequent to the sanction so granted, the accused was tried and convicted by the trial court. Later on, his conviction was confirmed by the High Court. The matter finally came before the supreme Court.

Discussing the law while answering the above-mentioned three questions the supreme court held that; "the sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servants against frivolous prosecutions. Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for the innocent but not a shield for the guilty".[3]

3. See *Supra* n. 1 at p. 672.

The court explains that the "validity of 'sanction' depends upon the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during the investigation. From this, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or costraint to grant the sanction, the order will be bad for the reason that the discretion of the authority 'not to sanction' was taken away and it was compelled to act mechanically to sanction the prosecution."[4]

The supreme court in this case further adds that by issuing a direction to the secretary of the government to grant sanction, the High Court closed all other alternatives tot he government. The government was compelled to "proceed only in one direction and to act only in one way namely, to sanction the prosecution of the appellant. The secretary was not allowed to consider whether it would be feasible to prosecute the appellant, whether the complaint of illegal gratification sought to be supported by 'trap' was false and whether the prosecution would be vexatious particularly as it was in the knowledge of the government that the complainants firm had been black listed once. The discretion not to sanction the prosecution was thus taken away by the High Court"[5]

The High Court, as the supreme court puts it, placed the sanctioning authority "in a piquant situation. While the Act[6] gave him the discretion to sanction or not to sanction the prosecution of the appellant, the judgment gave him no choice except to sanction the prosecution as any other decision would have exposed him to an action in contempt for not obeying the mandamus issued by the High Court. The High Court assumed the role of the sanctioning authority, considered the whole matter, formed an opinion that it was a fit case for the sanction to be granted and because it itself could not grant sanction under section 6 of the Act,[7] it directed the secretary to sanction the prosecution so that the sanction order may be

4. *Id.* at 672; AIR. 1997 SC 3400 at p. 3405.
5. *Id.* at p. 675; AIR 1197 SC 3400 at p. 3407.
6. Prevention of Corruption Act, 1947.
7. *Ibid.*

treated to be an order passed by an appropriate authority and not that of a High Court. In the circumstances, the sanction order cannot but be held to be wholly erroneous having been passed mechanically at the instance of High Court."[8]

On the third question as to whether any judicial authority can substitute its own discretion in the place of the discretion vested by the statutes in the administrative authorities, the Supreme Court has answered in the negative. The Supreme Court points to the settled law that in a mandamus proceeding of this kind, the court cannot convert itself into a court of appeal from the authority against which the appeal is sought. It is not the function of courts of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question is entrusted by law.

The Supreme Court points out that this principle has been reiterated by the courts in a long series of decisions.[9] The supreme court in this connection refers to its own decision in *Tata Cellular* v. *Union of India*[10] where it has been laid down that: "the court does not sit as a court of appeal, but merely reviews the manner in which the decision was made particularly as the court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision which itself may be fallible"[11] In the *Tata Cillular* case, the court further pointed out that "the duty of the court is to confine itself to the question of legality. Its concern should be:

(*i*) Whether a decision making authority exceeded its power?
(*ii*) Committed an error of law;
(*iii*) Committed a breach of the rules of natural justice.
(*iv*) Reached a decision which no reasonable Tribunal would have reached: or
(v) Abused it s power."[12]

Approvingly quoting the above principles, the supreme court in the present case[13] has ruled that the discretion to grant sanction is clearly vested in the administrative authorities and that the High Court has, for all practical purposes, substituted its own discretion in place of discretion

8. See *Supra* n. p.5.
9. The Vice-chancellor, *Utkal University* v. *S.K.Ghosh* (1954) SCR 883; sterling computers Ltd. V.M. & N Publications Ltd. (1993) 1 SCC 445.
10. AIR 1996 SC 11.
11. *Ibid* at p. 32.
12. *Id.* at p. 26.
13. See *supra* n.1.

vested by law in the administrative authority. So, finding the sanction order bad, the Supreme Court quashed the conviction by holding the whole proceeding void ab initio.

The judgment has serious implications for our society where corruption has assumed epidemic proportions. It raises serious questions on the following three aspects:

(*i*) Relevance of the sanction requirement
(*ii*) Balancing the technical requirement with the public interest
(*iii*) Conditions of excluding the sanction requirement

The present case[13] has brought into sharper focus the correctness of the continuance of the colonial requirement of sanction for the prosecution of public servants. Section 197 of the Code of Criminal Procedure was British-period legislation designed to give partial immunity to the superior officers of the British Raj. The section was again enacted as section 197 of the Code of Criminal Procedure, 1973. Similar provisions have been enacted in the Prevention of Corruption Act, 1947 and in the Prevention of Corruption Act of 1988. So, can it be said that we are mindlessly continuing with an archaic provision? Why should the corrupt public officials be given the shield of section 197 of the Criminal Procedure code or of other analogous provisions? The current trend is to treat the democratic state and its officials equal to any other private person. Such a trend is reflected in doing away with the exemptions in favour of the state in statutes and narrowing down of the sovereign immunity defences. The concept of sovereign immunity is being increasingly questioned by activist judicial decisions. These decisions hold the government liable for any tortious actions which have been committed by the government officials in the exercise of non-sovereign functions of the state. Interestingly, the courts, even though holding the state not liable for tort for any action in the exercise of its sovereign functions, have been whittling down the area and scope of the sovereign function. In the case of state of *Rajasthan* v. *Vidhyawati*,[14] the supreme court ruled that "viewed from first principles, there can be no difficulty in holding that the state will be as much liable for trot in respect of a tortious act committed by its servants within the scope of its employment but wholly dissociated from the exercise of sovereign powers, as any other employer"[15].

In the case of *Smt. Basava Kom Dyamogouda Patil* v. *State of Mysore*[16]. Where the seized property meant to be safely kept in police

14. AIR 1962 SC 933.
15. *Id* at p. 940.
16. AIR 1977 SC 1749.

Malkhana mysteriously disappeared, the supreme court held the state liable and asked it to pay compensation. Thus, the state was not allowed the plea of sovereign immunity.

In the case of *Rudul Shah* v. *State of Bihar*[17] where the petitioner's prolonged detention in the prison was illegal and wholly unjustified, the supreme court ordered compensation to the petitioner. The court directed the state top repair the damage done by its officers to the petitioner's rights. The court also left open the prospect of the state having recourse against those officers.

In sebastian *M. Hongray* v. *Union of India*,[18] the supreme court awarded exemplary damages for the disappearance of two persons in military custody.

In *Bhim Singh* v. *State of J&K*[19], the police detained Sri Bhim Singh in clear violation of his fundamental rights of personal liberty. The supreme court directed the state of Jammu-Kashmir to pay compensation to the victim.

In Saheli, a *Women's Resources Centre* v. *Commissioner of Police*,[20] the state was held liable for tortious act committed by an agency of the sovereign power acting in violation and excess of the power vested in it. In this case, a child was done to death on account of beating and assault by the police. The state was not allowed to take the advantage of sovereign immunity. The supreme court directed the state to pay exemplary compensation to the mother of the decease child.

In the case of *Smt. Nilabati Behera* v. *State of Oirssa*[21], the supreme court held that the award of compensation could be ordered by the courts in public law proceedings in cases where there had been a flagrant violation of fundamental rights by the state's instrumentalities or servants. The court further held that the principle of sovereign immunity was inapplicable in such cases.

So, in all these cases, the courts have innovatively interpreted the law and extended the ambit of public law to award compensation to victims of abuse of state's power. These judicial pronouncements in the last two decades have considerably narrowed down the core of sovereign functions. In this situation, should the sanction requirement be allowed to remain in the statute books?

17. (1983) 4 SCC 141.
18. AIR 1984 SC 1026.
19. AIR 1986 SC 494.
20. (1990) 1 SCC 422.
21. AIR 1993 SC 1960.

Though the courts have, in a series of decisions, come up with cogent reasons in support of sanction for prosecution, its present-day practical remifications are very different. In the case of *R.S. Nayak* v. *A.R. Antulay*[22], the Supreme Court, speaking through Justice D.A. Desai for a constitution bench, has advanced strong reasons in support of sanction-requirement. In matters of administration, the administrative exigencies and imperatives can be best understood by the executive only. The executive authority alone would be in the best position to judge as to what power had been conferred, whether that power could be abused for corrupt purposes and whether any prima facie conspiracy had been made out. The provision is thus based on the assumption that all the Constitutional fuctionaries will be performing their role honestly and fairly to uphold the cause of justice.

However, the practical realities hold a different mirror to us. The executive does not act fairly as it should. A newspaper report[23] quoting CBI sources says that 149 fully processed and investigated cases are awaiting sanction from the Union Government and Various State Govts. Some of the cases have been pending with the Government for years. The report further points out that the seriousness of the problem can be gauged from the classic example of the Czech Pistol case of the early 1990s. The CBI investigating this case made a request for sanction for the prosecution of an additional secretary and a joint Secretary in the Ministry of Home Affairs. The request for sanction was final turned down in 1997-full four years after the request was first made in 1993. This delay is unjustified and unfair to all concerned, including the government official under investigation.

Can it be said that the requirement of sanction runs against the public interest in the present context of rampant corruption and all pervasive nepotism in the political and bureaucratic circles? Considering the insistence by the Court on the technical requirement of sanction, can it be said that the present judgement[24] goes against the public interest? More so when the accused was already convicted on evidence. With the corruption pervading the executive ranks and the legislature afflicted with inertia, should the judiciary not come forward and try to evolve the law in the interest of 'we, the people of India'? Can one say that the right to clean administration is implicit in our Constitutional mandate? Should the archaic provision of sanction be modified and brought in tune with the

22. (1984) 2 SCC 183.
23. News-report in 'The Times of India dated Aug. 9, 1997.
24. See *Supra* n.1.

popular aspirations? These are some of the questions that may not admit of easy answers.

It is interesting to not that in some of the recent pronouncement, the Supreme Court seems to have tried to some extent to evolve the law on this point. In *K. Veeraswami* v. *Union of India*,[25] the Supreme Court has put the whole matter in the correct perspective. The Supreme Court has pointed out that S. 6 of the Prevention of Corruption Act, 1947 is primarily concerned to see that prosecution for the specified offences shall not commence without the sanction of an appropriate authority. However, the Court hastened to add that "that does not mean that the Act was intended to condone the offence of bribery and corruption by public servants. Nor was it meant to afford protection to public servant from criminal prosecution for such offences. It is only to protect the honest public servants from frivolous and vexatious prosecution. The competent authority has to examine independently and impartially the material on record to form his own opinion whether the offence alleged has no material to support or whether it is frivolous or vexatious. The competent authority may refuse sanction for prosecution if the offence alleged has no material to support or it is frivolous or intended to harass the honest officer. But he cannot refuse sanction if the material collected has made out the Commission of the offence alleged against the public servant. Indeed, he is duty bound to grant sanction if the material collected lend credence to the offence complained of."[26]

Taking this idea still further in the 'State through Anti-Corruption Bureau, *Govt. of Maharastra, Bombay* v. *Krishanchand*'[27] the Supreme Court held that one of the guiding principles for the sanctioning authority would be public interest and that the protection under section 6 of the Prevention of Corruption Act, 1947 could not be said to be absolute or unqualified. The Court also added in good measure that while a public servant should not be subjected to harassment genuine charges and allegations should be allowed to be examined by the Courts.

Even in the present case[28], the Supreme Court observes[29] that sanction is a weapon to ensure discouragement of frivolous and vexatious prosecution. The court further adds that it is a safeguard for the innocent but not a shield for the guilty.

25. (1991) 3 SCC 655.
26. *Id.* at p. 693 (Per Shetty and Venkatachaliah, JJ).
27. (1996) 4 SCC 472.
28. See *supra* n.1.
29. *Id.* at p. 672.

It is respectfully submitted that the Supreme Court in the present case, despite referring to the above-cases, has not appreciated the true import of these judgments. The idea behind the sanction requirement is only to discourage the frivolous or vexatious litigation against the honest officer. The litigation in the present case is neither frivolous nor intended to harass the honest officer. Sanction in a case like this could not have been refused in view of the mounting evidence. The very fact that the trial court convicted the accused and that the High Court confirmed the findings of the trial court, proves the guilt of the accused beyond all reasonable doubts. So, the sanctioning authority in this case would not have reached to any other conclusion. Reaching to a different conclusion would have been perverse and a clear abuse of power on the part of the sanctioning authority. It has been clearly laid down in the *K. Veeraswami* v. *Union of India*[30] case that the sanctioning authority is duty-bound to grant sanction if the evidence collected lend credence to the charge made. In a later decision, it has been held by the Supreme Court in *P.V. Narsimha Rao* v. *State*[31] that the requirement of sanction under S.19(1) of the Prevention of Corruption Act, 1988 is a matter relating to the procedure and the abserice of the sanction does not go to the root of the jurisdiction of the court.[32]

The court in the present case has argued that the secretary (i.e. the sanctioning authority) was not allowed to consider whether the complaint was false or whether the prosecution would be vexatious particularly as the complainant's firm had been black-listed once. It is respectfully submitted that the agruments are fallacious. That the complaint was not false could have been easily ascertained from the enormous evidence collected by the investigating agency prior to its request for sanction. Secondly, even a black listed firm has certain rights and remedies available under the law. In any case, the government was dealing with the firm despite that firm being black-listed. While considering the grant of sanction, the fact of the

30. (1991) 3 SCC 655 at p. 693.
31. As per the view of the majority in *P.V. Narsimha Rao* v. *State* AIR 1998 SC 2120- majority view constituted by S.C. Agarwal, J for himself and on behalf of Dr. A.S. Anand, J (as he then was); G.N. Ray, J. agreeing.
32. Even otherwise, the judicial trends is towards diluting the sanction requirement. In *Md. Hadi Raja* v. *State of Bihar* AIR 1998 SC 1945, it has been held that the protection by way of sanction under section 197 of the code of Criminal Procedure is not available to the officers of the Government companies or the public undertakings even when such public undertaking are 'state' within the meaning of Article 12 of the constitution on account of deep pervasive control, of the government. In *K. Mahapatra* v. *State of Orissa* AIR 1998 SC 2595, it has been held that a public servant cannot, if retired on the date of taking of cognizance by the court, claim the protection of sanction under section 19 of the Prevention of Corruption Act, 1988 even thought he crime alleged to be committed by him has been committed during his term of office.

firm having being blacklisted is absolutely irrelevant. It is like saying that a women allegedly of easy virtue shall have no right to complain of rape, inspite of the mounting evidence that has been collected in support of the complaint.

So, all that could have been done is that sanction could have been only delayed and not denied as per that present case. The executive does not seem all to eager to catch black-sheep amidst its ranks. More often than not, it delays sanction or altogether denies it.[33] The Czech Pistol case[34] and the Antulay Case[35] only buttress this point. The delay serves to effectively frustrate the prosecution. It only results in the vital pieces of evidence getting lost. A criminal trial must proceed expeditiously to serve the interest of justice. The importance of speedier trial in criminal matters so as to prevent extinction of evidence has been underlined by the Supreme Court in several cases such as in *Bakshish Singh Brar* v. *Gurmej Kaur*.[36]

So, taking into consideration all the facts and circumstances of the case as also the judicial dicta of the relevant cases, the decision of the High Court in detecting the Secretary to grant sanction cannot be said to be bad in law.

The judgement in this case is vulnerable to criticism on the third ground also. Can the taking of bribe be said to be a part of the official duty under section 197 of the Code Criminal Procedure or a duty in connection with the affairs of the Union or the State under Section 6 of Prevention of Corruption Act, 1947?

In the leading case of *Hori Ram Singh* v. *The Emperor*[37], Justice Varadachariar observes that: "there must be something in the nature of the act complained of that attaches it to the official character of the person doing it."[38]

This view was affirmed by the Privy Council in *H.H.B. Gill* v. *The King*[39] where the judicial committee, speaking through Lord Sigmond observes : "a public servant case only be said to act or to purport to act in

33. A report in the newspaper 'The Pioneer, June 23, 1997' says that request for sanction was pending with the Home Ministry in case against Mr. Sukharm, Mr. Satish Sharma, Ms. Shiela Kaul, Mr. P.K. Thugon and Mr. Madhav Singh Solanki.
34. Sanction refused full four years after the request for sanction was first made—The Times of India report dated Aug. 9, 1997.
35. In the case of Mr. A.R. Antulay, Sanction was granted almost eleven months after the request was first made.
36. (1987) 4 SCC 663 at p. 667.
37. AIR 1939 FC 43.
38. *Id.* at p. 56.
39. (1948) L.R. 75 I.A. 41 (PC): AIR 1948 PC 128.

the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgement he delivers may be such an act: nor does a government medical officer act or purport to act as civil servant in picking the pocket of a patient whom he is examining , though the examination itself may be such an act. The test may well be whether the public servant, if challenged can reasonably claim that what he does, he does in virtue of his office".[40]

In the case of *Baijnath* v. *State of M.P.*[41] then Supreme Court says that it is not every offence committed by a public servant that requires sanction for prosecution under Section 197 of the CrPC nor every act done by him while he is actually engaged in the performance of his official duties. But if the acts complained of are so integrally connected with the official duty as to be inseparable from them, the sanction under Section 197 will be necessary. But if there is no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction is necessary.

In *Matajog Dobey* v. *H.C. Bhari*[42], the Supreme Court speaking through Justice Chandrasekhara Aiyar for a constitution bench, rules that there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

So, in the light of the judicial dicta, taking of bribe cannot be said to be a part of the official duty or purported official duty. The questing has been conclusively answered by the Judicial Committee in *H.H.B. Gill* v. *The King*[43]. The Privy Council in this case has ruled that taking bribe cannot be said to be an act done by a public servant by virtue of the office he held. The Privy Council has similarly ruled in *P.C. Neogy* v. *The King*[44] and in *Lumbhardar Zutshi* v. *The King*[45] and declined to give the protection of Section 197 of the CrPC in such cases.

The Supreme Court has also followed these decisions and held[46] that sanction under Section 197 of the Criminal Procedure Code is not

40. 75 I.A. 41 At p. 59-60.
41. AIR 1966 SC 220.
42. AIR 1956 SC 44.
43. 75 I.A. 41.
44. 76 I.A. 10 at p. 16-17.
45. 77 I.A. 62 at p. 64.
46. *Ronald* v. *State of West Bengal* AIR 1954 SC 455.

necessary for instituting proceedings against a public servant on charges of conspiracy and of bribery.

The above principle has been laid down by the courts while interpreting Section 197 of the Code of Criminal Procedure. Can this principle be applied in the interpretation of Section 6 of the Prevention of Corruption Act, 1947? The answer to this question has to be in the affirmative because so many other principles laid down while interpreting Section 197 of the CrPC have been directly imported in the interpretation of Section 6 of the Prevention of Corruption Act 1947. In any case, 'official duty/purported official duty' (words used in Section 197 CrPC) cannot be different from 'duty in connection with the affairs of the union or the State' (words used in Section 6 of the Prevention of Corruption Act, 1947). As bribery cannot be an act done in connection with the affairs of the State, no protection should be available under section 6 of the Prevention of Corruption Act. However, the present case does not seem to have been examined by the Court from this angle.[47]

Thus, the present case has brought to light serious deficiencies of the criminal and anti-corruption laws. The criminal law, as Justice V.R. Krishna Iyer once commented[48], is the cuting edge of the rule of law and accordingly, criminal justice and its operational efficiency have high priority in a civilized society. With the executive and the legislature not doing their bit, the judiciary should come forward to cry halt to the spreading menace of corruption by innovative interpretation of statutes. If this is not done, then the fear, as expressed by Justice S.C. Pratap[49], of hopes becoming restless and turning into despair might become a reality.

47. Misappropriation of public funds and fabrication of false records can not be considered to be in furtherance of or in discharge of public duty. Therefore, no sanction is required under section 197 of the Code of Criminal Procedure—*Shambhoo Nath Misra* v. *State of U.P.* (1997) 5 SCC 326.
48. In the Newspaper "The Hindu" dated Jan. 20, 1998 in a book-review column.
49. In the case of *P.B. Sawant* v. *A.R. Antulay*, AIR 1981 Bom. 422.

BLOOD GROUP EVIDENCE IN LEGAL TRIALS OF DISPUTED PATERNITY

*Kirtiman Singh**

Forensic science again has been utilised in America in a series of celebrated cases. The kidnapping of the lindbergh baby in the 1930s by Bruno Hauftman led to one of the most famous cases. A crucial piece of evidence in this case was the fact that the wood of a home-made ladder (left at the scene of the of crime) showed a physical match with the boards from the floor Hauftman's loft, in respect of a nail hold spacing and the striation left by a damaged blade of a rotary cutter with multiple blades.[1]

Then again, in 1946 the ABO test (a blood grouping test) was attempted to be utilised in Charlie Chaplin's case to establish paternity. DNA fingerprinting was utilised in the famous O.J. Simpson case attempting to establish his presence at the scene of the crime where his wife, Nicole was murdered.

While the scope of forensic science is in itself humungous, blood group evidence-an adjunct of the same in particular, has been the hot-bed of controversy and in fact at times crucial in determining decisions.

Blood group evidence has been utilised time and again by the courts in criminal cases it is used in cases pertaining to sexual offences such as rape and adultery. In civil cases it is used where cases pertain to maintenance, divorce proceedings and paternity disputes. Blood group evidence may again be utilised to identify a person and his presence at the scene of the crime. An attempt will be made in this article not to deal with blood group evidence and its utility in general but its utility in paternity disputes in particular.

Blood group evidence relating to disputed paternity has been accepted by the courts for more than sixty years. As stated by Race and Sanger[2], before any blood group system can be employed in the investigation of paternity problems, certain criteria must be met:

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1. P.M. Bakshi: Forensic Science, Crime and DNA; Lawyers Collective; July 1998.
2. Race, F.R. and Sanger, R. Blood Groups in Man (1968).

(*a*) The blood group system must be inherited and the mode of inheritance known with certainity.

(*b*) It must be adequately developed at birth or soon thereafter.

(*c*) It must be unaffected by climate, age, disease, or by any other environmental or genetical condition.

Other considerations include the stability of the blood group sample, the relative usefulness of the system, the availability and cost of the necessary reagents to perform the test and the amount of blood required to allow testing Broadly, the blood group systems currently employed are:

1. Red cell antigens.
2. Serum protien polymorphisms.
3. Red cell enzyme polymorphisms.
4. HLA system.
5. DNA fingerprinting.

Within these five broad categories are included other paternity tests such as the ABO, MNSs, Lutheran, Kidd, Duffy and the new technological developments like 'Southern Blotting' technique. But it is not within the scope of this article to delve into the intracacies of these various tests and how they are performed. For any such information required Taylor's Principles an Practice of Medical Jurisprudence may be consulted. What is attempted here is to examine the value of such tests in law, and how far these tests have been instrumental in deciding cases, what the trend has been and what their evidentiary value is.

The result of a paternity test may indicate one of the following:

(*a*) Exclusion of paternity; or

(*b*) Non-exclusion of paternity.

As far as exclusion of paternity is concerned there may again be two orders of exclusion:

(*i*) *First order exclusion*[3] : Where the child possess a blood group that is both absent in the father and mother: eg.

	Mother	Child	Putative Father
Blood Group	O	B	O

3. Tayos's Principles and Practice of Medical Jurisprudence (1984) pgs 107 to 110.

In this example the B blood group gene present in the child cannot have come from either the mother or putative father. So he is excluded from paternity.

(ii) *Second order exclusion*[4] : Where the putative father is homozygos for a blood group gene, which he must pass on to all his children, but the gene is not present in the child in question.

In the following example the father has only N genes to give but the child has no N gene so non paternity is indicated.

	Mother	Child	Putative Father
Blood Group	M	M M	N

(b) **Non-Exclusion of paternity**

Where exclusion of paternity is obtained it is of value to the court to be provided with some indication as to the likelihood of paternity.

As the name suggests, in a given case paternity may not be excluded; indicating that the putative father may be the father. It has to be remembered that when a putative father is not excluded by a paternity test all it signifies is that he is likely to be the father-in no case does it signify that he is the father of the child in question.

It cannot be denied that *Jeffreys* and his colleagues made a great contributing to forensic science with the development of *DNA fingerprinting* in 1984 which has still further been improved by the development of the 'Southern Blotting' technique. Although DNA fingerprinting has achieved greater accuracy that any of it predecessors yet it cannot be said the this technique crosses the bridge between probability and surety. It is no wonder that DNA fingerprinting is referred to in some quarters as 'DNA profiling' for fear of conveying an impression of its accuracy as to the extent of individualisation which it, as yet, does not possess.

As mentioned by Taylor[5] even in the event of non-exclusion of paternity caution as to be exercised as false conclusions can be easily reached if a blood relative of the alleged parties is involved or the parties come from an isolated community in which inbreeding may have taken place, resulting in a gene uncommon in the general populating being more frequent. Before an analysis of Indian law as regards paternity test a quick

4. *Ibid* at pg. 107.
5. *Ibid* at pg. 108.

review of English and American law may be of assistance.

English Law

An attempt by way of statutory provision to make blood tests compulsory in England failed in 1938. However, in 1957 the Affiliation Proceedings Act was passed. Under the Act it was assumed that a man was the father once a sexual relationship with the mother at the time of conception was proven unless he could show another man had intercourse with her at that time. Failing the father's attempt, the mother's evidence had to be corroborated by facts such as blood tests etc.

The Family Reforms Act 1969 conferred powers on the court to direct taking of blood tests in civil proceedings in paternity cases. Since the passing of the 1969 Act the general practice has been to use blood tests when paternity is in issue. However, it is to be stated that the court cannot order a person to submit to tests but can draw adverse inferences from a refusal to do so. In this context the observation of Lord Denning M.R. in L. Re,[6] may referred to:

"If an adult unreasonably refuses to have a blood test, or to allow a child to have one. I think it is open to the court in any civil proceedings to take his refusal as evidence against him, and may draw an inference therefrom, adverse to him. This is simply Common Sense."

The Law in the United States

The legal use of scientific information in a paternity test in the U.S. was slow in its development. The judicial system in the period between 1925 to 1950 was reluctant to use blood group typing as evidence in bastardy cases. The most celebrated paternity case during this period was that of *Berry* v. *Chaplin*[7] in 1946 wherein the court disallowed the ABO test (which excluded Charlie Chaplin's paternity) and forced him to pay compensation. It was not until 1950 when the U.S. Supreme Court in the case of *Cortese* v. *Cortese*[8] established the legal precedent of excluding falsely accused men using blood tests.

The contemporary legal development of genetic testing to evaluate paternity stems form the introduction of legislation by the federal government requiring states receiving child welfare support to prosecute father's of illegitimate and legitimate children for support. This forced states to spend large money on prosecution. They rapidly amended their laws to

6. (1968) All ER 20.
7. 169 P. 2d & 442 (Cal. 1946).
8. 76 A 2d 717 (West 1950).

resolve difficult cases more expeditiously. Currently genetic determination are utilised predominantly in case of illegitimacy. Paternity tests have also been applied to the following : (1) divorce proceedings where grounds are adultery (2) annulment proceedings (3) affiliation case (4) surrogate parentage.[9]

Indian Law and Paternity Tests

In India there is no special statute governing paternity tests. Nor is there any express provision which provides for the admissibility of blood group evidence. However, various provisions of the Indian Evidence Act 1872 and the Constitution of India may be noted in this regard.

Section 9 of the Indian Evidence Act 1872 provides

Section 9: Facts necessary to explain or introduce relevant facts : Facts necessary to explain or introduce a fat in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parities by whom any such fact was transacted, are relevant in so far as they necessary for that purpose.

Thus where a fact in issue or relevant fact is a question of disputed paternity, blood group evidence may be admitted to support or rebut any inference suggested by a fact in issue or relevant fact by virtue of Section 9. It must remembered that though blood group evidence may be admissible by virtue of Section 9 of the Indian Evidence Act 1872 the weight given to such evidence by the courts in terms of evidentiary values is an entirely different aspect and will be examined subsequently through case-law. But even before blood group evidence is admitted the question arises whether a Court of Law can compel the person/s concerned to undergo the same by their own volition.

Article 21 of the Constitution of India provides

2.1 Protection of life and personal liberty-No person shall be deprived of his life and personal liberty except according to the procedure established by law.

It is submitted that any effort to compel any person to give blood group evidence against his consent will be in direct contravention to Article 21 which provides for the protection of personal liberty of the persons. Such

9. Forencic Science Hand book (Ed. by Richard Safesstien) Volume II (1988).

an attempt will amount to deprivation of the personal liberty of the person concerned, the protection of which is expressly guaranteed under Article 21 of the Constitution.

Again, Article 20(3) of the Constitution states

20 (3). No person accused of an offence shall be compelled to be a witness against himself.

When it is question of disputed paternity and the accused is the alleged father any attempt to subject him to a blood test against his wishes will again be in direct contravention to Art. 20(3) since such an attempt will in effect be that of compelling the accused to give evidence against himself.

Both Article 21 and Article 20(3) ar Fundamental Rights the protection of which is expressly guaranteed under the Constitution of India. It is thus submitted that it is not within the jurisdiction of any Court of law in India to order blood test when the parties are unwilling to subject themselves to the same. It must then be remembered that blood group evidence under Section 9 of the Indian Evidence Act 1872 may be admitted only if the parties concerned have subjected themselves voluntarily to blood group testing.

Cases of disputed paternity are often very closely lied with *matrimonial relationships*. Where such a matrimonial relationship is involved a paternity test, which may at time prove crucial, cannot be looked at in isolation. All the implications of such a test have to be kept in mind by a Court before a blood grouping test is conducted. Where that effect of such a test may lead to branding a particular child as illegitimate or a particular wife as unchaste, great caution will be exercised by the Court since the stigma of such names may in itself be greater that the wrong allege. It is important to examine *Section 112 of the Indian Evidence Act 1872* in this context:

Section 112: Birth during marriage conclusive proof of legitimacy: The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

As is evident from the wording of the section that subject to *"access"* any person born during a valid marriage or within two hundred and eighty days thereafter will be presumed to be legitimate provided the mother is unmarried during that period.

The law presumes strongly in favour of legitimacy of the offspring, as it is birth that determines the status of a person. Thus, in a paternity dispute where there is a valid marriage and there is 'access' a blood grouping test will not be admissible even if the parties concerned agree to it, if it dispels that presumption of legitimacy, despite the fact that the mother was living in adultery or any other circumstances which may rebut this presumption.

The exception therein with regard to 'access' is significant. 'Access' and 'non-access' mean no more than existence or non existence of opportunities for marital intercourse.[10] If 'non-access' is proved blood grouping tests may therefor be admissible. The logic of the section seems to be this: Unless it is clearly proved that there was no opportunity for marital intercourse between the parties to the marriage, no aspersions shall be cast upon the legitimacy of a child or the chastity of a woman.

But it must be noted that where no matrimonial relationship exists, subject to other qualifications which shall be seen subsequently with the aid of case law, blood-grouping tests may be admissible.

Apart from the above various other question have arisen time and again concerning blood tests and their utility in a Court of Law which have been pondered upon by the Courts. An appreciation of various cases is essential to understand other aspects of blood group testing.

In *Polavarapu Venkateswarlu* v. *Polavarapu Subayya*[11] the application was preferred under Sec. 151 of the C.P.C. invoking the inherent powers of the Court to direct a blood test. The learned judge was of the following view.[12]

"The is no procedure either in the Civil Procedure Code or in the Indian Evidence Act which provides for a test of the kind sought to be taken by the defendant in the present case. It is said by Mr. Ramakrishna for the respondent before me that in England this sort of test is resorted to by the courts where the question of access or non-access in connection with an issue of legitimacy arises for consideration... That may be. But I am not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind this court can force them to do so."

The same view was reiterated by the Kerela High Court in *Vasu* v. *Santhd*[13] where the court dealt with yet another aspect[14] :

10. *Venkateswarlu* v. *Venkatnarayana* AIR 1954 SC 176.
11. (1951) 1 MLJ 580.
12. *Ibid* at pg. 581.
13. (1975) KLT 533.
14. *Ibid* at pg. 536.

"Before a blood test is ordered his consent is required. The reason is that this test is a constraint on his personal liberty and cannot be carried out without his consent. Whether even a legislature can order a test is doubtful." the learned judge further observed[15]:

"The maximum that can be done where a party refuses to have a blood test is to draw an adverse inference."

However, in contrast is the decision in *Hargovid Soni* v. *Ramdulari*[16] where it was held:[17]

"No person can be compelled to five a sample of blood for blood grouping test and no adverse inference can be drawn against him for this refusal."

The point of law has been settled by the Supreme Court in the case of *Gautam Kundu* v. *State of West Bengal*[18] wherein it was observed[19]:

"Blood grouping is a useful test to determine the question of disputed paternity. It can be relied upon by the courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her will and no adverse inference can be drawn against her for this refusal."

Another important observation is note worthy in the cases of *Bharti Raj* v. *Sumesh Sachdeo*.[20]

"If in a case the court has reason to believe that the application for blood is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer."[21]

It may be pertinent to note, in detail the case of *Goutam Kundu* v. *State of West Bengal*[22] where the Apex Court has dealt upon, and substantially answered various questions that often come up before the court concerning blood tests:

The appellant was married to second respondent of Jan 6, 1990. After living together for some time, the wife went to reside with her parents in order to prepare for Higher Secondary Examination scheduled to be held from April 5 to May 10, 1990. In the month of April 1990 she conceived.

15. *Ibid* at pg. 536.
16. AIR 1986 MP 57.
17. *Ibid* at pg. 59.
18. AIR 1993 SC 2295.
19. *Ibid* at pg. 2300.
20. AIR 1986 All 259.
21. *Ibid* at pg. 269.
22. AIR 1993 SC 2295.

On her return to her matrimonial home she was meted our cruel treatment by her husband and family members because of her pregnancy. Ultimately she cane back to her paternal home and gave birth to a female child on Jan 3, 1991. She filed a petition under Section 125 CrPC for maintenance. The Chief Judicial Magistrate passed an ex parte order awarding maintenance. The appellant move the High Court, during the pendency of which he filed a Crl. Miscellaneous petition praying for blood group testing of the second respondent and the child to prove that he was not the father of the child, as according to him, if that could be established he would not be liable to pay maintenance. Dismissing the revision the High Court held that Section 112 of the Evidence Act says where during the continuous of valid marriage if a child is born that is conclusive proof of legitimacy. This section would constitute a stumbling block in the way of the petitioner getting his paternity disproved by blood group test.

According the appellant moved the Supreme Court:

The Judgement of the Court was delivered by Mohan, J. who observed:[23]

"It is the contention of Mr. Ashoke Sem, learned counsel for the appellant that the only way for a father to disprove paternity is by blood group test. Having regard to the development of medical jurisprudence to deny that request will be unreasonable. As a matter of fact, in England, this is commonly resorted to as it will leave no room for doubt."

The Court then went on to examine the law as is prevalent in England and the decision of the various High Courts in India in this regard, following which it observed:[24]

"In matters of this kind the court must have regard to Section 112 of the Evidence Act. This Section is based on the well known maxim *pater est quem nuptiae demonstrate* (he is father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed the law in general presuming against vice and immorality.

"It is rebuttable presumption of law that a child born during the lawful wedlock is legitimate and that access occurred between the parents. This

23. *Ibid* at pg. 2297.
24. *Ibid* at pg. 2301.

presumption can only be displaced by a strong preponderance of evidence and not by a mere blance of probabilities."

The learned judge then went on to observe:[25]

This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "cohabitation".

The effect of this section is this : there is a presumption and a very strong one though a rebuttable one. Conclusive proof means as laid down under Section 4 of the Evidence Act.

'From the above discussion; The following conclusions may be deduced:

1. No person can be compelled to give samples of blood for analysis.
2. There must be a prima facie case in favour of the husband, and he must prove 'non-access' in order to dispel the presumption under Section 112 of the Indian Evidence Act.
3. Before a blood test is ordered, the consequence of ordering a blood test in a given case must be scrutinised' whether it result in branding a child as a bastard, or a woman as unchaste.
4. Where there are ulterior motives, behind the making of such an application, or the application for such a prayer is one of fishing nature, such an application cannot be entertained.

Gautam Kundu's case enunciates with a fair degree of precision as to exactly in what circumstances a blood test will be ordered, what is the value of such evidence, whether a court order a blood test and whether an adverse inference can be drawn for a refusal to submit to comply with such a demand. This judgement will be of great assistance to courts and lawyers alike in aiding them in their endeavour to seek justice. Yet, it is evident that there exists a vacuum which only effective legislation can fill.

India lacks legislation not only concerning the precise status of blood grouping tests but also the relevant controls and measures required for conduction of these tests with optimum accuracy, the enactment and implementation of which lies within the legislature and the executive. Today, legislation with both respects is required in order to let science effectively aid the law in meting out justice.

25. *Ibid* at pg. 2301.

JUDICIAL ACTIVISM *VIS-A-VIS* INDIAN DEMOCRACY

*Kumar Ranjan**

Before elucidating the subject matter it is essential to understand the meaning of the word 'Activism'. The Chamber's 20th Century Dictionary enunciates that 'Activism' means "a policy of vigorous action of a philosophy or a creative will". In Webster's New Twentieth Century Dictionary the word 'Activism' has been stated to mean, "the doctrine or policy of being active or doing things with decision".

Judicial Activism, therefore, means an activism by taking recourse to judicial process which in turn means liberal judicial pronouncements on different intricate issues thereby creating new legal philosophy, In one sense, one can say that the court displays activism, whenever it seeks to afford a positive relief. Between the three pillars of a democracy, viz. legislature, executive and the judiciary, judicial activism establishes the supremacy of the judiciary, especially in the context of legislative arbitrariness or executive abuse. It emphasises the need for accountability and transparency in the action of both the legislature and the executive.

Judicial activism is viewed as contradistinguished from judicial restraint. Justice Cardozo said that the law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process.

Judicial activism is the need of the hour. To different people, it conveys different shades of meaning. By and large, the common people regard judicial activism as a panacea for the ills of contemporary public life. Judicial Activism in certain spheres has become necessitated because of change in moral values, change in political scenario and increases in societal field of public interest litigation.

Today, people look to the judiciary, perhaps more than ever before, to remove the maladies in public life. One reason may be the general disenchantment which the people have with the other limbs of Government.

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A situation has arisen, where the common man finds it difficult to get things done with the executive. This may be due to lack of commitment on the part of the bureaucracy. It is a matter of common knowledge that corruption has made its crippling impact in public administration, not only at the lower levels, but also at higher levels. Due to a combination of factors, the citizen has often to seek his remedies before the courts. Even legitimate entitlements which don't invite or involve controversy have come to require judicial intervention for their enforcement.

In our democracy Constitution is the Supreme lex of the country. Under the Constitution of India, the judiciary is given a much more important place than it ever occupied in India. The supremacy and the independence of the judiciary have been ensured under the Constitution and the acts of both the legislature and the executive can be questioned before the courts if they contravene the provisions of the Constitution or the laws of the land. The late Chief Justice Sir Harilal J. Kania had a very high conception of the independence of the judiciary and strove to maintain and uphold the dignity of the judiciary at all times. The power to interpret the Constitution is vested in the Supreme Court and the High Courts. Although courts can by judicial interpretation mould a law to suit the needs of the socieiy, a distinction between judicial law and legislative law cannot be lost sight of. Artictes 32 and 226 of the Constitution of India empower the Supreme Court and the High Courts to issue appropriate writs, orders and directions for enforcement of the fundamental rights and also for other purposes. Simultaneously these provisions enable citizens to seek judicial remedies. Consequently, it has become necessary for the judiciary to adopt an activist stance in order to meet the people's expectations. Law, like all other living institutions, has to change according to contemporary requirements. The judicial organ of the state has to meet the needs and challenges of the times.

Judicial Activism has always been in existence though the degree of activism might vary. In earlier days, the courts achieved activism largely through the interpretative process. Even in the 19th century we find decisions of the Superior Courts in England, interpreting laws so as to reach justice to the parties before it.

The glory of the Constitution is that it enables *all and sundry* to directly approach the highest Court of the land for redress. The judges, thus, have a duty to redeem their constitutional oath and do justice no less to the Rickshaw Owner than to the BMW car owner. It reflects the principle "be you ever so high, the law is above you".

Hon'ble J.S. Verma, former Chief Justice of India, revealed that Judicial activism must mean, *"an active justice delivery system from the commencement of the process of law till its logical conclusion - the process throughout being the obligation of the judiciary to manage"*[1].

Hon'ble Dr. Justice A.S. Anand, now Chief justice of India, while delivering his inaugural address at the Dept. of law, University of Bombay on 23-1 1-1996, observed.[2]

"The Judiciary has been rendering judgements which are in tune and temper with the legislative intent while keeping pace with time and zealously protecting and developing the dimensions of the human rights so as to make them mesningful and realistic. New contexts are being provided to criminal justice also resulting in prison reforms and humanitarian treatment of the prisoners and the under trials. The doctrine of equality has been employed to provide equal pay for equal work. Ecology, public health and environment are receiving attention at the hands of the Courts. Exploitation of Children, women and labour is receiving concern it deserves. Executive is being made more and more to realise its responsibilities."

According to the Constitution, all the fundamental rights, as envisaged in Part III of the Constitution, are mandatory and the judiciary has the power to declare a law unconstitutional if it is in contravention of those rights. The Constitution has accordingly vested in the Supreme Court and High Courts to issue directions or orders or writs respectively under Arts. 32 and 226 to safeguard such rights from infringement. Any aggrieved person can move the Supreme Court or High Court for appropriate legal remedy. The seven judges Constitution Bench of the Supreme Court by majority in *S.P. Gupta* v. *Union of India*[3] ruled that any member of the public acting bonande and having sufficient interest in instituting an action for redressal of public wrong or public injury, could move the Supreme Court/ High Court for seeking appropriate direction for the legal wrong or injury caused to a determinate class of persons. The court will not insist on strict rule of locus standi or standing or strict procedures when such a person moves a petition on behalf of such a class of persons who have suffered legal wrong and they themselves cannot approach the court by reason of poverty, helplessness or social backwardness. For such relax-

1. This has been taken from P.S.V. Prasad, *Judicial Activism Its Implications for Public Administration*, in The Administrator, Vol XLII, p. 154 (1997).
2. This has been taken from R. Bhattacharyya, *Judicial Activism : The Motive Force of Public Administration*, in The Administrator, Vol XLII, p. 71 (1997).
3. AIR 1982 SC 149.

ation of rule of locus standi in public interest litigations, justice Krishna Iyer and Justice Bhagwati used the term 'PIL' for the first time in their judgement in *Fertiliser cooperation Kamgar Union* v. *Union of India*.[4] Thus initiation of legal action in a court of law for the enforcement of public interest/general interest by somebody not directly aggrieved as ruled by the Supreme Court but not specifically provided in our constitution are nothing but expressions of judicial Activism.

Soon after the aforesaid decision of the Supreme Court the seeds of PIL which were sown as early as 1970 not only grew roots with firm footing but fully blossomed with flagrant smell with wide ramifications for judicial activism with its full assertion. One of the main features of PIL in India is that it has been initiated and led by the judiciary itself. Unlike in the U.S. where PIL originated, the role of lawyers and social action groups in this country has been supplementary. Almost'all the arguments in favour of petitioner were made by the judges themselves, not by the lawyers. Therefore, it is said that the PIL is the second incamation of Judicial Activism. Following are the impact of judiciai Activism on Public Administration:

(A) Cleansing the public administration.

(B) Making public administration citizen friendly, responsive and accountable.

(C) Activising public administration to look to public Interest.

(D) Motivating public administration to be functional.

(E) Emphasising public administration to be rational.

Public Interest Litigation (PIL) has become an effective method of making the dream of a welfare state a reality. The growth and structure of PIL in India is immensely indebted to judicial activism, otherwise, the existing laws of the country would have become disfunctional and no useful purpose could be achieved to fulfill the aspirations of the people. If we look at the judicial precedents, it will be found that it has success galore right from the Bhagalpur Blinding to the cases of non-criminal lunatics who were penned up in prison and such person received tangible benefit as the PI L bestowed effective relief on them. Following are the important areas of the social concern which have been dealt with by its various land mark judgements :

1. The alleviation of the conditions of Bonded Labour.
2. The improvement of the living conditions in prison.

4. AIR 1981 SC 344.

3. Social evils like harassment of women and the evil of dowry have also been remedied to an extent by judicial decisions.
4. The right to a proper health and sanitation as well as to mitigate the sufferings and plight of children.
5. Upholding the fundamental rights of victims of Bhopal Gas Tragedy.

Cleansing the administration in India of its various ills is of paramount importance at present when corruption has almost turned into a cancer endangering India's society, polity and economy. Not only corruption in higher bureaucracy and among elected political functionaries, often in collusion or in nexus with criminal elements, has become rampant creating a sense of shock and revulsion, but also corruption at lower levels has taken the form of easy speed money even for discharging their duties and for providing legitimate services, thus affecting justice and welfare.

While increasing demand for medical education has led to the opening of large number of medical colleges by private persons, groups and trusts with the permission and recognition of State Governments, these institutions were charging capitation fee as a consideration for admission. The Supreme Court held that capitation fee was nothing but a price for selling education and the concept of "teaching shops were contrary to the constitutional scheme and were wholly abhorrent to the Indian culture and heritage."[5]

The Supreme Court in *Vineet Narain* v. *Union of India*[6] pertaining to "hawala" transactions took upon itself the task of monitoring the investigations. Heads of the C. B.I. Revenue and other departments were called to the Court at all hearings, which were held mostly behind closed doors. Several politicians of all hues, including ministers and governments were caught in the "hawala" scam. However, final results were far from being satisfactory to the common citizens.

The *M.C. Mehta* cases have become notable phenomena in the PIL movement and judicial activism.

A number of orders were passed in 1996 by the Supreme Court in those cases resulting in :

1. The closure of tanneries in T.N. for destroying the ecology[7]

5. *Unnikrishnan* v. *State of A.P.* A.I.R. 1993 S.C. 2178.
6. AIR 1998 SCC 226.
7. AIR 1996 SC 1997.

2. Installation of pollution control devices in industries along the Ganga in U.P. Bihar and West Bengal.
3. Closure of hundreds of unauthorised small factories in the crowded areas of Delhi.[8]
4. Development of green belt around Taj Mahal.
5. Shifting of industries from Delhi to neighbouring states.[9]
6. Control of traffic pollution in Delhi;[10] and
7. Closure of prown farms in coastal states which destroy ecology and impoverished fishermen[11].

Ayodhya judgement[12] rendered the presidential reference superfluous: however, two (out of five) judges A.M. Ahmadi and S.P. Barucha stated that the impugned Act slanted in favour of one religious community against another. December 11, 1995 Supreme Court judgement on the endorsement of Hindutva as Indianisation, *Manohar Joshi* v. *N.B. Patil*;[12a] *Bal Thakery* v. *P.K. Kunte*[13], Justice Kuldip Singh's judgement on *Sarala Mudgal* v. *Union of India*[14] on Uniform Civil Code, judgement on the offering of citizenship to 65,000 Chakma refugees from Bangladesh, Supreme Court settlement on 14, Feb. 1989 in the Bhopal Gas Leakage case[15] for a sum of $ 470 million against the original claim for $3 Billion, are some of the sign posts on the road to judicial activism.

Activation of Public Administration

By many landmark judgements, the Apex Court has activated the administrative machinery when they failed to perform their legal obligations. The judicial process has achieved not merely initiation of action in case of inaction, but aiso monitored and channelised the action in the proper direction. A few recent decisions of the Supreme Court will illustrate how activist judiciary is activating the administration:

(a) Child Labour[16] : To fulfil the constitutional mandate under Art 24, the legislature enacted the Child Labour (Prohibition and Regulation) act 1986. The government did not evolve any mechanism to abolish the child labour as per dictum of law even after one decade of enactment of the law. On the basis of Public interest litigation initiated by Shri M.C. Mehta, Advocate, the Supreme Court in a significant judgement directed the Government of India, all State Governments and the Govemment of Union Territories to levy a fine of Rs. 20,000/- on those, who are violating the provisions of child labour (prohibition and regulation) Act 1986. The fine so realised per child employed as labour will go to a fund to be known as "Child Labour Rehabilitation-cum-Welfare Fund." The fund could be district-wise or area wise and the fund so generated shall from corpus, whose income shall be used only for the child concerned. This dictum of the Apex Court has paved the way for evolving administrative measures to abolish the child labour and rehabilitate these hapless children by giving primary education.

(b) Children of Prostitutes[17] : The Juvenile Justice Act, 1986 was enacted by Parliament for protection, treatment, development and rehabilitation of a juvenile, who, inter alia, is living in a brothel, or with a prostitute, or is associated with any person who leads an immoral life or is likely to be abused for immoral or illegal purposes. The Supreme Court issued notices to all the State Government, Union Territories and Government of India calling upon them to suggest their views on rehabilitation of the children of the prostitutes. All these children within the ambit of neglected juveniles who are required to be kept in "Juvenile Homes" established by the Government under the Juvenile Justice Act 1986.

(c) Sexual Harassment[18]: The Convention on Elimination of Discrimination Against Women (CEDAW) is a significant international legal document which pays specific focus to the violence the women suffer due to legal, social and cultural traditions. India ratified CEDAW on August 8, 1993.

According to the Apex Court, "Sexual Harassment" includes such unwelcome behaviour as : (1) physical contact or advances; (*ii*) a demand or request for sexual favours; (3) sexually coloured remarks; (4) showing pornography; (*v*) any other unwelcome physical, verbal or nonverbal conduct of sexual nature.

8. AIR 1996 SC 2231.
9. AIR 1996 4SCC 750.
10. AIR 1996 SC 3311.
11. AIR 1996 SC 1997.
12. M. Ismail Faruqui v. Union of India, (1994) 6SCC 360.
12a. AIR 1996 SC 796.
13. AIR 1996 SC 113.
14. AIR 1995 SC 1531.
15. For Contra, see Oleum Gas Leakage Case, i.e. M.C. *Mehta* v. *Union of India, AIR 1978 S.C 1086* on absolutely strict liability doctrine.
16. *M.C. Mehta* v. *State of T.N.*, AIR 1997 S.C. 609.
17. *Gaurav Jain* v. *Union of India* 14, 1997.
18. *Vishaka* v. *State of Rajasthan*, A.I.R. 1997 S.C. 3011.

The Supreme Court has laid down that it shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required. To prevent sexual harassment, every employer or person in charge of work place, whether in the public or private sector must take the following steps : (1) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways; (*ii*) The rules of Govemment and public sector bodies relating to conduct and discipline should include rules. Regulations prohibiting sexuat harassment and provide for appropriate penalties in such rules against the offender; (*iv*) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment Act, 1946; (v) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places.

(*d*) Protection of Environment[19] : Many state governments did not take appropriate steps to prevent pollution of water and environment as per provisions of the Water (Prevention and Control of Pollution) Act, 1974. Nor did the government make any effort to restore the damaged environment and ecology of the country. The Supreme Court swung into action by formulating the policy or raising "Environment Protection Fund" to restore the damaged environment and ecology. One public interest litigation was filed in the Supreme Court for preventing pollution in the city of Calcutta by relocating tanneries operating in Tangra, Titjola, Topsia and Pagla Danga areas in the Eastern fringe of Calcutta. On consideration of the entire facts and circumstances of the case, the law settled by Apex Court is that one, who pollute the environment, must pay to reverse the damage caused by his acts.

(*e*) Prevention of Favouritism and Nepotism in Administration : The Supreme Court has cancelled the illegal allotment of petrol pumps by Capt. Satish Sharma[20], Minister of State for Petroleum and Natural Gas, Government of India. By virtue of epoch making decision, Capt. Satish Sharma is held personally liable to

19. *M.C. Mehta* v. *U.O.I.* J.T. 1997 (1) SC 221.
20. Common Cause, *Aregistered society* v. *U.O.I.* (1996) 6 SCC 530 & 593.

pay Rs. 50 Lakhs as exemplary damages to the state echequer for his malafide exercise of discretionary power. The Hon'ble Minister in charge of Housing, Smt. Sheela Kaul[21] had to face the same fate for favouritism, nepotism and arbitrary exercise of discretionary power in allotment of houses in Delhi. Even the Judges who fell pray to the temptation given by the Government in getting allotment of houses were not spared by the judiciary. Sixteen judges of Rajasthan High Court were allotted houses for purchase under a special scheme floated by Rajasthan Housing Board in 1992. Most of these judges got the allotment from the Housing Board in violation of the conditions of the scheme, which has been struck down as arbitrary, discriminatory and against public interest by Justice Anshuman Singh, a judge of Rajasthan High Court.[22] Recently, Delhi High Court cancelled the allotment of petrol pumps and distribution of cooking gas and kerosene made to 70 odd people during the tenure of the Capt. Satish Sharma as petroleum Minister, because the allotments were made either on account of political patronage or some other extraneous considerations. By cancelling the allotment of houses or petrol pumps etc. and by imposing heavy amount of fine on the public servants, who did not exercise their discretion judiciously as per well settled principles of administrative law, the judiciary has created historic water shed in evolving the new role of public servants.[23]

Judicial activism does not mean judicial "tyranny". According to Chief Justice A.S. Anand "*If you are settinp standards for others, make sure that you reach those standards also*". Justice Anand further opined that "accountability coupled with transparency in action would ensure that the judges lives up to the expectations of the society", and added that it is absolutely essential for judges to, "know thair limits". He postulated the concept that justice hurried is Justice buried. Thus, emphasising that judges cannot take over the function of the executive. Justice Anand averred that the real damage to the independence of the judiciary is from within than from any outside agency and wamed that "these self inflicted wounds are extremelv difficult to be cured".

The courts by taking recourse to judicial activism are encroaching upon the exclusive domain of the executive in as much as the goal of the

21. *Shiv Sagar Tiwary* v. *U.O.I.* (1996) 6 SCC 558.
22. *The Hindu*, Dated August 3, 1997.
23. Common cause, A Registered society (Petrol Pumps Matters) v. Union of India. (1996) 05 SCC 530.

Court is to render justice.

From mear "justice", the courts have now begun to think in terms of "social justice", "socio-economic justice" and "distributive justice". The end of the law is seen to be not only vindiction of legal equality, but also provision of equality in fact with regard to more and more of elements that make life meaningful in the contemporary community. It no longer plays a regulatory role but also a constructive one.

A classic example of imparting social and distributive justice is the recent decision of the Supreme Court in *Air India Statutory Corporation* v. *United Labour Union*[24] wherein even the directive principle emobodied in Part IV of the Constitution of India were held to be enforceable.

Whetherjudicial activism should be matched with judicial self-restraint? There cannot be a clear-cut answer to the said questions, as somatimes judicial activism and judicial self-restraint may operate in different fields. The legal philosophy in this area may vary from case to case and would depend upon the fact situation.

Albert Camus stated "The wheel turns, history changes". Stability and change are the two sides of the same law-coin. In their pure form they are antagonisitc poles: without stability the law becomes not a chart of conduct, but a game of chance: with only stabillty the law is as the still waters in which there are only stagnation and death."

There cannot, however, by any doubt as Benzamin Cardozo puts it.

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will to pursuit of his own ideal of beauty or of goodness."[25]

The judicial activism, as illustrated above, has made the executive to be careful and cautious to discharge its duties and functions in rational manner because they are conscious and aware that in case of their committing wrong they would be liable to face the consequences without any protection. Judicial activism and judiciat restraint should go side by side so that the concept of separation of power with checks and balances as envisaged in our constitution is not completely shattered and all three organs of the State can continue harmoniously within their graceful limits and without exhibition of arrogance and supremacy creating constitutional dead-lock and predicament.

24. Air 1996 S.C. 648.
25. The Administrator, Vol XLL pp 56.

Last but not the least judicial activism is definitely for the benefit of the nation, society and individuals because it is accomplished through the judges who should be:

"One who is well versed in civil and criminal law and procedure, sprightful, of sterling character impartial towards friends and foes, of Dharma abiding nature, truthful, ever active and who has established control over anger, desire, greed and pleasant in speech and demeanour".[26]

26. Sukraniti - Ch- IV - S- 15-18.

BOOK REVIEWS

A History of Islamic Law, First Indian Reprint 1997, By N.J. Coulson, Universal Law Publishing Co. Pvt. Ltd., Delhi, Pp. VIII + 264. Price Rs. 195/-.

The book[1] under review was first published in 1964 and since then it has been continuously reprinted and updated many times. The book has already become one of the leading books on the subject.

The author has divided the book into three parts containing fourteen chapters, besides the introduction and conclusion.

The Introduction chapter elaborates the role of legal history in Muslim Jurisprudence. It is the only complete description of the history of Islamic jurisprudence from its origins, through the medieval period to the present. It is as relevant today as ever.

Part one deals with the genesis of Sharia Law. "Obey God and His Prophet". It established the precedents of Muhammad as a source of law second only to the word of God himself. Part one shows that the great bulk of the law had originated in customarry practice and in scholar's reasoning, that its precise identifications with the terms of the divine will was artificial, and that the classical theory of the four major sources or roots (usul) of law was the culmination of a process of growth extending over two centuries, yet the traditional Islamic belief holds that the four sources had been exclusively operative from the beginning.

Part two, deals with the legal doctrine and practice in medieval Islam. Under the classical theory of Islamic Law God alone is the legislator in Islam, Law is the command of God. The function of Muslim jurisprudence, from the beginning, was simply the discovery of the terms of that command. Law, therefore, does not grow out of, and is not moulded by society as is the case with the western systems. In the Islamic concept, law precedes and moulds society and society must ideally conform to it.

Muhammad was the last of the Prophets and after his death there could be no further communication of the divine will to man. The author further elaborates about the unity and diversity among the various schools of law developed after the death of prophat Muhammand. In the beginning there was bitter enmity and active hostility between the schools. The divergence between the different schools of law was due to the historical growth of

1. N.J. Coulson, A History of Islamic Law (1997).

Sharia law in the first three centuries of Islam.

According to ash-sha'rani, differences between the schools are simply the results of the legitimate exercise of independent judgment (ijtihod) in the absence of any explicit guidance from divine revelation.[2]

In chapters 9 and 10 of the book the author further elaborates about the Islamic Government. Islamic society and the Sharia Law.

In these chapters the author considers the results of the basic tension which was thus created between Sharia doctrine and established custom in two major spheres of private law - the family law and the law of civil transactions.[3] Family law was generally administered in accordance with strict sharia doctrine among the Arab muslims. Any deviation of legal practice from the sharia doctrine, as followed in certain areas, were never recognised as legitimate expressions of Islamic law. But in other spheres of law, however, there was no such dichotomy.

Part three, deals with Islamic law in modern times. In this part, the author has discussed at length, the growing intimate contact between Islamic and Western civilisation and the reception of European laws on the Sharia Law.

Politically, socially, and economically, western civilisation was based on concepts and institutions fundamentally alien in Islamic tradition and to the Islamic law. Because of the rigidity of the Sharia and the Dominance of the theory of toqlid (or strict adherence to established doctrine), there existed an apparently irreconcilable conflict between the traditional law and the needs of Muslim society who aspired to follow the western standards and values.

This is clearly evident in the fields of Public Law (Constitutional and Criminal Law) and of civil and commercial transactions. In this connection, the author refers to the Ottoman Majalla,[4] compiled in Middle Eastern countries. Criminal Law and procedure are almost completely Westernised.

As regards India, the Britishers followed the policy of non-interference with the religious laws. The traditional Hanofi law sponsored by the Moghul Emperors and administered by the Kazis was the existing law of India at that time. The Indian Penal Code and the Code of Criminal Procedure came into force to supersede the Islamic Criminal Law. Civil Law, was anglicised by the British Courts by adopting the principle of

2. *Id* at 102.
3. *Id*. at 135.
4. *Id*. at 151-52.

"justice equity and good conscience," which was in practice synonymous with the English law. Ultimately, the Indian Shariat Act, 1937, was passed, which asserted that Sharia to be the fundamental law of all Muslims in regard to their personal status including law of succession, gift and wakf.

In chapter 12, the author has discussed at length about the administration of Sharia law in the contemporary Islamic world and others. The Muslim tradition recognised only one judicial organ, the court of a single qadi, without any sustem of appeal. Systems of appeal have now been introduced almost everywhere e.g. Northern Nigeria, Saudi Arabia and Afghanistan. Egypt and Tunisia abolished the Sharia courts entirely and the Sharia family law, along with the civil and criminal law, is now administered by a unified system of national courts.[5]

In the Indian sub-continent the administration of Sharia law by the British courts, subject to supreme authority of the decisions of the Privy Council, led to a remarkable fusion of the two systems.[6]

Chapter 13, deals elaborately with the doctrine of taqlid and the legal reforms introduced in the Middle Eastern countries by applying the doctrine of takhayyur (process of selection). The primary purpose of reforms in these countries was the amelioration of the position of women under the Islamic law.[7] The author also refers to the doctrine of talfiq (to make up a patchwork, to piece together) and cites the Ottoman Law of Family Rights, 1917 in this connection.

Similar reforms in the Law of divorce as applied in the Indian sub-continent were effected by the Dissolution of Muslim Marriages Act, 1939.

In Chapter 14, the author advocates for the re-interpretation of the principles embodied in the divine revelation as a basis for legal reform. In this connection be refers to the views of Egyptian Jurist Muhammod Abduh and Iqbal of India and argues for the exercise of ijtihod or independent judgment by the present generation if Islam has to adapt itself successfully to the modern times. He also cites extensively the Islamic countries where the doctrine was applied.[9]

Finally, in the conclusion chapter, the author forcefully advocates for the use of the doctrine of ijtihod for the needs of the modern Islamic

5. *Id.* at 163.
6. *Id.* at 164.
7. *Id.* at 182-86.
8. *Id.* at 197.
9. *Id.* at 208-16.

society. The author notes as follows:

"..... the problem facing Muslim jurisprudence today is the same problem which it has always faced and which is inherent in its very nature, namely, the need to define the relationship between the standards imposed by the religious faith and the mundane forces which activate society."

The author concludes by saying that for law, to be a living force, must reflect the soul of a society.

The book contains useful notes, glossary, select bibliography and Index.

The greatest strength of this book is its precision, coherence comprehensive treatment and simplicity of language.

*Surendra Prasad**

10. *Id.* at 223.
11. *Id.* at 225.

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Criminal Justice and Medical Law (1999). By S.V. Joga Rao. Eastern Law House, Calcutta. Pp 228. Price 360/-.

In history there has always been a debate about What is law? What gives the legitimacy to a political state to make law? What rational basis can be attributed to the State power to criminalize and punish subjects under the authority of criminal law? For these questions or issues there are no strait answers in the legal theories or the science of jurisprudence. Legal thinkers and philosopers have constantly been concerned about these questions and have always tried to provide answers in variety of ways, giving their own moral, philosophical, societal interest, purely legal and jurisprudential analysis for the justification of the legitimacy of the state power. We can, for convenience, broadly divide them into two categories of jurisprudents. On the one hand there are natural law thinkers and philosophers like St. Thomas Acquinas, Hobbes, Locke, Rousseau and more recently J.M. Finnis who think that unless law is just and rational it does not truely satisfy the test of legitimacy. On the other hand there are positivist thinkers and philosophers like Austin, Kelsen and Hart who believe that there is no connection between the law and morality. They urgue that law and legality are pure questions of a formal enquiry about the validity of law through the Sovereign authority without caring for the moral contents of law. This reviewer believers that these views are the extreme ends of a scale. Validity and legitimacy of law is in fact a blend of both positivism and natural law, as there is always some inner morality of law and a legal system.[1]

This book under review by Joga Rao is a collection of his own papers and, perhaps, most of his papers have already been published in various journals.[2] The issue of criminal liability, as the author himself states, 'requires theoretical or philosophical clarity[3] and which the learned author has done with remarkable clarity in Chapter 1 of this book titled "Criminalization — Does Legitimacy Matter?".[4] The author has received a praiseworthy foreword from "Justice A.M. Bhattachargee who himself is a great scholar who has written famous books like Mohmmadan Law and the Constitution and Hindu Law and the Constitution. I have had the humble privilege of reviewing the book titled "Hindu Law and the Constitution" for the Journal of the Indian Law Institute. In the process, this reviewer himself has learned a lot. Therefore, the reviewer is of the

1. See L.L. Fuller, THE MORALITY OF LAW, Oxford University Press, (1969).
2. Hereinafter referred to as Joga Rao's CRIMINAL JUSTICE AND MEDICAL LAW.
3. *Id.* at p. 14.
4. *Id.* pp 1-23.

view that to get a remarkable and praiseworthy foreword from a Judge Scholar is by itself a testimony to the fact that the author has taken pains to write this erudite book.

In the second Chapter titled 'Victim of Sexual Lust and Sentencing Justice' the author has very aptly written a critique on the Judgment of the Supreme Court in *Raja and Krishna* v. *The State of Karnataka.*[5], where the Supreme Court held, while sentencing the appellants, that because in this case the prosecutrix agreed to share the same room with the appellants in a hotel at night the two young men became the victims of sexual lust and thus committed that crime of rape of the prosecutrix. The Court further held that this factor is one of the mitigating circumstances for reducing the sentence passed on the appellants. The author very rightly states about this case that the 'ratiocination of the Supreme Court is not in tune with the accepted and acknowledged principles of sentencing. With the result, after reading this judgment, one would be confused as who is the victim of *sexual lust? The Supreme Court's approach sadly conpounds* the confusion." In this Chapter the learned author has tried to clearly explain the aggravating and mitigating circumstances while sentencing an accused particularly the rapists.

Chapter 3 is devoted to 'Criminal Justice in Changing Society.' Here the author has tried to explain the historical developments in sentencing policy. The process in history about sentencing policy has been from strict liability with severe punishment to the criminal to the requirement of a guilty mind of the accused in the form of *Mens Rea* for the conviction of an accused for a crime. Of course even today there are some strict liability offences justified under the criminal law. The author has tried to briefly analyse the role of *Mens Rea* and the justification of strict liability offences. It is conceded that while sentencing generally is a discretion, still certain guidelines are needed for the judges while dealing with sentences of the accused according to the nature of crimes and victims.

The book also attempts to clarify the ambit of 'Legal burden' and tries to distinguish it from 'evidential burden' with the help of the constitutional provisions of the Constitution of South Africa and the case of *S.* v. *Bhulwana*[6] decided by the Constitutional Court of South Africa. Under the South African Constitution there is a unique provision about the burden of proof in criminal cases. Under Section 25(3) of the South African Constitution every accused person has the right to a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial or not to testify during a trial. The author rightly states

5. 1994 Cr. L.J. 248.
6. 1995(2) SAGR 748 (cc).

that the terms 'Legal burden' and 'Evidential Burden' are not used under the Indian Evidence Act.[7] The author does not try to compare the legal position in India and Constitutional position in South Africa. However he suggests that there is a room for imbibing such constitutional culture in India also.[8]

On the question of State's justification to criminalize a deviant behaviour the author is of the view that every deviant behaviour cannot be considered suitable for criminalization. In fact, with a view to restrict the unending process of criminalization by the State, in some of the Common Law countries like for instance canada, constitutionalisation of the General Principles of Criminal Law has been advocated.[9] On sentencing policy and objectives it may be emphasised that punishment and retribution is the primary aim of the sentencing policy to save the Society, although we must care for the victims and the rehabilitation and reform of the criminals if possible. These days penological thinkers have started advocating 'Just Deserts' as the proper and viable alternative sentencing aim. In fact the theory of just deserts is also a derivative of the retribution principles.[10]

The book is titled as Criminal Justice and Medical Law, however, unfortunately, only about fifty pages are devoted to the Medical law in this book. The material again has been divided into five chapters in the book. And there is a very sketchy treatment about the Medical Liability and the Consumer Protection law. Even the Health Care Risk and Role of the Insurance companies for the indemnity of hospitals and doctor's liability have been very briefly discussed. Perhaps, the chapters on medical law have not been written for lawyers but only for the doctors and hospitals to acquaint themselves with this branch of law.

On the whole, it is a welcome addition to the literature on the criminal justice and policy of sentencing. The book has been very attractively printed by Eastern Law House, Calcutta. However, the book has been very heavily priced at Rs. 360 for just about 290 pages book. The book is strongly recommended for the students and scholars of Criminal Law, Penology and the Law of Evidence. Law and Medical libraries should possess this book.

*Harish Chander**

7. Joga Rao's CRIMINAL JUSTICE AND MEDICAL LAW, op. cit, p. 114.
8. *Id.* at p 118.
9. *Id.* at p 47.
10. See Andrew von Hirsch : DOING JUSTICE : THE CHOICE OF PUNISHMENT.

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The Constitution of India (A Commemorative edition on the 50 years of Indian Constitution) by Subhash C. Jain, Taxmann Allied Services (P) Ltd., New Delhi; 2000, Pages 1-36 + xxxv + 1068 + lxxxiii. price Rs 2000/-

At a time when the Indian nation is celebrating the golden jubilee of the inauguration of its Constitution, the document of its destiny, it will be most appropriate to have a closer look at the working of the Indian Constitution for the past 50 years with a view to finding out the extent to which India has been able to realise the constitutional goals and aspirations set for us by founding fathers of the Indian Constitution. It is a matter of common knowledge for the students and scholars of constitutional law that while the Indian constitutionalism, which derived its inspiration and support from the American experience, has become a role model for most of the Asian countries which have established constitutional governments, it has lagged far behind some of these countries in providing the most basic human needs, such as food, shelter, clothing, health, safe drinking water and education, etc. to the vast majority of the Indian masses. It is disappointing to realise that the constitutional promise of a new egalitarian socio-economic order envisaged in the Preamble to the Indian Constitution and exemplified in Parts III (entitled Fundamental Rights) and IV (titled as Directive Principles of Social Policy) which together go to constitute the "conscience of the Constitution", has by and large remained a distant constitutional mirage in the country. Not only the gap between the rich and the poor in the country is growing but also the number of people below the poverty line has been studily growing. The recent efforts of the Indian Government at liberalisation of Indian economy with all its expected rewards have not improved the matters for the common man. The main reason is, obviously, bad governance or lack of good governance which has been the main bane of the Indian Democratic Process since its inception. The pessimist in the country does take solace in the surmise that the Indian people only get the governments they deserve.

The main questions, in the context of this disappointing socio-economic scenerio, are : Is something fundamentally wrong with the present Indian Constitution? Does it require reform in its fundamentals? and is something fundamentally wrong with the people who man the constitutional governments in the country? These questions and others have gained prominence in the public debate of the country, culminating in the establishment of a Constitution Review Commission to examine the working of the Constitution thusfar and to suggest and recommend the necessary constitutional reforms, of course, within framework of the basic structures of the Indian Constitution.

Many scholarly writings, dealing with various burning constitutional issues, have already appeared on the Indian academic scene. Many more are likely or expected to appear in the near future. All these works will be of immense help and use to the Constitution Review Commission which can take advantage of this fund of available literature on constitutional reforms.

This book under review assumes special significance in the context of the Constitution Review Commission's search for constitutional ideas from legal scholars and jurists of the country. This study, written by Dr. S.C. Jain who is presently working as Law Secretary. Ministry of Law and Company Affairs, Government of India, presents to the readers an analytical study of 37 select constitutional issues which, as the author rightly says, is meant to help generate a constructive constitutional debate in the country. The special feature of this commentary is that some of the constitutional issues which the study focuses on have not been the subjects of study is any of the regular text books or commentaries which have been so far written by various scholars and jurists in this country. Another striking feature of this commentary is that while the work presents a bulky volume of about 1100 pages, divided into five divisions, the substantive study, devoted to the discussion of 37 selected constitutional issues in Division four, covers only around 175 pages. The other four Divisions of the book provide to the reader certain valuable and precious constitutional materials at one place. The author has been thoughful enough to reproduce the text of the Constitution as amended upto date as well as the various constitutional amendinents so bar anacted along with their short summaries in Divisions I, V and III, respectively, of the study. In Division II the author reproduces the extracts of some of the historic speeches made by same of the prominent members of the Constituent Assembly in the Constituent Assembly ät the time of the final adoption of the Draft Constitution by that august body.

Division IV, which is the main substantive part of the commentary, deals with discussion of certain selected contemporary constitutional issues which are not only of topical importance and relevance, but also of national concern, particularly, in the context of the on-going national debate on constitutional reforms in the country. The author commences this part with an "Introduction", highlighting the significance and importance of judicial contribution to the development of constitutional jurisprudence in the country and concludes the same by giving an account of the changes that have been brought about by the various constitutional amendments and also of those that are in the offing by the various propsed Constitutional Amendment Bills. In between, the author discusses several constitutional

issues including those dealing with "Reservations for women and Article 16"; "Reservations in Employment in Hill Areas : Some Constitutional Issues"; "Constitutional Implications of Recognition of Certain Titles"; "Minority Educational Institutions and the Constitution"; "Proposal to Insert New Directive Principle to Promote Small Family Norm"; "Power of President to Grant Pardon and Petitions by Foreigners"; "Caretaker Government and Its Functions Pending Elections"; "President's" Competence to Remove Union Ministers Without Consulting Cabinet"; "President's/Governor's Address: A Constitutional Mandate"; "Removal of Judges of the Supreme Court/ High Court and the Powers of Parliament"; "Fellow-up of the Sarkaria Commission's Recommendations"; "Proclamation of Emergency under Article 352"; "Conflict between Legislature and judiciary"; "Doctrine of Separation of Powers" and "National Government" in Chapters 4, 5, 6, 7, 10, 11, 12, 13, 15, 19, 27, 30, 35 and 36 respectively.

In the introductory chapter the author, while discussing the decision in *Keshvananda Bharati's* case and its contribution to the development of Indian Constitutional law, opines that the Indian Supreme Court should have declared Part III of the Indian Constitution dealing with Fundamental Rights a basic structure of the Constitution. While appreciatling the author's concern for fundamental rights, it is submitted that the very concept of basic structure along with its crippling limitation on Parliaments' amending power is incompatible with the concept of popular democracy where the people's will, as reflected in the representative institutions, is supreme. Of couse, in the context of Indian popular democracy, the quality of the representative institutions in the country would ultimately depend upon the quality of the political awareness of the Indian citizenry.

In chapters 4 and 5 the author discusses the issues of reservations in state services for women and for people in hill areas, respectively. The author is in agreement with the judicial thinking on the issue of reservations for women which declares that reservations for women cannot be constitutionally permissible either under Article 16(4) or under Article 15(3) read as an exception to Article 16(1) of the Constitution.

The reviewer humbly begs to differ from this judicial thinking as well as the author's view point. It may be appreciated that while there is no express provision in the constitution providing for reservation for women, it may not amount to unduly straining the text of Article 16(1) if the same is read into the scope of that provision. It may also be appreciated that the entire judicial approach to the issue of reservations under Article 16 of the Indian Constitution, as articulated in *Indra Sawhney's* case has not been logical. In the thorny area of reservations the Supreme court is more

influenced by Justice Holmes' dictum that the life of law is not logic but expedience. In *Indra Sawhney's* case the Supreme Court sacrificed logic of the sake of expediency of harmonising the conflicting and competing constitutional values of formal and substantive equality in matters of employment in state services. In this case, it may be noted, the Supreme Court held that Article 16(1) was a facet of the general concept of equality as envisaged in Article 14 and that Article 16(4) was an illustration of that facet. The court also held that Article 16(4) was provided by way of abundant caution. However, the court confined the recourse to Article 16(1), as a source of reservations, to exceptional cases. Logically, it can be argued that if Article 16(1) is a facet of the concept of equality enshrined in Article 14 and if Article 16(4) has only been provided in the Constitution by way of abundant caution, why should then Article 16(1) be used sparingly and in exceptional cases only? Again, it will be logical to contend that if Article 16(1) is a facet of the concept of equality enshrined is Article 14 and if Article 16(4) is an illustration of that concept, why cannot the constitutional claim of reservations for women be read into the scope of Article 16(1)? It may also be mentioned, in this context, that even if Article 16(2), which prohibits discrimination only on the basis, *inter-alia*, of sex, is considered to be an elaboration of Article 16(1), it cannot and will not stand in the way of State's efforts of providing reservations for women under Article 16(1). Because, reservations for women under Article 16(1) would involve discrimination not only on the basis of sex but also on the basis of the need for empowerment of women which ought to be the core element of India's national population policy.

On the issue of reservations for people living in hill areas, there cannot be any two opinions on the need for reservations which can be constitutionally effected by recognising and classifying them as backward classes under Article 16(4) of the Constitution of India. The only doubt that can be raised is about the extent of reservations that can be made under this provision. In view of the judicially imposed ceiling of 50% on the extent of reservations, it may not be constitutionally feasible, as the author rightly opines, to have 100% reservations in favour of these people. Even here, it is submitted that a plansible constitutional argument in support of 100% reservations is possible. If Article 16(4) is provided only by way of abundant caution and if Article 16(1) is the main source of protective discrimination, there is no reason why 100% reservations can not be effected under that provision if the situation demands such a course of action.[1]

1. See, B. Errabbi, *Protective Diserimination : Constitutonal Prescriptions and Judicial Perception*, Delhi Law Review, Vols 10 and 11, PP. 66-82 (1981-82).

The issue of the scope of constitutional rights of the minority educational institutions has engaged the attention of the apex court in a large number of cases. The Supreme Court is again seized of the same issue in a case which is pending before a larger (11 judge) Bench. It is expected, in this case, that many issues which have already been settled might be reagitated and reopened. The main issue before the court in the pending case is whether a minority educational institution has the power under Article 30 of the Constitution to admit students by adopting its own method of selection. The learned author, while discussing this issue in chapter 7, counsels caution and says that it may not be either feasible or desirable to reverse the provisions made by the founding fathers of the Constitution in their wisdom. The learned author appears, rightly, to repose confidence in the Indian apex court when he says that the Supreme Court would rationalise the constitutional rights of the minority educational institutions consistent with the unity and integrity of the country.

The issue of constitutionality of the prescription of Punjabi language as an exclusive medium of instruction and examination in the Punjabi University has been discussed in chapter 8 where the author rightly says that punjabi language cannot be constitutionally prescribed as the exclusive medium of instruction and examination. This view, it may be appreciated, derives support from the ratio laid down in *Gujarat University* and *D.A.V. College* cases. However, the reviewer feels that the question whether or not Punjabi language can be constitutionally prescribed as the exclusive medium of instruction and examination depends upon the richness of that language at the given point of time. There cannot be a categorical answer valid for all times. This is so because of the contours of the test enunciated is the *Gujarat University* case which postulates that if the use of a particular regional language which is prescribed as exclusive medium of instruction and examination would result in lowering of standards of education, then only it would be beyond the legislative competency of the state to legislate with respect to that subject. In such a case, according to this test, the subject of medium of instruction and examination would become part of the subject of coordination and determination of standards under entry 66 of list I of the 7th Schedule to the Constitution with respect to which Parliament alone has exclusive power to legislate. Therefore, it all depends upon the richness of the language used as medium of instruction and examination and if its use does not result in lowering of standards, then the subject would remain with the state legislature under entry 25 of list III which deals with education including university education until it is not occupied by Parliament.

Chapter 10 deals with the issue of constitutional feasibility of the proposal to insert a new directive principle and a new fundamental duty in

the Indian Constitution. While analysing the scope of directive principles and fundamental duties the learned author opines that the directives per se do not confer power or take away any legislative power from the appropriate legislature. It is submitted that it will be more appropriate to talk in terms of obligations and not power as the directive principles of state policy seek to impose only unenforceable positive obligations on the state. In a way, the Indian legislatures under Part IV of the Constitution have a constitutional duty to legislatively implement all the directives enshrined therein. However, the view of the author is well taken when he says that if the proposal to insert a directive principle and a fundamental duty for the purpose of population control and small family norm is given effect to by amending the Constitution, the policies and programmes of the Government will be reinforced and the courts will be inclined to uphold and give effect to the laws and norms made for the purpose.

The issue of the scope of the pardoning powers of the President and of the Governors under Articles 72 and 161 of the Constitution, respectively, finds an interesting anlaysis in chapter 11. While the pardoning powers of the President and Governors are diseretionary and admit of minimal judicial interference, the author pleads that the exercise of these powers must be informed by the finer canons of constitutionalism. On the question as to whether these powers can be exercised by the concerned constitutional functionaries on their personal satisfaction without the aid and advice of the Council of Ministers, the author rightly feels that the constitutional requirement of seeking the aid and advice of the cabinet has become mandatory after the decision in *Smasher singh's* case.

In chapter 12 the author gives an account of the functioning of caretaker governments and makes a suggestion for the incorporation of a specific enabling provision in the Constitution to provide not only for the concept of caretaker government but also for the guidelines for its functioning. It is submitted that this suggestion may not be constitutionally feasible and, as Justice Jeevan Reddey rightly days in his foreword to the book, it is always better to have a convention developed in this regard.

Chapter 13 analyses the issue of legality of the sanction given by the President/Governor in his personal capacity for the prosecution of a minister under sections 19 and 197 of the Prevention of Corruption Act, 1988 and the Criminal Procedure Code, 1973, respectively. The another seeks to make a distinction between a situation involving a Chief Minister or Prime Minister and a situation involving a Minister. According to the author, while in the former case the issuance of sanction for prosecution would be based upon the doctrine of necessity, in the latter case, the sanction has to be given only on the aid and advice of the

concerned cabinet. It may be appreciated that while there is judicial support for the former situation, there is no such support for the latter. Therefore, it may be any body's guess. Let us await the decision of the Supreme Court in *J. Jayalalitha V.M. Chenna Reddy* which is pending before the Court. However, it may be mentioned that the author's view expressed here merits serious consideration.

Independence of the judiciary is one of the core aspects of Indian constitutionalism. To ensure this, the Constitution of India provides, in Article 124, for an elvaborate scheme not only for the appointment of judges to the higher judiciary but also for their removal. The author, in chapter 19, examines the efficacy of the removal procedure envisaged in that provision in the context of Justice V. Ramaswami's removal episode which was the first case of its kind in the annals of the Indian Constitutional history. It may be recalled that the impeachment motion for the removal of Justice Ramaswami, which was debated and voted upon in Lok Sabha on 11 May, 1993, was defeated for lack of majority support. Out of 401 members present, only 196 members voted for the motion and 205 members obstained. As the author says, no one voted against the motion. Failure of the impeachment motion attracted a lot of criticism from the bar and the press. The author quotes with approval the comments of Mr. P.P. Rao, an eminent, jurist, and Mr. Sahai in this regard. According to Mr. P.P. Rao, the oral whip of the then ruling party raised serious question whether it was a permissible course when the members of Parliament were to exercise their judicial power. He thinks that no member of Parliament, while acting as a judge, can refuse to decide and remain neutral. In a similar vain, Mr. S. Sahai said that the episode of Justice Ramaswami had shown that the Constitution was just 'paper-tiger' According to him, the report of the enquiry committe should be made binding on both Parliament and the President. While concluding the discussion on the issue, the author rightly observes that "while Parliamentary democracy has its pitfalls, we are faced with the dilamma whether everything be stated in the black letter law of the Constitution or whether we should rely on our duly elected representatives to administer the provisions of the Constitution in good faith. Only strong conventions, men of character doning the houses of legislature and doggedness of the people at large to force their elected representatives to abide by the constitutional provisions can keep the rule of law alive".

While the constitutional practice of special address by the Governor at the commencement of every new session of the state legislature under Article 176 is mandatory (for a discussion of this issue, see chapter 15) the issue whether the Governor is personally responsible for the substance or

content of his address has come up for discussion in the context of the address of the Governor of Bihar on 10/2/92 when his address was critical of the dismissal of the Tamil Nadu Government which enjoyed the majority support in the legislature. While examining this issue in chapter 22 the author is of the view that since the Governor's address reflects the Policy of the Government and that since he has no discretion in reading out the address given to him he is not personally responsible for the contents of his address. According to him, any other view would not only result in an unwarranted constitutional conflict but also be inconsistent with the constitutional scheme enunciated by the Supreme Court in *Semsher Singh's* case.

Chapter 27 draws our attention to the follow-up of Sarkaria Commission's recommendations. It is a matter of common knowledge that the Sarkaria Commission, which was appointed in 1983, submitted its report in 1988. Its recommendations mainly deal with centre-state relations in the Indian federal policy. It may be noted that Indian federalism, which is an essential aspect of Indian constitutionalism, with its emphasis on unity in diversity does not follow any traditional pattern of federal structure. While examining the extent of the implementation of the Sarkaria Commission's recommendations in the light of contemporary constitutional developments in the country, the author is in total agreement with Mr. C. Subraminiam who thinks that the states in the Indian federal policy must be given a much greater scope to shape their own destinies and much larger share in nation decision-making. The author also feels that no changes in the Constitution should be made unless they are intended to strengthen centre-state relations as well as the Indian polity as a whole.

In chapter 29, the author gives a few new insights into the scope of Parliament's Power under Article 252 of the Constitution which empowers Parliament to make laws with respect to state subjects if two or more states so request by resolutions passed to that effect. As the author rightly says, this provision is only an evabling one and does not impose any duty on Parliament either to enact, amend or repeal a law made pursuant to resolutions passed by two or more states. The moment the resolutions are passed, the state legislatures would lose their legislative competence to make laws with respect to the entrusted subject. However, it may be noted that, as the author rightly says, the concerned State Legislatures would be divested of their legislative powers only to the extent to which Parliament has been empowered by resolutions and not with respect to the whole entry. The author rightly asserts that under Article 252 there is no question of repugnancy between the state law and parliamentary law and that the state law would become ultra vires the Constitution if it is in conflict with a parliamentary law.

Chapter 34 has been devoted to the discussion of the issue of conflict between legislatures and judiciary which has assumed significance in the context of the conflict between the Tamil Nadu Legislative Assembly and the Madras High Court in March 1998 when an AIDMK member was reported to have hit the Minister of Agriculture on the floor of the House of the Tamil Nadu Legislative Assembly. The conflict between these two august institutions arose over summons issued to the speaker and secretary of the Assembly. The speaker took the view that he would not accept the summons from the court as it involved the sovereignty and privilege of the House. The author, analysing the available constitutional position as expounded by the Supreme Court in quite a few cases, suggests for the codification of the privileges of the members of Parliament and State legislatures. According to him, it is necessary to do so in the interest of smooth relations between the judiciary and the Legislatures as well as in the interest of the citizens' fundamental rights.

Referring to the views of the Committee on privileges of the Lok-Sabha as well as the Committee/Conference of Presiding officers or Legislative Bodies that there in no need to codify these privileges, the author rightly says that while this view is understandable as it is based upon the apprehension that this would give raise to more judicial interference, from the point of view of citizens the codification of the privileges of the legislators may be highly desirable.

The commentary under review is a welcome addition to the existing literature on Indian constitutional law in the country. The author has taken pains to project a few new insights into the problem of interpretation of the constitutional provisions dealing with the various issues discussed in the study. The author has ably combined his long experience as a top law officer of the Ministry of Law and Company affairs, Government of India, with his erudition in bringing out this commentary, which, I am sure, will be of great help and use to the lawyers and law teachers, if not to law students in the country. This hard bound volume with its fine getup can be a price and proud acquisition for all law libraries in the country.

In conclusion, it needs to be mentioned that there are a few avoidable typing and factual errors which have been left by over right. The same may be taken care of if the author has plans to bring out another edition of this study.

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FORM IV

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